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Freedom of Expression in the Workplace in Europe – The Example of France

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Among the many fundamental rights protected by the European Convention on Human Rights – the European analog to the United States' Bill of Rights – lies the freedom of speech. Article 10 of the European Convention states that “[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

In France, the Supreme Court is committed to ensuring this right is protected in the workplace. It has repeatedly ruled that “*unless abused, the employee enjoys, inside and outside the company, their freedom of expression*” and that “*the dismissal by the employer for a reason related to the employee's non-abusive exercise of their freedom of expression is null and void.*”

Series of Landmarks Cases of the French Supreme Court in 2022

In a series of major rulings in 2022 based on Article 10 of the European Convention, the French Supreme Court emphatically reaffirmed the importance of this fundamental right for employees.

Below is a description of the most noteworthy cases:

— The French holding company of a sugar-producing group dismissed for serious misconduct a senior executive it employed to serve as managing director of the Eastern European subsidiary. The alleged misconduct involved criticizing the former managing director of the subsidiary, making allegations of possible corruption and breaches of safety regulations, and questioning the group's strategic choices. The group also accused the managing director of misconduct for threatening to publicly disclose these allegations if he was not transferred back to France. The French Supreme Court ruled that the managing director had legitimately exercised his freedom of expression, as the statements made by him were not abusive, exaggerated, nor defamatory towards the group or the subsidiary's former managing director. The termination of his French employment, based on the exercise of this freedom, was therefore null and void.



- A managing director of a consulting firm was terminated for management failures, disagreements with his team, and an inability to work with other partners. He was also accused of not accepting and adhering to the firm's policy to promote "fun and pro" values. According to the French Supreme Court, the dismissal was null and void because it was based, in part, on the managing director's criticism of the firm and his refusal to accept the firm's policies, which the court considered a non-abusive exercise of his freedom of speech.

Practical and Financial Consequences of Dismissals Declared Null and Void

A court's declaration that an employee's dismissal is null and void has significant detrimental consequences for the employer:

- The declaration means the dismissal is deemed to have never occurred. The employee therefore has a right to choose to be reinstated to their employment with the employer; a right that is extremely difficult for the employer to oppose. As court proceedings can take years to resolve, the employer is often ordered to reinstate the employee years after their dismissal.
- Reinstatement results in a heavy financial burden for the employer. It must pay the reinstated employee all wages and other benefits the employee would have received between the date of the dismissal and the date of reinstatement. Back-pay can therefore amount to years of compensation.
- Any unemployment benefits or compensation earned by the employee from another employer during the period to which reinstatement applies cannot be deducted from the back-pay owed to the employee.
- When reinstatement is finally ordered, the former employee often has either been replaced or had their position eliminated, meaning that the employer has no open position to offer to the reinstated employee. In the absence of any valid ground for the termination of the reinstated employee's employment, the employer is typically forced by the circumstances to reach a settlement/termination agreement with the employee, which will invariably result in the payment of additional severance to the employee.

Conclusion

These recent cases should serve as a reminder to employers, when dealing with employees subject to French law or the laws of other European countries, to take extreme care when considering the dismissal of employees who have expressed opposition or criticism of the employer or its strategy. This is particularly important when dealing with senior executives because, in addition to the potentially significant financial stakes, these situations can be extremely sensitive from a reputational point of view. The risks are further enhanced because such dismissals can also be challenged by employees on the basis of legislation implementing the far-reach EU Directive on the protection of whistleblowers.

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