

[TERMINATION OF EMPLOYMENT CONTRACT]

Disciplinary proceedings: a written request for clarification is (already) a punishment

(Cass. soc. 19th, May 2015, 13-26916)

The employer who sends a request for clarification to an employee, further to facts that are considered as misconducts issues a punishment. Consequently, the employer is barred from dismissing that employee for those facts.

The civil law maxim “*non bis in idem*”, which prohibits double jeopardy, also applies to French Labour law, and most particularly to disciplinary procedures. Thus, an employer may not punish twice an employee for the same facts.

Under the French Labour Code, a punishment is defined as “*any measure, other than oral reproof, taken by the employer further to actions of the employee that are regarded as misconduct, regardless of the impact of such measure on the employment relationship, position, career or remuneration*” (art. L.1331-1).

Pursuant to this provision, courts construe any writing making reproaches as a warning – the lesser degree of punishment that can be issued by an employer. Hence, an email containing a reproach is considered as a warning and the employer is barred from taking any other measure in relation with the same facts (Cass. soc. 26th, May 2010, n°08-42893).

In the present case, the French postal services had sent a “*request for clarification*” to an employee after meeting with him during a pre-dismissal interview. Such request was presented by the internal rules of the company as an investigation measures for disciplinary procedures. It was further specified that it was not a disciplinary punishment.

After he answered, the employee was dismissed for serious misconduct. He then challenged the validity of the dismissal on the ground that the employer had already issued a punishment for the fact used as a cause of dismissal.

The French supreme court, considering that the request procedure had been implemented further to actions of the employee that were regarded as misconducts, that the request was compelling for the employee and that the answers were kept in the disciplinary file of the employee, held that the request was a disciplinary measure.

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