[DURATION OF WORK]

The employer may unilaterally impose the organization of the working time in the frame of four weeks-periods and hence avoid the payment of overtime.

(Cass. Soc. May 11 2016, 15-10025)

The working time is as a rule computed on a weekly basis. As a result, the employee is entitled to overtime payment for the overtime performed above the 35 hour legal duration during a given week.

It is however possible for the employer, as an exception, to organize a variation of the working time during the year and to compute the overtime on a broader period than the week. This must however be allowed by a collective agreement entered into at company level, i.e. a negotiation and an agreement with the unions (in some exceptions, with the staff representatives where no unions are represented in the company). Absent a collective agreement at company level, such an organization may be put in place if is provided by the collective agreement at the level of the industry.

In all cases, even if there is no collective agreement, it is possible for the employer to derogate to the computation of the working time in the frame of the week and compute it in the frame of periods of several weeks.

This is allowed by article D 3122-7-1 of the labour code. Pursuant to this provision, the employer may unilaterally set up an organization of working time within periods of not more than four weeks. This unilateral decision is made after a consultation with the works council, or the staff delegates, on the proposed schedule. Then the employer must present each year to the works council a report on the results of this organization. During the course of the year, the employer may change the proposed schedule (after having consulted with the works council, or the staff delegates). The employees are informed of the change of their working schedule with a notice of 7 workable days.

The commented decision concerned a company that had unilaterally changed the organization of the working time, and put in place the organization of the work in the frame of four week periods.

This resulted for the employees in a potential loss of overtime payment. Indeed this organization of the working time allows paying the employees on the basis of 35 hours, even if during a given week they work overtime (up to 39 hours, as hours above 39 must be paid as overtime), provided that in average over the period, the employee works 35 hours.

The unions represented in the company had contested this decision, and claimed that the employer was not allowed to implement it without each employee's individual consent, underlining that this modification of the working schedule was equivalent to a modification of the employment contract, since the employees would lose the benefit of overtime payments.

They recalled that the Labour code provides that where the organization of the working time on another period than the week is put in place by collective agreement, this is not a modification of the employment contract, and hence the employer can impose to the employee this new working schedule (and the corresponding loss of remuneration) without employee's consent. They underlined that no such provision exists when such organization of the working time is put in place by an unilateral decisions of the employer.

The TGI of Paris and the Court of Appeal of Paris accepted their argumentation. The Supreme Court decision of May 11, 2016 invalidated the decision of the Court of Appeal. In this decision the Supreme Court clearly rules that "article D 3122-7-1 of the labour code allows the employer to organize the duration of the work in the frame of periods of work and to unilaterally impose the allocation of the working time on a period not longer than four weeks".

This possibility for the employer to impose an organization of the working time avoiding overtime payments might be extended from four weeks to nine weeks, in companies below 50 people, pursuant to the bill of law currently discussed at the Parliament.

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