EMPLOYMENT & BENEFITS - FRANCE

Burden of proof in sexual harassment cases: towards a presumption of guilt?

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AUTHORS

Laurent Guardelli

Caroline Habib

Introduction

Since the Harvey Weinstein case, French society has been shaken by a social media movement in which *#balancetonporc* ("denounce your pig") has prompted a frenzy of reactions, from women revealing incidents that they had previously kept to themselves to false accusations and endless debate regarding what is considered as offensive.

Freedom of speech is an issue in the workplace, as the facts in sexual harassment cases are often time barred. This is one reason why Law 2017-242 (February 27 2017) – on the reform of the time limits in criminal matters – was passed, which extends the limitation period from three years to six.

In October 2017 reports of sexual violence increased by 30% compared with the same period in the previous year, representing 360 additional cases.

The recent spotlight on this issue provides an opportunity to describe the system in place for cases of sexual harassment in the workplace.

Handling of claims

A November 25 2017 circular on the handling of claims filed for sexual offences, which was published on December 29 2017, states that the increase in freedom of speech for victims has already led to a significant increase in the number of claims for such offences (ie, sexual harassment, sexual assault or rape) committed in both professional and private life.

The circular emphasises:

- the manner in which victims' claims are received;
- the provision of a designated processing system and the close monitoring of such claims; and
- the accompaniment of the victims in traumatic cases.

The circular specifies that a group should be created to draw up an inventory of the judicial treatment and identify the improvements to be made in order to punish perpetrators and meet victims' expectations.

Further, some victims' associations propose the reversal of the burden of proof of sexual harassment.

Definition

Article L1153-1 of the Labour Code defines 'sexual harassment' as follows:

"No employee should be subject to acts:

1 Of sexual harassment, consisting of repeated sexual remarks or behaviors which degrade his or her dignity because of their degrading or humiliating character, or create against him or her an intimidating, hostile or offensive environment;

2 Or assimilated to sexual harassment, consisting of any form of serious pressure, repeated or not, exercised for the real or apparent purpose of obtaining an act of a sexual nature, that it is sought for the benefit of the perpetrator or for the benefit of a third party."

'Sexist acts' are also punished, defined by Article L1142-2-1 as "any act related to the sex of a person whose purpose or effect is to undermine her dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment".

The legislature was unable to identify a specific punishment when characterising a new offence related to types of sexual behaviour, as the Labour Code provides none. It is up to the judge to decide.

Burden of proof

Law 2002-73 (17 January 2002) introduced a system whereby the burden of proof was in favour of the employee (or the candidate for recruitment, an internship or a period of training in a company) who alleges that he or she is a victim of harassment.

In a dispute, the alleged victim need only "present facts suggesting the existence of a harassment", meaning that the burden is on the defendant to "prove that his/her actions did not constitute such harassment and that his/her decision was justified by objective factors unrelated to any harassment". The judge must then form a conviction "after having ordered, in case of need, all the measures of instruction which he considers useful".

In order to re-balance the burden of proof between the parties, Law 2003-6 (January 3 2003) obliged the alleged victim to present facts in order to prove harassment.

However, Law 2016-1088 (August 8 2016) reinstated the regime as set forth by Law 2002-73, providing that the alleged victim should "present facts suggesting" the existence of harassment. Thus, the rules have been relaxed for the benefit of the employee (or the candidate for a job or internship) similar to the existing regime for discrimination (Article L1154-1 of the Labour Code).

Once an employee produces documents as evidence of sexual harassment, it is the employer's responsibility to prove that this is not the case. For example, where a candidate for employment plausibly contends that the employer's decision not to hire him or her was in retaliation to the refusal of a sexual favour, the company must justify that its reasons not to hire the candidate were legitimate (eg, lack of academic background).

Penalties in this field are heavy, ranging from damages to the nullity of the dismissal, which could result in the payment of all salaries owed since the dismissal. Further, it is worth emphasising that all decisions made in the workplace must not only be grounded by objective, professional reasons, but also well documented; who knows whether in future the burden of proof may lie entirely on the employer.

For further information on this topic please contact Laurent Guardelli or Caroline Habib at Coblence & Associés by telephone (+33 1 53 67 24 24) or email (lg@coblence-avocat.com or cha@coblence-avocat.com). The Coblence & Associés website can be accessed at www.coblence-avocat.com.
