

Industrial tribunals against the Macron scale: rebels with a cause?

26 June 2019 | Contributed by [Coblence & Associés](#)

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Introduction

The so-called 'Macron ordinances' overhauled the Labour Code in September 2017. One of the main effects was the introduction of a schedule of damages in French labour law, whereby a judge can award damages for unfair dismissal (ie, dismissal without a serious ground) only within certain limitations depending on the employee's seniority. This is a revolutionary change as it means that judges lose their power to freely assess the harm suffered following an unfair dismissal.

While some lower courts have applied the new law, an increasing number of courts are challenging it on the basis that, in particular, it would be contrary to the provisions of the International Labour Organisation (eg, Convention 158, Termination of Employment Convention 1982) and the Council of Europe (eg, Article 24 of the European Social Charter).

The first rulings by the courts of appeal are expected to happen in Summer 2019. The French Supreme Court has been asked for its advice, which it is free not to provide at this stage.

New scale determining damages for unfairly dismissed employees

On 22 September 2017 the overburdened registries of the boards of industrial tribunals welcomed queues of lawyers filing requests for their clients. The next day, Ordinance 2017-1387 entered into force. One of the most emblematic but also disparaged measures of the Macron ordinances is the creation of a scale framing damages that are granted to an employee in cases of unfair dismissal.

A similar scale already existed, but only as a suggestion, to encourage bargaining between the parties. In addition, damages for unfair dismissal were fixed on the following grounds:

- For employees with at least two years' service in a company with at least 11 employees, the minimum damages were fixed at six months' salary. The compensation was then adjusted with regard to the damage suffered and the seniority of the employee.
- For other employees, there was no minimum damages amount and the compensation was calculated with regard to the loss suffered at the judge's discretion.

The new scale aims to reassure employers of their ability to separate from their employees at a cost known in advance, and to encourage hiring on permanent contracts.

The scale maintains compensation ranges with regard to the size of a company's workforce and the length of an employee's service, but the judge is now bound by a minimum and maximum value.

The scale has been established using the results of a statistical study which considered the average amount of damages granted in industrial tribunals around the country.

The Constitutional Council validated the constitutionality of this scale on 21 March 2018. On 7 December 2017 the Council of State indicated that the violation of the International Labour Organisation Convention and the European Social Charter "is not likely to cast doubt on the legality of the scale".

In the months following the scale's enactment, there was a significant dip in the number of disputes and, although it may just be a coincidence, unemployment has declined since September 2017.

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Rebellion against the scale

In order to circumvent the maximum amount – which is applicable only to unfair dismissals – employees have raised claims on other grounds. For instance, employees have filed claims for nullity of dismissal (in cases of harassment or discrimination). Moreover, complementary claims for damages (eg, breach of the obligation of security, unfair execution of the contract or moral damage) have also increased.

However, an unprecedented number of industrial tribunals have dismissed the application of the damages scale. The first to dismiss the scale was the Troyes Industrial Tribunal (on 13 December 2018), which was followed by Amiens, Grenoble (where one section of the industrial tribunal ruled for the application of the scale and another against) and also Paris and Montpellier.

Other industrial tribunals have dismissed employees who were trying to avoid the scale.

Employees have raised – with varying levels of success – the Macron scale's violation of the International Labour Organisation Convention 158, which established the principle of "adequate compensation or any other form of reparation considered appropriate" in the event of an unfair dismissal.

As a matter of fact, several International Labour Organisation signatory states use such scales without their compliance being questioned. For example, the European Social Charter enshrines "the right of unfairly dismissed workers to appropriate remedy".

The increase in contradictory judgments among the industrial tribunals has created a legal uncertainty. It is now urgent to end the confusion.

End of rebellion is in sight

On 26 February 2019 the Ministry of Justice issued a circular asking the presidents of the courts of appeal to notify the ministry of any decision relating to the application of the scale. The ministry also requested to be kept informed of the ongoing appeal procedures in order to intervene in cases to publicise the opinion of the Prosecutor General's Office. This happened for the first time on 23 May 2019 before the Paris Court of Appeal.

The first judgments are expected from the Paris Court of Appeal in September 2019 and from the Reims Court of Appeal in June 2019.

Moreover, on 10 April 2019 the Louviers Industrial Tribunal appealed to the Supreme Court for an opinion. The tribunal asked the court to decide on the compatibility of the scale with these texts. The court's answer should be announced on 8 July 2019.

However, the Supreme Court's position remains uncertain as it normally has no jurisdiction to rule on the admissibility of a law in the context of a request for an opinion (ie, out of any appeal).

Comment

The suspense will be short-lived, which is helpful. It is unacceptable to apply laws differently across the country.

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