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*Fairness, Employee Privacy and Individual Freedom
Under French Labor Laws*

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New technologies have raised new issues regarding privacy and private life as separation between professional and private life becomes blurred. At the same time, the employees feel that they need higher protection as new technologies allow their employers to invade their privacy. They are also expecting fairness from their employers. New regulations and jurisprudences have emerged in order to address these new issues. France is no exception.

I/ Fairness, privacy and protection of private life at the time of recruitment:

1.1 – Job offer:

1.1.1 – Prohibited indications in job offer:

- General prohibition of discriminatory criteria:
 - Article L.310-2 of the French Labor Code prohibits reference in job offers to discriminatory criteria, as prohibited by article L.122-45 of the same code.
 - Article L.122-45 provides that no one may be barred from a recruitment process because of his/her origin, sex, social habits, sexual orientation, age, marital status, pregnancy, genetic characters, ethnic origin, nationality, race, political opinions, union activities, religion, physical appearance, health or disability.
- Specific prohibition of sex discrimination in job offers pursuant to article L.123-1 of the French Labor Code.

Consequence: obligation to indicate that the position is offered to male and female.

Exceptions:

- Article L.123-4 provides for the possibility to reserve positions to women if company has adopted a plan to ensure professional equality between men and women: in such case, the job offer may indicate that the position is reserved to women.
- Positions for which being a male or a female is a necessary condition. Such positions are listed by law: article R.123-1 refers to actors and models.

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1.1.2 – False representation and misleading statements:

- False representations and misleading statements are expressly forbidden by article L.311-4 of the French Labor Code.

This article provides for a non exhaustive list of matters where false representation of misleading statements are prohibited, namely: existence / availability of the job; nature and description of the job, compensation and other related benefits, work place, etc.

- Job offers must be written in French language with respect to
 - (i) Services to be carried out in France, and
 - (ii) Services to be carried out abroad if the employer or the author of the offer is French.

This requirement applies regardless of the fact that knowledge of a foreign language is a condition of the job offer.

1.1.3 – Legal consequences: employer’s liability and criminal penalties

(a) Consequences of false representation or misleading statements:

- Criminal penalties (article R.361-1 of the Labor Code provides for a fine of a maximum of EUR 450).
- Publication of a job offer in a newspaper is not a contractual commitment but a non binding “invitation to talk”. However, employer may be sentenced to indemnify harm caused to the employee because of false representation or misleading statements.

(b) Discriminatory requirements are punished by criminal penalties:

- Articles 225-1 and 225-2 of the Criminal Code provides for a maximum of 3 years imprisonment and/or a fine of a maximum of EUR 45,000.
- Article L.123-1 of the Labor Code provides for a maximum of 1 year imprisonment and/or a fine of a maximum of EUR 3,750.

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1.2 – Selection and hiring:

1.2.1 – Information requested from candidates:

(a) Information that may be requested from the candidate is limited to information:

- Having a “direct and necessary” link with the position to be fulfilled, **and**
- Allowing the employer to estimate whether the candidate is capable to fulfill such position (article L.121-6 of the French Labor Code).

(b) Information that must not be requested from the candidate:

- Information relating to their private life and individual freedom.
- Information relating to prohibited discriminatory criteria.
Examples of prohibited questions:
 - name and profession of parents, spouse, spouse’s parents
 - marital status
 - number of children
 - religious belief
 - political opinions
 - health condition (in particular, the employer is forbidden to ask whether the candidate is pregnant),
 - medical history
 - social security number
 - housing conditions
 - monthly budget
 - membership in groups, clubs, organizations
 - leisure activities
 - military status
 - criminal records (except if no record is a necessary condition for the job)
 - as well as all other questions relating to prohibited discriminatory criteria as listed in article L.122-45 of the Labor Code (see par. 1.1.1 above).

1.2.2 – Consequence of false representation or misleading statement by the candidate:

- False representation or misleading statements by a candidate are of no effect if such representation/statement came in response to a question that the employer was not legally permitted to ask.
- False representation or misleading statement made by candidate in response to questions having a “direct and necessary” link with the position to be fulfilled and allowing the employer to estimate whether the candidate is capable to fulfill such position may ground further dismissal or cancellation of the employment contract.

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However, courts consider that employer is faulty if he does not check the employee's statements with respect to diplomas, professional experience and skills. Based on such grounds, courts have refused to cancel an employment contract or legitimate dismissals.

1.2.3 – Other techniques of selection

(a) Obligation of loyalty:

- Works council must be informed of the techniques of selection prior to their implementation (article L.432-2-1 of the Labor Code).
- Candidates must be expressly informed of the techniques used in the recruitment process to which he/she participates (article L.121-7, al.1 of the Labor Code).
- Candidates must be informed of techniques used to collect data about him/her prior to their implementation (article L.121-8 of the Labor Code).
- Should the data collected about the candidate be processed by a computer, a prior declaration must be made to the “CNIL” (French personal data protection watchdog) and legal requirements concerning personal data processing shall apply.
- Data obtained with such techniques must remain confidential.

(b) Legal requirements as to the techniques used:

- Techniques used must be relevant with respect to the aim pursued (article L.121-7 al. 2 of the Labor Code).

The purpose of this requirement is to prevent the use of techniques which may be reliable for other purposes but not in a recruitment process (as an example: psychological tests may be conclusive for medical purposes but are not considered reliable to select candidates to recruitment).

- Techniques used must have been tested as reliable (exclude graphology, astrology, etc.).
- Techniques must not allow inquiring into candidate's privacy or individual freedom.

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II/ Fairness, privacy protection of private life and employment contract:

2.1 General prohibition of discrimination:

2.1.1 Article L. 122-45 of the French Labor code provides that no employee may be punished, dismissed or be concerned by a discriminatory measure, direct or indirect, relating notably to remuneration as defined in article L.140-2, incentive schemes, shares allocations, training, redeployment, appointment, qualification, classification, professional advancement, transfer or contract renewal because of his/her origin, sex, social habits, sexual orientation, age, marital status, pregnancy, genetic characters, ethnic origin, nationality, race, political opinions, union activities, religion, physical appearance, health or disability.

By exception:

- Pursuant to article L.122-45-3 of the French Labor code discrimination based on age are permitted provided that they are “*objectively and reasonably justified by a legitimate aim, in particular employment policy, and if the means used to pursue such aim are appropriate and necessary*”. The same article gives examples of permitted discrimination, *i.e.*:
 - Prohibition of access to employment or implementation of specific work conditions with a view to ensure protection of young and old employees.
 - Determination of an age limit for recruitment based on the education needed to occupy the concerned position or the necessity of a “reasonable period of work” before retirement.
- Pursuant to article L.122-45-4 of the French Labor code, discriminations grounded on the unfitness for work that has been recorded by the doctor appointed to examine the employees as provided by the Labor code (“Médecin du Travail”) are permitted if they are “objective, necessary and appropriate”. The purpose is to grant sick or disabled employees rights with equivalent to those of other employees.
- Article L.321-1-1 provides for criteria to determine the order of dismissal in the event of workforce reduction for economic reasons, which are (i) family charges, (ii) seniority with the employer, (iii) situation of employees who present social characteristics that will render their reemployment particularly difficult, notably disabled persons and aged employees and (iv) professional ability.

2.1.2 Article 225-1 of the French criminal code provides that “*discrimination comprises any distinction applied between natural persons by reason of their origin, sex, family situation, physical appearance or patronymic, state of health, handicap, genetic characteristics, sexual morals or orientation, age, political opinions, union activities, or their membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion*”.

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Article 225-2 of the same code provides that “*discrimination defined by article 225-1 is punished by three years' imprisonment and a fine of €45,000 where it consists (...) 3° of the refusal to hire, to sanction or to dismiss a person (...) 5° of subjecting an offer of employment, an application for a course or a training period to a condition based on one of the factors referred to under article 225-1(...)*”.

Article 255-3 provides for exceptions: “*the provisions of the previous article do not apply to:*

1° discrimination based on state of health, when it consists of operations aimed at the prevention and coverage of the risk of death, of risks for the physical integrity of the person, or the risk of incapacity to work or invalidity. However, when it is based on the consideration of predictive genetic tests relating to an illness that has not yet commenced or the genetic predisposition towards an illness, this discrimination is punished by the penalties provided for by the previous article;

2° discrimination based on state of health or handicap, if it consists of a refusal to hire or dismiss based on a medically established incapacity, according to either the provisions of title IV of book II of the Labour Code, or of the laws defining the statutory framework of the public service;

3° recruitment discrimination based on gender when the fact of being male or female constitutes the determining factor in the exercise of an employment or professional activity, in accordance with the provisions of the Labour Code or of the laws defining the statutory framework of the public service”.

2.2 Equal salary for men and women

Article L.140-2 of the French Labor code provides that “*all employers must ensure, for a same work or a work of equal value, an equal remuneration to men and women*”.

More than three decades after the enactment of these provisions, and having noted that in spite of them and of anti-discrimination legislations, women’s salaries remain 20% lower than men’s salaries, the French parliament passed a law in 2006¹ which main purpose is to incite trade-unions and employers to negotiate agreements to end salary spread between men and women by 31 December 2010.

Among various measures, this law provides for the following:

- Mandatory annual salary negotiations between unions and employers federations in each field of activities will include based on a “diagnosis” of the situation, the definition and schedule of measures to allow suppressing spreads of remunerations between men and women effective 31 December 2010. The same obligation shall apply to the annual negotiations on effective salaries that must be conducted in any company in which a union delegate has been appointed.
- Negotiations must start within twelve months following law enforcement.

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- Collective agreements shall not be extended by the ministry of Labor if such agreement does not include provisions aiming to the suppression of spreads of remuneration between men and women.
- Collective agreements negotiated in companies and concerning salaries shall be effective only if, when filed with the Labor administration, such agreements are accompanied by minutes showing that negotiation on the suppression of salaries spread have started and including the proposals put by each side to negotiation.
- A report on the application of the law shall be made: if necessary, the government shall submit to the parliament a bill providing for the taxation of companies which will not have satisfied the obligation to negotiate the suppression of salaries spread between men and women.

The law also provides for salary guarantee to pregnant women: upon their return from maternity leave, mothers must be granted the same increase of salary than the one they would have benefited if they would have not been in maternity leave. Accordingly they must be granted the benefit of any general increase of salary if any as well as a personal increase of salary equal to the average of all individual increases of salary granted during the time of the maternity leave to the other employees of the same professional category.

2.3 Equal pay for equal work

The French Supreme Court held in 1996, based on article L.140-2 of the Labor code, that equal salary must be paid to all employees, men and women, provided that the concerned employees are placed in an identical situation².

Identical situation does not necessarily refer to positions classified at the same level by the collective bargaining agreement: two positions of same level under this classification may have different characteristics (i) and the employees' respective professional skills may be of different value (ii).

- (i) With respect to the characteristics, the French Supreme Court has admitted that salaries may differ due to particular technical characteristics³, particular responsibilities⁴ or larger tasks⁵.
- (ii) With respect to the employee's skills, salary difference may be justified by the employee's efficiency, provided that the employer's appreciations rely on criteria which are both "objective" and "verifiable"⁶, such as the quality of the work done⁷ and the experience acquired⁸.

Higher education may also justify higher wage, provided that such higher education allow the employee to better achieve his/her tasks under the employment contract.

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2.4 Employees' rights to privacy and individual freedoms:

The employee's right to privacy and respect of his/her private life is provided by several legal sources, among which:

- Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms entitled "Right to respect for private and family life", which notably provides that:

"Everyone has the right to respect for his private and family life, his home and his correspondence".

- Article 9 of the French civil code, pursuant to which:

"Everyone has the right to respect for his private life".

- With respect more specifically to employment, Article L.120-2 of the French Labor code provides that:

"No one may impose restrictions on personal rights or on individual or collective freedoms that are not justified by the nature of the task to be achieved or are not proportionate to the pursued aim".

Based on this set of rules, French courts have elaborated jurisprudences in numerous cases involving privacy rights and individual freedoms:

2.4.1 Privacy:

- **Secrecy of employees' correspondences:**

As a matter of principle, correspondences are secret and no one is permitted to take knowledge of a correspondence exchanged between third parties, subject to criminal penalties.

Article L.226-15 of the French criminal code provides that:

"Maliciously opening, destroying, delaying or diverting of correspondence sent to a third party, whether or not it arrives at its destination, or fraudulently gaining knowledge of it, is punished by one year's imprisonment and a fine of €45,000.

The same penalty applies to the malicious interception, diversion, use or disclosure of correspondence sent, transmitted or received by means of telecommunication, or the setting up of a device designed to produce such interceptions."

But these penalties do not apply in cases where secrecy was breached in good faith, as a result of an error.

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Mails

Very recently the French Supreme Court has rendered an important decision in a case where an employer opened an envelope of “commercial appearance” bearing the name, position and professional address of an employee in the absence of any indication that the enclosure was of personal nature.

The Supreme Court⁹ has held that the opening of this envelope by the employer was lawful because in the absence of any indication that the mail was “personal”, it may have legitimately been considered as of “professional” nature.

E-mails

Emails received and sent thanks to the systems made available by the employer to the employees are also protected by the regulations providing for the secrecy of correspondences:

In a decision of October 2, 2001¹⁰, the Supreme Court affirmed the employee’s right, during work time and at workplace, to the respect of the privacy of his/her private life, which implies the secrecy of the correspondences.

As a result, the employer is not entitled to gain knowledge of personal emails sent or received by the employee thanks to the information system made available to him/her for the purpose of the carrying out of his/her work, even in the case where the employer has prohibited the use of such system for extra professional purposes.

But the Supreme Court has not yet defined what “personal” email means:

Certain lower courts have given extensive definitions, such as the Court of Appeals in Bordeaux¹¹ which has decided that employee’s emails are personal as long as they (i) are sent or received with the employee’s computer, (ii) are not circulated to all the computers of the undertaking and (iii) bear the name of such employee. Under such definition, almost all emails are “personal”.

For this reason, an employer who needs to use employee’s emails to prove that said employee is engaged in unlawful or disloyal activities must get a court order to have an expert or a bailiff appointed with mission to consult and record emails received or sent by the concerned employee from or to identified persons.

Article 145 of the new code of civil procedure provides that *“if there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure.”*

The Supreme Court has recently ruled¹² that appointing an expert or a bailiff to consult an employee’s personal emails was a *“legally permissible preparatory inquiry”* as required by article 145 of the new code of civil procedure.

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One must note that since the court order may be obtained by way of petition, the employee is not made aware of such order until the expert or the bailiff comes to him to consult his/her personal emails and cannot therefore take preventive actions to dissimulate or destroy the concerned emails.

- **Different solution regarding other files and documents:**

Law and jurisprudence are less protective with respect to files or documents which are not covered by the principle of secrecy of the correspondences.

Any file or document which is not identified by the employee as ‘personal’ are deemed to be ‘professional’. Accordingly, the employer is entitled to consult such file or document even in the absence of the employee¹³. This applies to all documents located in the office of the employee as well as to any document produced by the employee using the computer made available by the employer.

To the contrary, the employer is not allowed to consult the employee’s files or documents identified as ‘personal’ in the absence of such employee or after having unsuccessfully called him/her to attend to the consultation, except ‘in case of risk or particular event’¹⁴. Such case of risk or particular event appears quite limited (illegal activities made through the use of the employer’s means, terrorist threat and other similar risks or events).

- **Monitoring of employees:**

(a) The employer is legally entitled to monitor the employees at work. But the installation and implementation of specific monitoring means or devices are regulated.

Works council and employees must be previously informed of the monitoring:

- Works council must be informed and consulted prior to any decision concerning the implementation of means or technologies allowing the monitoring of the employees activities (article L.432-2-1 of the French Labor code). The same applies with respect to the implementation of data processing for human resources management.
- Each employee must be personally informed of the implementation of the monitoring means or devices pursuant to article L.121-8 of the Labor code.
- Any information that would have been collected in breach with the above regulations cannot be used against the employee¹⁵. Violation of the obligation to inform and consult the works council is also a criminal offence.

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- The above regulations do not only apply to the implementation of technical devices but also to any other means used to monitor the employees. As for example, using security guards to identify the employees causing damage to equipment is subject to the above regulations.
- The above regulations apply only to means and technologies which purpose is to monitor the employees. The Supreme Court has held that the employer may freely set up video cameras in a warehouse where employees were not supposed to work¹⁶. Similarly, the Supreme Court has held that checking the details of the telephone invoice provided by the telephone company is not subject to the above regulations because the purpose of the verification was not to monitor the employees¹⁷. Some computer systems tracing the use made of such systems may also not be subject to information of works council and employees if they have not been primarily designed to monitor the employees. The French Supreme Court has specified in this respect that using computers does not have the effect of granting anonymity to the work accomplished by the employees¹⁸.

(b) The means or technologies used must not have the effect of imposing restrictions on personal rights or on individual or collective freedoms that are not justified by the nature of the task to be achieved or are not proportionate to the aim pursued (Article L.120-2 of the Labor code).

Examples of means or technologies that have been held not proportionate to the aim pursued:

- Shadowing employees by private detective has been held to be a violation of private life out of proportion with the employer's legitimate interest¹⁹.
- Biometrics processes are not proportionate with the aim of counting employees work time. Pursuant to the Court in Paris, only security aim or protection of the activities carried out in identified premises may justify the use of such process.

(c) The means or technologies used must be reliable.

- **Processing of personal data:**

Numerous monitoring devices involve the collection and processing of employees' personal data.

Pursuant to the 1978 French Data Protection Act as modified in 2004 to conform to EU Directive, processing may be performed only on personal data that meet the following conditions:

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- The data must be obtained and processed fairly and lawfully.²⁰
- The data must be obtained for specified, explicit and legitimate purposes and must not subsequently be processed in a manner that is incompatible with those purposes.²¹
- The data must be adequate, relevant and non excessive as regard to the aim pursued and their future use.²²
- The processing must have received the consent of the person whose data is processed.²³
- The data controller must provide such person with the following information:²⁴
 - * The identity of the data controller.
 - * The purpose of the processing for which the data is intended.
 - * Whether replies to the questions are compulsory or optional.
 - * The possible consequences for him/her of the absence of a reply.
 - * The identity of the recipients or categories of recipients of the data.
 - * The rights granted to him/her in relation to the processing of data (right of opposition to collect data, rights of access to the data and rectification...).
 - * When applicable, the intended transfer of personal data to State that is not a member State of the European Union.

Failure to comply with one of these requirements is punishable by a maximum of five-year imprisonment and a maximum bill of EUR 300,000.²⁵

Processing must be preceded by the information and consultation of the works council and by a declaration to CNIL or, in some cases, by the authorization of this body. Pursuant to the law of 6 August 2004 and the decree 2005-1309 of 20 October 2005, the employer is discharged from declaration if a “correspondent” has been appointed by the employer with mission to ensure that legal requirements are fulfilled.

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2.4.2 Private life and individual freedoms:

- **Incidence on the employment contract of facts pertaining or deemed to pertain to private life:**

As a matter of principle, a fact pertaining or deemed to pertain to the employee's private life cannot constitute a fault allowing the employer to take disciplinary action against such employee and/or terminate his/her employment contract.

Therefore, it is of prime importance to determine what pertains to private life and what pertains to professional life. The following are examples of facts that have been considered as pertaining to (i) private life and (ii) professional life:

Private life

- Generally, the employee's behavior out of workplace and outside of work time cannot be faulty under the employment contract.
- Employee's actions that happened in the course of another professional activity and which are not related to the concerned employment contract cannot ground disciplinary measures²⁶. Accordingly, a wrongdoing made by an employee under a previous contract with another company cannot ground disciplinary measures by current employer.²⁷
- Actions accomplished by employee acting out of the supervision of the employer cannot ground disciplinary measure by said employer: as for example, an employee having two part time employment contracts cannot be penalized for an event which happened in the course of the other employment contract. In such case, the employee insulted his boss under the first employment contract while the same person was also his boss under the second employment contract²⁸!
- In the event that an employee is successively assigned to several companies of a same group, thereby changing of employer, the last employer cannot ground the termination of employment on facts that took place under the preceding assignments of the employee.
- The treasurer of the works council using works council money to pay his personal expenses is not faulty under the employment contract because, as treasurer of the works council this employee was not under the supervision of the employer.

Professional life

- Driving while being drunk out of work time and have his license suspended for such reason pertains to the professional life of a person employed as a driver²⁹.

- To hit another employee during a staff meeting organized by the works council out of work time but in the employer's premises is faulty under the employment contract and justifies termination³⁰.
- Generally, faulty behaviors by the employee out of the work time but accomplished within the employer's premises are deemed to pertain to professional life³¹.
- Facts committed out of work time and outside the workplace is faulty under the employment contract and may justify termination if such facts relate to professional life: for example to hit at home another employee who came to pick up company car justifies termination of the employment contract³².

By exception, facts pertaining to the employee's private life may allow the employer to terminate his/her employment contract if such facts cause to the employer an "objective and clear disturbance" due to the position of the employee and the "finality" of the employer. Examples of such disturbance are:

- Employee's behavior towards his partner, who is also employed by the same company, having resulted in the arrest at the workplace of the employee³³.
- Prosecution of bank employee after police discovery in his home of stolen vehicle, forged documents and guns³⁴.
- Prosecution of employee for having committed repeated acts of violence on child under 15 resulting in the death of this child³⁵.
- Fight between employees out of work time and outside the workplace, during a dinner intended to bring together employees of two companies having merged³⁶.

In such cases, the employer is entitled to terminate the employment contract for cause, but not to take disciplinary actions or dismiss the employee for fault.

The reason is that the employee's behavior during private life does not constitute a violation of the employment contract as the employee's contractual obligations do not and must not extend to private life behaviors.

By exception, some of these behaviors may be in breach with the employee's obligations of "loyalty" and "integrity", with respect to certain professions: in the above case concerning the bank employee, such employee was rightfully dismissed for "serious fault", according to a decision of the Supreme Court, because as an employee of a bank he was held to an obligation of "integrity" under his employment contract.

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- **Beyond privacy and private life, employees have right to “Personal life”:**

The French Supreme Court has extended the range of employees’ rights beyond the protection of privacy or private life in deciding that the employees have right to “personal life”. Accordingly, the Supreme Court has held *inter alia* that the employee:

- May freely decide on the location of his home and refuse to relocate it.
- May refuse to work at home or to install at his/her home files or equipment.
- Is free to get married or remain unmarried.
- May have an affair with a subordinate employee or a superior.
- May be excessively indebted (even though such employee works as manager in a bank).
- Is free to buy a car to a competitor of his/her employer.

Numerous litigations have arisen concerning the freedom for the employee to dress as he/she wishes:

As a principle, to dress oneself in accordance with his/her wish is an individual freedom of the employee. Accordingly, any restriction to this freedom must be justified by “the nature of the tasks to be achieved” by the employee and proportionate with the pursued aim, as provided by article L.120-2 of the Labor code.

Courts deciding on such issue have held as follows:

- Refusal by an employee in contact with customers to wear specific clothes allowing customers to identify the company and giving to the latter a “dynamic and efficient” image may justify the termination of his employment contract³⁷.
- The employer may legally prohibit an employee working in contact with customers to dress in a tracksuit³⁸.
- The dismissal of a female employee who refuses to change “suggestive clothes which may cause trouble in the company” is legally justified³⁹.
- To prohibit male employees from wearing Bermudas is not a sexual discrimination and a male employee working in contact with customers may be legally dismissed for having continued to wear such clothes in spite of prohibition by his employer⁴⁰.
- To prohibit female checkout operators in a supermarket to wear trousers is an excessive restriction to individual freedom which is not justified by the task carried out by these employees⁴¹.

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- The obligation to wear a uniform must be justified by the nature of the task and be proportionate with the aim pursued. This is not the case for a carpenter as the employer does not prove that such uniform provides specific protection⁴².

Similar jurisprudence applies to hairstyle or employee's weight or measurements.

In matters involving religious belief such as the wear of Islamic scarf, Courts must arbitrate between anti-discrimination laws and the principle that the employer may restrict employee's freedoms if the restrictions are justified by the nature of the tasks to be achieved and proportionate with the pursued aim.

Such a matter has not yet been reviewed by the French Supreme Court. Lower courts have held that prohibition to wear an Islamic scarf is justified *"by the nature of the tasks to be achieved by a vendor who is in contact with customers in a commercial centre opened to a large public having various beliefs, imposing neutrality or at least moderation in the expression of personal options"*⁴³. In this decision, the Court of Appeals in Paris noted that the prohibition was proportionate to the aim pursued because the employer had accepted that the employee wears a cap that complies with the religious requirements.

In another decision, the Court of appeals in Versailles has held that the termination of an employee who refused to take off her Islamic scarf was legally justified because this employee worked in a place opened to the public and the employee's freedom to dress herself in accordance with her wish is not a "fundamental freedom"⁴⁴.

One must note that if a "fundamental freedom" would have been restricted by the employer, the decision of the court would have been different.

The right to believe in a religion is a "fundamental freedom" under the French constitution. Also, as explained above an employee cannot be legally punished, dismissed or be concerned by a discriminatory measure because of his/her religious beliefs.

This is the reason why the dismissal of an employee wearing an Islamic scarf which notification referred to the "refusal of the employee to give up to the expression of her religious belief" was held null and void. One must add that in this matter the dismissed employee was employed in a job of telephone operator and was therefore not in visual contact with the public.⁴⁵

2.5 Specific action in case of breach of individual freedom:

In order to reinforce the protection of the employees' freedoms, article L.422-1-1 of the Labor code provides that if a staff representative ("délégué du personnel") takes knowledge, notably thanks to an employee, of the existence of a breach of individual freedom that is not justified by the nature of the tasks to be achieved or are not proportionate to the aim pursued, said representative may raise the issue with the employer.

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In such case, the employer must immediately conduct an inquiry with the staff representative and take relevant steps to solve the issue.

In the event that the employer does not take action as well as in the event of a disagreement between the employer and the representative on the existence of such breach, the concerned employee and the staff representative (if the employee does not oppose) may bring the issue to the Labor court in a summary proceeding. The court may then order any measure to stop the breach.

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- ¹ Law n°2006-340 of 23 March 2006
² Cass. soc. 29 October 1996 n° 92-43.680
³ Cass. soc. 8 January 2003 n°00-41.228
⁴ Cass. soc. 11 January 2005 n° 03-15.258
⁵ Cass. soc. 13 March 2002 n° 00-42.536
⁶ Cass. soc. 18 January 2000, n° 98-44.745
⁷ Cass. soc. 26 November 2002 n° 00-41.633
⁸ Cass. soc. 16 February 2005 n° 03-40.465
⁹ Cass. mixte. 18 May 2007 n° 05-40.803
¹⁰ Cass. soc. 2 October 2001 n° 99-42.942 “Nikon”
¹¹ CA Bordeaux, ch. soc. sect. A, 1 July 2003 n° 01/01847, Sté Cegelec Sud Ouest v/ Le Blanc
¹² Cass. soc. 23 May 2007 n° 05-17.818
¹³ Cass. soc. 18 October 2006, Juris-Data n° 2006-035412
¹⁴ Cass. soc. 17 May 2005, Juris-Data n° 2005 - 028449
¹⁵ Cass. Soc. 15 May 2001 n° 2084 FS-PB (employee); Cass. soc. 7 June 2006 n° 1459 FS-PB (works council)
¹⁶ Cass. Soc. 31 January 2001 n°98-44.290
¹⁷ Cass. soc. 15 Mai 2001 n° 99-42.937
¹⁸ Cass. Soc. 18 July 2000 n° 98-43-485
¹⁹ Cass. Soc. 26 November n° 00-42.401
²⁰ Article 6 of Act n° 78-17 of 6 January 1978
²¹ Article 6 of Act n° 78-17 of 6 January 1978
²² Article 6 of Act n° 78-17 of 6 January 1978
²³ Article 7 of Act n° 78-17 of 6 January 1978
²⁴ Article 32 of Act n° 78-17 of 6 January 1978
²⁵ Articles 226-16 to 226-24 of the French criminal code
²⁶ Cass. soc. 25 October 2000, n° 4031
²⁷ Cass soc. 31 May 2005, n° 1192
²⁸ Cass. soc. 11 June 1998, n°2962
²⁹ Cass. soc. 2 December 2003 n° 2479
³⁰ Cass. soc. 12 January 1999 n°158 D
³¹ Cass. soc. 28 March 2000 n° 1530 P; Cass. Soc. 17 July 1996 n° 3519 D; Cass. Soc. 25 June 2002, n° 2134 FS-P; Cass. Soc. 4 July 2000 n°3208 FS-D
³² Cass. soc. 6 February 2002 n° 521-FD
³³ Cass. soc. 9 July 2002 n° 2566 F-D
³⁴ Cass. soc. 25 January, 2006 n° 171 FS-PB
³⁵ CA Dijon 9 September 2004 n° 03-858 ch. soc.
³⁶ CA Versailles, 30 May 2000, 15^e ch.
³⁷ CA Poitiers 30 October 2001 n° 00-2356
³⁸ Cass. soc. 6 November 2001 n° 4435 F-P
³⁹ Cass. soc. 22 July 1986
⁴⁰ Cass. soc. 28 May 2003 n° 1507 FS-PBRI
⁴¹ CA Paris 7 June 1990 21^e ch. B
⁴² CA Toulouse 7 June 2001 n° 00-4707
⁴³ CA Paris 16 March 2001 n°99-31302
⁴⁴ CA Versailles 23 November 2006 n° 05-5149 5^e ch.B
⁴⁵ CA Paris 19 June 2003 n° 03-30212