

New developments regarding evidence and moral harassment



Gwenaëlle ARTUR
Partner



César SOLIS
Associate

Cass. soc. 17 mars 2021, n° 18-25.597 FS-PI

An investigation conducted by a third-party following the report of a moral harassment situation, even without cross-examination, is an admissible method of evidence in case of a disciplinary dismissal.

In a decision dated March 17, 2021, the French High Court (Cour de cassation) ruled that a report resulting from an investigation carried out by a third-party (an independent consultancy firm) is a valid evidence, that complies with the principle of loyalty in the gathering of evidence, even if the accused employee was not heard during the investigation, or even informed about the existence of said investigation.

In a short statement, the Court of Cassation ruled out the application of the principle¹ forbidding the collection of any employee's personal information using any process that has not been brought to his/her attention, and concluded that the investigation performed by a third-party without hearing or even informing the alleged perpetrator of the harassment, did not violate the principle of fairness in gathering the evidence.

As part of its general safety obligation² the employer is required to take «all measures to ensure the safety and protect the physical and mental health of the employees». In the event of a harassment issue at work, in practice, the fulfilment of such obligation entails the launching of an investigation aimed at establishing the materiality of the alleged harassment.

It is worth noting that, until now, in accordance with Article L. 1222-4 of the French Labor Code, French case-law required that the accused employee be informed of any collection of personal information about him/her³.

However, for the Cour de cassation, this principle does not apply to the investigation related to moral harassment.

In this case, the decision previously rendered by the Paris Court of Appeal, which applied the texts and case law in a classic manner, is overruled by the Cour de cassation.

By deciding so, the Cour de cassation redefines its position in terms of gathering of evidence in moral harassment cases by easing the admissibility of evidence. The application of this solution to sexual harassment cases would also seem cohesive.

However, one important question remains: what about the adversarial principle?

¹ Further to Article L.1222-4 of the French Labor Code.

² Set forth in Articles L. 4121-1 and L. 4121-2 of the French Labor Code.

³ Cass. soc. 18 oct. 2017, n° 16-16.462 F-D, or also, Cass. soc. 15mai 2001 n° 99-42.219 FS-PB.

Indeed, the position of the Cour de cassation makes it possible to implement a disciplinary penalty, based on a third-party investigation, without the employee even having been heard, or even informed about the investigation.

In terms of collecting evidence in cases of harassment, this legal loophole opened up by the Cour de Cassation is valuable, as it can sometimes be difficult to collect any evidence to prove a harassment situation. However, this solution could lead to other delicate legal issues related to a potential violation of the principle of due process and the rights of the defence.

Contact details :

Gwenaëlle ARTUR

Partner,
Steering Legal
M +33 6 20 50 31 55
gartur@steeringlegal.com

César SOLIS

Associate,
Steering Legal
M +33 1 45 05 16 65
csolis@steeringlegal.com