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No compensation for an invalid non-compete clause where no harm shown (FR)

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Summary

An employee who could not prove any harm resulting from an invalid non-compete clause in his employment contract could not obtain damages.

Facts

Mr X was hired by Ufifrance as a salesperson to develop client relationships. On 27 October 2010, the employee brought a claim against Ufifrance for constructive dismissal after being summoned to a preliminary dismissal meeting. Mr X brought various claims against Ufifrance in relation to the execution and termination of his employment contract, which are beyond the scope of this case report. He also requested damages for an invalid non-compete clause in his employment contract.

Judgment

The Court of Appeals of Poitiers dismissed his claim for damages, holding that an invalid non-compete clause in an employment contract does not necessarily cause prejudice to the employee and that in this case the clause had caused Mr X no harm, because following his termination he had continued to conduct a competing activity.

The decision of the Court of Appeals was upheld by the Supreme Court which held that "*the existence of a prejudice and its assessment is part of the remit of the tribunals; the Court of Appeals, having found that the employee had not suffered any prejudice resulting from the invalid non-compete clause, validly dismissed the claim*".

Commentary

Under French law, a non-compete clause is valid if the following conditions are met: (i) it must be necessary to safeguard the company's legitimate interests and should not prevent the employee from finding a new job, based on the employee's job and qualifications in the relevant sector of activity; (ii) it must have limited duration and geographical scope; and (iii) the employee must be financially compensated and the compensation should not be merely notional. If any one of these conditions is not met, the non-compete clause will be void.

Up until this decision, the Supreme Court's position had been that an invalid non-compete clause provided in an employment contract necessarily caused prejudice to the employee, and should be compensated by payment of damages.[1] In the case at hand, the non-complete clause did not provide for any financial compensation and therefore the employee was claiming damages for prejudice automatically incurred.

However, the Supreme Court changed its position by holding that an invalid non-compete clause does not necessarily cause prejudice to an employee, unless he or she can demonstrate it did. Here, the employee's claim was dismissed as he failed to prove any harm was caused.

Over the years, the Supreme Court has tended to find that certain employer shortcomings cause automatic prejudice to employees and has awarded damages as a result. However, more recently the Supreme Court has started to abandon the notion of 'automatic prejudice' (which had greatly expanded over time) in favour of an assessment of the circumstances and of the reality of the harm suffered.

This shift in the Supreme Court's position has been confirmed in other decisions, notably in one dated 13 April 2016,[2] in which the Supreme Court held that providing the employee belatedly with his final payslip and work certificate did not necessarily cause prejudice to

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1. Supreme Court, Soc. 12 January 2011 n° 08-45.280; Supreme Court, Soc. 7 July 2015 n° 14-11.580.
2. Supreme Court. Soc. 13 April 2016, no. 14-28.293.

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the employee. In another decision dated 17 May 2016[3] the Supreme Court held that the omission of the name of the collective bargaining agreement on payslips did not cause automatic prejudice to the employee.

In all of these newer decisions, the Supreme Court places the burden on the employee to prove the harm suffered before it will award damages. In our view, this approach is more satisfactory that its previous one. The employee will no longer be indemnified just by demonstrating the employer's shortcomings but must now prove the existence and extent of the harm caused by them.

In our view, this trend does not make French employment law less protective of employee rights but simply deters them from being tempted to seek damages for matters that have not caused them any loss. Abandoning the notion of automatic prejudice in all situations will also enable the judges to decide which shortcomings do still cause automatic prejudice. In addition, by encouraging employees to set out and prove their prejudice, the courts can indemnify it more accurately.

Based on the Supreme Court's broad ruling in this case, it is likely other employer shortcomings will now come in for the same kind of scrutiny and compensation for employees will be reviewed. We can therefore await application of this new principle to, for example, payment of remuneration below the minimum wage;[4] failure to set out the criteria for rehiring in a dismissal letter;[5] and non-compliance with compulsory medical examinations.[6] The list goes on.

Comments from other jurisdictions

Romania (Andreea Suciu, Noerr): Unlike the French courts, the Romanian courts are rather reluctant when it comes to awarding (moral) damages to employees. The obligation on the employer to pay moral damages to the employee has only been expressly regulated by the Labour Code since July 2007, two months after the Supreme Court ruled that moral damages may be awarded provided that the law, the collective bargaining agreement or the individual employment agreement include explicit provisions covering this. Therefore, an automatic right to compensation is far from being accepted by the courts and proof of actual harm is necessary.

We can only applaud the stance of the courts: a different approach would be too burdensome for the employer, as otherwise it is likely that many employees would base claims for damages on the mere existence of an infringement of their dignity without illustrating how this has actually harmed them.

Greece (Elena Schiza, KG Law Firm): There is no specific legal provision in Greek law regarding non-compete clauses; they are mainly treated by case law. They are usually accepted by the courts as valid, provided that their content is not contrary to mandatory provisions of Greek law. More specifically, Greek courts have ruled that in order for the employer to enforce a non-compete clause, the following requirements must be met:

a. the employer should be able to prove that it has a legitimate business interest to protect by the non-compete clause;
b. the scope of the non-compete restrictions must be reasonable; said requirement applies to the job position, the needs of the company to provide for the covenant, its term, its geographical limit, the business activity etc. For example, a clause according to which the employee agrees not to work for another employer in any capacity worldwide would be deemed unreasonable and therefore unenforceable.
c. the employee must receive consideration for his loss caused by agreeing to the non-compete clause. Greek case law provides that in order for a non-compete clause to be valid, the employer must offer a 'reasonable' compensation to the employee, which must be in relation to the restriction imposed (duration, geographic area, activity/business sector etc.).

In case a non-compete clause is considered as invalid by the court, then it is not enforceable and therefore not binding for the parties. Furthermore, the court may modify the clause in an eventual litigation, if one of the parties submits a relative demand. For example, an employee could argue in an eventual litigation that the covenant is null and void as abusive, and therefore, not binding, and alternatively, request from the court to declare that it would only be enforceable, for example, for a shorter period, or a more narrow geographical space and business activity etc.

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3. Supreme Court. Soc. 17 May 2016, no. 14-21.872.
4. Supreme Court. Soc. 29 June 2011, no. 10-12.884.
5. Supreme Court. Soc. 16 December 1997, no. 94-42.089.
6. Supreme Court. Soc. 13 December 2006, no. 05-44.580.

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