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<p>GENDER DISCRIMINATION IN FRANCE</p>

A French female journalist, Françoise Giroud, famously declared: *“Women will have gained equality only when incompetent ones reach positions of power”*.

Beyond the savoury sally, how are equal opportunity rules implemented and construed in France, given the cultural particularities of this country?

The social attitudes that reign in France have little in common with those of any other culture, perhaps because they find themselves in the unique position of linking two very different socio-economic groups.

France falls between two classifications of European family values and working patterns: those of the Southern European and Northern European countries. The Southern European countries tend to favour traditional family structures where the woman stays home to raise a family and the man goes off to work. The Northern European countries tend to place less emphasis on their family lives; men and women split the job market almost equally. France finds itself tucked neatly, both physically and culturally, between these two social groups which constitute Europe.

The principle of equality between men and women at work was set forth by the *Rome Treaty* in 1957, and several European Directives have enlarged the scope of protection against gender discrimination:

- the *1975 Directive*, concerning remuneration,
- the *1976 Directive*, concerning equality between men and women in access to employment, training and work conditions,

- the *1978 Directive* concerning social security
- the *1992 Directive*, relative to pregnant women,
- the *1996 Directive*, concerning parental leave,
- the *1997 Directive*, relative to the burden of proof in case of discrimination on the basis of gender,
- the *2002 Directive*, that modifies the *1976 Directive*,
- the *2006 Directive*, that modifies, clarifies and completes existing directives concerning equality between men and women.

While France is experiencing some resistance in practice due to the more traditional mentality prevailing in the collective subconscious, these European rules apply in France.

The *French Labour Code*, created in the early 70's, lists all grounds of discriminations prohibited by EU law: origin, gender, sexual preference, age, familial situation, pregnancy, citizenship, race, political or religious beliefs, physical appearance, family name, health conditions or handicaps.

All types of decisions are covered by this prohibition: hiring, training period, trial period, dismissal, disciplinary measures, retirement and all measures affecting the course of the employment contract. Discriminating against an employee on the basis of one of these grounds constitutes a criminal offence in France.

Despite the broad prohibitions covered by the *French Labour Code*, the number of discrimination cases before the courts remains limited. Historically, non-discrimination in French employment relations has never been a hot topic because French employment law is so protective of employees that there are many other ways of challenging an employer's decision. For example, an employee typically will challenge the "fair cause" behind his/her dismissal, which claim is very carefully scrutinized by the labour courts. Absent a "fair cause" for dismissal, the employer is condemned to pay damages to the employee, which can reach 2/3 years salary, depending on the seniority of the employee.

However, the number of discrimination-based claims in court has lately increased as plaintiffs have become more aware of their rights. In addition, since 2004, employees can count on the assistance of the Anti-discrimination and Equal Opportunity Commission (hereafter "the HALDE", *Haute Autorité de Lutte contre les Discriminations et pour l'Egalité*) to help them build and defend their cases.

I. Scope of protection against gender discrimination

1. Equal pay

"*Had Lehman Brothers been called Lehman Sisters, they wouldn't have gone bust*", was the joke on Wall Street one year ago.

Behind the joke, an acknowledged fact: women are more risk-adverse than men; therefore female traders tend to have a more conservative approach.

This cautiousness directly impacts the level of the bonuses: in London, according to a study published by the Equality and Human Rights Commission, the bonuses allocated to female

traders are 80% inferior to that of male traders. The financial sector, dominated by men, is certainly one of the areas where pay gaps are the most blatant.

Can the physiological differences between men and women be used as an excuse to justify pay gaps? Not according to European law.

The principle of equal pay for equal work was the starting point of the equal opportunity policy for genders in the European Community. The aim of member states was to avoid distorting the economic competition among them, where some member states might pay more attention to the question of gender equality than others.

The principle of equal pay is recognized by the *French Labour Code* and must apply to men and women for equal work or for work to which equal value is attributed.

As a consequence, an employer can fight a prima facie case of discrimination by demonstrating that the difference in salary is specifically justified by an objective cause, such as education, level of responsibilities, seniority, professional skills, etc. An employer can also rely, often successfully, on the job market at the time of hiring to explain that, due to the shortage of applicants and the need for an immediate recruitment, a higher salary had to be offered.

Here are a few examples of French case law regarding equal pay:

- One case has held that the equal pay principle does not prevent the payment of a specific allowance to female workers as they enter into maternity leave since such allowance is meant to compensate for the detrimental consequences of their being out of the workplace for the time of their maternity leave.
- Another case held that the payment of a “day care allowance” granted to women only under a collective bargaining agreement, must also benefit male workers with young children because they have to face day care costs to the same extent as their female co-workers. For that purpose, men and women are placed in the same situation so there is no ground for different treatment.
- Finally, a recent case held that the equal pay principle cannot justify the reduction of an employee’s salary simply because another employee with higher responsibilities receives the same salary.

As a result of consistent action from the 70s onwards, the discrepancy between men/women salaries overall has narrowed. Still, after more than 30 years of equal pay legislation in Europe, there remains a gender pay gap of roughly 15 % in Europe and 25 % in France.

2. Sexual harassment

The prohibition of sexual harassment is an area of law that lacks clear definition of the very concept of sexual harassment. The definition of sexual harassment, in fact, widely varies according to the culture of the country considered. Where does innocent flirting stop, when does unsolicited attention become unbearable? The boundaries are blurred.

In France, a Latine country, flirty relationships are commonplace among co-workers, and the “freedom” to compliment a female co-worker on her looks is deeply rooted in the French

mentalities. This may come as a shock for most Anglophone women accustomed to no-nonsense intermingling in the workplace. The same comment on the attractiveness of a female employee, while seen as flattering in France, will be resented as insulting in the USA.

Do French co-workers intermingle more than in other countries? Probably not, but they certainly are more open about it. A bragging womanizer will arouse admiration and jealousy in France, but may risk his career on a nasty sexual harassment trial in a less open-minded country.

A rule of conduct in the Code of Ethics for French attorneys also tells a lot about France: until some years ago, it was forbidden for an attorney to have a couch in his office, for it was taken for granted that the temptation to try and seduce his secretary would be too strong ... inconceivable in a Northern European country.

In 1992, when a statutory act was enacted in France prohibiting sexual harassment, following the recommendation issued in 1991 by the European Commission, it was widely debated whether its provisions were adapted to the French context. That is, the 1992 statutory act retained a restrictive definition of sexual harassment, limited to situations where a superior would pressure a subordinate for sexual favours in return for a professional advantage (hiring, promotion, etc).

The legislator clearly refused to extend the definition of sexual harassment to any sex-related behaviour bound to offend a person's dignity, such as offensive statements or bad taste jokes. Absent the intention to obtain sexual favours, there was no sexual harassment. Any inappropriate behaviour, such as the display of pornographic material, was likely to qualify under certain conditions as moral harassment, but not sexual harassment. Sending romantic poems to a co-worker with no offensive content also did not qualify as sexual harassment, according to the ruling of an Appellate Court.

Even this restrictive prohibition raised concerns that the door was opened to frivolous claims, such as those supposedly filed in the USA. Though illegal in France, sexual harassment was still a kind of joke the French liked to cite when making fun of their up-tight, cross-Atlantic neighbours.

In France, the concept of sex at the work place is commonplace to the point that the expression "*promotion canapé*" (literally "couch promotion") is used to refer to and, under the guise of humour, minimize the concept of sexual harassment by insinuating that the "victim" freely agreed to a relationship which would benefit her career.

The *2002 European Directive* adopted a more extensive definition of sexual harassment which includes any inappropriate behaviour referring to sex and creating a hostile working environment. The harasser, under such Directive, does not necessarily have to be a superior and does not have to seek sexual favours. The concept of sexual harassment is therefore here subjective.

This Directive also states that sexual harassment constitutes gender discrimination, thereby adopting the Anglo-Saxon conception of sexual harassment: had the victim been a man rather than a woman or a woman rather than a man, she/he would not have been harassed.

In France, the qualification of sexual harassment as a discriminatory behaviour is slowly being recognized. A new statutory law was adopted in France in 2002, which widens the scope of sexual harassment by eliminating the prerequisite according to which the harasser must be a

superior: "horizontal" harassment (among two co-workers on the same level of the org. chart) and even harassment from a subordinate towards a superior are now admitted. The harasser must have a sexual goal in mind, but the victim's career is not necessarily at stake.

This statutory law also creates an evidentiary system favourable to the victim in order to take into account the particular difficulties faced in order to prove a subjective situation: the plaintiff must come up with some evidence establishing a presumption of sexual harassment. The plaintiff must then reverse the presumption.

This evidentiary system is very similar to the one laid down by the European Directives of 1997 and 2000 in discrimination matters and discussed below under II.

As far as prevention is concerned, France is in compliance with European law and, like Anglo-Saxon countries, tends to place a quasi-automatic responsibility on the employer who does not prevent sexual harassment from happening at the workplace.

Despite a heavy cultural atavism, and thanks to the influence of European law, France has finally recognized the seriousness of sexual harassment issues and taken appropriate actions.

The number of claims based on sexual harassment is increasing; such claims being usually brought jointly with a claim for unfair dismissal.

3. Motherhood and career

In France, pregnant workers and mothers returning from maternity leave are very well protected against discriminatory measures. As compared to other European countries, it is relatively easy to find public and affordable day care centers which welcome toddlers as young as 3 months old.

The average number of children per woman in France is now slightly above 2 which is the highest rate in Europe, along with Ireland. The percentage of working women (whether they have children or not) in France is 60 %, which is above the European average. Therefore the percentage of working mothers is relatively high in France.

In short, France, although a Latine country with its share of machismo, is a country where motherhood and career are reasonably compatible.

3.1. The ban on dismissal of a pregnant woman

In France, there is a ban on dismissal of pregnant women from the moment the employer knows about the pregnancy, during maternity leave, and for four weeks thereafter. If a pregnant employee is dismissed before having informed her employer about her pregnancy, and if she notifies the employer of her condition within 15 days following the dismissal, the protection applies and she has a right to be immediately reinstated.

Any form of dismissal in violation of the laws is deemed void. As a consequence, the dismissed employee is entitled to all the salary she would have received, but for the dismissal, plus she can choose between being reinstated or receiving damages amounting to at least 6 months

salary. Moreover, violating the provisions protecting the employment of a pregnant woman constitutes a criminal offence.

On her side, a pregnant worker can terminate her employment contract without notice.

New mothers are paid their full salary during 16 weeks of maternity leave, 26 weeks starting with the third child.

3.2. Protection during trial period

The ban on dismissal of a pregnant woman does not apply during an employment trial period. However, if a company wants to terminate the employment of a pregnant woman during her trial period, the decision to terminate the contract must not be based on her pregnancy. The pregnant employee, if dismissed during trial period, bears the burden to prove that the decision was motivated by her pregnancy, whereas dismissal of a pregnant woman after the trial period is illegal *per se*. A dismissal motivated by pregnancy during trial period is not void, but entitles the employee to damages which is a much more clement sanction.

According to European law, the same sanction shall be applied to the same violation. However, discrimination against a pregnant worker is sanctioned differently in France, depending on whether such discrimination occurs during or after the trial period.

In order to put an end to this discrepancy, which is not in line with EU regulation, it is likely that French courts may ultimately decide in future cases that a discrimination-based decision against a pregnant woman, even during her trial period, will be deemed void, meaning that the employee has a right to reinstatement.

This is the direction shown by the European Court of Justice (hereafter "ECJ") in its decision of October 11th 2007, which ruled that any pregnancy-based termination of the employment contract is a direct discrimination which must be sanctioned in the same way, notwithstanding the timing of its notification.

3.3. Parental leave

A woman who gives birth can choose to take a parental leave: her employment contract is suspended during one, two or three years during which she may be entitled to a portion of her salary, depending on the applicable collective bargaining agreement.

Upon her return from the maternity leave, she can also choose to work part-time. The employer is obliged to enable her to work part-time up to the third birthday of her child.

3.4. Resuming the workplace after a maternity leave

Women who return to work after maternity leave or parental leave are protected against discrimination, meaning that the employer is obliged to assign them to the same position or to a position equivalent to the one they had before maternity leave.

The employer is also obliged to give them a pay rise equivalent to the average increase awarded in the company during their absence.

3.5. IVF treatment and definition of pregnancy

The ECJ has been faced with a case by an employee who had been dismissed while she was undergoing an IVF treatment. The dismissal took place after the *in vitro* creation of embryos and shortly before the transplantation of one embryo into her womb.

The question was whether the starting point of pregnancy could be deemed to date back to the *in vitro* creation of embryos.

The ECJ ruled that, at that very moment, pregnancy had not begun yet (ECJ February 26th 2008). This position takes into account the practical stakes of the question submitted to the Court: ruling to the contrary would lead to protecting women as of the time of creation of *in vitro* embryos, which embryos can be kept frozen for an undetermined period of time before transplantation, if they are ever transplanted. As a consequence, protecting the woman at this point would open the door for an unlimited and therefore excessive protection.

However, the ECJ ruling left room for protection in other cases where a woman undergoing an IVF treatment can demonstrate that her dismissal occurred only because she was undergoing such treatment and was therefore “threatening” to become pregnant. The application of this rule is limited, however, to women who are seeking pregnancy through an IVF treatment. In other words, a woman trying to get pregnant in a natural way is not granted the possibility to demonstrate that her dismissal is solely motivated by the fact that she wishes to conceive.

Here, and like for the pregnant woman dismissed during a trial period, the dismissal is not void *per se*, and the plaintiff bears the burden to prove the causal link between her desire to conceive and the decision made by the employer to dismiss her.

4. Glass ceiling and maternity

The career gap between men and women has narrowed, as compared to when women entered the employment market after WW II. But men and women are still far from being on equal footing as far as reaching top management positions: the glass ceiling is only cracked but not shattered.

In France’s largest companies, women hold just 2 percent of the executive management positions. In the United States, women hold 5,1 percent of these positions, and in the UK’s top companies, the figure is at 3,6 percent.

The EU Directive of 1976 laid down the principle of equal opportunity for men and women regarding access to employment, training and promotion. This Directive did not, however, directly address the question of maternity, which is usually the main hurdle to a career progression.

The EU Directive of 2002 is much clearer on the topic, and states that any less favourable treatment which is based on pregnancy or maternity leave is discriminatory.

In 1998, the ECJ heard a case by an employee who, returning from her maternity leave, was not allowed an annual evaluation interview, due to a collective bargaining provision which stated that interviews were only granted to employees with a minimum of six-month seniority. Because of her maternity leave, the employee had been in the company for less than six months. Absent an evaluation interview, the door to a possible promotion was closed. The ECJ ruled that the exclusion of the employee from the benefit of an evaluation interview was prohibited gender discrimination.

French case law is in line with EU case law in this respect: the French Supreme Court ruled in 2008 that an employer who does not promote an employee returning from maternity leave, when such promotion had been discussed before her maternity leave, and rather promotes a man, is discriminating on the basis of the maternity leave.

5. Indirect discrimination and affirmative actions

Indirect discrimination occurs when a decision, neutral in appearance, affects far more persons of one sex than the other. However, objective elements, independent of sex, can also justify the decision, but such elements must be “appropriate and necessary”.

An example of an “appropriate and necessary” decision was provided in 2008 in a UK case. In such case, it was charged that the women who never worked the late shift for family reasons, did not benefit from a special pay increase which the employer chose to give to those who worked a 24/7 shift pattern. Such women alleged a breach of the equal pay rule. They argued that the pay difference amounted to indirect sex discrimination, because, due to their childcare responsibilities, such women could not choose the 24/7 shift pattern and were therefore excluded from the special pay increase. Their case was dismissed: the employer’s wish to reward night-time working was an ‘appropriate and necessary’ aim and so provided a justifiable defence to the claims.

The 1976 Directive, which goal was to promote equal chances between men and women, opened the door for affirmative actions. However, the ECJ applies a strict test to affirmative actions, because such affirmative actions are seen as exceptions to the principle of equality.

In the Kalanke ruling in 1995, the ECJ reviewed a German Act which granted priority to women who competed with men for a promotion in professional areas where women are underrepresented (that is, account for less than 50 % of the workforce). The EJC ruled that this Act, because it granted an absolute and unconditional priority to women, went beyond the limits of an acceptable affirmative action.

The Kalanke ruling has been criticised as a blow against affirmative actions for women.

After the Kalanke case, the ECJ has validated national Acts which grant priority to women, as long as such priority is not absolute or unconditional, but based on objective criteria. The European Commission further communicated that quotas can be applied to men and women at work, as long as these quotas are flexible and take into account the particulars of each case.

In France, the concept of affirmative action is suspicious because it breaches Article 1 of the Constitution according to which each and everyone is equal before the Law. This equality principle is broadly understood as the cement of the French Republic, and any attempt to circumvent this principle with exceptional measures is fiercely criticized. Holding to the ideal of

“egalitarianism”, France prides itself on making no distinction of gender, ethnic background or race.

Although an Act of 1983 that constitutes a chapter of the *French Labour Code*, called “professional equality between women and men”, laid down the possibility of carrying out affirmative actions through temporary measures in order to ensure equal opportunity for women, such affirmative actions are hardly ever heard of.

In 2006, the French Constitutional Council reviewed the constitutionality of a statute which gave more decision-making power to women in order to promote parity between men and women on the boards of private and public companies. This statute was judged unconstitutional because the consideration of gender should not prevail over the merits and professional skills.

II. Evidentiary issues

1. The plaintiff must make a *prima facie* case

In 1989, the ECJ ruled that when a female worker provides the evidence that the average salary of women is inferior to that of men, the employer must justify that his practice is not discriminatory.

This is an adjustment of the well-established principle according to which the plaintiff bears the burden of proof.

In discrimination cases, the burden of proof is shared between the plaintiff and the defendant: the employee must make a *prima facie* case that discrimination is most likely to exist. Then the employer must prove that there is an objective reason for the difference in treatment.

If the employee fails to provide *prima facie* evidence of the alleged discrimination, this will automatically lead to the dismissal of her case. On the other hand, if the employer fails to provide an objective explanation for the difference in treatment, this may lead the judge to rule that the difference is discriminatory.

This evidentiary rule has since been confirmed by the EU Directives of 1997 and 2000, and by the French Supreme Court and the French legislator. The *French Labour Code* now sets forth that, in a case where discriminatory treatment is alleged, the plaintiff must put forward some evidence suggesting the existence of a direct or indirect discrimination based on gender, familial situation or maternity. Facing such evidence, the employer must justify the objective reasons underlying his decision.

2. The HALDE, a hand reached out to the plaintiff

The « HALDE » was created in 2004, an Anti-discrimination and Equal Opportunity Commission that plays an essential role in the battle against discrimination in France. This administrative agency deals with any discrimination, direct or indirect, prohibited by international, European or national law. Therefore, the scope of intervention of the HALDE, although it includes gender discrimination and sexual harassment, is not limited to these specific types of discrimination. In fact, the HALDE typically deals with discrimination based on ethnic origins or race.

The main task of the HALDE is to ensure the efficiency of the legal mechanisms prohibiting discrimination, by:

- investigating the claims submitted: the HALDE can require any information, documentation and explanation in order to appreciate the fact pattern; if the employer refuses to cooperate, the HALDE can seek a court injunction to be allowed to enter the premises of the employer and obtain any documentation in relation to the claim;
- providing assistance to the victim of a discrimination : help him / her build a case, gather the necessary evidence;
- advising the victim of a discrimination as to the possible legal actions, the statutes of limitation, etc.;
- issuing a recommendation to the employer and rendering such recommendation public, as well as the names of the concerned parties;
- joining a pending litigation in order to comment on the case, even without being invited by the plaintiff;
- promoting equal opportunity and diversity through various actions, such as training, public meetings, advertising, etc.

In 2006, due to the success of the HALDE, their powers were enlarged and now include:

- forwarding a case to the public prosecutor, and recommending a possible criminal prosecution;
- filing a criminal complaint based on discrimination; and
- mediating between an employer and an employee (alternative dispute resolution).

Each year, the HALDE publishes a report on its activity and points to the companies which, according to the HALDE, conducted discriminatory actions. The employers have no access to the investigations carried out by the HALDE, be it during the investigation or after completion of such investigation. Therefore, the employer finds himself having to answer targeted questions from the HALDE without knowing which evidence was submitted by the employee, or which facts he/she described to the HALDE.

Even though the HALDE cannot directly condemn or penalize the employer, its influence in practice should nevertheless not be underestimated:

- when publishing a recommendation in a given case, the HALDE is *de facto* condemning the employer in the face of the public opinion and therefore damaging its reputation, whereas the employer, who is denied access to the file, is not in a position to respond to the evidence underlying the recommendation, because such evidence is never disclosed;
- when joining a pending litigation to express their opinion, the HALDE are represented by their own lawyers, who specialise in anti-discrimination law. Although the judges have no

obligation to take their position into account, it is most likely that the position taken by the HALDE will strongly influence the outcome of the trial.

The exact role played by the HALDE when joining a pending litigation has been commented in many publications because it is a very specific one and a novelty in the French judicial landscape: the HALDE appears as a sort of *amicus curiae*, only they are not independent and their recommendation is only meant to back up the employee's discrimination case.

The HALDE, a self-invited private expert on discrimination matters, could be labelled as the "employee's best friend".

The HALDE also lends a helpful hand to plaintiffs who are facing evidentiary difficulties, for example in sexual harassment cases.

III. A gender discrimination claim from a transsexual

A transsexual is a person who has Gender Identity Disorder, which is a persistent discomfort about one's assigned gender, or a sense of belonging to the other gender and a desire to be of the other gender.

The European Court of Human Rights and the ECJ recognize the right of individuals to obtain modification of their civil status in order to take into account their sexual conversion. According to the ECJ case law, discrimination based on the sexual conversion of a worker constitutes prohibited gender discrimination (ECJ April 30th 1996).

In France, the question of transsexualism is not dealt with by any statute, but by case law. In 1992, the French Supreme Court ruled that if the Gender Identity Disorder has been medically observed by a court-appointed expert, and if the individual underwent a surgical operation to obtain a sexual conversion, then the individual has a right to modify his civil status.

The 2006/54/CE Directive of the European Parliament affirmed that the ECJ rule relating to the principle of equal treatment between men and women also applies to those who have had a sexual conversion.

In France, the HALDE has issued several recommendations, following claims brought by transsexuals alleging discrimination in the workplace. The HALDE tends to find that there is gender discrimination when the dismissal of the employee is concomitant with the disclosure of his/her transsexualism.

In a case currently pending before the HALDE, an employee claimed to be the victim of discrimination. "Roger" had been employed during five years without difficulty. He had given hints about his desire to become a woman, but this was not a problem because his transsexualism did not interfere with his work or relations with co-workers. The employer was open-minded to the point that they hired Roger's boyfriend, which did not raise any difficulty either. After a while, however, Roger became more and more aggressive about his transsexualism and demanded to be called "Jane", refusing to answer to "Roger". He also started using the lady's room, which was disapproved by his female co-workers.

Roger then declared that he would not wear the mandatory safety shoes until the employer provided him with female safety shoes. The employer's position was that, until Roger underwent

a surgical operation and obtained the modification of his civil status, he would be considered a man, because the employer could not substitute to the authorities and declare him a woman.

The relationship between Roger and his co-workers further deteriorated until, one day, following a blazing row, Roger punched another co-worker in the face. Roger was immediately dismissed. Roger then approached the HALDE, hoping that the latter would conclude that the dismissal was a discriminatory decision.

The investigation is currently underway, and the employer must disclose all documentation required by the HALDE, without knowing which evidence was brought by Roger.

Roger is trying to demonstrate that the row which led him to be violent was a consequence of the continuous discrimination he was "victim" of. The employer, on the other hand, is arguing that violent behaviour, such as a punch in the face, be it from a transsexual or not, cannot be tolerated at the workplace.