

## French Supreme Court Validates Caps on Damages for Unfair Dismissals

***For employers doing business in France, the court's recent decisions mean more predictability in the amounts that judges can award in case of unfair dismissals.***

In two landmark decisions on 11 May 2022, the Employment Chamber of the French Supreme Court confirmed that the grid of maximum caps on damages amounts that judges can allocate for unfair dismissals from work are fully valid. The decisions confirm a cornerstone of President Emmanuel Macron's labor law reform of 2017.

### What is the purpose of the grid?

Under French law, unfair dismissals result in payment of damages to the employee in an amount that a judge determines. One of the key achievements of President Macron's labor law reform was to make these amounts predictable, legally reliable, and remove the high level of legal uncertainty and inconsistency between labor judges in determining the amount of damages. Predictability favors businesses and investments, and likewise favors amicable out-of-court waiver and settlement agreements that are generally a lot easier to reach when both parties know what the court exposure could be. Since 2017, the court exposure is set forth by a grid that provides the maximum amounts that a judge can allocate for unfair dismissal. These maximum amounts are set forth as a multiple of monthly average salary. The multiple depends on the employee's length of service. As a rule of thumb, one could say the grid sets forth one month of salary per year of service, though the curve is not entirely linear: slightly higher than one month per year at the beginning, and lower towards the upper end of the grid. The grid therefore starts at one month for less than a year of service, and reaches 20 months as of 29 years of service.

Those in the legal profession and employers generally agree that the grid has, since 2017, satisfied its purpose: legal predictability has led to significantly more disputes being settled amicably at a foreseeable cost, instead of going into lengthy court procedures.

## Why was the grid at risk?

Shortly after its implementation, several first instance employment tribunals handed down rulings setting the grid aside, and therefore allocated higher damages amounts, considering it incompatible with the provisions of certain international treaties, namely:

- Article 10 of the International Labor Organization (ILO) Convention no. 158, which provides that judges must, in the event of an unfair termination, “be empowered to order the payment of adequate compensation or such other relief as may be deemed appropriate”
- Article 24 of the European Social Charter, which guarantees “the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief”
- Article 6 § 1 of the European Convention on Human Rights, which lays down the right to a fair trial

These first instance employment tribunals considered that the grid, at least in some cases, deprived judges of their ability to adequately compensate unfairly terminated employees.

## What did the Supreme Court rule?

The Employment Chamber of the French Supreme Court, the highest judicial authority in employment law disputes, had not rendered a formal decision on the validity of the grid until the 11 May 2022 rulings, but had previously issued two opinions in 17 July 2019 that already upheld the grid. These opinions echoed decisions from other highest courts:

- The highest French Administrative Court (*Conseil d'État*) had previously discarded the argument that the grid was allegedly not compliant with Article 24 of the European Social Charter and Article 10 of the ILO Convention no. 158.
- The French Constitutional Court (*Conseil Constitutionnel*) had ruled that the grid was compliant with the French Constitution, in particular on the ground that the grid pursues an objective of general interest aimed at enhancing the predictability of the consequences of the termination of the employment contract.

Still, various lower employment courts have persisted in setting aside the grid on a case-by-case basis, maintaining legal uncertainty.

One potential risk was that the Supreme Court now, while in principle validating the grid, could still have allowed a case-by-case appreciation by lower judges in certain exceptional cases in which the grid would not allow an “adequate” indemnification for the harm suffered by unfair dismissal. Such an outcome would have significantly reduced the reliability of the grid, but the Supreme Court did not open such a Pandora’s box. It held that:

- the grid allows adequate indemnification within the meaning of Article 10 of the ILO Convention (in this context, the Supreme Court recalled that the grid is not applicable in cases involving breach of a fundamental freedom, moral or sexual harassment, discrimination, etc., in which damages are uncapped);
- therefore a French judge may not set aside the grid on a case-by-case basis; and

- Article 24 of the European Social Charter has no direct binding effect within the French legal system (in particular on judges and plaintiffs).

The Supreme Court's rulings, while non-binding in theory, are in practice nearly always complied with by lower courts. Therefore, these recent rulings are now expected to put an end to these occasional but persisting deviations by lower courts.

## Conclusion

The Supreme Court decisions are a very welcome confirmation that would strengthen the predictability of damages amounts for unfair dismissals, which are capped. Lower courts may not deviate from the caps on a case-by-case basis. However, as observed in other countries with capped damages for unfair dismissals, such caps could lead employee plaintiffs to try to pursue harassment, discrimination, or similar other claims that would allow the award of uncapped damages.

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