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Client Alert Commentary

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Forced Production of Internal Investigations Reports Before French Courts

Two decisions handed down in quick succession by the Paris and Toulouse Courts of Appeal highlight the complex interplay between interests at stake in each case.

Both of the judicial decisions in question concerned pre-trial discovery requests seeking access to internal investigation files that led to the dismissal of an employee in one case and the exclusion of a member of a nonprofit organisation in the other. In both cases, the sanctioned persons issued the requests on the ground of Article 145 of the French Code of Civil Procedure.

The two cases produced divergent rulings, but the factual elements of each case may explain the difference in solution.

Refusal to order disclosure of elements of the internal investigation when disclosure is not essential

The case that gave rise to the Toulouse Court of Appeal ruling of 19 January 2024 (RG n° 23/02401) concerned an employee who was dismissed following an internal investigation after a colleague reported an incident. The employee, in challenging his dismissal, asked the employer for access to the internal investigation file. This request was unsuccessful and the employee then applied to the pre-trial judge to access the documents, arguing:

- his legitimate interest in obtaining the information, which was essential to his defence and to decide whether to take legal action on the merits, since the investigation report was, in his view, the sole basis for his dismissal;

- pursuant to Article 15 of the General Data Protection Regulation (EU) 2016/679, he had a right of access to and a copy of all his personal data, and, according to Commission Nationale Informatique & Libertés, a right of access to his disciplinary file — which could be extended to the entire procedure, including his business emails.

The Toulouse Court of Appeal rejected these arguments. The French judges indicated that the claimant had to demonstrate “a legitimate and proportionate interest without infringing the protected interests or the freedom of the persons concerned”, and found that this interest was not currently justified.

The judges took the following factors into account:

- the content of the dismissal letter was not confined to a mere reference to the internal investigation report; it also detailed the nature and circumstances of the alleged grievances in a manner that the individual in question could identify;
- the dismissal letter's reference to other substantive elements, such as messages sent by the employee from his professional email address;
- the absence of any certainty that the employer would rely on the internal investigation in the event of a dispute over the dismissal on the merits, the principle being the freedom of evidence in labour matters[1];
- the possibility for the employee, on the basis of the statement of grievances, to decide whether or not to bring an action on the merits, and to determine his mode of defense, which may evolve throughout the procedure in the light of the documents produced by the employer;
- the disproportion between the interest in disclosure and the breach of confidentiality of certain testimonies recorded in the report, which go far beyond the sole claimant's personal data.

Communication of elements of the internal investigation when they are necessary to understand the alleged misconduct

In the second case, which gave rise to the Paris Court of Appeal ruling of 18 January 2024 (RG no. 23/15208), a nonprofit organisation appealed against a summary order issued on the basis of Article 145 of the French Civil Procedure Code. The summary order requested the nonprofit organisation disclose documents to an expelled former member, including a copy of the anonymised internal investigation report that formed the basis of the Board of Directors' decision.

The nonprofit organisation argued that producing the requested information likely would entail manifestly excessive consequences, since such communication:

- was not provided for in the statutes and internal regulations of the nonprofit organisation, which is recognised as an entity of public interest;
- contravened the non-profit organisation's obligation to protect its employees and preserve their anonymity;

The nonprofit organisation also argued that the elements of the investigation and the report of the law firm commissioned were part of the protection of presumed victims and whistleblowers. Moreover, even if these materials were anonymised, the victims would still be easily identifiable.

Conversely, the fact that the results of the investigation were drawn up by a specially commissioned law firm, and were therefore covered by attorney-client privilege, does not appear to have been considered in the debate to reject the disclosure request.

The Paris Court of Appeal ruled against the nonprofit organisation, confirming the lower court's order forcing the organisation to communicate the report.

The outcome, radically different from that of the Toulouse Court of Appeal, could be explained by distinct circumstances:

- the decision at stake was one made by a board of directors to exclude a member from a nonprofit organisation, so the principles specific to labour court proceedings did not apply;
- the investigation report was expressly referred to in the exclusion decision and had apparently been emphasised by the board of directors in justifying its decision;
- the exclusion decision seems to give the person sanctioned only a vague idea of the alleged grievances;
- the pre-trial judge ordered the communication of only anonymised versions of the investigation report so that the risk of pressure was not, in the Court's view, characterised.

Therefore, the Paris Court of Appeal decided on the ground of the principle of adversarial proceedings and the defence rights that the former member should be given access to the report that formed basis for the Board of Directors' decision, so that the excluded person could "become aware of the materiality of the acts attributed to him/her and usefully contest the decision before a judge". This last point seems central to balancing all the interests at stake in the case.

These two rulings, issued on consecutive days, raise two important considerations. First, the person excluded or dismissed must be in a position to know the alleged infringements "relatively precisely". Second, when this is the case, the person no longer has a legitimate interest to obtain the internal investigation report, in consideration of the other interests that require protection.

If you have any questions about this article, you can contact one of the authors below or the Latham & Watkins lawyer who usually advises you:

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Endnotes

[1] In application of the principles of freedom of evidence in industrial tribunal matters and the right to a fair trial, the Cour de cassation had occasion to state in a 2023 ruling that "*if the judge cannot base his decision solely or decisively on anonymous testimony, he may nevertheless take into consideration anonymized testimony, i.e. testimony rendered anonymous a posteriori in order to protect its authors but whose identity is nevertheless known by the employer, when it is corroborated by other elements enabling the credibility and relevance to be analyzed*". (Soc., April 19, 2023 n° 21-20.308).