



ARTICLE



CLASS-ACTION PROVISIONS AGAINST DISCRIMINATIONS VOTED ON NOVEMBER 5, 2015, BY THE SENATE: A BROADLY-DESIGNED SCOPE

Employment and Social Security Law | 16/11/15 | Eric Manca

On October 1, 2014, the class-action procedure created by the Hamon Act dated March 17, 2014 entered into force in French legislation after decades of debates. Without awaiting sufficient feedback on the practical implementation of this procedure, the Government has introduced two Bills in order to create new classaction proceedings in the fields of health products and the fight against discriminations.

On the latter issue, the Bill on 21st century justice, which is backed by the Minister for Justice, was voted in first reading by the Senate on November 5, 2015. The fast track parliamentary procedure has been implemented, which means this Bill should finally be passed in the first quarter of 2016. Key features and outlines of class actions against discrimination are set out below.

Representative professional trade union organisations and approved associations would have standing to initiate class actions

Christiane Taubira's Bill, such as amended by the Senate in first reading, grants standing to approved associations whose purpose under their constitutive documents includes the defence of interests that have been harmed. These associations are however not entitled to act on the basis of alleged discrimination in the context of an employment relationship.

Furthermore, the Bill allows employee trade unions that are representative not only on a national level, but also at branch or company level, to initiate class actions against a private or a public employer in matters relating to discrimination in the workplace. Such organisations do not however have standing to launch other types of class actions.

A very broad scope

The Bill on 21st century justice amends the anti-discrimination Act of May 27, 2008 in order to enable the launching of class actions on behalf of several persons who, placed in a similar situation, suffer direct or indirect discrimination based on the same grounds (in breach of the professional's statutory or contractual obligations) and caused by a single private or public person.

The ordinary class-action procedure provisions state that actions may seek the cessation of a breach and redress for the harm sustained.

However, provisions specific to class actions in discrimination cases governed by the Labour Code would have the sole purpose of obtaining the cessation of the alleged discrimination (through a court injunction, accompanied where necessary by a daily fine).

Redress for each individual's personal loss would require each individual to launch a separate action before the labour court. For this reason the statute of limitations for individual actions would be suspended during the course of class actions and, more precisely, starting from the notification of the formal notice requesting the employer to cease the reported situation.

The new class-action procedure will therefore tackle possible discriminations committed not only in the workplace (statutory and/or contractual breaches) but also, beyond the field of employment relationships, discriminations in relation to the benefits that are granted or denied to customers through sales or services contracts.

Under these circumstances, the risk of instrumental use of class actions in discrimination cases is much more important than for consumer protection class actions, in a world where companies are increasingly judged on their values as much as their products.

A mandatory prior formal notice

Le projet de loi prévoit cependant un The Bill does however set out a prerequisite for the initiation of class actions. The approved association or trade union must officially put the professional on notice to cease the reported breach before filing a claim (it being specified that since the antidiscrimination Act of May 27, 2008, the burden of proof has been reduced to allow the plaintiff to merely establish "facts from which it may be presumed" that the alleged discrimination exists).

Class actions can only be launched after the expiry of a period of four months from receipt of the notice (ordinary provisions).



This formal notice should enable interested companies to forestall class actions by prioritising discussion or settlement negotiations and, in any case, to avoid discovering the launching of a class action against them through the media, as was unfortunately the case for the first class actions initiated in consumer protection cases.

In the context of employment relationships, the employer will be required to inform the works council (or, where there is none, the employee representatives) and its representative trade unions within a period of one month from receipt of the notice. At the request of any of these, the employer may have to initiate a discussion regarding the measures required to resolve the situation or to explain its objections to the expressed position.

A class action may then be launched if, within a period of six months from the formal notice, the situation has not been resolved.

Overview of class-action proceedings for the cessation of discriminations

In the field of fighting discrimination in the workplace, class actions may seek only the cessation of the discrimination (under the current drafting of the Bill). In all other fields, the purpose of class actions may be to obtain the cessation of discrimination and/or redress for the harm suffered.

An approved association or trade union may launch a class action before civil or administrative courts in view of the cessation of collective discriminations based on identical grounds and caused by a single person. The writ of summons will refer to an undetermined number of "individual cases" (thus at least two individuals). The court will rule on both the admissibility and the merits of the case. If the court ascertains the existence of a discrimination, it may order the professional to cease this discrimination and to take, within a defined period, all useful measures to that end, if necessary with the assistance of a third party appointed by the court. The court may also order a daily fine to ensure swift performance.

Overview of class-action proceedings to obtain redress for the harm suffered as the result of a discrimination (excluding employment relationships)

Phase 1 : In this procedure, the (judicial or administrative) court shall rule on both the admissibility of the action and the liability of the defendant. The court shall determine in a single ruling the criteria for joining the class and the publicity measures. Such measures (e.g., where appropriate, TV advertising) may only be implemented once all available domestic appeals (Court of Appeals and Supreme Court) have been exhausted. The process shall then move to the indemnification phase.

All losses sustained may be compensated, except moral harm.

Phase 2 : The Bill on 21st century justice sets forth two types of proceedings to redress the losses sustained:

- Individual compensation procedure: within the time period and conditions set by the ruling, any person wishing to join the group shall file a claim either with the plaintiff or directly with the professional found liable. The latter may decide to compensate, on a case by case basis, if the applicant fulfils the membership criteria for the group. Failing an agreement, persons whose claims have not been satisfied may refer to the judge having ruled on liability in view of seeking an order against the professional.

- Collective procedure for liquidating claims: interested parties may join the group by declaring themselves to the plaintiff, who will be entrusted with the task of claiming compensation from the professional. For this purpose, the plaintiff may negotiate a settlement (in full or in part) on the amount of compensation, which must be approved by the judge. Absent an agreement, the judge shall rule on individual losses that have not been redressed.

As it stands, the Bill does not allow class actions to be brought for breaches that had ceased at the date of entry into force of the Taubira Act.

Nevertheless, it is to be feared that this provision will be withdrawn by the National Assembly, as was the case for the Hamon law. This would be the source of considerable legal uncertainty for companies in general.

Finally, solicitation from members of regulated professions, for the purpose of initiating a class action, is prohibited.

Eric Manca, Partner
