

AN EMPLOYEE CAN NOT BE DEPRIVED OF HER RIGHT TO EXERCISE HER STOCK-OPTIONS IN CASE SHE IS DISMISSED FOR GROSS NEGLIGENCE

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It is not unusual to find stock-option plans providing that, in the event the beneficiary is dismissed for gross negligence (“*faute grave*”), all rights with respect to any unexercised options shall immediately and automatically lapse.

Insofar as stock-option plans are considered as incentives for employees, managers and CEOs, it may have seemed indeed justified to deprive beneficiaries, whose employment relationship has been terminated for wrongful behaviour, from the benefit of stock option plans.

Such was the case of an employee who had been dismissed for gross negligence, considering she had taken vacations without her employer’s consent and refused to come back to work when requested. Pursuant to a clause of her stock-option plan providing that the options shall lapse in the event the beneficiary is dismissed for gross negligence, such employee had been deprived of her right to exercise her options.

The employee then initiated judicial proceedings against her employer challenging the validity of her dismissal for gross negligence and to obtain the payment of an amount equivalent to the exercise of her stock-options. After having ruled that the dismissal for gross negligence was valid, the *Chambre sociale* of the *Cour de Cassation* ruled against the *Cour d’appel* on the question of the right to exercise the options. According to the *Cour de Cassation*, the loss of her right to exercise her options due to her dismissal for gross negligence shall be considered as a financial sanction which is prohibited pursuant to article L.1331-2 of the Labour Code. As a consequence, this type of provision may not validly be inserted in a stock-option plan.

The said article provides that “*penalties or other financial sanctions are prohibited. Any*

provision to the contrary shall be deemed unwritten”.

From a criminal law perspective, such offence could result in a fine up to EUR 3,750.

This prohibition of a general nature aims at any kind of deduction from a salary due to an employee’s negligence and/or misconduct or to a voluntarily faulty performance of the employee’s assignment. Thus, the Court has ruled that the benefit of a bonus could not be refused due to the employee’s negligence or misconduct (Cass. soc. 22/11/1995 n°91-43.809). By contrast, the decrease or the loss of the bonus can be validly conditioned by the presence of the employee provided that the absence of the employee – for any the reason – leads effectively to the loss (or the decrease) of said bonus.

Could this decision from the *Chambre sociale* be considered as a precedent impacting the validity of any stock option plan which would include a provision conditioning the right for an employee to exercise his/her options to his/her presence in the company at the date of such exercise?

The *Cour de Cassation* has ruled several times, and in particular by a decision dated October 20th, 2004, that a stock-option plan can validly condition the exercise of the option to the existence of an employment agreement in force at the date of exercise of the option. The *Cour* had further specified that in order to be applicable, such plan must obviously be opposable to the employee.

In order to come to this conclusion, the *Cour de Cassation* had decided that conditioning the exercise of the option to the presence of the employee in the company on the date of exercise of said option could not be analysed as a breach of the employee’s fundamental rights, including the freedom to work.

The argument pertaining to the prohibition of financial sanctions had been raised at the time of these decisions. However, but it had been overruled considering that no capital gains having been made at the date of termination of the employment contract, the loss of the right to exercise the option could not be considered as impacting the employee's remuneration.

This new decision of the *Chambre sociale* hence uses article L.1331-2 of the Labour Code to decree that provisions of stock option plans, which provide that the options shall

lapse in the event the beneficiary is dismissed for gross negligence (or wilful negligence), are not enforceable.

However, this decision should not challenge the validity of stock-option plans which condition the exercise of the option to the presence of the employee in the company on the date of exercise of the option, insofar as the said plans make no reference to a misconduct of the beneficiary.

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Ichay & Mullenex Avocats is a French law firm focusing on all legal issues related to the new technologies, the green business and the sustainable development in France and abroad. They are considered experts in intellectual property and Internet law, e-commerce, online gaming, data protection. Ichay & Mullenex Avocats also assists its clients on all issues related to financing, mergers & acquisitions, restructuring, etc. and advises them on their litigation and arbitration procedures.

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