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Remuneration in the French system

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I – The concept of pay/wage

A) Pay as a fundamental right

There is no fundamental right as such : French constitution does not provide any obligation of paying the wage.

Indeed, paying the wage is only a contractual obligation we can deduce from case law : judges define contract of employment as "the contract from which the employee obliges himself to work under the direction of the employer, in return for remuneration"[1]. As a consequence, paying remuneration is a condition for a valid employment relationship[2].

B) Pay : a definition

1. Meaning of wage

There is a difference between "wage", and "remuneration".

Indeed, according to the Labour Code, "the remuneration is the basic wage and all the other accessories, paid directly or indirectly by the employer to the employee".[3]

As a consequence, one can say that wage is part of the remuneration. The first one is the basic pay, and the other one is the basic pay plus bonuses and accessories.

What is the whole remuneration composed of ?

2. Components of the remuneration

Pay is composed of basic remuneration and accessories. Let's detail them.

→ Basic remuneration

Remuneration is the cause of the obligation to work. Without remuneration, and contrary to the accessories, the obligation to work would have no effect.

Contracting parties determine its amount and the mode of remuneration, which is often defined by the customs of the profession.

There are three main modes of remuneration.

- *Remuneration on a time-spent basis*

In the case of remuneration on a time-spent basis, wage is set according to the number of hours of work, which is also often provided in the contract (except for flat-rate pay agreements, cf below).
Thus, one can deduce a wage per hour, which increases in case of overtime work.

1Cass. Soc., 10 Juillet 2002, n°08-44.987
2Cass. Soc., 27 Octobre 1949, n°5.832
3Article L.3221-3 of the Labour Code

This is the historical mode of remuneration, labourers being paid to the hour spent, foremen and chief executives to the month worked. Even though this difference is now diminished, labourers and employees are paid according to the number of hours worked, chief executives are submitted to flat-rate pay agreements. The main characteristic of this kind of contract is that employers have a margin of appreciation when calculating the remuneration : it is not strictly linked to the time spent.

- *Performance pay*

Performance pay is the remuneration paid according to the obtained results in a given time. It can be either individual, or collective.
Performance is mathematical : the employee is paid according to the quantity he produces. More precisely, the wage corresponds to the manufacture price multiplied by a certain rate. This is commonly called "piecework wage".

Performance pay is sensitive, and the French "Cour de Cassation" puts limits, which are necessary because of the obligation to pay the SMIC and also because of workers having physical limits as well.
For instance, the Cour de Cassation uses the European principle providing the interdiction of any clause (for basic and accessory remuneration) which would compromise security[4] in order to prohibit, for a driver, a performance bonus calculated given the number of kilometres[5].

Moreover, employers has to respect the obligation to pay the SMIC. As a consequence, he can be led to pay the difference[6].

- *Payment in kind*

It used to be food for farmers ; it now concerns everyone and can be cars, computers, "tickets restaurant", canteen,...
The payment in kind consists for the employer to supply a good or a service (e.g. a trip), allowing the employee not to pay a fee he would have had to pay otherwise.
There must be a possibility of private use.

Their value is determined by collective conventions or, failing that, by decree.
Thus, the price of a meal amounts to the "minimum guaranteed", that is to say 3,36€[7]. Housing amounts to 0,02€ a day[8]. and for other goods or services, one consider they are equivalent to the factory price.

Payment in kind is included in the SMIC. As a consequence, it can complete the remuneration to reach it.

→ Accessories of remuneration

4 Règl. Cons. CE nº 561/2006, 15 mars 2006
5Cass. Soc., 13 Novembre 2003, n°01-46.177
6Article D.3231-5 of the Labour Code
7Article D.3231-10 of the Labour Code
8Article D.3231-10 of the Labour Code

There is an important diversity of remuneration accessories. But all of them do not enter the category “remuneration”. To distinguish them, the criterion is the fact that the prime, or bonus, is obligatory or not. As soon as the employer has a discretionary power (about the opportunity of paying the bonus, or even about its amount), the bonus will not be considered as an element of remuneration. Statute, collective agreement and also contract, can make it obligatory. Let’s list some of these accessories :

- *bonuses linked to the results of the employee’s work*

There are performance bonuses (often piecework pay), incentive bonus for reaching certain targets (but the objectives absolutely have to be reachable and reasonable[9]) performance reward (only collective, it is due when the company reaches a certain turnover) and the « boni de chantier », paid if the labourers succeed in finishing the work before the foreseen date.

- *bonuses linked to the conditions of work*

There are mainly the attendance bonus, which can be either fixed or variable according to the number of days of attendance and the hardship allowance. In that case, the hard conditions of work must be formerly defined.

- *bonuses disconnected from the execution of work*

These bonuses often seek to reach an objective : to encourage fidelity. Either because the bonus is paid annually only, or because they offer a particular advantage other companies do not.
For instance, there is the common thirteenth month bonus, the holidays bonus, the years of experience bonus (conditional on a certain number of years of service).

- *tips*

Tips given to the employer must be fully dealt to the staff in contact with clients[10]. Thus, the system of tips is collective (even though the practice tends to be opposite).

- *allowances*

Indemnities are paid in order to replace the wage when, for any reason, the contract is suspended and thus the work cannot be done (for sick leaves, maternity leaves, ...) and they can also be the counterpart of a particular contractual obligation (non-compete obligation or legal obligation, compensation in lieu of notice, allowance for retirement, ...)
As for other accessories, allowances enter the category of remuneration since they are obligatory.

- *accessories excluded from the remuneration category*

That implies they will not be subject to charges or taxes.
Reimbursement of professional fees and damages are not remuneration.

9Cass. soc., 13 janv. 2009, n° 06-46.208
10Article L.3244-1 of the Labour Code

C) The right to a minimum or sufficient wage

France is one of those countries where there is a minimum wage. In May 2013, it is of 9,43 euros per hour (gross wage).

This right to a minimum wage per hour has existed since an Act of 11th February 1950. Let's give details about its legal value and its scope.

1. Legal value of the right to a minimum wage

There are two levels of the right to a minimum wage : the statutory one, and the collectively agreed level.

→ The statutory minimum wage

A 1950 Act[11] creates the "minimum interprofessional guaranteed wage". The "SMIG" in French.
This is a minimum wage per hour, fixed by Decree.

A 1950 Decree[12] determines the amount of the SMIG, according to the aim of "protecting the workers of all the territory, given by the cost of life in every place of work".
It makes a difference of amount between Paris and the rest of France.

A 1970 Act[13] replaces the SMIG by the SMIC; interprofessional minimum wage of economic growth. The different zones disappear : the minimum wage is the same from the North to the South of France.

Today, it is the Labour Code which imposes the respect of the right to the legal minimum wage[14].

But the sanctions are only provided at the regulatory level.
If the employer does not pay the minimum wage, he will have to pay a fifth class fine of 1500€[15].

The SMIC is protected at a statutory level. The legislator in 1950, wanted it as a very minimum, improvable with a collective agreement.

→ The collectively agreed minimum wage

The 1950 Act gives to the workers representatives the right to negotiate about wages. It is not only a right, but also the new principle : the statute provides that "the legislator now let the trade union deciding of the conditions of remuneration".
The collective agreements should improve the minimum wage.

The "Auroux Act" of 1982 creates an obligation for the largest companies (more than 300

11Act of 11th February 1950 about collective agreements
12Decree of 23rd August, 1950
13Act of 2nd January 1970
14Article L.3231-1 of the Labour Code
15Article R3233-1 of the Labour Code

employees) to negotiate about "effective wages"[16].

Moreover, the legislator wanted to encourage the workers representatives to agree about the right to a minimum collective wage, at the level of every activity. Indeed, the statute provides the impossibility to extend a branch agreement if it does not contain a collective minimum wage[17].
And the statute is efficient : in 1997, 84% of the national branch collective agreements provided collective minimum wages.

The right to a minimum wage is of public order. But its personal scope is not unlimited.

2. The personal scope

The Labour Code extends this right to the whole private sector, but also to some employees of public establishments[18]. This is a wider scope than the main provisions of the Code : this right has a fundamental importance in the French society.

However, this principle suffers of exceptions :

- for underage people : - 20% for the youngest (under 17 years old) and – 10% for the oldest[19].
- for sandwich courses : between 25% and 78% of the SMIC. This percentage increases especially with the age[20]

D) The concept of minimum or sufficient wage

The SMIC is the minimum wage per hour which has to be paid anyway, no matter the mode of remuneration (only tips, remuneration according to the time spent,...).

To define it, one need to briefly study its history, before listing the elements of the remuneration which are included in the SMIC.

1. History

One can say SMIC was born in 1899. Employees then had to wait for the Act of 1950 for an improvement. It is only in 1970 that the nowadays rules were given.

→ The decree of 1899

This decree obliges the employer to pay a "normal wage", that is to say a wage defined by the medium rate which was paid in the area.

The aim was only economic, not social at all : it was to avoid unfair competition. But the decree was not very obliging.

16Article L.2242-15 of the Labour Code
17Article L.2261-22 of the Labour Code
18Article L3231-1 of the Labour Code
19Article D.3231-3 of the Labour Code
20Article D.6222-26 of the Labour Code

→ The 1950 Act and its improvement

The socialist Parliament adopts the 1950 Act. It creates the minimum interprofessional guaranteed wage ("SMIG").

The context was peculiar : it was the after second world war, economic and social rights were constitutionally adopted, by the 1946 preamble. It declares "the Nation guarantees to the individual and to its family the necessary conditions to their development. " (tenth paragraph).

That is why the rate of the SMIG was fixed according to the "typical budget" of a labourer, that is to say according to the needs of the poorer workers.
The statute provides that the rate is defined by a Decree, adopted by the government after a report from a special commission.
The annual evolution is absolutely discretionary, and that was criticized.

The 1952 Act about the SMIG gives the principle of automatic adjustment on the prices evolution[21]. As soon as they rise up to 5% from the last increase of the SMIG, the rate is put up in proportion.

→ The 1970 Act : the nowadays rules

The May 1968 "social revolution" led to the Grenelle Agreements. They significantly increased the rate of the SMIG, and erased the differences according to parts of France.

That was an important change.

But as earthquakes, it has aftershocks.

In 1970, the SMIG becomes SMIC : minimum interprofessional wage of economic growth. Not only a letter changes, but the whole concept of the minimum wage : the economic aim came back.

What are, exactly, the objectives of this Act ? What are the modalities of fixation of the SMIC rate ?

- *The objective of the 1970 Act*

They are defined by the Labour Code[22].

The first one is social : to avoid, in a context were companies are getting larger, social inequalities. Indeed, the higher wages are increasing and the goal is to maintain a parallelism between these, and the lower remunerations. However, the indexation of a category of wages on other implies the risk to create a "non-stop inflation". That is why the parallelism cannot be absolute.

The second one is to allow persons earning the SMIC to participate to the economic growth.

21Act of 18th July, 1952
22Article L.3231-2 of the Labour Code

How ? The rate is fixed high enough to maintain an important purchasing power, and thus to sustain economic growth.
From now on, the SMIC is of general interest, and worker earning the SMIC have an active role.

These objectives are applied thanks to new modalities to define the rate.

• *The modalities to define the SMIC*

There are three criteria to make the rate change. Each one corresponds to an aim.

<u>To reach the aim of guaranteeing the purchasing power :</u>

As soon as there are 2% of inflation from the last time the SMIC was increased, it is increased again, in due proportion (2%)[23].

<u>To reach the aim of participation to the economic growth :</u>

Every 1st of January, the SMIC is increased[24]. This revalue is obligatory but the government can discretionarily decide on the rate.

This rise is adopted, like in 1950, by a Decree taken after a report of the national commission of collective negotiation (composed of trade unions).
As a consequence, both interests of the employers, employees and of the state are taken into account.

If the rise is discretionary, the statute provides a limit to the executive power : the rise can not be inferior to the half of the increase of the medium French wage[25]**.**
But this limit is not very obliging, and if the government limits itself to this rise, the objective of decreasing social inequalities will not be reached. The 1950 legislator may have wanted to save the interests of employers.

SMIC thus satisfies economic and social interests. Another element is taken into account to determine its rate : the inclusion or exclusion of elements of remuneration.

2. <u>The elements of remuneration included in the SMIC</u>

The criterion to know what elements are included in the calculation and what elements are not is the fact they are the direct counterpart of an effective work[26].The elements which are just paid “on the occasion of” work are excluded.

<u>→Included elements</u>

There are : basic remuneration, benefit in kind, productivity bonus,… [27]

23Article L. 3231-5 of the Labour Code
24Article L.3231-6 of the Labour Code
25Article L.3231-8 of the Labour Code
26Cass. Soc, 7 Avril 2010, n°08-44.865
27Cass. Soc, 7 Avril 2010, n°08-44.865

→ Excluded elements

It may be the exception to the rule : supplement for overtime work is excluded.

Are also excluded bonuses for years of experience, for constancy, for holidays, , supplement for Sunday work, fees reimbursement, etc., …

The concrete result of all this is, for a great number of workers, a fixed rate of remuneration.

3. The rate of the SMIC

The gross amount of SMIC is 9,43€ per hour and 1425,67€ per month.

The net wage is 7,39€ per hour and 1120€ per month.

E) Payment in absence of work

Remuneration is the counterpart of the executed work. And yet, employer sometimes has to pay daily allowances to complete social security ones.

→ Sick leaves

Social Security maintains 50% of the medium gross remuneration earned during the last three months. There are three days of waiting period.

But the employee has to fulfil some conditions to perceive these allowances : he has to have worked for at least 200 hours during the last three months, to send the medical certificate to the social security establishment[28].

The employer completes up to 90% of the remuneration for the first thirty days, and 66,6% afterwards[29]. There are seven days of waiting period.

The conditions are different : the employee has to have worked for at least a year, send the medical certificate to the employer within 48 hours, and accept the control of a doctor sent by the employer[30].

These indemnities are limited to a three years leave.

A supplementary coverage can provide indemnities up to 100% of the remuneration.

→ Leave for occupational accident and disease[31]

Coverage is more important in that case. Indeed, Social Security grants 60% of the

28Article L.323-1 of the Social Security Code
29Article D.1226-1 of the Labour Code
30Article L.1226-1 of the Labour Code and D.323-6 of the Social Security Code
31Article L.433-1 of the Social Security Code

ordinary remuneration for the firs 28 days, and 80% for the next ones[32]. There is no time limit.

As for the employer, he has no statutory obligation, but a lot of collective agreements or customs provide the obligation for him to add indemnities up to the full remuneration of the employee.

→ Paid leave

Only assumed by the employer, indemnities amount to the remuneration that would have been paid if the employee had worked[33].

→ Maternity leave

Social Security allocates the amount of the insured's daily income[34]

There is no statutory obligation for the employer, but most of the collective agreements provide the continued pay.

→ Parental leave

Parental leave occurs when a parent fully or partly ceases his professional activity in order to rise his child.

For the parent leave, there is no obligation for the employer to pay anything. But collective agreements can provide such an obligation.

Nonetheless, Social Security must grant the "activity supplement of the parent's choice"[35]. To benefit from this, the employee must have worked for at least two years. The amount is about 383€.[36]

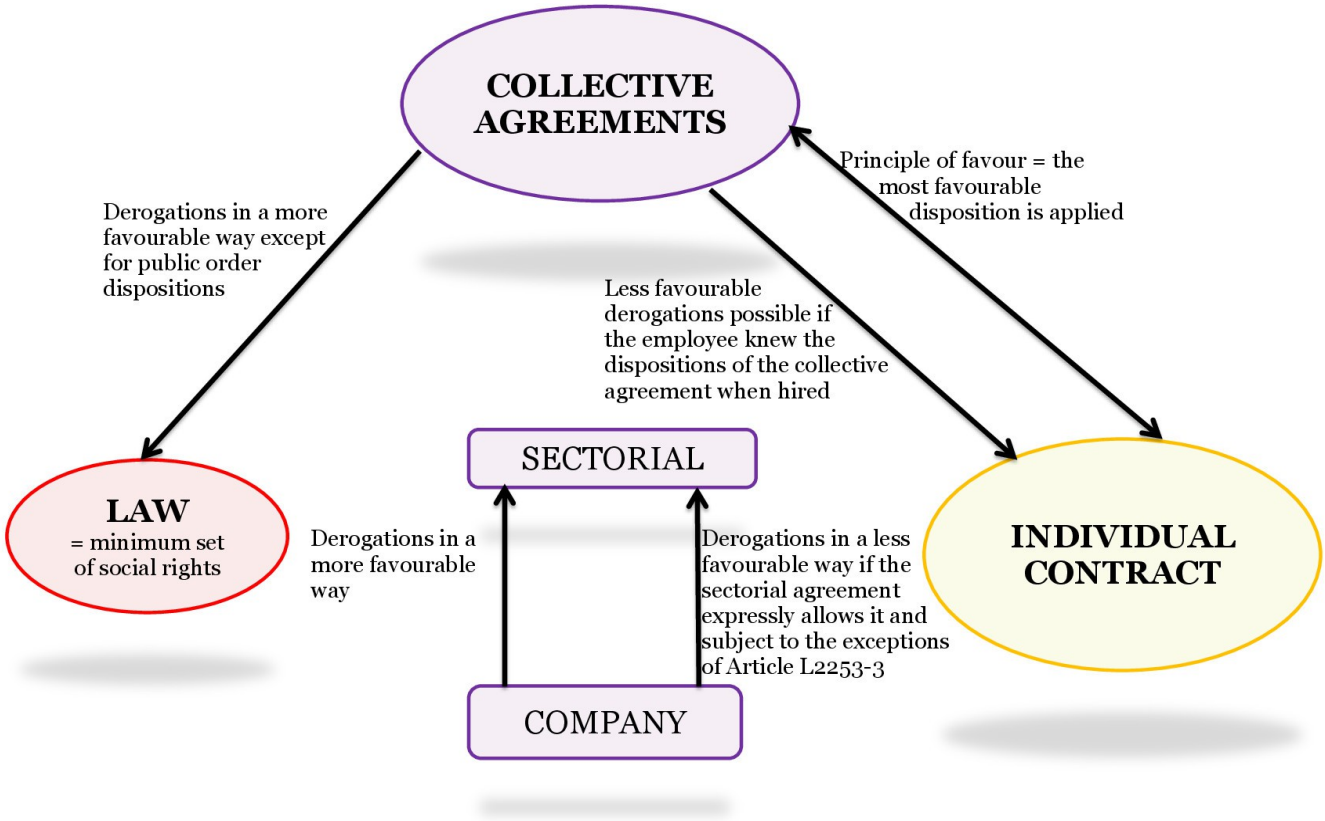
32Article R.433-1 of the Social Security Code
33Article L.3141-22 of the Labour Code
34Article R.331-5 of the Social Security Code
35Article L.531-4 of the Social Security Code
36Article L.551-1 of the Social Security Code

II – Mechanisms for determining pay

In French law, there are several sources for determining pay :

- The Law
- Collective agreements
- The individual contract
- And to a lesser extent, case law and practices.

But it is important – and also quite difficult – to understand how these different sources are structured.
Usually, it is the law which sets the important principles.
But then, there is a so-called "principle of favour" which states that if a provision is more favourable to the employee, it should be in priority applied to him. Therefore, there are many possibilities of derogations : Provisions of collective agreements can derogate to the law if more favourable. Provisions of the contract of employment can in the same way derogate to the law or to collective agreements[37].
However, it has recently been decided that, in certain conditions, derogations can even be made in a less favourable way. But this exception to the principle of favour has to be expressly stated by the law and as far as remuneration is concerned, the French Labour Code expressly provides that collective agreements made at the company level cannot contain covenants derogating to sectoral collective agreements about minimum wages[38].



37 Articles L2251-1 and L2254-1 of the Labour Code
38 Article L2253-3 of the Labour Code

A) The Law

First of all, concerning the law, in France, we have a "Labour Code" which lists the applicable statutes. Different articles deal with the subject of remuneration.
For example, article L3242-1 of this code states that the remuneration is paid on a monthly basis and is independent, for a determined effective working hour, from the number of days worked in a month. The aim of this principle is to neutralize the irregular repartition of the number of days in a month.

The code also determines the principle of a minimum wage and its mode of calculation. Indeed, article L 3231-2 states that the minimum wage guarantees to the workers who have the lowest wages, the spending power as well as a participation in the economic development of the nation.

The law also provides provisions for overtime, for which the remuneration is inflated compared to normal working hours. In France the legal duration of effective working time is 35 hours per week but the collective agreements can establish a different duration. The remuneration of all the hours worked that exceed those amounts has to be increased. Article L3121-22 says that the first 8 hours have to be increased of 25%, and from the 9th hours, the remuneration has to be increased of 50%.
A collective agreement can establish a different rate of inflation but it can never be lower than 10%.

B) Collective agreements

After the Second World War, collective agreements became and still are today the main mean of establishing the level of remuneration.

Different levels exist:
- from the company
- from the group
- from the sector of activity
- from the national level

We have here to underline the importance of the sectorial collective agreements. Indeed, they determine the level of the minimum wage applicable to which all the employers of the sector have to comply with. As a consequence, no collective agreement from the company and no individual contract of employment can derogate to that minimum. Therefore, the freedom of contract is limited.

The sectorial collective agreements that may be expandable have to determine the minimum wage of the unqualified worker, the hierarchical rating of the different professional qualifications as well as the procedure and periodicity intended for their modification.
This is what we call the hierarchy of the wages which is a characteristic of the French system.
It is the addition of the wage and the bonuses that have to be equal to the minimum stated by the agreement.

However not all the sectors of activities are covered by those agreements.

Furthermore, since the law of 1982, the Labour code obliges the companies to negotiate each year and at least once a year, about the wages. This is what is called in French law the "annual mandatory bargaining". This negotiation has to be about the basic wage, the bonuses and the other benefits in kind. The aim of this negotiation is to remove or at least to reduce the differences of remuneration between the men and the women.
If the company does not organise this yearly negotiation, it risks the abolition of the reduction of the taxes it has to pay.

We also have to underline that most of the time the wages really practiced are those resulting from the individual contract of employment that are higher than the minimums stated by the agreements.

Finally, we have to say that if a covenant of a collective agreement is more favourable to the employee, it replaces the statements of the individual contract of employment.
This is what we call in French law, the "principle of favour" (article L 2242-8 of the Labour code).

C) The individual contract of employment

The remuneration is also an element of the individual contract of employment. In the end, the amount of salary depends on the individual contract of employment, which can always derogate to collective norms, as long as it is in favour of the employee.
The French Cour de cassation stated that the remuneration, as consideration for work, should result in principle from the contract of employment, subject to, on the one hand, the SMIC and on the other hand, the advantages resulting from collective agreements, practices of the company or unilateral commitments of the employer[39].
In practice, it is the employer who has the control of the amount of wages subject to a contractual agreement, provided the SMIC is respected as well as conventional minimum, non discriminatory rules and the principle "equal pay for equal work". As a consequence of this last principle, if the employer wants to increase the pay for some of his employees but not to all of them, he will have to justify his choices with objective reasons.

The fact that the remuneration is deemed to be determined by the parties' agreement has huge implications.
Indeed, because the remuneration – whether its amount or mode of calculation – is an element of the contract of employment, it cannot be modified without the consent of the employee, even if the modification is very small and even if the modification is in favour of the employee. The employee has the right to refuse this modification and this refusal can never be the basis for a sanction.
Nor can the modification of the remuneration be imposed to the employee and justified on the basis of a reduction of working time, of a reduction of the quantity of work given to the employee, of the implementation of a mobility clause.
The only tiny exception that we may mention is about the modification of the structure of the remuneration in case of reduction of working time. Indeed, as we just mentioned it, reduction of working time cannot in itself justify a diminution in the remuneration of the employee, but it is possible to replace a part of the remuneration by a bonus in order to

39 Cass. Soc. , 20 octobre 1998 , n° 95-44290

maintain the same level of remuneration without asking for the employee's consent.

In the French system, there may be a peculiarity concerning the chief executives that consists in an agreement which allows to determine an inclusive wage, including a fixed amount of overtime.
This is called “flat-rate pay agreements” and three different kinds of such agreements exist :

- The flat rate pay agreement in hours in a week or in a month
- The annual flat-rate pay agreement in hours
- The annual flat-rate pay agreement in days

For these last two types of flat-rate pay agreements, there must be a prior collective agreement to allow the conclusion of such agreements between an employer and an employee. This prior collective agreement fix the limits and the guarantees offered to the employees.
Besides, those agreements can only be concluded with a certain category of employees : those benefiting from a real autonomy in the organisation of their timetable.

The Cour de cassation has held on 29th June 2011[40] that some conditions have to be respected in order to guarantee the employees' rights to health, safety and rests periods.
These conditions mainly consist in assuring that the provisions concerning the daily and weekly rests periods are respected, as well as assuring an effective counting of the hours of work.

In this same case, the Cour de cassation held that flat-rate pay agreements, both regarding French law and European law. However, this system has been condemned by the European Committee on Social Rights because it is considered as violating the dispositions of the European Social Charter, in particular its article 2§1[41].

D) Customs and practices

Finally, in regard to case law, the question to be asked is to know whether the judge can determine the salary.
In the Courcelles case (1998)[42], the Supreme Court reminds that the remuneration, as consideration for work, should result in principle from the contract of employment, subject to, on the one hand, the SMIC and on the other hand, the advantages resulting from collective agreements, practices of the company or unilateral commitments of the employer. Therefore, this means that the remuneration can also be fixed, even if only partially, by customs and practices.
The issue that can arise here is to know what would happen if the employer and the employee do not agree on the variable amount of remuneration or if the practice that determines the variable amount of remuneration is denounced and the parties do not reach a new agreement.
In order not to leave the employee defenceless in the face of the employer, it has been held that the judge can intervene and determine this amount.

Another hypothesis where the judge can intervene in order to set the amount of

40 Cass. Soc. , 29 juin 2011 , n° 09-71107
41 European Social Committe, Decision on the merits, 23rd June 2010
42 Cass. Soc. , 20 octobre 1998 , n° 95-44290

remuneration concern the flat-rate pay agreement.
The Labour Code provides that when an employee, having concluded a flat-rate pay agreement, receives a remuneration unrelated to the constraints imposed on him, he can refer the matter to the judge so that damages will be granted to him in order that he gets a remuneration corresponding to the level of remuneration in the company and to his qualification[43]
So here again, judges have the power to modify the remuneration, despite what has been decided between the parties.

43 Article L3121-47 of the Labour Code

III – The principle of equal treatment in terms of pay

The principle of equal treatment in terms of pay restricts the employer's discretionary power to determine the level of remuneration of his employees. Briefly put, it consists in the principle of "same work, same pay" and it should not be mistaken for the principle of non-discrimination.
The originality of this principle is that it has no statutory ground as such. Indeed, it arises from Case law and its signification has evolved throughout the years and the different cases brought before the Court.

A) The origins and the evolution of the principle of equality in terms of pay

The origin of the principle of equal remuneration has to be found in the Labor Code[44]. It use to apply only to the differences between male and female. Later on, this principle was extended by a famous case called the "Ponsolle Case" of 1996[45] which deduces a general principle out of it. Indeed, according to the Court, the rule of equality of treatment between male and female is part of a more general rule which consists in the principle of "same work, same pay". In other words, the employer has to ensure the equality of remuneration between every employees (male or female) of a same company who are in an "identical situation".

From this case aroused several specific statutory rules meant to ensure the equality of remuneration between different types of workers. For instance, the principle now applies between permanent and the temporary employees[46] but also between full time workers and part time workers[47]

One should now consider the signification of the principle.

B) The signification of the principle of "same work, same pay"

To refer to the principle of "same work, same pay", the employees must work in the same firm[48]. In other words, they have to be submitted to the same employer.

The expression of "same pay" refers to the remuneration in general and not only the salary[49]. It means that the global remuneration (salary, tips, bonuses…) must be of the same amount as the remuneration taken into account for the comparison.

Besides, the position of the Court about the signification of the expression "same work" has evolved. Indeed, in its first approach, the Court used to link the notion of "same work" to the notion of "same position". To do so, the judges used to take into account the coefficient, the qualification or the employees' length of service in order to qualify the similarity of the work[50]. In its second approach, which is the one currently in force, the notion of "same work" refers to the duties, the responsibilities and the special qualities required for the

44Article L. 3221-2 of the Labour Code
45Cass. soc., 29 octobre 1996, n° 92-43.680, Bull. n° 359
46Article L. 1242-15 of the Labour Code and L. 1251-18, al. 1 of the Labour Code
47Article L. 3123-10 of the Labour Code
48Cass. soc., 12 juillet 2006, n° 04-46.104 F-D
49Cass. soc., 10 octobre 2000, n°98-41.389
50Cass. soc., 23 octobre 2001, n° 99-43.153

positions in question[51]. Basically, to apply the principle of equal remuneration, Case law does not require the two situations to be strictly identical and considers that they can be only "comparable".

Nevertheless, the principle of "same work, same pay" does not prohibit a certain personalization of the remuneration by the employer. Indeed, the employer is still free to provide a different remuneration to employees executing a similar work if he can justify it with objective reasons that can be materially verified[52]. It is then up to the judge to appreciate the reality and the relevance of these justifications[53].
Basically, the elements that might justify a difference of remuneration are the following ones: the experience[54], the responsibilities[55], the quality of the work if it is founded on objective criterion[56], the diploma when it is relevant for the job in question[57], ...

51Cass. soc., 23 mars 1999, n° 96-43.767
52Cass. soc., 1er décembre 2005, n° 03-47.197
53Cass. soc., 20 février 2008, n° 05-45.601
54Cass. soc., 29 septembre 2004, n° 03-42.025
55Cass. soc., 28 novembre 2006, n° 05-41.414 F-PB
56Cass. soc., 8 novembre 2005 n° 03-46.080 F-D
57Cass. Soc., 19 octobre 2005, n° 03-42.108

IV – Flexible pay systems

A) Related to the performance of the individual employee or of the team

Regarding flexible pay systems related to the performance of the individual employee or of the team, French law provides mainly with one system : the productivity bonus. But there are also two other kinds of bonuses that can be considered as being related to the individual performance of an employee : the attendance bonus and the seniority bonus.

1. The productivity bonus

The productivity bonus is aimed at rewarding the performance of the employee.

It can be stated by a collective agreement, a practice or by a unilateral commitment of the employer, but mainly it is determined by a covenant in the individual contract of employment. However, the covenant does not have to fix precisely the objectives, this falls within the scope of the employer's management powers so that he can choose to change them unilaterally. Nevertheless, the employees must be aware of the objectives they are expected to achieve.

Such a bonus can be linked to the performance of the individual employee, i.e the bonus will be granted if the employee undertakes a given work in the time determined by the employer ; or it can also be linked to the performance of the team, i.e the bonus will be granted in a uniform way to all the members of the team if they manage to attain the objectives set by the employer.

However, in any cases, it is important that such a bonus has to be based on attainable and reasonable objectives. In any event, the failure to achieve the objectives is not in itself a sufficient fault to justify a dismissal. Such a lay off can only be justified if the objectives were reasonably attainable and if the employee has committed a fault in not attaining them.

Besides, the French Cour de cassation has decided in a judgment of 17th July 1996 that if it is stated that the productivity bonus is to be calculated on the basis of the results of the company (and not of the performance of the individual employee or of the team), the employer is not allowed to invoke that the employee has not done his job well in order to refuse the payment of the bonus.

Moreover, it has to be underlined that this productivity bonus has been subjected to many criticisms for the reason that it contributes to strengthen the competition between the employees and to establish a bad atmosphere in the company.
Furthermore, the Cour de cassation held that the productivity bonus which has the effect of exposing the employees to a danger is forbidden. For instance, it is the case for a bonus granted depending on the distances travelled and the delivery times because it encourages the employees to exceed the speed limits while driving[58].

Another criticism that can be made is that often, when the employees leave the company in the course of the year, they will not be able to claim the payment of this bonus, as it is not calculated pro rata temporis.

58Cass. soc., 24 sept. 2008, n° 07-44.847

2. The attendance bonus

The attendance bonus is not directly linked to the performance of the individual employee, but as its aim is to prevent employees from being absent from the company it has therefore a link with the productivity.
The main issue related to this bonus is about how to deal with attendance bonuses when the employees are on strike.
Accordingly to article L2251-1 of the French Labour Code, an employer can not take discriminatory measures with regard to remuneration or social advantages for employees on strike. Thus, the employer is only allowed to reduce the attendance bonus for reason of strike if all others absences lead as well to such a reduction.

3. The seniority bonus

In the same way, the seniority bonus helps to win the loyalty of the employees and prevent the turn-over, as well as it rewards the growth in competences gained by the employee thanks to their accumulated experience. Therefore, it can be indirectly considered as a mean to encourage the increase in their performance.

B) Related to company's results

Other flexible pay systems are related to the company's result.
As such, the French system provides with a profit sharing bonus that consists in associating the employees to the results of the company. The amount will be calculated proportionately to the results of the company and the criterion are determined by a collective agreement.
Employers often prefer to give their employees a profit sharing bonus than to grant them with a pay rise because profit sharing bonuses are exempted from national insurance contributions.

In France, there are two kinds of profit sharing bonus :

– *Statutory profit-sharing bonus*[59]

According to French law, statutory profit-sharing bonus is mandatory. There, this has to be considered as a right for the employees.
Its aim is to collectively guarantee to the employees the right to participate to the results of the company.
It takes the form of a delayed effect financial participation, calculated according to the profit of the company, constituting what is called a profit-sharing reserve.

The employees' right to profit-sharing applies independently of the nature of the activities of the company or of its legal form. However, it is only mandatory in companies of more than 50 employees. But smaller companies can apply this measure voluntarily.

An Act of 3rd December 2008 has put an end to one of the specific characteristics of the statutory profit-sharing bonus that was the unavailability of the sums due under the profit-sharing.

59 Articles L3321-1 to L3326-2 of the Labour Code

Now the beneficiaries have the option between immediate payment or to block this money for five years.
But an incitement for the blockage still remains : if the sum is blocked, it is not subjected to tax income whereas if the employee ask for the money to be directly applicable, it will have to pay tax income on it.
But in any case, those sums are exonerated of social contributions and are deductible of the company's taxable income.

– *Discretionary profit sharing bonus*[60]

Its aim is to collectively associate the employees to the results of the company. It has a random nature and is resulting from a mode of calculation linked to the results and performances. Its implementation is optional and goes through the conclusion of an agreement.
Such implementation is possible in any company, no matter its size, the nature of its activities or its legal form.
So as to encourage the implementation of an agreement on discretionary profit sharing bonus in companies without such an agreement, an Act of 3rd December 2008 has established a tax credit.
In the same way, in the absence of an agreement on discretionary profit sharing bonus, the employer has to engage negotiations each year with the employee's representatives on that matter.
Such an agreement is concluded for a limited period of 3 years.
The repartition between the beneficiaries, in the form of a bonus, can be uniform or proportionate to the length of service in the company during the year under review.
However, it has to concern all the personal. A seniority condition of no more that 3 months can only be required.
Besides, there is a limit on the amount of that bonus : the overall total can not exceed 20% of the total gross wages and the individual amount can not exceed half of the amount of the annual average social security ceiling, in order to prevent any abuses, such as the possibility of replacing an important part of the remuneration with such a bonus.

About the nature of this bonus, its essential feature is that it takes the form of an immediate payment of a disposable income for any expenses. But this is not a salary as such : it is not consideration for work and has a collective and random nature.

60 Articles L3312-1 to L3315-5 of the Labour Code

V – Variation of pay in time of crisis

In time of crisis, the question of the variation of pay is quite essential because it appears as a way for employers to reduce their costs and save money. Sometimes, employers argue that it is the only solution for the firm's survival. Conversely, for the employees, the possibility of reducing their pay in time of crisis is not seen as a solution but as a problem. Indeed, the possibility of a flexible pay system during these periods of time puts them in a precarious situation. On the other hand, the total absence of flexibility may lead to suppressions of jobs. In that case, it would put the employees in an even harder situation knowing that the employment market is always more difficult in time of crisis so it would be tougher for them to find another job. This explains why the legislator has created a legal framework in order to balance these opposite interests.

However, whenever the employer is allowed to modify the remuneration for economical reasons, he must respect the statutory or collectively agreed minimum wage, the principle of non-discrimination and the principle of equal treatment.
The first possibility for the employer to vary the amount of the wage is to change the employee's individual remuneration in his contract of employment. To do so, the employer must get the employee's agreement. Indeed, the remuneration being an essential element of the contract of employment, the employee has the right to refuse the modification and cannot be dismissed under this ground. This general principle arises from Case law.
Nevertheless, to get around this difficulty, the employers are tempted to insert certain clauses concerning the future variation of the remuneration in the contract of employment. The legality of this type of clauses depends on their content. For example, are considered as illegal by the judge the clauses providing a right for the employer to modify the wage at any time and according to any criterion he decides. Conversely, the Court established that are valid the clauses providing a periodical revision of the way to calculate the variable part of the wage (if they respect the general conditions related to the flexible remuneration).

The second option regarding the variation of remuneration is to change the collective agreement on this subject. In that case, there is no need for the employer to obtain the employee's individual agreement. Basically, there are two traditional ways to modify a collective agreement: by denunciation or by revision.

To denounce a collective agreement, the employer has to respect the conditions contained in the collective agreement itself and especially the notice period. If there is no such notice in the collective agreement, the employer must respect a three months notice by default[61]. However, the denunciation should be notified by its author to the other signatories of the collective agreement and should be registered at the employment administration[62]. Finally, once a collective agreement is denounced, a new negotiation must take place at the request of one of the interested parties within the next three months[63]. The original collective agreement is maintained until a new one replacing it enters into force or up to a maximum of twelve months after the end of the notice period. If no collective agreement is concluded within this time limit, the general rules of collective bargaining provides that the employee's "individual social benefits"[64] should be maintained.

61 Article L. 2222-6 of the Labour Code
62 Article D. 2231-2 of the Labour Code
63 Article L. 2261-10 of the Labour Code
64 Only the advantages which the employee has actually benefit from or which are not only potential. (in French : « avantages individuels acquis »)

The conditions of revision of a collective agreement are defined in the convention itself[65]. However, every legally representative trade union should be invited to negotiate the amendment. Nevertheless, only the initial signatories of the collective agreement are allowed to sign the amendment.

Moreover, the Labor Code provides an annual obligation to negotiate the salaries in the company[66]. On this occasion, remunerations might also be modified at a collective level.

Apart from these traditional ways to modify the remuneration, some specific mechanisms resulting in a decrease of remuneration have been set up in case the employer faces exceptional economical issues.

One of these instruments consists in measures of short time working. Under these measures, the employer is allowed either to reduce or to suspend his company's activity. The direct consequence of such measures is a decrease of wages since the duration of work is reduced. It explains why the legislator has set up certain conditions to avoid some employers' abuses. First, measures of short time working must be collective and temporary[67]. Concerning the temporary nature of these measures, the employer cannot suspend his activity for more than 6 weeks. On the other hand, he can diminish the firm's activity up to 2 months. In compensation for the diminution of salary, the employees are granted a specific allowance of short time working by the State. Its rate depends on the company's size. Moreover, the employer has to complete this indemnity with an additional allowance fixed in the collective agreement. Usually, the total compensation is of 60% of the gross remuneration per hour[68].
Recently, management and unions planned to start a negotiation in order to set up a new system for short time working. This system would have to obey some principles that are listed in the national collective agreement of the 11th of January 2013[69]. Briefly put, the system would be unified and simplified, the procedure of administrative authorization which has been re-introduced recently would be maintained, professional training would be encouraged during the period of short time working and employees would benefit from counterparts in order to compensate the negative effects of the measures. This national collective agreement being meant to be transposed in a statute, these elements have been inserted in a recent project of law[70]. The final statute should be adopted in the beginning of the summer 2013.

On the 11th of January, management and unions also agreed on a new possibility to conclude collective agreements "in order to remain jobs"[71]. It would allow the conclusion of

65 Article L. 2222-5 du C. trav.
66 Article L2242-1 et suivants C. trav.
67rticle L.5122-1 C. trav.
68 Article 4, A.N.I., 21 février 1968 sur l'indemnisation du chômage partiel » ; Avenant 15 déc. 2008, Arr. min., 26 janv. 2009, JO 1er févr.
69 Article 19 A.N.I., 11 janvier 2013 pour un nouveau modèle économique et social au service de la compétitivité des entreprises et de la sécurisation de l'emploi et des parcours professionnels des salariés
70 Article 11 Avant-projet de loi relatif à la sécurisation de l'emploi, 6 mars 2013
71 Article 18 A.N.I., 11 Janvier 2013 pour un nouveau modèle économique et social au service de la compétitivité des entreprises et de la sécurisation de l'emploi et des parcours professionnels des salariés

specific collective agreements on a new balance between work and wage in case of exceptional economical issues faced by the company. This possibility has been transposed in the pre-cited project of law[72]. According to this act, the seriousness of the economical issues should be established by a formal diagnosis. Besides, the measures of short time working contained in the collective agreement should not lead to the decrease of the lowest salaries (it concerns the employees who make less than the SMIC uprated of 20%). The counterpart of such an agreement would be the guarantee of maintaining jobs during the time of the convention. The disrespect of this obligation by the employer could give rise to the award of damages to the employees. Moreover, the different efforts should be made proportionally on the side of the employees and on the side of the management team. However, the collective agreement could not last more than two years and would require the agreement of at least 50% of the legally representative trade unions to be valid. Furthermore, the application of the collective agreement at the individual level would require to obtain the employee's agreement. But in case of refusal, the employee would be dismissed under the rules of redundancy.
Until the adoption of the final statute transposing the national agreement of the 11th of January 2013, the possibility to conclude collective agreements in order to remain jobs will only be applicable to the companies that are in the scope of the national agreement. For now though, there has been no concrete application of these kind of agreement.

72 Article 12 Avant-projet de loi relatif à la sécurisation de l'emploi, 6 mars 2013

VI – Consequences of non-payment of wages by the employer / enforcement of pay

We will study here the remedies before the court available to the employee, the case of constructive dismissal, and finally we will study the valid reasons for non-payment.

A) Remedies before the court

First, we have to say that there is in France a principle called "the right to payment"; it is related to the fact that the employer cannot release himself from his contractual obligation to pay the wage by granting non contractual benefits.

As we saw before, the remuneration is paid on a monthly basis. It is the "inspecteur du travail", who is the health and safety executive who has to verify this periodicity during his controls by asking the employers a copy of the pay slips.

Concerning the remedies before the courts, the employee who considers himself as a victim can act within five years by introducing a claim in front of the employment tribunal.
This lapse of time emanates from the law of the 16th July, 1971 and cannot be changed by any means.
Before that, an action was possible only during 6 months.

Furthermore this lapsing applies to all the actions pertaining to the remuneration such as the action of payment itself but also to the back pays, the payment of the kilometrical compensation as well as the reimbursements of the business expanses.
However the article L 3245-1 states that this lapsing also applies to the actions of the employers against their employees for the restitution of a portion of the wage that the employer should not have paid.

This term of limitation can be interrupted if the employee introduces a claim against his employer or if the employer pays what was missing.

Two types of sanctions exist for the employer, the criminal sanction and the civil one.

Concerning the criminal sanctions, the employer is likely to be sentenced to a fine of a third class; corresponding to the amount of 450 euros, in different situations; and particularly in case of non-respect of the rules governing the periodicity of payment, the methods of payment, the date and place of payment as well as the rules concerning the pay slips.
The violation of the law, the statutes and the rules coming from an extended collective agreement dealing with the bonuses is also punished of a 4th class fine corresponding to 750 euros.
We say than a collective agreement is extended when it applies to all the employers of a sector of activities even if they did not sign the agreement. The procedure of extension is carried out by a ministerial order.
If an agreement is from the national level and if it has been extended, then it has the same field of action of a law.

Concerning the civil sanctions, the employer who does not respect the rules concerning the wages can be sentenced to pay interests on unpaid amount as well as damages if the harm

done is different from the one resulting from the delay and also in case of bad faith from the employer.

B) Constructive dismissal

The case law, in certain circumstances, has established that the delay of payment and *a fortiori* the non-payment of the wage is considered as an act of gross misconduct from the employer and entitles the employee to terminate the contract of employment, without having to respect any notice period. This is the French equivalent to the constructive dismissal.
Here, the dismissal is considered as due to the employer's conduct who is in debt of paying compensation for breach of contract as well as awards equivalent to the notice period.

In case of constructive dismissal for reason of non-payment of the wage, the employee will be eligible to receive an unemployment allowance.

C) Valid reasons for non-payment

Concerning this point we will focus first of all on the question of the strike.

In France, the contract of employment is considered as a reciprocal contract. It means that each part, the employer and the employee, have duties to respect. The wage constitutes the counterpart of the work; as a consequence if the employee stops working, it releases the employer from his obligation to pay the wage.
This is why strike is a valid reason for non-payment.

In principle, the deduction of the wage has to be strictly proportional to the non-worked duration; and this is the case even if the collective agreement states that the inherent needs of the profession do not allow determining the repartition of the hours of work. Neither the loss of production nor the time needed to start again the machines do entitle the employer to make a supplementary deduction of the wage.

However, if the strike is the consequence of a serious and deliberate breach from the employer of his obligations, the wage has to be maintained.
This was decided by the case law in several situations, such as in case of an occupational accident due to the non-respect from the employer of his obligations in terms of security or also in case of an unilateral reduction of the wage by the employer.

Of course, an agreement concluded by the employer and the employees concerned, at the end of the strike, can foresee the payment of a part or of the whole salary.

Other reasons for non-payment of wage are valid too; are for example concerned the unpaid leaves, the layoffs, as well as the cases of *"force majeure"*.

In other cases, the salary is maintained although the employee is not really working. This is the case concerning the paid leaves, the maternity leaves, the bank holidays or in case of temporary unemployment.