Terminating the employment relationship in France: what do employers need to know?

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In France, an employer cannot terminate the employment contract of an employee without cause. French labor law does not recognise the concept of "at will" employment which allows employers to terminate the employment relationship at any time, without notice, good cause or prior warning.

Any dismissal must be justified by a real and serious cause, i.e., be based on facts which must be accurate, verifiable, and serious enough for the dismissal to be justified.

Dismissal is the classic way of terminating the employment contract at the initiative of the employer. There are two types of dismissal based on either personal or economic grounds, both being strictly regulated in their implementation. In recent years, a third way of terminating the contract has developed considerably: termination by mutual consent which allows the employer and the employee to agree on the termination conditions without having to give a reason.

What is required to dismiss an employee on personal grounds?

The personal ground is wholly concerned with the employee unlike the economic ground which is not. The classic example is poor performance - work is not performed satisfactorily, the employee commits repeated errors, he/she does not meet the deadlines set for the performance of his/her tasks etc.

Practical points: as an employer, you can only justify dismissal for poor performance if the work requested falls within the employee's duties as defined in the employment contract and if sufficient adaptation and training time has been granted to the employee. In the event of a dispute, you must be able to prove that all actions have been taken to improve the employee's performance by implementing a performance improvement plan with training provided. This plan must be documented by regular meetings with the employee focused on the improvements observed or the persistent difficulties. The annual appraisal interview documents must also be kept up to date to ensure the completeness of the employee's file.

Dismissal on personal grounds can also occur when the employee has committed a fault. It is then a disciplinary dismissal: for simple fault, serious misconduct, or gross negligence.

Simple fault requires that the dismissal necessary is subject to a notice. The employee continues to work during the notice period and receives all the termination indemnities (severance pay, paid vacation indemnity, notice period indemnity). Serious misconduct means that it is not possible to maintain the employment relationship and justifies an immediate termination of the contract, e.g. the bad behaviour of an employee towards another employee or repeated and unjustified absences that disrupt the business. In this case the employee does not work during the notice period and does not receive any indemnity except the paid vacation indemnity. Gross negligence is a particularly serious breach committed with the intention of harming the employer. As in the case of dismissal for serious misconduct, it deprives the employee of all his/her indemnities except the paid vacation indemnity. It should be noted that gross negligence is rarely found proved by the courts.

Practical points: you have two months to initiate the disciplinary procedure as soon as you have knowledge that one of your employees has committed a fault. However, since serious misconduct as well as gross negligence makes it impossible for the employee to remain in the company, you must initiate the procedure for termination of the employment contract within a limited period after having information of the alleged facts if no further investigation is necessary. The length of this limited period is not precisely defined, but if there is an unreasonable delay in taking action, the court may question the real seriousness of the alleged facts.

What are the conditions for redundancy?

Redundancy is unrelated to the person of the employee. It results from either the termination or transformation of the employment of the employee (for example, technological changes occur which impact the position of the employee) or from a modification of an essential element of the employment contract (such as a salary reduction due to economic difficulties) which is refused by the employee, following in particular:

- economic difficulties characterized either by significant changes in at least one economic indicator such as a drop in orders or turnover, operating losses or a deterioration in cash-flow or gross surplus operating, or by any other element likely to justify these difficulties;
- technological changes;
- a reorganization of the company necessary to safeguard its competitiveness; or
- the company ceasing to operate.

In addition, under French labor law, redundancy is the ultimate solution that can only be implemented if employee cannot be redeployed in available jobs within the company, or if the company belongs to a group, within the subsidiaries of this group located in France and of which the organization, the activities, or the place of operation allow the permutation of all or part of its staff.

Practical points: in the event of a dispute, you must be able to prove that you have carried out all the necessary searches for the purposes of the employee's potential redeployment, for example, if the company belongs to a group, by sending written requests to the group's entities located in France. In the absence of the redeployment of the employees, you must be able to produce the negative responses received.

What procedure must the employer follow to dismiss an employee on either personal or economic grounds?

Before implementing the dismissal procedure, the employer must check the collective bargaining agreement applicable to the company, which may include specific provisions on the subject. The employer is then required to apply them.

That said, whatever the reason given, the employer must in particular respect the following steps: inviting the employee to a preliminary meeting, holding the meeting, and sending a written notification of the dismissal. The letter convening the meeting must contain certain mandatory information and indicate that the employee can be assisted either by a member of the company's staff or by an external advisor chosen from a specific list. During the meeting, the employer must explain the reasons for the planned dismissal and listen to the employee's explanations (where the dismissal is on personal grounds). It should be noted that these steps are slightly different in the event of a collective lay-off for economic grounds, particularly when an employment safeguard plan (a social plan) is necessary.

Practical points: you must never inform the employee of your decision to dismiss him/her during the preliminary meeting. Indeed, at this stage, the decision is not supposed to be made. You must therefore not fall into the trap of answering any questions that the employee could ask at the end of the meeting about whether or not he or she is being dismissed. The only possible answer that the employer should give is that no decision has been made at this stage.

The absence of the employee at the preliminary meeting does not prevent you from continuing the procedure, and therefore from notifying the employee of his or her dismissal. Obviously, the situation would be different if you had convened the meeting knowing that the employee could not attend (e.g. where the employee is hospitalized).

At least two working days after the meeting, the dismissal letter can be sent to the employee by registered mail with acknowledgment of receipt. It will contain a reminder of the reasons for the dismissal as explained during the preliminary meeting. During the 15 days following receipt of the dismissal letter, the employee can ask the employer for clarification on the reasons for the dismissal. The employer then has 15 days to provide these details. If the employee whose dismissal is contemplated is a protected employee (for example, a member of the social and economic committee, a union representative, a judge at the labor tribunal, an employee requesting the organization of employee representatives' elections, or an employee candidate for these elections), you must request the prior authorization of the labor inspectorate. The latter has two months as from the receipt of the request to issue the decision. Failure to respond within this period is deemed to be refusal. The dismissal of a protected employee without the authorization of the labor inspectorate is null and void. The employee can then request either reinstatement or compensation.

Practical points: verbal dismissal, i.e., which is not notified in writing to the employee is prohibited. Such dismissal is deemed to be without real or serious cause, and it is no longer possible to regularize it by subsequently sending a letter of dismissal. In such a case, the employee will apply to the labor tribunal and obtain damages for unfair dismissal.

How to secure the dismissal and the absence of subsequent dispute?

The employer and the employee can sign a settlement agreement after a dismissal. This agreement is not in itself a method of terminating the employment contract, its purpose is to settle the consequences of the termination. The main value of such an agreement to the employer, is that it includes a waiver of any claim depriving the employee of any possibility of bringing a dispute before the labor tribunal in relation to the conclusion, performance, or termination of the employment contract. The counterpart of this waiver is the payment of a settlement indemnity to the employee. Thus, any dispute relating to the employment relationship is definitively closed.

Practical points: **you must never conclude a settlement agreement before the dismissal, i.e., before the dismissal letter has been sent by registered mail with acknowledgment of receipt and received by the employee, or in the absence of the employee at his home, before the employee went to the post office to collect the dismissal letter. Otherwise, the settlement agreement is null and void.**

Also note that direct negotiations with the employee are not covered by confidentiality. Indeed, if no agreement is reached, the employee is then in possession of documents from the employer establishing the willingness of the employer to negotiate. If these documents are produced in court, the employer's position would be weakened. However, if parties are legally represented throughout the process, the negotiations for and the content of the settlement agreement will be confidential.

What is the termination by mutual consent?

This is an amicable way to terminate an indefinite-term employment contract, distinct from resignation and dismissal. It requires the agreement of the employer and the employee, unlike the two other types of termination which are respectively the unilateral decision of the employee (in the case of resignation) or of the employer (in the case of dismissal).

The benefit of a mutual termination for the employer is that it does not have to justify the reason why the contract is terminated. The interest for the employee is that he/she will be able to benefit from unemployment benefits.

The procedure is as follows. The parties negotiate the terms of the termination during one or more meetings and sign a specific form formalizing their agreement. From the date of execution, each party has 15 calendar days within which to withdraw from the agreement. At the end of this period, the form is sent by the employer to the labor administration for approval. The administration has 15 working days from receipt of the form to issue its decision. In the absence of a response within this period, approval is deemed to have been given. The employee must receive a specific termination indemnity which cannot be less than the amount of the legal severance pay set by the labor code, or the collective bargaining agreement if it is more favorable. It can also be higher following negotiations with the employer. This indemnity is subject to a specific social charge contribution to be paid by the employer, which is 20% of the amount paid.

Practical points: you must keep proof of delivery of a signed copy of the agreement to the employee. You can give this document against discharge, for example. The French supreme court has decided that if the employee does not have a copy of the termination agreement, the agreement is null and void.

The termination by mutual consent can be challenged by the employee only if he/she proves that he/she did not consent freely. Accordingly, this type of termination is not without risk for the employer if it occurs in the context of a conflict and particularly where there may be harassment.

Practical points: if an employee wishes to benefit from a mutual consent termination particularly in a difficult context, you should ask him/her to make his/her request in writing to establish that the employee initiated the process and that he/she was not forced by the employer to agree to such termination. The services of a lawyer throughout the process are also a way to secure the process to demonstrate that the employee has been independently advised.

Termination by mutual consent or dismissal with settlement agreement: what to choose?

The choice will depend on the relationship between the parties. If they simply intend to end the employment relationship, without there being any risk of litigation, termination by mutual consent is the most suitable. On the other hand, if the situation is one of conflict with the risk of dispute by the employee not only in relation to the termination itself but also on other aspects of the employment relationship, dismissal followed by a settlement agreement will be more secure for the employer.

The execution of a settlement agreement is also possible within the framework of a termination by mutual consent. The benefit is that it will prevent any subsequent claim from the employee relating to the performance of the employment contract (e.g., dispute on working conditions, overtime, etc.). However, a settlement agreement relating to the termination of the employment contract cannot be signed following a termination by mutual consent.

To conclude, a termination is never completely risk-free, but the employer will substantially reduce exposure to an employee's successful claim by complying strictly with the rules applicable at each step of the termination process.

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