COMPARATIVE LABOR LAW DOSSIER
DISMISSAL DUE TO BUSINESS REASONS IN FRANCE

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Introduction

Employment relationships in France are highly regulated, in particular with regard to termination of employment. The main sources of law that govern employment relationships are essentially the Labor Code, collective bargaining agreements and case law of the French Supreme Court (*Cour de Cassation*).

Employment at will does not exist in France. However, unless a collective bargaining agreement or the employment contract provides otherwise, an employment contract can be terminated without any restrictions (i.e., without justification or indemnities) during the probationary period or «trial period». The duration of this probationary period is either fixed in the labor contract or in a collective agreement. Law also organizes a subsidiary minimum termination notice must be complied with during the probationary period[1].

After the probationary period, an employment contract can only be terminated in certain circumstances, depending upon whether the contract is entered into for a fixed term[2] or an indefinite term. Resignation (*démission*) is the ending of the contract by the employee. The resignation is only valid if the employee resigns of his own free will and not, for example, because the employer puts pressure on him to resign. An employee who wishes to resign must respect any period of notice imposed by law, contained in his contract or in a collective agreement, or customarily applied in his particular industry. If the employee does not give the required period of notice, the employer may be entitled to damages and interest for any resulting loss.

Regarding indefinite-term employment contracts, an employer can terminate the contract at any time, but it must be able to justify from a real and serious cause of termination (*cause réelle et sérieuse*), and it must comply with the applicable dismissal procedure which varies depending on the type of dismissal.

[1] Labor Code (LC), Article L1221-19.
[2] Ferkane Y., Joly L., Mihman N., «Contrats à durée déterminée en France», *IUSLabor* 1/2014 p. 10. Such contracts normally come to an end at the expiration of the fixed term. The «Code du Travail» does, however, provide for the contract to be brought to an end before the expiration of the term in a number of circumstances, namely agreement between the parties, serious wrongdoing, or «force majeure».

Real and serious cause means that the dismissal has to be exact, precise, objective and of a sufficiently serious nature to justify the dismissal. This requirement applies to any type of dismissal regardless of the age/position/length of service of the employee and the headcount of the company.

It is up to the employer to prove the reality and the seriousness of the grounds for dismissal on the basis of objective and material evidence. In the event of litigation, if the employer fails to adduce such evidence, the dismissal of the employee will be held to be unfair. If the court considers that there is a doubt in this regard, the issue is resolved in favor of the employee.

There are two major categories of dismissals based on real and serious cause:

- Dismissals based on the employee's behavior ("dismissals for personal/professional reasons", such as a poor performance, the employee's negligence or the employee's inability to work).
- Dismissals based on economic grounds ("dismissals for economic reasons/for business reason"). Dismissals for economic reasons can be either individual or collective, depending on whether one or more positions are to be eliminated or significantly modified.

1. How does the legislation or the judicial bodies define the causes that allow for a dismissal due to business reasons?

According to Article L.1233-3 of the French Labor Code, a redundancy (or dismissal due to business reasons) is «*a dismissal decided by the employer for one or more reasons that are not related to the employee, which result from the elimination or transformation of a position, or a modification, refused by the employee, of an essential element of the employment contract, notably due to economic difficulties or technological changes*».

Where the employer invokes economic difficulties to support the redundancy, the legitimacy of the redundancy is dependent on the real and serious nature of the economic difficulties at the time of the redundancies.

The French Supreme Court has taken a very restrictive approach in its interpretation of acceptable economic reasons.

Dismissals due to business reasons are often contemplated owing to the financial difficulties encountered by the company (financial losses, non-offsettable loss of

markets, long-lasting drop in activity, etc.) as well as the company's shutdown[3]. Case law has accepted that the general economic situation (product prices, cost of raw materials) be taken into account to justify a restructuring operation[4].

The difficulties experienced by the company must however be real and serious and cannot be the result of the employer's intentional and fraudulent behavior. In general, the loss of a market, a slowdown in sales or lower turnover or profits during the year prior to the redundancy do not qualify as economic difficulties[5].

According to legislation, economic difficulties and technological changes are not the only two possible causes for redundancy proceedings[6].

If not justified by economic difficulties or technological changes, a restructuring operation must be indispensable to safeguard the company's competitiveness or that of the group's line of business to which the company belongs.[7] The existence of a threat to its competitiveness must be established.[8] But restructuring with a view to safeguarding competitiveness does not imply the existence of immediate economic difficulties. It implies anticipating risks and where applicable, difficulties to come. Hence, restructuring for the sake of safeguarding competitiveness is seen more as a preventive measure. In other words as the *Cour de cassation* stated "[t]he employer can anticipate foreseeable economic difficulties and take advantage of a healthy financial situation in order to adapt its organization to market evolution in the best possible way"[9]. French courts highly scrutinize the need to restructure the company in order to remain competitive as an economic ground, which is more debatable than losses, and verify that there is truly a need to restructure the company in question in order for the company/group/line of business to remain competitive. French courts thus tend to require that the company convince them that had it not implemented the redundancy plan in question, the company/group/line of business would have faced serious economic difficulties. In practice, it is therefore difficult to determine in advance whether or not a French court will uphold this type of economic ground.

Courts are not empowered to restrict the company's choice of possible solutions to safeguard the competitiveness of the company or of the group's business sector.

[3] Cour de cassation., Employment Div. (herafter "*Soc.*") , January 16, 2001
[4] Soc., Dunlop decision, November 21, 2006, n°05-40.656
[5] Soc., June 8, 2005, n°03-41.410; Soc.,, Employment Div., July 12, 2004, n°02-43.610
[6] Soc., January 16, 2001
[7] Soc., April 5 1995, *Thomson Tubes* ; P. Lokiec, « Les juges et le contrôle de la sauvegarde de la compétitivité », *SSL* 2007, n° 1334, p. 6
[8] Soc., July 4, 2006, n°04-46.261
[9] Soc., January 11, 2006, n°04-46.201, n°05-40.977

Better management or the interests of the company invoked by a financially healthy company are not considered valid grounds to demonstrate that the restructuring is necessary to preserve the company's competitiveness.

2. Do the business reasons that justifying the dismissal must concur in the whole company or can they only concur in workplace where dismissal occurs?

When a company, which does not belong to a group of companies, proceeds to a redundancy, the economic grounds are assessed at the level of said company.

However, when a company is part of a group of companies and proceeds to a redundancy, the economic grounds are in principle assessed at group level, unless it can be established that there are various lines of business within the group, in which latter case the economic grounds are assessed at the level of the group's line of business to which the company proceeding to the redundancies belongs.

However, where a company is part of a group of companies and proceeds to a redundancy, the economic grounds are in principle assessed at group level, unless it can be established that there are various lines of business within the group, in which latter case the economic grounds are assessed at the level of the group's line of business to which the company proceeding to the redundancies belongs. There must be valid economic grounds either at group level if the group only operates in only one line of business, or at the level of the line of business in which the company operates if the group operates in several lines of business.

In regard to safeguarding competitiveness, judge's ruling on the merits of a case must establish that there are indeed economic difficulties at the level of the group's line of business to which the company belongs or that there is a threat to the competitiveness of said line of business.

Determining at which level there must be valid economic grounds for a company to carry out collective redundancies is critical, as companies belonging to a group often wrongly believe that it is sufficient to have valid economic grounds at company level.

As far as a company belonging to a group is concerned, the fact that said company is experiencing valid economic grounds at company level is not sufficient. There must be valid economic grounds either at group level if the group only operates in only one line of business, or at the level of the line of business in which the company operates if the group operates in several lines of business.

3. What is the procedure that the company must follow to conduct a dismissal for business reasons? Are there specialties in such procedure in relation to the number of workers affected?

In France, the procedure to follow in cases of dismissal for business reasons varies depending on the number of employees concerned, the size of the enterprise and the presence (or not) of staff representative bodies[10].

The greater the number of employees involved, the more burdensome the procedure becomes for the employer. The employer needs to fulfill various obligations towards the Works Council, the local labor authorities (*Direction Régionale des Entreprises, de la Concurrence, de la Consommation, du Travail et de l'Emploi,* i.e. Regional Directorate for Companies, Fair Trading, Consumer Affairs, Labor and Employment –which is known as 'DIRECCTE') and the employees concerned.

The most complicated procedure is for large redundancies, which requires the employer not only to inform and consult the employee representative bodies (works councils and the health and safety committee) and implement dismissal ordering criteria, but also to implement a social plan to limit the number of dismissals, assist employees made redundant to find new employment and mitigate the impact of their redundancy.

In any case, any dismissal on economic grounds would be judged null and void if the consultation procedure had not been complied with.

- Dismissal of a single employee

The steps for dismissing one employee for business reasons are similar to that of dismissal for personal/professional reasons, subject to some specific additional requirements.

The employer must send or hand-deliver a notice of a pre-dismissal meeting under the same conditions as those outlined in the dismissal procedure for personal/professional reasons. During the meeting, the employer must explain the reasons for the dismissal and propose to the employee within companies with fewer than 1.000 employees, a personalized redeployment agreement.

This redeployment scheme, which was negotiated at national level, aims at accelerating employee redeployment and provides for measures such as social and psychological support, orientation, coaching, training and assessment of professional skills, etc.

[10] A. Lyon-Caen, « La procédure au cœur du droit du licenciement économique », *Dr. ouvrier* 2002. 161,

The employee has 14 days as of the receipt of the information note to accept or refuse the personalized redeployment agreement. If the employee accepts, the employment contract will be considered as terminated by mutual agreement between the parties as from the expiration date of the 14-day period.

Within companies with 1.000 employees or more, a redeployment leave financed in part by the employer, which purpose is to allow the employee to benefit from training measures and job search program. The duration of such leave is 4 months minimum and nine months maximum. The redeployment leave takes place during the notice period, during which the employee does not have to perform.

Then, the employer must send a notification of the dismissal to the employee after a minimum waiting period of 7 business days (15 days for an executive employee). The dismissal letter must explain in detail the economic reasons for the dismissal and their impact on the employee's position or employment contract.

The employer must refer to the "personalized redeployment convention" or "redeployment leave" and remind the employee of the remaining period of time for him/her to opt for such retraining program. It enables to state that the employee has a right of priority for re-employment for one year after the dismissal if the company envisages to hire employees with the same qualifications and if the employee elects to use such right of priority within a year from the end of the relationship.

Finally, the employer must notify the "*Directeur Départemental du Travail*" (Local Labor Administration) of the dismissal within 8 days following the date of the sending of the dismissal letter.

- Dismissal of two to nine employees (collective dismissal)[11]:

The employer must set up a list outlining objective criteria to be used for determining the order in which the employees will be dismissed[12] (e.g. seniority, family situation, age, qualifications, etc.). The employer must provide written notification to the employee representatives (Works council) with all supporting documents explaining the reasons for the collective dismissal and providing sufficient details on the latter.

At the earliest three days later, the employer must meet with the employee representatives. In addition to the meeting, the employer must send to each employee to be dismissed a convocation letter to attend a pre-dismissal meeting, under the same

[11] LC Art. L. 1233-8 to L. 1233-10
[12] LC Art. L. 1233-5

conditions as those outlined in the dismissal procedure for personal/professional reasons.

The employer must hold individual pre-dismissal meetings with each employee to be dismissed and provide him/her with the personalized redeployment convention or redeployment leave[13]. A minimum waiting period of at least 7 business days after the meeting must elapse before these dismissal letters can be sent to each employee and such sending must be performed by registered letter with return receipt requested. The employer must then notify the "*Directeur Départemental du travail*" of the dismissals within eight days following the date of the sending of the dismissal letters.

- Dismissal of at least ten employees (collective dismissal)[14]:

In cases where an employer intends to collectively dismiss at least 10 employees within a 30-day period, the procedural steps are more substantial and may be summarized as follows: this procedure deals specifically with the social consequences of the restructuring discussed during the first part of the procedure (see further above), i.e., the collective dismissal that should result from said restructuring. Article L. 1233-34 of the Labor Code allows the Works Council to appoint a CA for assistance during its consideration of the information presented by the management on the proposed economic dismissals. Such appointment results in three Works Council meetings (instead of two, as with other dismissals).

Up to 2013 the law did not set a deadline for the issuance of works council opinions. This has translated into a stronger negotiating position for employees, as works councils have been empowered to stall the collective redundancy process for long periods of time by requesting additional information from the employer or delaying a request for expert assistance. Under existing law, social plans can also be challenged for insufficiency and result in the suspension or the cancellation of a redundancy procedure. On 11 January 2013, a national inter-professional agreement (*accord national interprofessionnel* or ANI) was signed between French employer organizations and three national trade unions on a new economic and social model to promote business competitiveness and protect employee jobs and career paths. Negotiated at the invitation of the government, the 2013 ANI served as the basis for a new “flexisecurity” bill.

The rules on collective dismissals in France have been reformed by legislation passed

[13] F. Héas, « Le droit au reclassement du salarié en cas de restructuration de l’entreprise ou d’altération de sa santé », *Dr. ouvrier* 2007. 452
[14] LC Art. L. 1233-28 to L. 1233-33

on 14 June 2013 (*Loi de sécurisation de l'emploi* – LSE)[15]. Under this new legislation, consultation of the works council and health and safety committee on a "large" collective (i.e. when a company with at least 50 employees plans at least 10 job cuts) will be subject to new time limits.

Previously, the redundancy process had not been subject to specific deadlines. For large international businesses wishing to restructure or, for example, close a manufacturing plant, this made it very difficult to forecast how long it would take to complete a collective dismissal procedure involving more than nine employees. This is mainly because the employer must first consult with and obtain an opinion from the works council before any definitive decision is taken. Failure to follow this process is a criminal offense under French law. Although works councils do not have the power to veto the restructuring, they often use delaying tactics. Many companies experience delays in the implementation of a restructuring project, lasting up to several years, when the works council or unions are able to obtain a court order to suspend the consultation process for various reasons, including allegations that they have not received sufficient information to issue an opinion.

In this context, it was vital for employers that the works council consultation process was clarified. The consultation deadline can be included in a collective bargaining agreement entered into with union representatives. In the absence of such an agreement, the LSE Bill provides that the consultation should be completed in two to four months, depending on the number of employees concerned (two months when fewer than 100 dismissals are planned, three months for 200 to 250 dismissals, and four months when more than 250 employees are to be dismissed). At the end of the consultation period, the works council will be deemed to have been consulted, even if they have refused to issue the legally required “opinion” before the employer can start to implement any restructuring project and serve notice on the affected employees. The works council also has the right to get help from an “expert” (e.g., a chartered accountant), whose costs are fully paid by the employer, to better understand the economic and financial situation of the French company and the industry to which it belongs. Under the LSE Bill, such expertise should be sought in a timely manner to comply with the new deadlines.

The works council must give its opinion within two, three or four months of the first consultation meeting, depending on whether 10-99, 100-249 or at least 250 job cuts are planned. If the works council fails to give its opinion within this period, it is nonetheless deemed to have been consulted.

[15] P.-H. Antonmattei, « Grands licenciements pour motif économique, des innovations séduisantes à parfaire », *Sem. Soc. Lamy*, 2013, n° 1570 p. 15 ; « 24 regards sur la sécurisation de l’emploi », *SSL* 2013, n° 1592.

However, the legislation has introduced a new obligation for the company will have to seek the French labor administration's agreement to its redundancy plan. Such a plan has to be discussed with the union's representatives and/or the works council in the course of the consultation process and includes everything that the employer will offer to terminated employees to help them find a new job (including mobility aid, training and additional severance packages). The labor administration's agreement should be made within eight days if the unions have agreed to the redundancy plan, or otherwise within 21 days. Without the labor administration's agreement, the company can elect to resume the consultation process or to bring the matter before the administrative court, which has to make a judgment within three months. If that judgment is appealed, the court of appeal and the Supreme Court each have three-month deadlines to issue a ruling.

4. In the French legal system are there groups of workers who have retention of priority in a dismissal for business reasons and/or exist criteria for determining the workers affected by such a redundancy?

Where an employer is unable to internally redeploy its employees, it is required to define the criteria that shall be applied to govern the order of the contemplated redundancies[16].

In principle, the criteria defining the order of redundancies are defined by both the Labor Code and the relevant Collective Bargaining Agreement, where applicable. In addition, it should be noted that the criteria selected to determine the order of redundancies may only be fixed after the employer has consulted with the works council and/or the staff delegates on this issue.

Pursuant to Article L.1233-5 of the Labor Code, an employer must determine the order of redundancies based on the following legal criteria:

- The number of dependants, in particular for single parents;
- The employee's length of service;
- The employee's situation, which would make finding new employment particularly difficult, notably for disabled and old employees;
- The employee's skills assessed in light of his/her professional category.

The above criteria must be applied on a professional category basis. Case law defines a professional category as all employees in a company performing similar duties and with comparable professional training[17].

[16] F. Géa, « L'ordre des licenciements à l'épreuve de la logique contractuelle », *RDT* 2012. 218
[17] Soc., February 13, 1997,

Accordingly, where an employer wishes to eliminate a position, the criteria selected to determine the employee to be made redundant must be applied within the professional category of the eliminated position. Where the employer foresees eliminating all of the positions within a professional category, it is no longer necessary to select criteria to determine the order of the redundancies. Furthermore, the order of the redundancies must be assessed at overall company level and not merely at site level.

Finally, it is possible to provide that an employee who volunteers to leave can be made redundant, in order to avoid making redundant an employee who may be redeployed. However, it is important that the relevant employee comes to a voluntary decision to leave.

Where the employer fails to respect the order of redundancies or provide the employees with information regarding the criteria selected for the order of redundancies, employees may take civil action to obtain damages for the loss incurred.

5. Does the dismissal for business reasons that is declared correct/legal generate the worker's right to obtain an economic compensation?

Employees made redundant are entitled to the following indemnities:

- Severance pay

The employee must receive severance pay (*indemnité conventionnelle de licenciement*) in accordance with his/her length of service and the provisions of the relevant CBA. The calculation of severance pay is generally based on the employee's average salary during his/her final three or twelve months of employment, depending on which is more favorable to the employee. The employee's basic salary and bonuses are used to calculate the average salary.

The employee receives statutory severance pay (*indemnité légale de licenciement*), where severance pay provided for by the relevant CBA is lower than statutory severance pay or where no collective bargaining agreement applies within the company.

- Indemnity in lieu of notice

If the employer decides to release the employee from work during the notice period, it must pay the employee an indemnity in lieu of notice (*indemnité compensatrice de préavis*), which corresponds to the salary he/she would have received had he/she worked during the relevant period.

- Indemnity in lieu of paid holiday

The employee is entitled to receive an indemnity in lieu of paid holiday (*indemnité compensatrice de congés payés*) corresponding to the days accrued but untaken at the time of the employment contract is terminated.

6. In addition to, when applicable, the worker's right to an economic compensation, what other company obligations derive from a dismissal due to business reasons?

As seen above, there are three types of redundancy procedures, based on the number of the redundancies implemented and the number of employees within the company:

- The redundancy of a single employee: it does not require a collective redundancy plan or a consultation of the works council, except for consultation on the selection criteria for the order of redundancies;
- The redundancy of fewer than 10 employees: the works council must be consulted and no collective redundancy plan is required;
- The redundancy of 10 employees or more within a company employing at least 50 people, thus requiring the consultation of the works council and the implementation of a collective redundancy plan.

7. What are the consequences that arise from breach or non-compliance with the legal procedure regarding redundancies due to business reasons?

Employees made redundant have the possibility of filing a claim before the Employment Tribunal.

An employee can base his/her claim on the absence of real and serious grounds for redundancy. A redundancy that is not based on real and serious grounds is considered unfair and gives rise to the payment of damages to the employee. In companies with at least 11 employees and for employees with at least two years' service, the damages amount to at least six months' salary. Where the employee has less than two years' service or the company employs fewer than 11 employees, damages are also awarded, but there is no minimum set amount.

Moreover, where the employer fails to comply with the redundancy procedure, the court may award the employee damages for the loss incurred.

In companies with at least 11 employees and for employees with at least two years' service, the damages amount to 1 month's salary. Where the employee has less than two years' service or the company employs fewer than 11 employees, damages are also awarded, but there is no minimum set amount.

The judge can also decide to cancel the redundancy, notably when the employees were made redundancy in the absence of a job preservation plan or in application of an invalid plan. In such cases, the employees are entitled to be reinstated to their former job or, failing such, to an equivalent position, unless the reinstatement proves physically impossible. Failing reinstatement, the employees will be granted damages in compensation thereof.

In addition, particularities of the redundancy procedure may entail specific penalties. For instance, failure to consult the staff representatives may result in civil penalties (nullification of the proceedings) or criminal penalties. The employer may notably be sentenced for non-compliance with the rules governing the selection criteria for the order of the redundancies or for non-compliance with the job preservation plan.

8. Are these specialties in the dismissal due to business reasons for microcompanies and/or small and medium enterprises?

Within companies with fewer than 1.000 employees, such as microcompanies or small and/or medium enterprises, a personalized redeployment convention provides psychological assistance, professional counseling and coaching, professional abilities evaluation, and training, in order to facilitate the redeployment of the employee after his or her dismissal. These measures are put in place by the Employment Agency.

The employee has 14 days as of the receipt of the information note to accept or refuse the personalized redeployment convention. If the employee accepts the personalized redeployment convention, the employment contract will be considered as terminated by mutual agreement between the parties as from the expiration date of the 14-day period.
However, the employee will be entitled to a dismissal indemnity calculated according to the collective bargaining agreement applicable to the company. For the purpose of determining the dismissal indemnity, the notice period the employee would have been entitled to in the event he or she would have refused the personalized redeployment convention is taken into account.

9. What consequences exist regarding the legal regime of dismissal due to business reasons when the dismissal takes place within the framework of a company that is part of a holding or a business group?

First, where a company is part of a group of companies and proceeds to a dismissal due to business reasons, the economic grounds are in principle assessed at group level.[18]

Within companies with 1.000 employees or more, a redeployment leave financed in part by the employer, which purpose is to allow the employee to benefit from training measures and job search program. The duration of such redeployment leave is four months minimum and nine months maximum. The redeployment leave takes place during the notice period, during which the employee does not have to perform. In the event the duration of the redeployment leave exceeds the length of the notice period, the end of the employment contract is postponed until the end of the redeployment leave. During the redeployment leave exceeding the notice period, the employer must continue to pay a monthly remuneration to the employee equal to 65 % of the average monthly gross remuneration received by the employee over the last 12 months.

In accordance with Article L.1233-4 of the French Labor Code, an employee may only be made redundant if his/her redeployment within the group to a position in the same professional category or a lower one proves to be impossible.

Besides, Article L.1233-4-1 of the French Labor Code provides that when a company or the group to which it belongs is set up outside the French territory, the employer asks employees prior to dismissal on economic grounds, if they agree to receive proposals for redeployment abroad, in each of the places where the group is set up, and if so what possible restrictions they would accept concerning the characteristics of the jobs offered, particularly with regard to salary and location. The employee has 6 days to accept or not the proposals for redeployment abroad.

The "Florange law": the law "*restoring prospects for the real economy and industrial employment*", known as the *Florange* law, which was adopted by the French Parliament on 24 February 2014 in response to ArcelorMittal's 2013 closure of the Florange blast furnace in northeast France.

The main measure of this law is the requirement that companies employing more than 1.000 employees in France and/or Europe must research a purchaser in the event that the company contemplates closing a profitable site that could potentially lead to a

[18] Soc., June 25, 1992, n° 90-41.244

redundancy exercise.

When a company contemplates closing a site in France under the conditions above, it has to, among other things:

1. Inform its work council and the labor administration of its intent to close the site no later than the consultation process for the contemplated collective redundancy exercise;
2. Inform, by any appropriate means, the potential purchasers of its intent to sell the site;
3. Draft a document presenting the site that provides the necessary information to potential buyers;
4. Provide access to any necessary information to companies that want to acquire the site (except if this information could be harmful to the company's interests or jeopardize its continued activity);
5. Take into consideration any purchase offers; and
6. Provide a motivated response to each of the purchase offers.

10. Is it possible to conduct a dismissal due to business reasons in a public administration? In this case, what specialties exist in regard to the definition of the business causes?

In the French legal system, provisions from the Labor Code specifically concern private sector employees. The public sector employees enjoy a specific protection from dismissal under public law.

However, it exist various dismissal procedures:

- Disciplinary dismissal;
- Dismissal for incapacity;
- Dismissal for professional misconduct;
- Dismissal in the interest of the service (i.e suppression of the post or refusal of the modification of an essential clause).

Regarding the definition of the business reasons, such a type of dismissal does not exist in the French public sector.