UNIVERSITÉ DE STRASBOURG

# Individual Dismissal


India VITTE

Oualid EL FAGROUCHI

François SAID

Géraldine PILARD-MURRAY

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# Introductory statements

## 1) The definition of "dismissal"


Dismissal is the most regulated mode of terminating the working contract in France as termination is considered as a very serious matter.
This possibility is only available in the context of a permanent working contract outside the trial period.

The permanent working contract can then only be terminated by the employer in the forms provided for by law and under the condition to satisfy the legal requirement of justification[1].

To give a general idea of how dismissal interacts with other ways of terminating the working contract, some figures may be useful : during the 1rst semester of 2017, about 550 000 employees registered at the unemployment service : 12 000 following an economic dismissal, 38 000 (so more than triple) after an individual dismissal, 110 000 after a short term contract and about 36 000 following a termination by mutual consent.

## 2) The grounds for dismissals

Any dismissal must be justified by a real and serious cause[2]. The reality of the cause is the proof that the facts are objective (based on the employee's behavior), precise and existing (ie materially verifiable by the judge)[3].

Seriousness means a substantive condition in the the judge's appreciation. It implies a cause of a certain gravity, which makes it impossible for the company to continue working with the employee without any damage for the company.

If the cause is real but not relevant enough it will not necessarily be sufficient to dismiss the employee. Both the reality and seriousness of the cause must be assessed on the date of the decision to terminate the contract of employment.

[1] Article L1232-1 1° and 2° of the French Labor Code
[2] Articles L1232-1 2° et L1233-2 2° of the French Labor Code
[3] Cour de cassation Social chamber, 14 May 1996, n° 94-45.499 ; Cour de cassation Social chamber 15 October 2013, n°11-18.977

There are two main categories of reasons for dismissal in France : the personal motive related to the individual workers concerned and the economic motive. The individual motive will only be presented here.
The personal motive is based on reasons inherent to the person which means that the breach sanctioned must be reproached to the employee personally[4].

The personal motive can be grouped into 2 main categories:

→ the one based on disciplinary misconduct.

Dismissal is disciplinary when it is pronounced because of a behavior of the employee considered as faulty by the employer. Labor law has different levels of fault (misconduct, gross misconduct, wilful misconduct) which the employer chooses. If the judge questions the seriousness of the facts, no requalification by the employer is possible. Disciplinary dismissal must at least be based on one or more accurate and verifiable facts that make it impossible to keep the job.

→ the one based on non disciplinary misconduct. Cases of non-disciplinary personal dismissal may then be related to:

- the very person of the employee :

- reasons related to the employee's behaviour: For example, dismissal based on precise elements consisting in a public denigration of a manager[5].
- reasons related to the employee's personal life: The private life of the employee can not in principle be grounds for dismissal except if the employer can prove that the private life of the employee causes real and serious negative effects for the company[6] through a characterized objective disorder.
- reasons related to events affecting the performance of the employment contract such as illness. The inconvenience caused by the absence of the employee for the company, as a whole, or for a service essential to the proper functioning of the latter, may then suffice. This supposes that it is no alternative to a definitive replacement at a time close to the dismissal or within a reasonable time following it. It applies as well in case of physical incapacity when the employee has been declared unable to work for medical reasons by the entitled authority.

- the execution of the work

[4] Cour de cassation Social chamber, 27 May 1998, n° 96-41.276
[5] Cour de cassation Social chamber 5 May 2004, n° 01-45.991
[6] Cour de cassation Chambre sociale, 14 septembre 2010, n° 09-65.675

- reasons related to the competence or the professional aptitude of the employee. These reasons must not come from a deliberate behavior of the person concerned. Example: professional incapacity is when the employee does not meet goals which are achievable.
- reasons related to a refusal of the employee to amend the working contract (except when the amendment is based on discriminatory ground or the refusal based on an undue invasion of privacy).

# Factors for allowing dismissals

Only the reasons given above may justify dismissal.

The procedure for dismissal for personal reasons applies to private employers and their employees, as well as to the personnel of public persons employed under private law. But as such, the public or private quality of the employer will not in itself have any impact on dismissal.

While the number of workers employed will be relevant to the dismissal procedure it will not be relevant to the dismissal itself as dismissal is based on personal grounds. Similarly, the duration of the contract will affect the calculation of the severance pay but will not be relevant to allowing the dismissal.

# Sources of law concerning dismissals

There are a number of sources in French labour law for dismissal:

**1**/ the Constitution mentions a series of social rights, some of them related to labour relations that have an indirect impact on dismissal:

- The right to employment which is protected by paragraph 5 of the preamble to the 1946 Constitution.
- freedom of association in paragraph 6 which corresponds to the freedom to form and join a trade union freely.
- The right to strike in paragraph 7.
- The right to participate in the collective determination of working conditions and the management of the enterprise in paragraph 8.

**2**/the law and the Labour Code. The legislator has an important role in French labor law. Article 34 of the Constitution defines the scope of the law, stating that the legislator determines the fundamental principles of labour law. As this concept of fundamental principles is not defined, the legislature has interpreted this notion in an extremely broad way. The law is the main source of the law of dismissal in that it lays down the rules of substance and form to be respected in this respect.

**3**/ Regulatory power. This also plays an important role in labor law and the law of dismissal as regulations are necessary to implement the legislation.

**4**/ International and European sources. Article 55 of the Constitution guarantees the superiority of international treaties over legislative and regulatory provisions. These international sources, in fact, bring together several sets of standards from several international or European organizations, including:

→ the international sources of the ILO, including Convention No. 158, which deals with protection against dismissal. It should be emphasized that this convention is of direct applicability which means that an employee can avail himself directly of an international provision before the labour tribunal and that the judges can dismiss French law not in conformity with international provisions.

→ European sources: acts of the Council of Europe with for example the article 24 of the 1996 European Social Charter (Revised) of the Council of Europe on the "Right to Protection in Case of Dismissal" must be interpreted with a view to ensuring the

effective exercise of the right to protection in case of dismissal in terms of just cause, appropriate compensation and right of appeal to an impartial body

→ European Union sources. At the level of primary European law, in the margins of the principle of non-discrimination, the article 153 TFEU stipulates that "[...] the Union [...] shall complement the action of the Member States in the field (s) [...] of protection of workers in the event of termination of employment contract and information and consultation of workers ". Article 30 of the Charter of Fundamental Rights of the European Union further stipulates that: "Every worker has the right to protection against unjustified dismissal in accordance with Community law and national laws and practices".
Therefore, despite the absence of “dismissal law” at the EU level, there are many sources of European law dealing with dismissal that have been transposed into French law (notably Directives 2006/54 / EC and 2000/43 / EC on the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin, Directive 2000/78 / EC establishing a general framework for equal treatment in employment and occupation, Directive 92/85 / EEC on the implementation of measures to promote the improvement of safety and health of workers who are pregnant, have recently given birth or are breastfeeding ).

**5**/Collective agreements. They result from a process of collective bargaining in specific legal areas defined by the legislator. The collective agreement is a written act concluded between an employer or group of employers on one side, and one or more trade union organizations on the other. The collective agreement will automatically apply to the employment contract that enters into its contract scope. In terms of personal dismissal, it will intervene in the field of the applicable notice, the amount of severance pay, the deadlines to respect for the implementation of certain dismissals.

**6**/Case law. If the law intervenes in the establishment of the fundamental principles to be respected in case of dismissal for personal reason, case law has a very important role in that it interprets these principles, gives them life and makes them evolve. The concept of real and serious cause for example is derived from the law but its meaning has been given thanks to case law. The same applies to the reasons for personal dismissal which are not provided by law but have been developed by the case law on the basis of the principles established by law.

While labour and dismissal law in France have the image of being restrictive for the employer, things are changing. Decades ago, the idea was to limit the power of the employer in order to limit dismissals. Today, the trend is toward greater flexibility around dismissal, the objective pursued in both cases being that of favoring employment.

# Criteria for allowing the dismissal

## 1. The need for a lawful reason to dismiss


### a. Criterion allowing the dismissal

Dismissal for personal reasons must be based on a real and serious cause[7]. The real and serious cause is established if it meets the 3 following criteria:

- it is objective,
- it is precise and existing in reality,
- it is sufficiently important to justify termination of the employment contract.

The lack of real and serious cause leads to sanctions for unlawful dismissal.

### b. disciplinary and non-disciplinary reasons

The dismissal is possible for disciplinary reasons if the employee is at fault. An employee may be dismissed for simple misconduct, gross misconduct or wilful misconduct following disciplinary proceedings. On the other hand, the employee cannot be dismissed for a slight fault (without serious consequences on the functioning of the company). The consequences of dismissal vary according to the qualification chosen by the employer. In the event of a dispute, it is up to the judge to determine whether the employee has committed a fault and whether it is a minor, simple, gross or wilful fault.

Simple fault may be recognised, for example, in the event of an error or negligence committed by the employee in the course of his or her work.

The employee's fault is considered as a gross misconduct if it makes it impossible for the employee to remain in the company[8]. The wrongdoing (s) must be directly attributable to the employee. Gross misconduct results in the immediate departure of the employee.

The seriousness of the offence is assessed according to the specific circumstances of each case. Gross misconduct can be recognised even if the misconduct is committed for the first time.

In practice, gross misconduct is often admitted in the following cases:

[7] Article L.1232-1 of the French Labor Code

[8] Social chamber, 26 february 2013, n° 11-27.372

- unjustified absences or abandonment of position,
- indiscipline or insubordination of the employee (refusal to perform a work task specified in the contract),
- harassment, violence or insults against the employer or other employees,
- thefts in the company,
- drunkenness during working hours.

The employee's fault is considered wilful when committed with the intention of harming the employer[9]. Wilful misconduct may be recognized in particular in cases of unfair competition or during a strike (e. g. in the event of degradation, violence, kidnapping or when the employee deliberately prevents other non-strike workers from working).

Generally, three other reasons may allow the dismissal when no fault has been committed by the employee.

- In case of professional incompetence

Professional incompetence is a combination of two different notions: the inadequacy of an employee's skills and his inability to achieve the stated objectives. A distinction is also made between dismissal for incompetence and dismissal for poor performance, but the procedures to be followed are identical.

Dismissal for professional incompetence is based solely on the employee's inability to perform his or her work properly[10]. This does not constitute a disciplinary circumstance under any circumstances, even if a precautionary layoff takes place.

Examples of professional incompetence : incompetence, vocational maladjustment, mistakes, chess, disruption, insufficient or unusable work, lack of qualifications, despite the training efforts.

- Physical incapacity

No employee may be dismissed because of his or her state of health. Thus, for example, an employer cannot dismiss an employee on the sole pretext that he or she is regularly ill.

If it is established that the dismissal is linked to the employee's state of health, it is considered discriminatory. Its consequences are those in case of null and void dismissal.

However, the employee's illness may have consequences on his or her ability to return to work or on the good functioning of the company, which may justify dismissal.

[9] Social chamber, 27 march 2013, n° 11-19.734

[10] Social chamber, 6 january 2011, n° 09-67.334

The dismissal of an employee declared unfit to resume employment is possible[11]:

- if the employer proves that it is unable to offer a job in accordance with the advice and instructions of the occupational physician,
- or if the employer has offered one and the employee has refused it,
- or if the opinion of unfitness drawn up by the occupational physician explicitly states that "any retention of the employee in employment would be seriously detrimental to his or her health" or that "the employee's state of health precludes any reclassification to employment".

- refusal to amend the employment contract

A change in the terms and conditions of employment proposed to an employee may lead to a simple change in the working conditions if he/she does not call into question a clause provided for in the employment contract. It could be, for example:

- a new distribution of a full-time employee's working hours (without changing the working time or disrupting working hours);
- a new task assigned to the employee that corresponds to his or her qualifications;
- a change of place of work in the same geographical area (or a change of place in another geographical area, if a mobility clause so specifies in the employment contract).

In this case, the employee may not object to the change, unless he or she can justify an undue invasion of privacy or a change on a discriminatory ground. Any unwarranted refusal of the employee may result in his or her dismissal[12].

### c. Unlawful reasons

Certain facts may in no case constitute real and serious grounds for dismissal. In this case, the dismissal shall be considered null and void or without real and serious cause.

- Reasons arising from professional life

Dismissal shall in no case be based on any of the following grounds:

- the fact of having suffered or refused to suffer repeated acts of moral or sexual harassment (or for having testified to such acts or having related them)[13],
- the fact of having reported or testified, in good faith, either to his employer or to the judicial or administrative authorities, of corruption of which he was aware in the performance of his duties[14],

[11] Article L.1226-2-1 of the French Labor Code
[12] Social Chamber, 1st june 2016, 14-21.143
[13] Article L.1132-3 of the French Labor Code
[14] Article L.1161-1 of the French Labor Code

- refusing, on the basis of sexual orientation, a geographical relocation to a state that criminalizes homosexuality[15],
- participation in a lawful strike[16],
- opinions expressed in the context of employees' right of expression,
- political opinions, membership and union activities,
- the exercise of a right (for example, to apply to the labour inspector or the labour tribunal),
- a previous sanction of more than 3 years[17].

- Personal life motives

Termination may not be based on any of the following grounds:

- a discriminatory ground (origin, sexual orientation, morals, family status, nationality, ethnic or religious affiliation, etc.)[18],
- a private matter (unless it creates an objective disturbance in the company or is accompanied by a breach of the duty of loyalty to the employer),
- the state of health or disability (except in the case of incapacity established by the occupational physician),
- pregnancy, motherhood, adoption[19].

Most of these unlawful motives are the same than those at the EU level.

## 2. Dismissal, a management tool ?

Dismissal can't be considered as an ordinary tool in France because of the employer must always pay a compensation except in case of gross misconduct[20]. The cost of the dismissal has been reduced in case of unlawful dismissal since the reform of labour law on 22 September 2017. Before that, there was no limit on the amount of compensation. Therefore, in order to harmonize the award of compensation and to make the cost of a litigation more predictable for the employer, a scale has been established which state the amount of compensation depending on the seniority and the size of company[21]. This scale doesn't apply if the dismissal is based on discriminatory grounds or in case of moral or sexual harassment[22].

[15] Article L.1132-3-2 of the French Labor Code
[16] Article L.1132-2 of the French Labor Code
[17] Social chamber, 26 may 2010, n°08-44366
[18] Article L.1132-1 of the French Labor Code
[19] Article L.1225-4 and L.1225-4-1 of the French Labor Code
[20] Article L.1234-2 of the French Labor Code
[21] Article L1235-3 of the French Labor Code
[22] Article L1233-3-1 of the French Labor Code

Secondly, we will see that there are many formal and procedural requirements which can make a dismissal very long even without a litigation. The employer will prefer an agreement with the employee on termination of the contract instead of a dismissal which can lead to a costly litigation.

# Formal and procedural requirements

An employer who intends to dismiss an employee for personal reasons must comply with the procedure for dismissal. The steps to be followed are as follows: the employee is summoned to a preliminary interview, the interview is conducted, a letter of dismissal is sent, notice is given, and obligations related to the termination of the contract. Other obligations may be imposed on the employer (especially if the employee is an employee representative or if the collective agreement so provides).

## 1. The letter of invitation to a preliminary interview

The letter of invitation shall contain the following information:

- the purpose of the interview between the employee and the employer (that is, consider dismissal of the employee)[23];
- date, time and place of this interview;
- possibility for the employee to be assisted during the interview by someone from the company;
- and, if there are no employee representatives in the company, the employee may be assisted by an employee advisor. The letter then mentions the town hall or labor inspectorate contact information so that the employee can obtain a list of advisers[24].

## 2. Preliminary interview

- Date of interview

The date of the interview must be scheduled at least 5 working days after submission of the registered letter or hand-delivery of the letter of invitation.

- Conduct of the interview

During the interview, the employer shall state the reasons for the proposed decision and obtain the employee's explanations[25].

Under no circumstances must the employer announce its decision to dismiss the employee during the interview.

[23] Article L.1232-2 of the French Labor Code
[24] Article L.1232-4 of the French Labor Code
[25] Article L1232-3 of the French Labor Code

- If the employee is absent

The employee is not required to report for the preliminary interview. His absence cannot be blamed on him.

However, this absence does not call into question the following stages of the procedure (except in the case of irregular summons) and the employer may subsequently send the employee a letter of dismissal.

### 3. The dismissal letter

The dismissal must be notified to the employee by registered letter with acknowledgement of receipt at least 2 working days after the date of the preliminary interview[26].

A maximum legal deadline for sending the letter is provided only in the event of dismissal for disciplinary reasons. It is set at a maximum of 1 month after the date of the preliminary interview. However, treaty provisions may provide for different time limits.

The letter, signed by the employer (or, failing that, by a person entitled to dismiss the employee) must state each reason for the dismissal and set out the rights and obligations of each party.

The reasons for dismissal may be specified by the employer, after notification of dismissal, on its own initiative, or at the request of the employee. For both the employee and the employer, the time limit corresponds to 15 days after the notification of dismissal letter[27]. This possibility has been introduced by the last reform of the French labour law in september 2017.

It is the letter of dismissal, possibly specified by the employer, which sets the limits of the dispute as to the grounds for dismissal.

### 4. Notice period

The contract is not interrupted upon notification of termination. The employee is still required to execute a notice, unless he or she is in one of the following situations:

- exemption from notice by the employer,
- dismissal for serious misconduct or gross negligence,
- termination for incapacity.

[26] Article L1232-6 of the French Labor Code

[27] Article L1235-2 and R1232-13 of the French Labor Code

During the notice period, the employee who is required to give notice continues to work in the company, under the usual conditions, and to receive his or her remuneration (salary, any bonuses, etc.).

The notice period depends on the duration of employment[28] :

- 1 months from six months to two years of employment;
- 2 months above 2 years of employment.

Agreement, collective or contractual provisions may provide for a more longer period of notice or seniority condition for the employee.

## 5. Consequence of a breach of procedure

Where an irregularity was committed during the procedure but the dismissal is ordered for a real and serious cause, the employee may apply to the judge for compensation not exceeding one month's salary.

For example, the inadequacy of the letter of dismissal alone does not render dismissal without real and serious cause. On the other hand, the absence of a real and serious cause for dismissal, constituted by a defect in the reasoning of the termination letter, is due to compensation from the labor courts.

Dismissal for personal reasons is irregular when the procedure has not been followed, but the failure to do so is not sufficient to cancel or deprive the dismissal of a genuine and serious cause.

If the dismissal of an employee occurs without the requisite procedure having been observed, but for a real and serious cause, the judge shall require the employer to carry out the prescribed procedure and shall grant the employee, at the employer's expense, an indemnity not exceeding one month's salary[29].

[28] Article L1234-1 of the French Labor Code
[29] Article L.1235-2 of the French Labor Code

# The role of the labour authority, workers' representatives and/or collective agreements in dismissal

The French labour authority intervene if the dismissal concerns a protected employee. The employer must, apply for a dismissal authorization from the labor authority who is responsible for the establishment that employs the employee. The labour authority conducts a contradictory investigation, during which the employee may, at his request, be assisted by a representative of his union[30].

The labour authority shall take his decision within 15 days of the date of receipt of the request for a dismissal authorization. In the event of an employee being laid off, the time limit is reduced to 8 days.

Workers' representatives will assist employees during the preliminary interview but he will not defend him. He will have the role of witness during the preliminary interview.

Generally collective agreement can provide some steps in the dismissal procedure (e. g. the need to request the opinion of the disciplinary board), a different notice period or a different basic compensation more favourable for the employee.

[30] Article L.2421-3 of the French Labor Code

# Judicial control of dismissal

First of all, the judge must make sure that the whole procedure has been carried out, the existence of a letter of invitation to a preliminary interview, the actual interview, the dismissal letter, its contents and the respect of a notice period.

## 1) Control of the preliminary interview

In the preliminary interview, the employer explains the reasons for the dismissal, but it is also the equivalent to a conciliation procedure, that is why it must take place in any case whatever the reason for the dismissal[31].

The judge first verifies that the interview happened. It cannot be replaced by an informal meeting between the employer and the employee, or a simple phone call.

Then he controls the procedure, checking the conditions that were mentioned before.

## 2) Control of the letter of dismissal

The judge will check if the letter makes a few mentions : first it must affirm in a clear and unequivocal manner that it is a dismissal ; it must also be signed by by the employer or his representative.

The reasons contained in the letter can now be specified by the employer after the notification of the dismissal.

It must make mention of the employee's individual right to formation, his right to a notice period and its methods of exercise.

If there is a breach in procedure, the dismissal is considered irregular, but it does not mean it is without a genuine and serious cause.

## 3) Control of the real and serious motive

[31] Article 1232-2 of the French Labour Code

Le council of Prud'Homme is qualified to appreciate the real and serious nature of the dismissal. The control of the judge can be applied to all dismissals, without regards to the company's workforce or the employee's years of experience.

The cause of dismissal is appreciated at the time of the dismissal. Also, he must consider the real and serious nature in light of the elements provided by the parties at the starts of the dispute.

### 4) Matter of the control

The judges verify that the facts the employer claims are true.

They must examine all the alleged motives[32].

The control of the judge regarding the reason of dismissal goes as following : It must first verify the reality of the motive, meaning that it is existing, precise, and objective.

Then, it must control the seriousness of the motive. According to case law, a serious cause means a cause of some gravity which makes it impossible, to continue the work without damaging the company.

Finally, the legality of the motive. It must always be lawful, that is to say not to go against one of the public or private freedoms guaranteed by the constitution, the law, or the regulations in force.

The rules of control are particular concerning the disciplinary dismissal. The judges must appreciate the gravity of the employee's misconduct and sort it between simple misconduct, gross misconduct and wilful misconduct.

### 5) Admissibility of the remedy

Every worker should be able to contest the motivation of his dismissal, no matter which reason was given by the employer.

A firm and final promise of employment accepted by a candidate is worth a contract of employment. The fact that the employment contract has been terminated before any commencement of performance does not exclude that the employee may claim

[32] Article 1235-1 of the French Labour Code

payment of a notice indemnity and, if applicable, the corresponding holidays with pay[33].

However, there are limits and prescription of the legal action. For any action challenging the breach of employment contract, the action is now prescribed by 12 months from the notification of the break[34].

### 6) Control exercised on the employee's evidence

The judge does not only control the dismissal, it also verifies the means of evidence used by the employee to contest the reason of dismissal[35].

For example, about documents taken from the company by the employee, the control consists in finding out if they were necessary to his defense. So, it has been judged that an employee was in his right to steal documents from his employer, if it contained information the workers were supposed to know.

On the other hand, judges condemned the behavior of an employee who got hold of documents who weren't necessary to his defense, and proved to be of interest to his new employer, which was a competitor.

The representative of the employer can testify in favor of the employee. Even an employee which, representing the employer, dismissed another employee, is able to testify and furnish information in his favor.

About the form of the proof, the French judges have accepted as evidence text messages or e-mails, if they are considered reliable enough by the court.

However, some means have been considered as unfair to the employer, such as a secret recording of a conversation between the employer and the employee[36]. A voice message from the employer though, is valid, since he obviously knew the recording could be saved.

[33] Court of Cassation, Social chamber : September 21th 2017
[34] Article L1471-1 of the French Labour Code
[35] Court of Cassation, Social chamber : March 27th 2001
[36] Court of Cassation, Social chamber : Néocel case, 1991

## 7) Investigative measures

If the judge has not been able to form his conviction on the basis of the information, he must prescribe measures of inquiry to obtain further information.[37]

The law does not give a precise list of the measures available to the judge, but we can mention a few from the Code of Civil Procedure and case law :

- He can request for the production of documents held by one of the parties or by third parties
- He can order an on-site investigation, as well as an expert report
- He can summon persons that were not called to testify by any party

In case of indecision from the judge, the principle applied is to **give the benefit of the doubt to the employee.**

[37] Article R1454-4 of the French Labour Code

# The consequences of a lawful and unlawful dismissal


The consequences and the effects of a dismissal vary depending on whether it is a lawful or an unlawful dismissal.

## 1) Compensation and other consequences

First of all, the amount of the compensation fluctuates depending on the lawfulness and the type of dismissal. We will then distinguish the situation of an employee who has been lawfully dismissed to the situation of an employee who has been unlawfully dismissed.

- Lawful dismissal

The employee who has been lawfully dismissed will be given a severance pay if he has been dismissed after 8 months of uninterrupted service with the same employer[38]. The methods of calculating this allowance depend on the gross remuneration that the employee had before the termination of the employment contract. Concerning the amount of this award, the employer must choose the more favourable between the legal award and the award mentioned in the relevant applicable collective agreement. In addition, the employee is entitled to receive other awards. If the employer decides to exempt the employee of their duty to stay in the company during the notice period, the employer will have to pay a compensation in lieu of notice[39]. Also, if the employee didn't take their paid leave by the end of the employment contract, they are entitled to compensation for the paid leave which hasn't been taken by the end of the contract. However, if an employee is dismissed for gross misconduct, they will be deprived from the severance pay and the compensation in lieu of notice but will still receive the compensation for not taking paid leave.

- Unlawful dismissal

However, when the dismissal is considered as unlawful, the compensations won't be similar. We must distinguish the consequences and compensations of a dismissal considered as unlawful because of a lack of real or serious cause to the dismissal considered as void.

  - Lack of real and serious cause

[38] Article L1234-9 of the French Labour Code
[39] Article L1234-5 of the French Labour Code

In the situation of an unlawful dismissal due to a lack of real and serious cause the employee will be entitled to receive, in addition to the severance pay, remedies that compensate the loss suffered. A new ordinance from September 2017[40] has introduced a scale that calculates the amount of the compensation given in case of an unlawful dismissal due to a lack of lack of real and serious cause. The scale is composed of a threshold and a cap of the number of wage awarded depending on the payroll of the company and the length of service of the employee. For example, an employee with 30 years of service could be granted a compensation amount of 3 wages to 30 wages depending on the fact of the case (See appendix). Furthermore, reinstatement can be an option at that point. However, the employee who has been dismissed without a real and serious cause has no vested right to be reinstated. The Labour Court may propose the reinstatement of the employee, which can't however, according to the provisions of Article L1235-3 of the Labour Code, be imposed on the employer. In practice, such a request is very rare.

- Dismissal considered as void

When the dismissal is unlawful because it is considered as void, the employee dismissed will have a right to ask for a reinstatement however, if the reinstatement is not requested or if it's judged by the judge as impossible, the latter will award to the former an eviction indemnity which won't be below 6 wages. The eviction indemnity compensates two types of damage: material injury (loss of wages) and non-pecuniary damage as the injury to feelings caused by the violation of the protective status.

### 2) Legal guarantees of the enforcement of the sentence

In the situation where the judge, ruling that the dismissal is unlawful, ordered the employer to pay a certain amount of money to the employee, they have to pay. If the employer lodges an appeal, there are legal provisions according to which judgments ordering the payment of sums with respect to the remuneration and indemnities are provisional interim rulings within the maximum limit of nine months' salary[41]. The employee, no matter what the employer decides to do, has a guarantee to receive, at least, a part of his due compensation but to a certain extent.

There are other mechanisms to ensure the payment of the severance pay in the case of a lawful dismissal. According to civil law provisions, the severance pay is sizeable in its entirety via common law procedures (seizure-attribution or notice to third party holder). Nevertheless, actions linked to the termination of the contract of employment are subjected to deadlines. Indeed, the employee has only 12 months[42]

[40] Ordonnance n° 2017-1387 du 22 septembre 2017 relative à la prévisibilité et la sécurisation des relations de travail
[41] Article R516-37 of the French Labour Code
[42] Article L1471-1, French Labour Code

to bring forward an action regarding the different kinds of award due or received as a consequence of their dismissal

In addition, as soon as an employee is dismissed he can, under some conditions trigger a right to unemployment allowance. Thus, to be entitled to an unemployment allowance, it is necessary to have had a job. Thus, it is requested that the employee has worked for at least 88 days or 610 hours, which corresponds to 4 months of work, in the last 28 months for those under 53, or in the last 36 months for over 53 years old. You must also have been deprived of your job following, for example, a dismissal even for gross misconduct.

### 3) Error in the qualification

The employer who makes an error of qualification in the letter of dismissal by qualifying as a fault a mere professional insufficiency, automatically deprives the dismissal of real and serious cause[43]. It is therefore important to pay close attention to the reason for dismissal stated in the letter of dismissal, also because of the specific dismissal procedure reserved for disciplinary dismissal (delays, prescription of mistakes, etc.).

[43] Cass. Soc., May 9, 2000, No. 97-45.163

# Special categories of workers

There are some circumstances when employees are protected from dismissal. These protections result from fundamental freedom as the freedom to testify[44], the freedom of speech but also fundamental rights like: the right to have a private life, including having a family (art 8 of the ECHR) the right to strike[45], the right to sue, freedom of association (article 11 ECHR). As a result, all employees considered as belonging to the category of protected employees are concerned by the special procedure of dismissal, including when it intervenes in the context of the judicial liquidation. We can then distinguish protections linked the employee's mandate, to a physical state or linked to some actions carried out.

### 1) Protection linked to the employee's mandate of trade union representatives and employees' representatives

This protects[46] any employee who is a candidate in a professional election, holder or former holder of a mandate of representative of the personnel (union delegate, representative of the union section, holders or alternates of a mandate of employee delegate, representative of the staff to the works council ...) or exercising certain mandates outside the company. Also benefiting from the protection against dismissal, the union delegate, the staff representative, the member of the works council, the employee representative on the committee for health, safety and working conditions, established by agreement or collective agreement.

If the employer contemplates the dismissal of a protected employee, there is a specific procedure to follow. Indeed, an employer wishing to dismiss a protected employee must, in addition to compliance with the usual legal procedure, obtain prior authorization from the labour inspector. In case of authorization by the labour inspector, the employee benefits within two months from an appeal before the Minister in charge of labour, the administrative court or the inspector himself. If the dismissal authorization is cancelled, the employee then benefits from the rights provided in the event of dismissal, that is to say, he can ask to be reinstated, as well as obtaining compensation for the loss suffered. In addition to the prior authorization of the labour inspector, the employer wishing to dismiss a staff representative, a

[44] Cass soc 29-10-2013 n°12-22-447 FSPB : RJS 1/14 n°9
[45] Article 7 of the préambule de la Constitution de 1946 and the French Constitution of October 4, 1958.
[46] Article L2411-1 of the French Labour Code

member of the works council or a staff representative at the CHSCT must consult the works council for an opinion after the preliminary interview.

### 2) Protection linked to a physical state

- Maternity and paternity

In addition, the labour code protects pregnant women against a "dismissal" that is motivated only by pregnancy. Indeed, according to Article L. 1225-4 of the Labour Code, it is forbidden for the employer to terminate the employment contract: during the medically established pregnancy, during all the periods of suspension of the employment contract to which the employee is entitled (whether or not she uses this right), as well as during the 10 weeks following the expiry of these periods. However, the same text indicates that the employer can break the contract, under certain strict conditions, but in this case, the termination of the employment contract can not take effect or be notified during periods of suspension of the employment contract. For the Court of Cassation, it follows from these provisions that only periods of suspension under maternity leave constitute a period of absolute protection against dismissal. This is an absolute prohibition on breaking the employment contract, whatever the reason for the break. The protection is therefore "total". Outside these periods, the employer may terminate the contract if it proves a serious fault or the impossibility of maintaining the contract. The Court of Cassation concludes that there is a possibility of dismissing the employee, including during the 4 weeks (newly 10 weeks) following the expiry of the periods of suspension of the employment contract. There is therefore only a "partial" protection.

Paternity is also a ground of protection[47]. Thus, during the 10 weeks following the birth of the child the employer can not dismiss a salaried father (except for serious fault or impossibility to maintain the contract for a foreign reason to the arrival of the child). The protection applies both during periods of absence from the father and during periods of work.

- Victims of occupational disease

An employee who suffers or suffered from an accident at work or an occupational disease is protected against dismissal. The rules in this matter, of public order, must be scrupulously respected by the employer. The employee whose employment contract is thus suspended can not be dismissed, except in very special cases. According to Article L. 1226-9 of the Labour Code, "during the periods of suspension of the employment contract, the employer may only terminate the contract if it justifies either serious misconduct interested in the impossibility of maintaining the contract for reasons unrelated to the accident or illness. "

[47] Article L1225-4-1 of the French Labour Code

In those situation, the protection result from a kind of immunity where can be total or partial. If the employer doesn't respect this immunity, the dismissal will be considered as void.

### 3) Protection resulting from actions carried out by the employee

- Taking part on strikes

The right to strike of employees is a fundamental freedom with constitutional value. Thus, the right to strike for employees in the private or public sector is guaranteed by the French Constitution of October 4, 1958; Article 7 of the preamble to the 1946 Constitution; Articles L2511-1 and L1132-2 of the Labour Code determining the protection of employees of the private sector who are on strike; Act 63-777 of 31 July 1963 applying to the right to strike of civil servants of the State, departments, municipalities. Consequently, the exercise of the right to strike can not give rise to any discriminatory measure and can not justify a dismissal, except for gross negligence attributable to the employee. Thus, dismissal pronounced in the absence of gross negligence will be void[48].

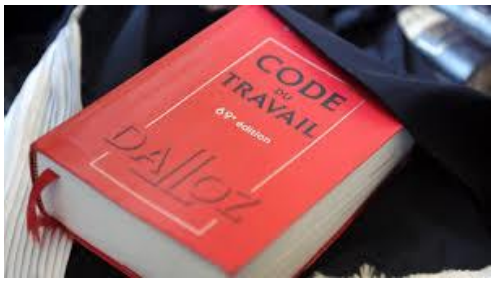
- Discrimination

This protects the employees who have been dismissed for enduring or refusing to endure harassment or for testifying of such behaviours[49]. The protection is also granted to those who have been dismissed following an action brought by or on behalf of an employee on the basis of the provisions of the articles prohibiting discrimination, where it is established that the dismissal has no real and serious cause and is in fact an action taken by the employer as a result of this legal action. This covers dismissal for a discriminatory motive[50], linked to a legal action regarding gender equality[51],

In the event of a dismissal linked to the elements aforementioned, will be considered as void.

[48] Cases N°10-26497 – N°10-26499 – N°10-26503 of the Court of Cassation, May 9, 2012
[49] Article L1152-3 and L1153-4 of the French Labour Code
[50] Article L1132-4 of the French Labour Code
[51] Article L1144-3 of the French Labour Code

# Development of dismissal law in the past 10 years




In the past 10 years, two major reforms have shaped the law relating to dismissal: the 2016 El-Khomri Act[52], and the 2017 ordinance launched by Emmanuel Macron[53].

The former evoked wide protests by labour unions around the country. A broader protest movement known as Nuit debout arose within the context of opposition to the legislation; stating its aims as "overthrowing the El Khomri bill and the world it represents".

This law makes it easier for companies to lay off workers, reduce overtime payments, and reduce severance payments that workers are entitled to if their company has made them redundant. On the other hand, it allows workers to transfer untaken days off between employers, and provides additional support for young people without training or qualifications.

During the election campaign for the 2017 French presidential election, Emmanuel Macron announced he wanted to go further than the El Khomri law and continue the reform of the labor code.

The major changes include the creation of a scale of damages that any labor court judge will have to apply in the event of wrongful dismissal. The employer now knows what the limits of the penalty will be before the procedure has even started[54].

Another change concerns the motivation of the dismissal letter. A poorly drafted letter does not lead to a dismissal without real and serious cause anymore. The employer may, at the request of the employee or on his initiative, specify the content of the letter of dismissal. The judge will then rule on the reality and seriousness of the ground of dismissal invoked in both letters.

The reform also introduced the new collective conventional break. Under this term, in fact, are hidden the old voluntary departure plans. By collective agreement, the company can organize the departure of employees, volunteers, and this without having to prove any economic difficulty.

[52] Law n° 2016-1088, 8 august 2016 on labor, modernizing social dialogue and securing career paths
[53] Ordinance N° 2017-1387, 22 September 2017 on the predictability and security of labor relations
[54] Article L1235-3 of the French Labor Code

To summarize, the evolution of dismissal law in the last 10 years has been drastic: dismissal of an employee, including for personal reasons, has been made easier and easier.

On the impact on unemployment, the main goals are to increase both layoffs and hirings. It is therefore the turn-over that will increase, and it isn't sure that it will be favorable for those in the most precarious situations.

# Appendix

| Amount of compensation for dismissal without real and serious cause | | |
|---|---|---|
| **Seniority of the employee in the company (in complete years)** | **Minimum indemnity (in months of gross salary)** | **Maximum indemnity (in months of gross salary)** |
| 0 | 0 | 1 |
| 1 | 1 | 2 |
| 2 | 3 | 3,5 |
| 3 | 3 | 4 |
| 4 | 3 | 5 |
| 5 | 3 | 6 |
| 6 | 3 | 7 |
| 7 | 3 | 8 |
| 8 | 3 | 8 |
| 9 | 3 | 9 |
| 10 | 3 | 10 |
| 11 | 3 | 10,5 |
| 12 | 3 | 11 |
| 13 | 3 | 11,5 |
| 14 | 3 | 12 |
| 15 | 3 | 13 |

| | | |
|---|---|---|
| 16 | 3 | 13,5 |
| 17 | 3 | 14 |
| 18 | 3 | 14,5 |
| 19 | 3 | 15 |
| 20 | 3 | 15,5 |
| 21 | 3 | 16 |
| 22 | 3 | 16,5 |
| 23 | 3 | 17 |
| 24 | 3 | 17,5 |
| 25 | 3 | 18 |
| 26 | 3 | 18,5 |
| 27 | 3 | 19 |
| 28 | 3 | 19,5 |
| 29 | 3 | 20 |
| 30 et au-delà | 3 | 20 |