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Droit Social France

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FOCUS

Contractual termination and dismissal, connections and complications: clarification by the French Supreme Court:

Three rulings handed down on 3rd March 2015 for the first time specify the position of the Cour de cassation regarding contractual termination prior to or following dismissal. These rulings demonstrate the Court's intention of restricting possibilities of the employee disputing the termination.

Mutual severance agreement subsequent to dismissal amounts to withdrawal of the dismissal (*Cass. soc., 3 March 2015, n°13-20549*)

On 9th January 2009, an employee was dismissed for misconduct, the notice period being waived.

On 10th February 2009, the mutual severance agreement was agreed. It was approved in March.

No express agreement was made on withdrawal of the dismissal. However, the Cour de cassation considers that a mutual severance agreement agreed subsequent to dismissal is valid and leads to withdrawal of the dismissal.

This is a surprising attitude. Indeed, in the past the Court considered that dismissal could not be withdrawn by the employer so long as the employee had not clearly and unequivocally given consent (See, in this regard: *Cass. soc., 12 May 1998, n°95-44.354*). Considering that signature of a mutual severance agreement is adequate is not self-evident.

To be followed...

Mutual severance agreement does not automatically involve waiver by the employer of the initially initiated disciplinary procedure (*Cass. soc., 3 March 2015, n°13-15.551*)

An employee insulted a supplier on 21 May 2010. The employer summoned the employee to a preliminary interview preparatory to possible dismissal, which was arranged for 7th June.

On the day of the interview, mutual severance agreement was agreed.

On 16th June 2010, the employee exercised the right to withdraw, and on 21 June, the employer once again summoned the employee for interview.

On 1st July 2010, dismissal was notified to the employee.

The employee disputed the regularity of his dismissal, claiming that the employer, by taking the route of mutual severance agreement process, had waived the right to exercise its disciplinary authority.

The Cour de cassation did not accept the employee's argument and indeed specified:

- that a new preliminary interview should be arranged, and
- that the 2 month limitation period must be respected (*C. trav., art. L. 1332-4*).

Negotiation and conclusion of a mutual severance agreement does not therefore automatically lead to waiver of the employer's exercise of its disciplinary authority.

Care should, nonetheless, be taken with regard to the possibility of conclusion of a mutual severance agreement on the same day as the preliminary interview. Indeed, in this case, the validity of the contractual termination was not disputed by the employee, because the employee had withdrawn.

Mutual severance agreement does not automatically involve suspension of the limitation period (*Cass. soc., 3rd March 2015, n°13-23348*)

Following many unjustified absences, the employee and the employer agreed a mutual severance agreement.

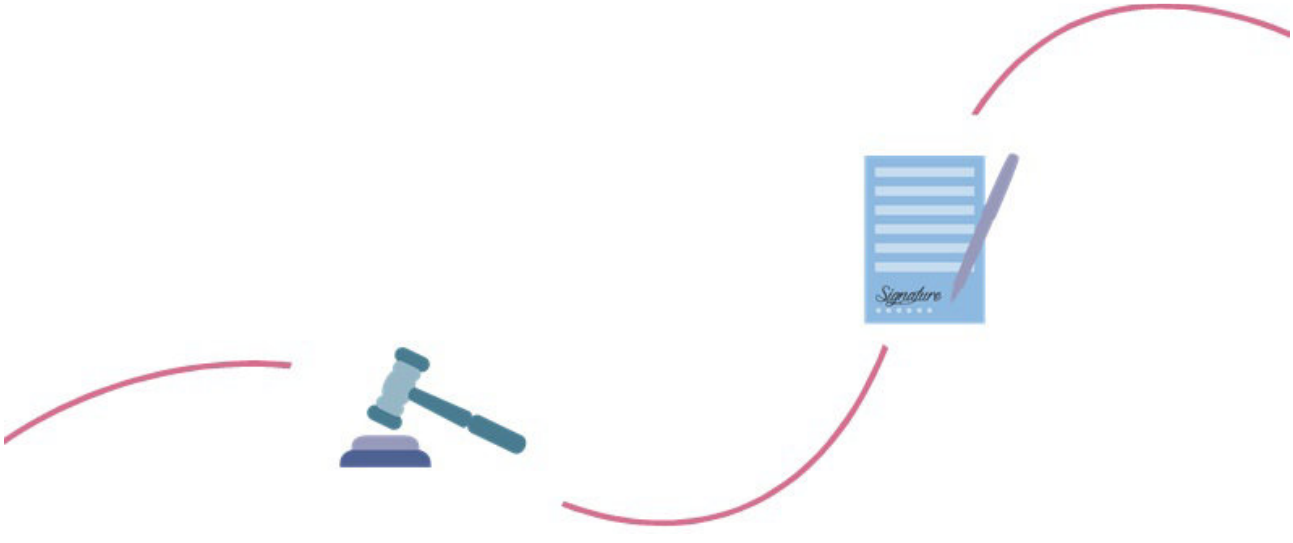
The employee withdraws. The employer thus undertakes disciplinary proceedings, although more than two months had passed between discovery of the wrongful acts and the summons. Dismissal was therefore stated to be without genuine and serious cause.

By this ruling the Cour de cassation clearly confirmed that agreement of a mutual severance agreement has no suspensive effect on the two month limitation period set by L.1332-4 of the Labour Code.

Conclusion: In order to avoid any difficulty, negotiation of a mutual severance agreement may be envisaged in the following two scenarii:

- **negotiation of a mutual severance agreement prior to the procedure for dismissal being opened:** the negotiation must be carried out within a short period of time in order to be able to organise the period for withdrawal and the limitation period ;

- **undertaking the dismissal procedure whilst also offering a mutual severance agreement** Take care in this case, however, with regard to lack of consent due to the dismissal procedure.



No impact of a general waiver clause in a settlement on the employee's rights over stock options (*Cass. soc., 11th March 2015, n°13-25828*)

By this ruling, the Court states that, unless express provision is made to the contrary, the potential rights which the employee may hold under stock options are not affected by the settlement managing the consequences of the dismissal.

This is confirmation of a ruling dated 8 December 2009. In that case also, the interpretation was made very strictly (*Cass. soc., 8th December 2009, n°08-41.554*)

It is difficult however to make sense of this. The Court indeed seems to have adopted divergent positions:

- In some cases, such as in the case of stock options but also in the context of non-competition clauses, the Court requires that the waiver is expressly provided. (*See, in this regard: Cass. soc., 12th October 1999, n°93-43.020; Cass. soc., 18th January 2012, n°10-14.974) and non-discrimination clause (Cass. soc., 24th April 2013, n°11-15.204 ; Cass. soc., 2nd December 2009, n°08-41.665*);
- In other cases, it grants full effect to a general waiver clause, for example with regard to indemnification of a loss of salary and compensation of the notice period (*Cass. soc., 5th November 2014, n°13-18.984*)

One lesson should be drawn from this fluctuating case-law: legal certainty requires exhaustive drafting.

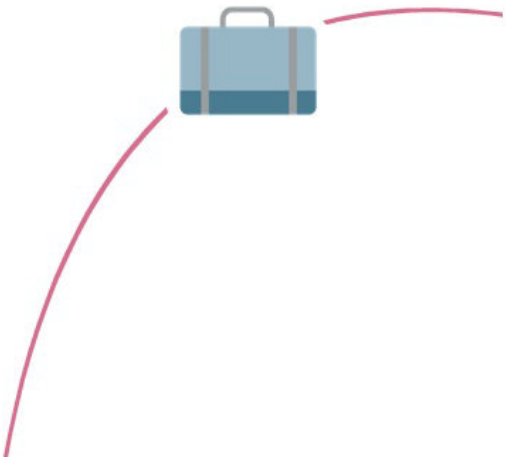
A trade union body is well-founded to request that a short-term contract be reclassified as a permanent contract before the *Tribunal d'instance* in the context of an electoral dispute (*Cass. soc., 17th December 2014, n°14-13.712 and 14-60.511*).

In principle, the power to reclassify a short-term contract as a permanent contract falls under the aegis of the Industrial Tribunal (*C. trav., art. L. 1245-2*).

The ruling handed down by the Court's social chamber extends this jurisdiction to the tribunal d'instance in one specific case: electoral disputes.

Indeed, although the Court was careful to reiterate the principle of exclusive jurisdiction of the industrial tribunal, it then specified that trade union body may request "reclassification" of a short-term contract as a permanent contract in the context of an electoral dispute regarding particularly, the calculation of numbers.

It is therefore very likely that the ruling of the electoral court to reclassify a short-term contract as a permanent contract will then be used by the employees in action before the industrial tribunal. A breach has been opened.



Non-competition cause: the possibility for the employer to unilaterally waive this clause during performance of the employment contract must be expressly agreed (*Cass. soc., 11th March 2015, n°13-22.257*)

Unless otherwise agreed in the employment contract or agreement, the employer cannot unilaterally waive the non-competition clause during performance of the employment contract.

This is a logical solution since, in the past, the Cour de cassation specified that the employer could not unilaterally waive the non-competition clause where such a possibility had not been provided for by the parties in the clause (*Cass. soc., 28th November 2001, n°99-46.032*).

Non-competition clause: detail regarding financial consideration (*Cass. soc., 11th March 2015, n°13-23.866*)

An employee resigned on 20th July 2009. The person was excused from serving the notice period, which was however remunerated. The compensating indemnity for the non-competition clause was not paid on the date of the person's effective departure from the firm, but at the end of the notice period.

On 29th August 2009 (during the unserved notice period) the person concerned took up a new activity in a competing company. The person's previous employer referred a complaint to the industrial tribunal for breach of the employee's non-competition clause.

The employee argued that the non-competition clause was not binding during the notice period since the employer had not paid the financial consideration during said period.

The Court validated this reasoning. Conclusion:

- an employee who fails to respect the non-competition clause during the notice period, but who has not received the financial consideration on the date of effective departure from the firm cannot be justified in considering that there was no breach of the non-competition clause.

To reiterate, the Cour de cassation recently confirmed that the employee may claim payment of the compensating indemnity for the non-competition clause on effective departure from the company (*Cass. soc., 21st January 2015, n°13-24.471 : cf. Newsletter March 2015*)

The employer must therefore anticipate and be careful of this.

An employee who is victim of discrimination and moral harassment may receive double compensation (*Cass. soc., 3rd March 2015, n°13-23.521*).

For different types of prejudice there is distinct compensation. In some cases discrimination and moral harassment are intertwined, to the extent that the courts hearing the case on the merits confuse them. In this case, however before the Cour de cassation, this was not so: the damages awarded for discrimination compensate the physical and moral harm arising from the interested party being deprived of part of her functions after returning from maternity leave and not from the harm suffered by this event which arose from the moral harassment which she suffered.

Implementation of measures by the employer to bring to an end a situation of moral harassment does not exclude a breach of the employer's obligation to provide a safe workplace, which breach may justify constituting termination of the employment contract (*Cass. soc., 11th March 2015, n°13-18.603*)

In this case, an employee was the victim of harassment. As soon as the employer was informed of it, corrective measures were immediately implemented.

The Court, in line with its rulings of 26th March 2014 (*n°12-23.634*) and 12th June 2014 (*n°2-29.063*) concluded that the violations were indeed proven, but censured the Court of Appeal's ruling on the basis that it had not sought to discover whether said violations had prevented continuation of the employment contract.

Indemnity for violation of protective status is subject to social contributions (*Cass. 2ème civ., 12th February 2015, n°14-10.886*)

In the absence of detail, under both fiscal (*CGI, art. 80 duodecies)* and labour (*CSS, art. 242-1*) provisions, an indemnity for violation of protective status is subject to tax and social contributions. This was the position of the URSSAF of the Pays de la Loire. It is also the position of the 2nd civil chamber.

The Cour de cassation indeed adopted a restrictive position:

"Given that in allowing this appeal, the ruling upholds that sums paid on termination of an employment contract and being of a remunerative nature are subject to social security contributions, that an indemnity for breach of protective status paid to a dismissed employee sanctions the employer's misunderstanding of the employee's protective status, but does not remedy the harm suffered by the employee by way of termination of their employment contract, and is not therefore in addition to the salary; that the fact that it is not referred to in Art 80 duodecies of the CGI as not constituting taxable income arises from the fact that it does not compensate the prejudicial consequences of termination of the employment contract; that its compensatory nature excludes it from being subject to social contributions;

That in so ruling, the court of appeal violated the aforementioned texts".

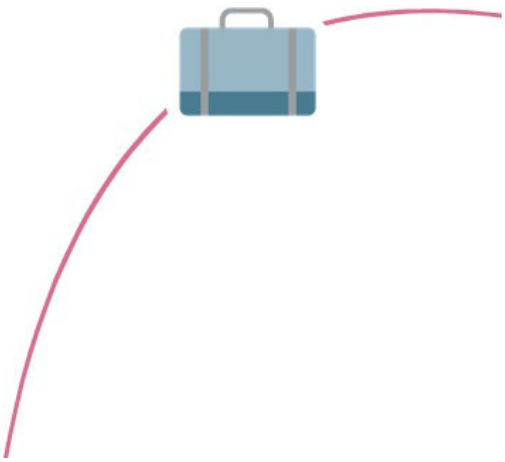
The response is clear and certain.

Suspension as a safeguard measure is possible, even when decided after the preliminary interview (*Cass. soc., 4th March 2015, n°13-23.228*)

In principle, suspension as a safeguard measure is notified at the same time as summons to the preliminary interview.

The Court has, however, made possible suspension as a safeguard measure occurring subsequently to the preliminary interview, without it being automatically qualified as a disciplinary suspension.

Caution: specify that suspension is a safeguard measure!



Flash: Administrative guidance on the implementation of a personal prevention of difficult working conditions account in 2015

(Instr. DGT-DSS n°1 dated 13th March 2015, NOR: ETS1504534J)

The General Labour and Social Security Directorates have initiated a series of instructions intended to accompany implementation of a personal prevention of difficult working conditions account. Instruction DGT-DSS n°1 dated 13th March 2015 gives detail on implementation of the provision arising from Law n°2014-40 dated 20th January 2014 guaranteeing the future and fairness of the pensions system, and its application orders.

The instruction details the arrangements for said account and reviews the obligations of employers in 2015, in which year only four of the ten difficult working conditions factors have to be taken into account. These are night working, work in successive, alternating teams, repetitive work and hyperbaric working conditions. The six other factors will take effect on 1st January 2016, and shall be the subject of another text.

Regarding the field of application of the difficult working conditions account, an individual record of prevention of exposure must be prepared regardless of the size of the firm, or the number of workers so exposed. This account concerns all employees of private firms, staff of public bodies employed under terms of private law, apprentices and persons employed under professional training contracts.

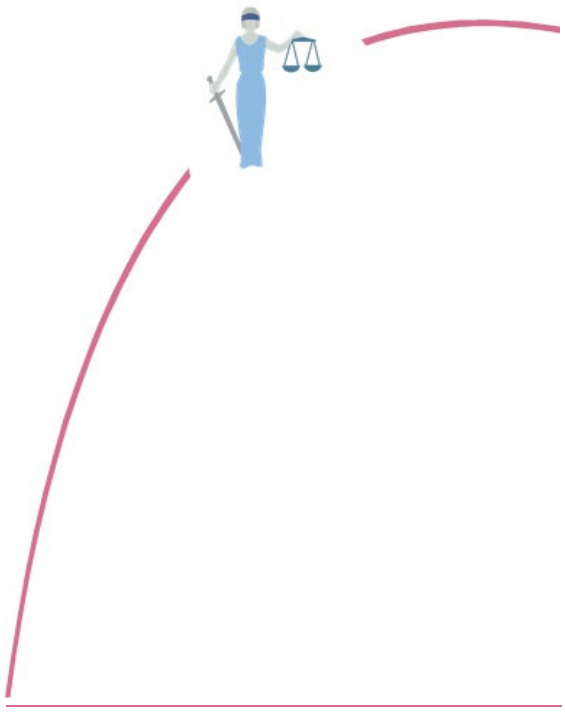
In the absence of legal details, according to this instruction, the employer has to declare exposure to difficult working conditions identified for 2015 in the Annual declaration of Labour data (*DADS*), at the latest by 31st January 2016.

Finally the instruction specifies that employees' periods of absence shall be taken into account "where they clearly call into question exposure over the thresholds" which relate to the post in question, such as long-term sick leave or educational leave.

Said instruction is completed by nine technical sheets regarding:

- opening of the difficult working conditions account, declarations by the employer and payment of contributions;
- field of application of the obligation to establish an individual record of prevention of exposure and of the benefit of the personal difficult working conditions account;
- thresholds of exposure to factors of difficult working conditions applicable in 2015;
- the conditions of preparation and communication of prevention of exposure sheets;
- connections between assessment of individual exposure to difficult working conditions and the overall risk assessment process;
- requirements for reporting exposure;
- reporting and payment terms applicable to contributions relating to the personal difficult working conditions account;
- requirements for reporting contributions in DSN;
- terms of acquisition of difficult working conditions points by employees

This first instruction will shortly be followed by a second, specifying the terms of acquisition and use of pension points by employees in the context of the difficult working conditions account.

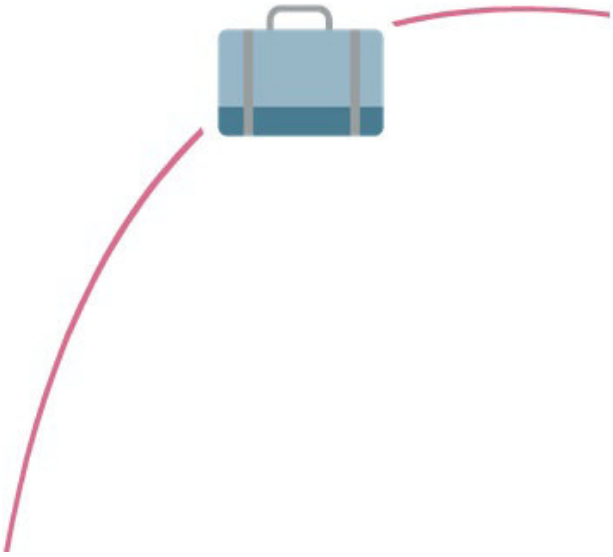


To be continued: Fight Against Discrimination

The discussion group on prevention of discrimination met on 8th April to finalise its draft report for the government.

The report contains 17 proposals, including implementation of a diversity representative in firms of over 300 employees, development of social dialogue within the firm in the light of discrimination risks, definition of a new possibility of collective appeal (in the event of failure of social dialogue) open to any party having standing to act (associations, trade unions, employees, etc.).

On the question of anonymous CV's, the group stated, on the other hand, that a majority was against this becoming obligatory. The discussion group wishes the transparency and traceability of recruitment procedures to be reinforced. In this regard, the group issued the idea of creating an "applicants' register" modelled on the staff register. Finally, the group recommends innovative (video CV) and non-discriminatory recruitment methods



Contacts

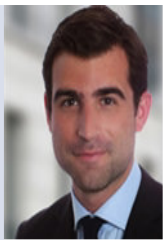
Pour tout renseignement dont vous auriez besoin, nous vous invitons à contacter

Alexandra Stocki
Associée

Tel: +33 1 42 68 67 09
Alexandra.stocki@twobirds.com

Maxime Bailly
Collaborateur

Tel: + 33 1 42 68 67 13
Maxime.bailly@twobirds.com



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