Read this post online

The “rupture conventionnelle” under scrutiny

The *“rupture conventionnelle”* is a contractually negotiated termination of an indefinite term employment agreement. It was created by the Law no. 2008-596 of June 25, 2008, and has been a huge success. In 2009, out of the 230,095 terminations that have been contractually negotiated, 191,309 or 83.14% of them were approved by the French labor administrations.

To provide necessary details and additional information on this type of termination, notably with regard to the minimum dismissal indemnity owed to the employee, the following documents were published:

- A circular dated July 22, 2008 (*Circulaire DGT n° 2008-11* on the examination of the approval request for the contractually negotiated termination of an indefinite term employment agreement),
- A circular dated March 17, 2009 (*Circulaire DGT n° 2009-04* on the contractually negotiated termination of an indefinite term employment agreement), and
- An Instruction DGT 2009-25 dated December 8, 2009.

With the publication of the Instruction DGT no. 2 dated March 23, 2010 on the consequences an economically difficult context may have on this type of termination, we now need to touch base on the application and proper use thereof.

1. The contractually negotiated termination – the common practice:

In practice, companies and employees sometimes have a tendency to forget certain “details” listed below.

Mandatory timeframes

Although this method of termination seems to be satisfactory for both employees and employers, it nonetheless requires the parties to scrupulously comply with legal timeframes.

As such, if an employer is presented with a request that the termination take effect as soon as possible, it must be firm and remind the employee that legal timeframes must be respected (specifically, the retraction period for the parties and the examination period of the approval request by the labor administration).

The validity of this type of termination depends upon it.

The contractually negotiated termination and settlement

The contractually negotiated termination must not be confused with a settlement agreement, even if the company decides to grant the employee an indemnity that is higher than the applicable minimum.

Formalities of this type of termination

A form is available from the labor administration entitled *"Rupture conventionnelle d'un contrat de travail à durée indéterminée et formulaire de demande d'homologation"*, which provides a space (Box 3) entitled *"Convention de rupture"* or "Termination Agreement". While the parties can just fill-in and sign this form, in practice, it is often necessary to complete this form with a written and detailed settlement agreement. This settlement agreement allows both parties to raise and address all the issues that may cause difficulties when the termination becomes effective and notably when the balance of any outstanding amounts owed to the employee is being calculated.

For example, it is vital to list all the elements of remuneration that will be paid to the employee: number of paid vacation days, number of compensatory or RTT days, the bonuses – in whole or in part – that will be paid, the remuneration to which the employee is not eligible, if applicable, the return and date of return of company property, etc.

Please be reminded that there is no notice period with a contractually negotiated termination.

The parties mutually agree upon the legal termination date of the employment agreement and, for the period between the signature of the termination agreement and its effective date, the parties must, when necessary, contractually manage the employee's situation. Legally, the employment relationship should continue normally during this time.

In practice, one or both parties sometimes assimilate this intermediate period as a notice period, and therefore, the employer often releases the employee from working it. If the parties wish to implement certain specific terms and conditions concerning the performance of the employment agreement (unpaid leave, special paid leave, benefit of the Right to Individual Training fund), they must include them in this settlement agreement to avoid any misunderstanding and difficulty when the termination becomes effective.

But companies should be warned against the following: do not release the employee from working the period between the signature of the termination agreement and the **contemplated** legal termination date of the employment agreement.

The reason is that, contrary to the cases of dismissal or resignation where the end date of the employment relationship is certain, this is not the case for the contractually negotiated termination.

It is important for both parties to take into account the fact that the labor administration has a timeframe, difficult to anticipate, in which to approve this type of termination. Neither party should therefore count on a specific termination date or on the approval thereof. Based on the figures set forth above, 16.86% of the termination agreements were not approved last year. Often, companies and employees too quickly assume that the signature of these agreements means the end of the employment relationship. Yet, these termination agreements can only become effective if the labor administration approves them.

2. The refusal to approve the termination for economic reasons:

The aforementioned Instruction DGT no. 2 concerns the case of refusal to approve the contractually negotiated termination based on economic factors.

Although the Instruction recalls that *"the contractually negotiated termination cannot be used to circumvent the rules for collective dismissals based on economic reasons"*, it explicitly mentions the principle that such a termination may be used even if the company is facing economic difficulties and is proceeding with economic dismissals. It also clearly states that the labor administration does not need to analyze the reason behind this type of termination, with a few exceptions addressed below.

Specifically, the labor administration must verify whether there is a possibility that the procedures for economic dismissals are being circumvented. The following examples can hint to such circumvention:

- massive use of the contractually negotiated termination,
- in a company or a group faced with an "economically difficult situation" likely to lead to the preparation of an Employment Preservation Plan (*Plan de Sauvegarde de l'Emploi* or PSE).

The circular specifies that the following may constitute circumvention: the frequency of the approval requests and/or the fact that, when the number of the contractually negotiated terminations and the number of economic dismissals are added, applicable thresholds requiring a PSE are exceeded.

Please be reminded that a PSE must be implemented if the following thresholds of economic dismissals are met:

- 10 economic dismissals within a period of 30 days;
- 10 economic dismissals carried out during a period of 3 months preceding any new dismissal;
- 18 economic dismissals during the same calendar year.

The labor administration will take into account any useful document and information in its verification process (requests for partial unemployment, minutes from the Works Council meetings, etc.).

With regard to companies or groups that are located in different regions and therefore subject to different

local labor administrations, the concerned administrations should communicate with each other and exchange information.

3. Analysis and comments on Instruction DGT no. 2:

In terms of substance, this Instruction does not provide any new information. In fact, the aforementioned Circular dated March 17, 2009 already stated: *"Finally, one should be particularly careful when using the contractually negotiated termination in view of circumventing the protections provided by economic and collective dismissals. An economically difficult situation for a company, even a PSE limited to other jobs/positions, alone, is not sufficient to preclude the use of this termination method. However, the coordinated and organized nature of these terminations may constitute an additional piece of evidence."*

Further, local labor administrations have already been refusing to approve contractually negotiated terminations that gave the appearance of a possible circumvention – without awaiting the publication of this recent Instruction.

Although the freedom to contract between parties wishing to terminate an employment agreement in this manner is not being challenged, this liberty must not deprive the concerned employee of the specific protections of an economic dismissal. Additionally, this freedom cannot deprive other employees of these protections, especially those provided under a PSE. It is tempting for a company to "distribute" job elimination between the contractually negotiated termination method and an economic dismissal procedure to keep the number of such dismissals below 10 and thereby circumvent the obligation to implement a PSE.

Like any dispute relating to a contractually negotiated termination, only the French labor judge has jurisdiction with regard to a claim concerning the refusal to approve. This means that any other recourse before other courts and administrative bodies is prohibited, as set forth in Article L.1237-14 of the French Labor Code.

However, the French labor courts are not competent to actually approve the contractually negotiated termination. As such, if litigation arises concerning the refusal, and the labor court decides to nullify the refusal, the matter goes back to the labor administration where it will be reconsidered by taking into account this court decision, which is not subject to appeal (*Circulaire DGT n°2009-04* dated March 17, 2009). Although certain labor courts have incorrectly given themselves jurisdiction on this matter, asking such courts to approve the termination is not advisable because the only way to guarantee the validity of this type of termination, and therefore to guarantee that the termination indemnity will be free of any tax or social charges, would be to obtain administrative, not court, approval.

day-to-day operations, specific transactions and strategic decisions.

Our clients, whatever their size, nationality and business sector, benefit from customized services that are tailored to their specific needs.

For more information, please visit us at www.soulier-avocats.com.