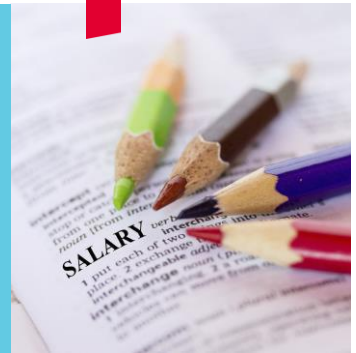


TERMINATION OF THE EMPLOYMENT CONTRACT



Both the employer and the employee may terminate the employment contract provided they comply with the rules stated in articles L.124-1 to L.125-13 of the Labour code.

These rules differ depending on the case : termination with notice of an open-term contract by the employer (I), resignation by the employee (II), termination with immediate effect for gross misconduct (III), termination by mutual agreement (IV) and termination of a fixed-term employment contract (V).

Collective bargaining agreements may include provisions that differ from the Labour Code; if needed, the provisions of the applicable collective bargaining agreement should consequently be checked previously.

I. Termination with notice of an open-term employment contract

1. General principle

The open-term employment contract can be terminated at the employer's initiative provided he has real and serious reasons to do so.

These reasons may be linked to the employee's capabilities or behavior or based on the operating needs of the company, establishment or service.

Are real the reasons that present a character of objectivity, which excludes prejudices and personal reasons (for example disagreement); are serious the reasons having a certain degree of gravity or those linked to the employee's capabilities when they result in important difficulties for the employer.

There are three stages to follow in the dismissal procedure:

- a preliminary stage : the preliminary interview in companies employing at least 150 employees,
- the dismissal notification in the forms and delay prescribed by law,
- if so requested by the employee, the enunciation by the employer of the grounds underlying the dismissal.

2. *The dismissal preliminary interview*

- **Summon of the employee**

Any employer with 150 employees or more that contemplates dismissing any employee must, before reaching any decision, interview the employee concerned.

A dismissal notified without observing the procedure of the preliminary interview is irregular for procedural defect. However, the employee is not required to arrange a preliminary interview when terminating with notice an employment contract within the trial period since no grounds need to be given for such termination.

Notice of such interview must be given by registered letter or in writing by hand, duly acknowledged as received. The notice must indicate the purpose of the interview and its date, time and place (i.e. the project to dismiss the employee, but not the reasons why the decision is taken).

A copy of the letter of summon must be sent to the employees' representatives if any or otherwise to the Labour inspection (ITM).

- **The employee's assistance**

The summon letter must inform the employee that he may be assisted during the preliminary interview by an employee of his choice (that is to say a member of the staff of the company or a member of a trade union representative at the national level and represented within the staff delegation of the company).

- **The assistance of the employer or of his representative**

The employer or his representative may be assisted during the preliminary interview by a member of the staff or by a representative of an employers' professional organization, provided he informs the employee in the notice of the preliminary interview.

- **The date of the preliminary interview**

The day of the preliminary interview can be fixed at the earliest on the second business day following the day of the notice.

- **Steps of the preliminary interview**

During the interview, the employer or his representative must give the reasons for the termination, discuss these reasons with the employee and take note of the comments of the person who assists the employee.

- **The notification of the dismissal**

The letter of dismissal with notice period must be sent at the earliest on the day following the preliminary interview and, at the latest, eight days after the interview.

In case the employee duly summoned does not attend the preliminary interview, the dismissal letter can be sent to him at the earliest on the day following the day fixed for the preliminary interview and, at the latest, eight days after this day.

3. *Form of the dismissal*

Notice of the dismissal must be given by the employer to the employee by registered letter or in writing by hand, duly countersigned by the employee as received.

4. Notice period

When the employer terminates the employment contract, notice must be given as follows, according to the length of the employee's service:

- two months for employees whose length of service is less than five years;
- four months for employees whose length of service is between five and less than ten years;
- six months for employees whose length of service is of ten years at least.

The length of service is calculated at the moment of the dismissal notification.

The notice period takes effect on the first day or on the fifteenth day of the month:

- notice given before the fifteenth day of the month takes effect on the fifteenth day,
- notice given after the fourteenth day of the month takes effect on the first day of the following month.

5. The grounds for the dismissal with notice

The employee dismissed may request the employer to provide him with the grounds for his dismissal. The request by the employee must be submitted to the company in the form of a registered letter within one month of the date of the notification of the dismissal.

The employer must state his/her reasons in detail within a further month. The statement must be sent by registered letter. Reasons for dismissal must be supported by demonstrable and explicit facts, the dates of occurrence of the facts, the name of the witnesses, the reference to warnings sent to the employee, the situation of the company, etc. The goal is to allow the employee to challenge the reasons indicated and to allow the judge to appreciate if the grounds for the dismissal are valid.

If the employer fails to give the employee by writing the reason of his dismissal within the delay of one month, the dismissal is considered unfair.

The employee can demonstrate by all means to a court that his dismissal is unfair even though he has not previously requested the employer to give him the grounds for his dismissal.

6. Compensation paid in lieu of notice

The employer who terminates an open-term employment contract without observing the legal notice period must pay to the employee a compensation in lieu of notice. That compensation is equal to the remuneration payable for the period of notice or for the remaining period of notice.

7. Severance payment

In case of termination of an open-term employment contract by the employer for any reason other than gross misconduct, a severance indemnity is due unless the employee has not reached 5 years of service.

However, a severance indemnity is not paid to the employee who fulfills the conditions to be entitled to a normal legal retirement pension.

The seniority is calculated at the end of the notice period even when the employee is released from work during the notice period (see under point I.9).

The rates of severance pay are as follows:

- one month of remuneration for a seniority of at least five years;
- two months of remuneration for a seniority of at least ten years;
- three months of remuneration after a seniority of at least fifteen years;

- six months of remuneration after a seniority of at least twenty years;
- nine months of remuneration after a seniority of at least twenty five years;
- twelve months of remuneration after a seniority of at least thirty years.

Employers who have fewer than twenty employees can opt in the dismissal letter to extend the period of notice instead of paying severance pay. In that case notice is as follows:

- five months for employees with a seniority of at least five years;
- eight months for employees with a seniority of at least ten years;
- nine months for employees with a seniority of at least fifteen years;
- twelve months for employees with a seniority of at least twenty years;
- fifteen months for employees with a seniority of at least twenty-five years;
- eighteen months for employees with a seniority of at least thirty years.

The severance indemnity is calculated on the basis of the gross remuneration effectively paid to the employee during the twelve months immediately preceding the month of the notification of the dismissal. Sickness indemnities as well as the usual bonuses and allowances (e.g. 13th month, collective bargaining agreement allowances) are taken into account in the basis remuneration for the calculation of the severance indemnity. Compensation for overtime, discretionary bonuses and allowances that cover business expenses (e.g. travel and accommodation allowances) are however excluded from the calculation.

The employer must pay the severance pay at the moment when the employee actually quits his work, i.e. at the moment the work release takes effect.

8. *Holiday leave in order to search a new job*

During the notice period, the employee is entitled to holiday leave in order to search a new job within a limit of 6 business days.

The holiday taken is fully paid by the employer provided the employee is registered at the National employment development agency (ADEM) and provided he proves that he effectively searches a new job.

9. *Work release during the notice period*

The employer may release the employee from work during the notice period.

The work release must be expressly mentioned in the dismissal letter or in a subsequent letter given in hand to the employee.

The employer must continue to pay the employee his full remuneration as well as any other benefits that would otherwise have accrued to the employee. The employee exempted from work can start a new job with a new employer during the notice period. If the salary paid by the new employer is inferior to the salary paid by the former employer, the former employer must pay to the employee the difference between the two salaries during the remaining notice period.

II. Resignation by the employee

The employee who intends to terminate his employment contract must notify his resignation by registered letter or in writing by hand, duly acknowledged as received.

The notice period to be respected by the employee in case of resignation depends of his seniority and is equal to half the notice period in case of termination by the employer, i.e.:

- one month if the employee's seniority is less than five years;

- two months if the employee's seniority is comprised between five and less than ten years;
- three months if the employee's seniority is ten years or more.

The seniority is calculated at the date where the resignation is notified to the employer.

The starting date of the notice period is the same as for dismissal (see point I.4).

If the employee resigns without respecting the notice period, he will have to pay to the employer an indemnity equal to the remuneration corresponding to the notice period or, where applicable, to the remaining part of the notice period.

The employee can ask the employer to be exempted from work during the notice period. However, the employer is free to accept or reject the request. The release from work requested by the employee and accepted by the employer is considered as a termination by mutual agreement.

III. Termination with immediate effect for gross misconduct

1. General principle

The employment contract can be terminated without notice (for open-term contracts) or before its term (for fixed-term contracts) in case of gross misconduct of the employee.

The employee dismissed for gross misconduct is not entitled to a severance payment.

2. Definition of the gross misconduct

The Labour code considers as being a gross misconduct any conduct that immediately and definitively makes it impossible to continue the working relationship. The impossibility to execute the working relationship is not material but moral and results from the loss of confidence from the employer in the employee. Case law considers that a unique and occasional fact of disobedience cannot be the reason for an immediate dismissal for gross misconduct.

The law considers that in order to appreciate the facts and faults resulting from the professional behavior of the employee, the level of study, the professional experience, his social situation and any elements that may have an effect on the responsibility of the employee, as well as the consequences of the dismissal, must be taken into consideration.

3. Case law examples

- Unjustified absence from the work place

In case of temporary absence of one or two days, case law seems to make the qualification of gross misconduct dependent on whether the absence has triggered issues in the operation of the enterprise.

The voluntary and conscious breach by the employee of his obligations towards the employer in case of sickness (information of the employer, submission of initial medical certificate and of additional medical certificates in case of extended sickness leave) constitutes a gross misconduct justifying an immediate dismissal.

- Insubordination

In order to be considered as a gross misconduct justifying an immediate dismissal, the insubordination must be persistent, systematic and repeated in order to avoid that the dismissal is due to an impulsive reaction of the employer upset by a single misconduct of his employee.

Insults and threats by an employee to his employer are considered as gross misconduct if they express a clear intention of insubordination that affects the necessary employer's authority to his enterprise's operations and that renders impossible the maintaining of the employee's employment contract.

The fact for an employee to go on holiday leave without having received the preliminary approval of his employer constitutes an act of insubordination having a character of gravity sufficient to justify an immediate dismissal for gross misconduct.

- Participation to a strike

The participation of an employee to a strike within the legal conditions, i.e. after the end of the procedures at the National conciliation office (*Office National de Conciliation*), does not constitute a gross misconduct that may lead to an immediate dismissal.

4. Form of the immediate termination for gross misconduct

In companies occupying at least 150 employees, the procedure of preliminary interview is also applicable to the dismissal for gross misconduct.

The notification of the immediate termination for gross misconduct must be done by registered letter or in writing by hand, duly acknowledged as received.

5. Grounds for dismissal

The dismissal letter must mention precisely the facts imputed to the employee and the reasons why they are considered as gross misconduct. If the grounds are not stated in writing the dismissal is considered as unfair.

Case law considers that the grounds must be stated precisely in order to allow the judge to appreciate their seriousness and to check if the grounds brought to the court are the same as the ones communicated to the employee. If the reasons of the dismissal are not stated with sufficient precision, case law considers that the dismissal is unfair. This aims at avoiding that the employer gives reasons that are different than those having really led to the dismissal.

6. Time limit for dismissal

The dismissal with immediate effect shall take place within one month as from the day on which employer is aware of the facts that constitute serious reasons to such dismissal. This time limit does not apply when criminal proceedings have begun within one month, nor does it apply when earlier misconduct is invoked in the light of a further incident.

7. Gardening leave (*mise à pied conservatoire*)

The employer can place the employee on gardening leave until the day of the notification of the dismissal. The salary and benefits to which the employee is entitled shall continue to be granted in full during the gardening leave. In such case, and when necessary after a preliminary interview, the dismissal for gross misconduct must be notified at the earliest one day after the start of the gardening leave and at the latest eight days after this date.

8. Termination for gross misconduct at the employee's initiative

Employees can resign their employment contract with immediate effect (i.e. without notice) in case of gross misconduct of the employer. The serious reasons that may justify a resignation with immediate

effect cannot be invoked after a period of one month as of the day on which the employee is aware of them.

The resignation with immediate effect must be notified under the same forms as the resignation with notice (see point II).

The employee is not obliged to indicate the grounds of his resignation with immediate effect in the resignation letter. However, he must be able to bring the proof of the facts that he invokes in front of a court.

IV. Termination by mutual agreement

Both open-term and fixed-term employment contracts may be terminated by mutual agreement between the employer and the employee without having to respect the legal notice period.

The mutual agreement must be recorded in writing and in two copies signed by the employer and the employee. If these conditions are not fulfilled, the termination with mutual consent is considered null and void.

V. Termination of the fixed-term employment contract

Fixed-term employment contracts may only be terminated in the following conditions:

- termination with immediate effect for gross misconduct;
- termination by mutual agreement.

The termination with notice as prescribed in the Labour code for open-term employment contracts is not applicable to fixed-term employment contracts.

The fixed-term employment contract ceases automatically at the contractual due date.

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