French labour law : Mutual agreed termination (rupture conventionnelle): the 2018’ most important decisions of the French Supreme Court

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The Mutual agreed termination is a subject of a much framed procedure which permits to sever an unlimited term contract by a common agreement between an employer and its employee.

The success of the Mutual agreed termination is explained by the possibility for the employee to receive unemployment benefits (assurance chômage) at the termination of the contract.

According to a DARES study, published in January 2018, the success of the mutual agreed termination isn’t denial; in 2018, 437.000 mutual agreed termination has been approved. They concern about 14% of unlimited term contract termination (CDI).

Also, the DARES notes that the employees with the highest remunerations get more easily benefits more favourable than the legal minimum.

It is important to precise that the amount of the mutual agreed termination can not be inferior to the amount of the legal benefit, which is provided by article L.1234-9 of the French labour code (¼ of salary per year of seniority for the 10th year, then ¾ of salary per year of seniority beyond 10 years).

50% of the mutual agreed termination which has been signed would actually be dissembled unfair dismissal.

In this context, employees have to be wary when they are negotiating a mutual agreed termination, knowing that they are in a situation of inequality toward their employers, because of the subordination link (lien de subordination) inherent in the employment contract (about this point: "Salariés, cadres, cadres dirigeants : combien négocier sa rupture conventionnelle après les ordonnances Macron ?" - https://www.village-justice.com/articles/salaries-cadres-cadres-dirigeants-combien-negocier-rupture-conventionnelle,27827.html).

With several decisions delivered in 2018, the “Cour de cassation” has confirmed and precised the strict procedural of mutual agreed termination, which protects the consent of the employees.

1) Annulation of the mutual agreed termination and lack of consent

1.1) The alteration of mental faculties of the employee who signed a mutual agreed termination defects the employee’s consent (Cass, soc, 16 mai 2018 n°16-25852)

When an employee signs an agreement, the alteration of his mental faculties caused by a brain tumour is likely to defect the consent and can permit to quash the mutual agreed termination (rupture conventionnelle), which produces the effects of a dismissal without just cause. (Cass, soc, 16 mai 2018, n°16-25852).

The company had changed the decision of the Paris Court of appeal, which had granted the employee’s requests, arguing that the medical certificates were established after the signature of the mutual agreed termination.

The taking of one’s case to the French supreme court of appeal (Cour de cassation) had been rejected, considering “that having noted, by a sovereign assessment, the existence of an alteration of the employee's mental faculties, at the time of signing the mutual agreed termination (rupture conventionnelle), likely to vitiate his consent, the Court of Appeal rightly decided that the termination was analysed as a dismissal without real and serious cause”.

In this respect, the Supreme Court has considerably restricted the possibilities of the nullity of the mutual agreed termination.

In this respect, the Court of Cassation has considerably restricted the opening of applications for the nullity of the mutual agreed termination to cases of fraud, lack of consent or non-respect of the procedure.

In this way, in this decision, the French Supreme Court strictly appreciates the employee capacity of giving a light consent, without consideration of the professional circumstances surrounding the conclusion of the agreement, and in particular the fact that the work doctor (médecin du travail) had declared his ability shortly before the agreement was signed (which the employer claimed).

Indeed, the conflicting or equivocal context surrounding the signing of the agreement is insufficient to characterize in itself the lack of consent that opens the possibility of asking the nullity of the agreement.

For example, a mutual agreed termination can be validly concluded throughout a suspension of an employment contract as a result of a work accident or an occupational disease. (Cass, soc, 30 septembre 2014, n°13-16297).

1.2) A moral harassment affects the mutual agreed termination only if the harassment had vitiated the employee’s consent at the mutual agreed termination

In the same way, even if there is a harassment verified at the signing of the mutual agreed termination, the employee have to prove its consent had been vitiated.

In this case, to obtain the nullity of the mutual agreed termination, the first instance judges, were based on article L.1152-3 of the French labour code, which states breach occurred in ignorance of the protective measures on harassment is null. This is provided when the moral harassment was clearly proved by the employee.

The French Supreme Court states that the existence of facts of moral harassment, in the absence of lack of consent, doesn't affect the validity of the mutual agreed termination, in accordance with article L.1237-11 of the French labour code.

To obtain the nullity of the mutual agreed termination, the employee have to prove the harassment has resulted to the lack of its consent.

1.3) Nullity of the mutual agreed termination if the employee doesn't have one copy if the convention (Cass, soc, 7 mars 2018, n°17-10963).

Furthermore, the French Supreme Court reminded if a copy of the convention is not given to the employee, he can request for the nullity of such convention.

In this case, the Court of appeal had nonsuited the employee of his request, précising he had perceived the amount resulting from the agreement.

The Supreme Court quashed this decision on the grounds that: "the Court of Appeal has nonsuited the employee of her request of nullity of the convention, without respond to her conclusions. Indeed, in her conclusions, the employee had invoked the non-delivery of a copy of the convention, which was likely to involve the nullity of the convention". (Cass, soc, 7 mars 2018, n°17-10.963).

1.4) The mutual agreed termination is null and void if it is addressed to the « DIRECCTE » before the withdrawal period expiration (Cass, soc, 6 décembre 2017, n°16-16851).

In the same way, if the request for an official approval is sent before the withdrawal period, the employee can request for the nullity.

Indeed, in this case, the employee requested the nullity of the convention because the request of the convention had been sent to the "DIRECCTE" before the withdrawal period ending.

The company has opposed to this request arguing texts didn't provide expressly the nullity when the withdrawal period weren't respected and invoked only the lack of consent can provoke the convention nullity.

Without surprise, the French Supreme Court had judged that: "the Court of appeal, which has noted the request of certification of the mutual agreed termination had been addressed to the "DIRECCTE" before the withdrawal period ending, has legally justified her decision" (Cass, soc, 6 décembre 2017, n°16-16851).

In effect, the control of the “DIRECCTE” is limited to verify the dates of the procedure and the amount of the specific benefit. Also, the respect of the withdrawal period is crucial, because the period is the only procedural point which permits to presume the employee consent was free and informed.

1.5) The nullity of the mutual agreed termination has the effects of an unfair dismissal (Cass, soc, 30 mai 2018, n°16-15273).

Finally, as soon as the convention is cancelled, the mutual agreed termination agreement has the effects of a dismissal without just cause: payment of compensation in lieu of notice, payment of legal or collective severance pay and payment of a dismissal without just cause benefit by the employer.

In a decision of may 30,2018, the Supreme Court added that the nullity of the mutual agreed termination agreement entailed an obligation for the employee to return the sums received pursuant to the agreement.

2) About the minimum amount of the specific mutual agreed termination benefit : the case of professional journalists

Article L1237-13 of the Labour Code provides that the specific mutual agreed termination benefit may not be less than the amount of the legal severance indemnity calculated in accordance with article L1234-9 of the Labour Code, namely ¼ of months' salary per year of seniority for the first 10 and 1/3 of months' salary per year for years over 10.

Some employees, in accordance with the industry-wide agreement or legal dispositions, receive a severance pay more favourable rather than benefit provided by the labour Code.

Indeed**,** journalists receive a severance pay more favourable, provided by the article L7112-3 of the labour code (1 mouth of wage per year of seniority for the 15 first years).

Also, a journalist who had concluded a mutual agreed termination requested that the amount of his benefit be calculated in accordance with the dispositions of article L7112-3 of the labour code, which are more favourable rather than those of the article L1234-9.

If the Court of Appeal had ruled in his favour, the Supreme Court of Appeal overturned the decision in 2015, arguing that Article L1237-13 determining the amount of the specific termination benefit referred only to Article L1234-9 of the Labour Code, which excludes that the amount of the mutual agreed termination benefit be calculated on the basis of Article L7112-3 of the Labour Code applicable to journalists.

Then, a question has arisen, about the articulation between the specific severance pay provided the Article L. 1237-13 of the Labour Code and the more favourable severance pay provided by an industry-wide agreement.

As soon as the case was referred to the 9th Chamber of Pole 6 of the Paris Court of Appeal after cassation, this time, the employee requested the application of the conventional severance pay of journalists, the amount is in reality identical to that of Article L7112-3 of the Labour Code.

The amendment No.4 of 18 may 2009 made obligatory the payment of a conventional mutual agreed termination benefit no less than equally to the

It should be noted that amendment No. 4 of 18 May 2009 to the National Interprofessional Agreement of 11 January 2008, extended by decree of 26th November 2009, made it mandatory to pay a termination benefit equal to the monthly conventional severance indemnity for agreements concluded as from 28 November 2009. This agreement applies to all employers in sectors of activity covered by an industry-wide agreement signed by an employer federation that is a member of the MEDEF, the UPA or the CGPME.

In this case, since the journalist belonged to the audio-visual sector, the company did not fall within the scope of this agreement, the French Supreme Court ruled that the minimum amount of the specific mutual agreed termination benefit should therefore be that of the legal severance pay provided by the Article L. 1234-9 of the Labour Code. (Cass, soc, 27 June 2018, n°17-15948).

3) The agreement termination signed after the refusal of approval of a first agreement opens a new withdrawal period of fifteen days (Cass, soc, 13 juin 2018, n°16-24830)

Once the two parties have signed, each of them have a period of fifteen calendar days to exercise a right of withdrawal. It is possible to exercise this right by sending a letter by any means, which testifies of its reception date by the other side (Article L1237-13 of the French labour code).

In this case, another mutual agreed termination had been signed as soon as the administration had refused to certify the first one, because the amount of the specific benefit were inferior to the legal minimum.

Also, parties had signed a second convention which had took the same terms of the first one, except for the amount of the specific benefit, but without modify the expiration date of the withdrawal period.

The Supreme Court (Cour de cassation) approved the Court of appeal decision. Indeed, she had judged the employee had to benefit of a new withdrawal period and so, not having disposed of it, the second convention was null.

Effectively, it should be noted that the mutual agreed termination mechanism has been designed in such a way that the withdrawal period is an essential guarantee of the parties' consent. That’s why the Supreme Court of appeal appreciates its respect strictly.

Also, when the official approval is refused, it is more prudent to delay the mutual agreed termination and to repeat the procedure at its beginning.

Furthermore, when the withdrawal period is expired, the administration has fifteen days from the request reception to reach a decision. At the end of this period, the employee has twelve months to contest the mutual agreed termination and ask for its cancellation (Article L1237-14 of the labour code).

Regularly, the « DIRECCTE » does not declare explicitly. Therefore, it is deemed to have reach an implicit decision of certification of the mutual agreed termination at the end of the fifteen day period.

In such a configuration, if the employee does not necessary know the date on which the “DIRECCTE” received such certification request (it is often transmitted by the employer), he cannot know precisely the termination date of his right to contest.

In this case, the DIRECCTE had made an implicit certification decision for the convention (on November 16th, 2010).

On November 17th, 2011, the employee has taken a legal action in front of “le conseil des prud’hommes” to request the cancellation of the convention. As the company opposed the prescription period, so the employee defends in arguing this period was not enforceable against him, because he had not been informed of the reception date of the certification request by the “DIRECCTE”.

The Supreme Court (Cour de cassation) has confirmed the Court of appeal decision: the appeal made by employee has been rejected. The request was judged barred by the French Supreme Court because it was introduced after the expiration date ends. The Supreme Court said “the Court of Appeal, which noted that the employee and the employer had, on October 8th 2010, signed a mutual agreed termination, and it was not disputed that the convention had been performed, pointed out that the employee had the time necessary to act before the expiry of the period provided for in Article L. 1237-14 of the Labour Code; the Court of appeal accurately deduced from this that its request for cancellation of the mutual agreed termination, submitted after that period, was barred” (Cass, soc, 6 décembre 2017, n°16-10220).

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