SHORTER ARTICLES, COMMENTS AND NOTES

Termination of French Labor Contracts

Introduction

The chief ends of French labor law are the economic and physical protection of the salaried employee. French law elevates this protection to the plateau of *ordre public:* it can neither be waived by mutual agreement, nor relinquished by an attempt to apply a less stringent law of some other country.[1] The basic rule could thus be expressed: *If an employee works in France, then regardless of his employer's nationality or his own and regardless of the law specified as applicable in his contract, he has access to a French labor court and to the protection of French labor law.*[2] A special set of such courts benched by elected laymen (half from the employers' side, half from the employees') enjoys a virtual monopoly of the trial of employer-employee disputes.[3] Sympathetically disposed towards employees, these courts vigorously implement the law's design. By American standards the cost of legal counsel to the employee is modest;[4] the economic rewards of successful litigation can be great, and the employee sues with the knowledge that the courts

[1]CODE CIVIL [C. CIV.] art. 3, al. 1 (Fr.); DERRUPPÉ, DROIT INTERNATIONAL PRIVÉ 89-90, (3d ed. Dalloz 1973). LEREBOURS-PIGEONNIÈRE & LOUSSOUARN, DROIT INTERNATIONAL PRIVÉ § 320 (Dalloz 1970). *See also* Simon-Depitra, *Droit du travail et conflits de lois,* 47 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [R.C.D.I.P.] 285, 296 (1958); Battifol, 2 DROIT INTERNATIONAL PRIVÉ § 576 (1971). The limited exceptions apply only where a change in the applicable law favors the employee.

[2]A management-level employee or *cadre* who sues his employer has the choice of a labor court or a civil court benched by a professional magistrate. CODE DE TRAVAILLE [C. TRAV.] art. L. 517-1. *See* LEFÈBVRE, MEMENTO SOCIAL § 826(b) (1979) [hereafter cited as LEFÈBVRE]. Article 14 of the *Code civil* must also be kept in mind as it confers upon a French national the right to sue in a French court regardless of the defendant's domicile or nationality, the place where a contract is to be performed, or the inconvenience of the forum. Moreover, the French courts are reluctant to conclude that a French national has waived this right, although a waiver is possible. *See* Carbonneau, *The French Exequatur Proceeding: The Exorbitant Jurisdictional Rules of Articles 14 and 15 (Code civil) as Obstacles to the Enforcement of Foreign Judgements in France,* 2 HASTINGS INT'L & COMP. L. REV. 307 (1979).

[3]C. TRAV. art. L. 511-1.

[4]French counsel may take on an employee's case for a fee varying anywhere from as little as 300 FF (approximately U.S. $70) to 2000 FF (approximately U.S. $469). Costs may exceed this

will listen attentively to his cause. Taken together these factors make employee-employer litigation a major field of legal practice in France.

I. Types of Contracts

French labor law segregates all employment agreements into two types: contracts of (1) definite and (2) indefinite duration. The indefinite duration contract is by far the most prevalent,[5] and most of the regulations apply to it. If employment is divided into three stages—hiring, working, and firing—it is the first stage that is the least regulated. Although the employer can freely choose which type of contract he wishes to use, the establishment of a definite duration agreement was until recently a hazardous venture for any employer. The Labor Law Code said little concerning such contracts. Counsel who turned to the case law to seek its contours soon discovered that the courts looked with disfavor upon this type of employment agreement. They restricted its application, did not feel bound by the language of the contract, and generally made onerous the task of judicial prophesy. With the enactment of the Law of January 3, 1979, concerning definite duration contracts, the French legislature greatly reduced the hazards.

Because of the limited use of the definite duration contracts, I shall only mention them briefly. The bulk of litigation concerns indefinite duration agreements and the firing stage. I shall therefore suggest some of the more important regulatory mechanisms applicable to the dismissal process when an indefinite duration contract is used.

A. *Contracts of Indefinite Duration*

The Termination Process

By far the most important regulatory mechanism protecting the salaried employee in France is the restriction on an employer's right to dismiss an employee whose trial period has ended. The trial period itself will normally range from two weeks to three months depending on the importance of the job. Its duration is limited by custom, collective bargaining agreements, and the employee's contract but will be invalidated if it exceeds the "customary" length.[6] During the trial period, either party is free to terminate the employment without cause and without payment of any kind of indemnity. Once that period has ended the balance swings heavily in favor of the employee.

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slightly in Paris. Moreover, the employee may get the benefit of free legal advice from counsel retained by his union to assist him in deciding whether to sue.

[5]The Minister of Labor has stated that definite duration contracts affect only 10 percent of the French labor force. Nat. Assem. Session set Dec. 5, 1978, Débats Parlementaires. [1978] Journal Officiel de la République Francaise [J.O.] 8839 (Fr). A report submitted to the National Assembly states that only 1.4 percent of permanently employed persons have a definite duration contract and that about 60 percent of all definite duration contracts are for a period of under six months. Assem. Nat. Rapport No. 744, annex to Session of Nov. 30, 1978, at 5-6.

[6]Lefebvre, *supra* note 2, §§ 921, 924 (1979).

Thereafter, the relation can end in one of two ways: the employee's voluntary resignation, or his dismissal by the employer. The determination of whether the end came about through resignation or dismissal turns upon which party took the initiative,[7] but the law will not presume a resignation.[8] French law requires that there be a clear and definite manifestation by the employee of his intention to end the employment, and a statement of resignation made impetuously will not suffice.[9]

If the employee wishes to resign, he need give no reason for his action. If, on the other hand, the employer wishes to dismiss him, then the employer must fulfill both procedural and substantive requirements imposed by the Law of July 13, 1973.[10] The most significant of these is the requirement that the employer possess a genuine and serious cause *(cause réelle et sérieuse)* for the dismissal based on something the employee did or failed to do.[11] Substantial case law has evolved around each word of the phrase.[12] The fact that the employer has a genuine cause is insufficient. In order to justify a dismissal it must also be serious. Moreover, even though the employer has adequate cause for dismissal, if he does not invoke it in what the court determines to be a timely fashion, he will be deemed to have waived the cause. A substantial portion of French labor litigation involves a dispute between the parties as to whether the requisite cause existed. Given the design of the law and the disposition of the courts, the employer is hard put to prevail unless he has carefully built and documented his factual record prior to the actual dismissal.

In addition to the above substantive safeguard the employee benefits from procedural guarantees. The extent of these guarantees varies according to the average number of employees the employer has, with ten and fifty being major cut-off points. Increased procedural guarantees exist at each level. The tenure of the dismissed employee is another critical factor with one year and two years being the principal divisions,[13] again with increased rights as tenure goes up. It should be recalled, though, that the basic protection of no dismissal without genuine and serious cause applies to all employees whose trial period has ended regardless of their tenure and regardless of the size of the employer's operation.

The tenure rules are of particular importance to multinational employers because the statute states that modification of the employer's legal status through sale, merger, or otherwise will not affect its employment contracts.[14] From this statutory statement the courts have evolved a doctrine of economic

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[7]*Id.* § 956.

[8]Judgment of June 13, 1975, Cour d'appel, Limoges, [1976] D.S. Jur. 308.

[9]*Id. See also* LEFÈBVRE, *supra* note 2, § 959.

[10]Law No. 73-680 of July 13, 1973, [1973] J.O. (July 18, 1973) (incorporated into the Labor Law Code and cited hereafter by code section).

[11]C. TRAV. arts. L. 122-14-2, 122-14-3.

[12]The case law has been recently organized and cited extensively in PELISSIER, LE NOUVEAU DROIT DU LICENCIEMENT (1977).

[13]C. TRAV. art. L. 122-14-6.

[14]C. TRAV. art. L. 122-12.

continuity so that when an employee moves from one company to another within the same "group" of companies each move does not sever his tenure. The court looks rather to his tenure with the economic unit.[15] Some collective bargaining agreements specifically set forth the same rule for management level employees.[16]

An additional reason makes the tenure rules of significance to multinational employers. An employee with one year of tenure has the statutory right upon dismissal to request his employer by registered letter return receipt requested to state the genuine and serious cause that formed the basis of his dismissal.[17] Thereafter the employer must reply within ten days by a similar letter in which he delineates the cause.[18] The French Supreme Court has added to this a judicial gloss of major significance. In several cases it has enunciated the rule that the employer's failure to reply within the required delay raises an irrebuttable presumption that no cause existed thereby making the dismissal unlawful.[19]

If inadequate cause is deemed to exist because of the above presumption, the court will normally award minimum damages equal to six months' salary. This does not include other indemnities to which the employee will have a right. If the employee has two years' tenure, six months' salary is a statutorily compelled minimum damages award.[20] If the local manager of the French subsidiary, upon receiving such a registered letter from a dismissed employee, requests advice by mail from someone in the parent office in the United States, it is highly improbable that it will be able to send its reply within the required time limit. The ten-day delay is simply too short for transatlantic mail. If the home office is to be consulted, it must be done by

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[15]Société Unipa v. Cadoret, Judgment of July 1, 1965, Cass. civ. soc.; Société Paul Gillard v. Chapelet, Judgment of May 23, 1966, Cass. civ. soc; *See also* Lyon-Caen, *Observations sur le licenciement dans les groupes internationaux de sociétés,* 63 REVUE DE DROIT INTERNATIONAL 439 (1974); Despax, *Groupe de sociétés et contrat de travail,* DROIT SOCIAL No. 12 (Dec. 1961). *See also* C. TRAV. art. L. 122-14-8. That statutory section would appear to apply only where the parent company is French, but the case law, the scholarly writing, and common sense all tend to indicate that the same rule is also applicable to a United States parent with a French subsidiary. In other words, an employee who has worked for a United States parent company in New York for three years and comes to France where he is dismissed after six months might well be deemed to have over two years tenure because of the "continuity of the enterprise" doctrine and be entitled to the considerable protection that he thereby acquires under French law. The author has been able to find no reported case on point, but is presently making this contention in litigation under way in the French courts. Dawson v. SNEF Electromécanique and General Electric Technical Services Company, Conseil de Prud'hommes d'Aix-en-Provence (Sept. 1979).

[16]*See* Convention Collective de la Métallurgie art. 10 (Metalworkers agreement).

[17]C. TRAV. arts. L. 122-14-2, R. 122-3.

[18]*Id.*

[19]Janousek v. S.A. des Ets. Georges et Cie., Judgment of Oct. 26, 1976, Cass. civ. soc., [1976] Bulletin de la Cour de Cassation 427; Société Siteel v. Lamaire, Judgment of June 10, 1979, Cass. civ. soc., [1979] Bulletin de Documentation Pratique de Securité Sociale et de Législation du Travail [S.S. L.T.] 331; Eralu v. Wheeler, Judgment of May 3, 1979, Cass. civ. soc., [1979] S.S.L.T. 478.

[20]C. TRAV. arts. L. 122-14-4, L. 122-14-6.

telex or phone. Counsel summoned to advise an employer who has failed to respond to such a letter within the ten-day period can only try to show that the employee lacked the necessary tenure to benefit from the statute (less than one year) or try to minimize damages. The conclusive presumption raised by the French Supreme Court will preclude him from prevailing on the merits of the cause of dismissal.

Other procedural rules benefit certain protected categories of employees, such as pregnant women who normally cannot be dismissed under any circumstances,[21] women who have had a child born within the prior twelve weeks,[22] employee delegates *(délégués du personnel),*[23] members of the *comité d'entreprises,*[24] union delegates,[25] and a few other limited categories. Other rules become applicable if there has been a dismissal for economic reasons *(motif économique)* within the prior twelve months in which case prior approval of the government Labor Inspector for the Department must be obtained even if there exists a genuine and serious cause.[26]

For employers who have a maximum of ten salaried employees, and for all employers when the employee in question has less than one year of tenure, there is a simplified dismissal procedure.[27] It consists of sending the employee a registered letter return receipt requested advising him of his dismissal. No employee who benefits from the protection of French labor law and whose trial period has terminated can ever be dismissed without at least receiving a registered letter return receipt requested. Of course this rule is inapplicable if the employee resigns; in such an instance, though, counsel for the employer will normally wish to advise his client to obtain such a resignation letter from the employee. In the case of dismissal, in addition to the registered letter, there must also be the requisite cause. If the reason for dismissal is an economic one, such as a drop in sales or a reorganization of the company, there must be prior authorization of the Departmental Labor Inspector.[28]

In the normal case that counsel is apt to encounter, where the employer has more than ten employees and the employee he wishes to dismiss has one year or more of tenure, the procedure in skeleton form is the following: (a) The employer must send a registered letter return receipt requested to the employee stating that he is contemplating dismissing him and fixing a date for a meeting to discuss the contemplated action; (b) At the meeting the employer must tell the employee the reasons for the contemplated decision and listen to the employee's explanations. The employee has the right to be assisted at this

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[21] C. TRAV. art. L. 122-25.

[22] *Id.*

[23] C. TRAV. arts. L. 420-22, L. 520-23, R. 436-1, L. 462-1.

[24] C. TRAV. arts. L. 436-1, L. 436-2, R. 436-1, L. 463-1.

[25] C. TRAV. arts. L. 412-2, L. 436-1, L. 436-2, L. 461-2, L. 461-3.

[26] LEFÈBVRE, *supra* note 2, §§ 2108(3), 2118(b), 909(2). Arrêté interministeriel of Dec. 15, 1977. *See also* Ministry of Labor Circular, January 10, 1978.

[27] *See* LEFÈBVRE, *supra* note 2, § 2108.

[28] *Id.* §§ 2119, § 2135.

meeting by another employee of his choice; (c) The employer must wait for at least one working day to expire after the above meeting and may then send a registered letter return receipt requested to the employee notifying him of the dismissal. The employer need not give his reasons in that letter. However, if the employer wants the employee to stop work upon receipt of the letter, he must explicitly notify him that he need not work during the required prior notice period. The duration of the prior notice period is determined either by reference to the collective bargaining agreement, if there is one, and if not, then by reference to the statute. The statute gives an employee with tenure of more than six months and less than two years the right to one month's prior notice. If his tenure is two years or more, he has the right to two months' notice.[29] Collective bargaining agreements often extend this period for management-level employees.

The outline given thus far of the substantive and procedural requirements for dismissal applies only to an employment relation of the indefinite duration type. At this point the kinds of indemnity payments that may be involved when an indefinite duration employment relation is severed should be considered.

INDEMNITY PAYMENTS

In the event of a resignation the employee would normally receive an indemnity only for the portion of his paid holidays that he has not used as of the date of resignation.[30] In the event of lawful dismissal, that is, one in which a genuine and serious cause does exist and the proper dismissal procedure is followed, the required indemnities will be the following: the unused paid holiday indemnity, the dismissal indemnity, and the prior notice indemnity. Paid annual holiday rights equal two days of paid holiday per month worked for any employee who has worked at least one month.[31] This indemnity might equal a month's salary. The statutory dismissal indemnity represents the minimum indemnity to which every dismissed employee having at least two years tenure is entitled. It consists of one-tenth of the employee's average

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[29]C. TRAV. art. L. 122-6. *See also* LEFÈBVRE, *supra* note 2, § 965.

[30]Employee resignations tend to be rare because unemployment benefits are not awarded to an employee who resigns unless a legitimate motive exists for the resignation, such as illness or a spouse being transferred to another region. LEFÈBVRE, *supra* note 2, §§ 604, 621. As these benefits can vary from approximately 35 percent to 90 percent of the employee's most recent salary and last a full year, the loss discourages resignations unless the employee has found a better job. The loss of tenure rights also discourages resignations as tenure must be started over again with another employer. Even for high level management employees the loss of these rights can be significant.

[31]C. TRAV. arts. L. 223-1, L. 223-2; LEFÈBVRE, *supra* note 2, § 750.

monthly salary multiplied by the number of years of tenure.[32] An employee with ten years' tenure would thus be entitled to one month's salary as a dismissal indemnity.

The prior notice indemnity arises out of the statutorily required minimum notice the employer must give of the dismissal. An employee with two years' tenure, as stated above, has the right to two months' notice. If the employer wishes him to work during that period, no indemnity will be payable at all, but the employee will normally have the right to take off two paid hours per day to look for another job.[33] However, the employer may wish the employee to stop work immediately when he sends out his dismissal notice. In that case, he will then owe a prior notice indemnity to the employee of two months salary. That indemnity must equal the total remuneration the employee would have received if he had worked during the prior notice period.[34]

The indemnities outlined above are occasionally reduced if the cause of the dismissal falls into either of two further gradations of employee error which exceed genuine and serious cause.[35] They are rare and will not be discussed here. More frequently the indemnities are increased either because the employee's individual contract provides for a longer prior notice period or because a collective bargaining agreement exists which may substantially increase the cost of dismissal. A recent case under the collective bargaining agreement for the chemical industry will show how significant the costs can become.

The case involved a middle-level management employee earning an annual salary of 135,000 francs (about U.S. $32,000) or 11,250 francs per month. Although he had fifteen years tenure he was performing his job inadequately and was responsible for significant cost overruns on projects for which he had primary responsibility. Under article 4 of the collective bargaining agreement applicable to the chemical industry, this employee was entitled to three months prior notice of a dismissal. If the employer wished to let the employee go immediately, he would be liable for a prior notice indemnity of 33,750 francs (11,250 × 3). Although the statutory dismissal indemnity is one-tenth of a month's salary per year of tenure, the chemical industry's agreement increases that in article 14 to 40 percent of a month's salary for the first ten years and 60 percent for the next five. His dismissal indemnity under the agreement thus came to 78,750 francs. His unused paid holiday indemnity came to a half month or 5,625 francs. In light of the noncompetition clause in the employee's contract, he was also entitled under article 16 of the collective bargaining agreement to one-third of his monthly salary payable on a monthly basis for the two years during which he would be forbidden to work for a competitor. His indemnity thus amounted to 90,000 francs.

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[32]C. TRAV. arts. L. 122-9, art. R. 122-1; LEFÈBVRE, *supra* note 2, § 2126.

[33]*See* LEFÈBVRE, *supra* note 2, § 974 and cases cited therein.

[34]C. TRAV. art. L. 122-8.

[35]The two further categories are *faute grave* and *faute lourde*. If the employee commits the former, he loses some of his benefits; if he commits the latter, he loses all of them.

Thus without taking into consideration any damages at all the sum reached was 208,125 francs (about U.S. $49,000). Negotiations were entered into with the employee, and a decision was reached to pay a sum that represented damages of six months' salary or 67,500 francs. This is the minimum amount he would have received from a court if it deemed there was insufficient cause to dismiss him.[36] The maximum the employee might have received as damages if he prevailed would probably be about 168,750 francs to which would be added the indemnities already mentioned. In other words, the employer's total exposure in the event of a suit by this particular employee subsequent to a dismissal was probably about 375,000 francs or close to U.S. $90,000. An informal settlement was reached, and the employee was paid about 275,000 francs or almost U.S. $65,000. The employer's motivation to find methods of avoiding such a costly process should be apparent.

Conclusion

The use of definite duration contracts affords only limited relief. While such contracts can be of any duration, they can only be renewed once for a period fixed at the time the contract is entered into and not exceeding the initial duration.[37] They do not offer a long-term solution to the French employer, although they can provide useful short-term benefits, particularly as a means of extending the trial period.

The multinational employer with employees working in France will find no safe haven sheltering it from suit by a disgruntled employee in a French labor court. The mere insertion in a contract that United States law will prevail will certainly not foreclose the French court from entertaining the suit and eventually awarding indemnities to the employee if it finds that the regulations were not respected and that no genuine and serious cause existed.

Given the underlying purposes of French labor law and the disposition of the labor courts, the nearest thing to a "safe haven" is a prudent policy. Establishing a written record well in advance of the termination of the contract substantiating the grounds for dismissal followed by scrupulous attention to the details of the dismissal process are minimum requirements of such a policy.

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[36]C. TRAV. art. L. 122-14-4. This assumes that the employer commits no procedural errors during the dismissal process; if he does, minimum damages would be increased by one month's salary for a total of seven months or, in the case under discussion, 78,750 francs. *Id.* art. L. 122-14-4.

[37]C. TRAV. art. L. 122-1. Two renewals are allowed if the total duration does not exceed one year.