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Breach of contract

Breach of contract is provided by articles L. 1237 to L 1237-16 of the French Labor code ("code du travail") from the legislation n°2008-596 of the 25th of June 2008 on the modernization of labor market.

It allows a breach of a contract of employment by an agreement between the employer and the employee. It is not imposed and gives possibility to reparations.

This agreement is made in a legal framework and in respect of the parties' consent.

Chapter 1. The scope:

A. Possible remedies:

The breach of contract concerns French workers' permanent contracts ("CDI") and French employees working in a foreign company as long as they have signed a French law permanent contract. It is possible to sign it with a protected employee, a lawyer employee, an employee whose working contract is suspended.

B. Forbidden remedies :

The subsequent remedies are forbidden: those of public officers placed in private schools, public officers ("fonctionnaires") under a contractual statute, employees under fixed term contracts (« Contrat à durée déterminée CDD ») and during a trial period.

C. Possibilities of employees benefiting from a specific protection against dismissal:

In the event of an incompetence of professional origin, the employee on sick leave due to a work incident or a professional sickness who after a period of absence takes on his position and is declared twice unfit by a doctor possesses a definite incompetence. The case-law has considered that the protective rules of the employee exclude breach of contract.

This also applies to the employee in the process of being incompetent, first visit only.

The French Court of cassation, on the other hand, has indicated that breach of contract was accepted for a sick employee in a case on the 30th of November 2013.

In 2014, the French Court of cassation decided and declared that except in the case of fraud or defective consent ("vices de consentement") the breach of contract could be concluded in the event of a work accident or professional accident.

In the event of a sick employee declared fit but under conditions, the French Court of cassation considered on the 28th of May 2014 that it is possible to sign a breach of contract except in case of fraud of defective consent ("vices de consentement").

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D. Breach of contract concluded in contentious circumstances:

The principle is the parties' agreement. If a conflict exists and that one of the parties proves that the breach was imposed on him then the breach is void. The importance is to check if there was defect of consent ("vices de consentement").

Chapter 2. Procedure:

A. One or several interviews :

Article L1237-12 of the French labor code ("Code du travail"): breach of contract is subject to one or several interviews with or without representation. There is no obligation of notification to the employee for a formal interview, the problem will be probationary.

It has to be proved that the employee was informed that he could be represented.

Three interviews are necessary: one for negotiations ("pourparlers"), a second one where the breach is genuinely negotiated and a third one to sign the breach of contract. The more there is interviews, the more possible claims for defect of consent ("vices de consentement") are excluded.

The amount of compensation has to be informed as well as the date of breach, the upholding or not of the competition clause. It is possible to negotiate whatever is wanted.

B. Assistance of the parties :

Article L1237-12 of the French labor code: "The parties to a contract agree to a principle of breach of contract during one or several interviews during which the employee can be assisted:

1° Either by a person of his choice belonging to the company's staff, being an employee holder of a trade union mandate ("mandate syndical") or an employee member of a representative institution of staff or any other employee;

2° Either, in the absence of a representative institution of the company's staff, by a councilor of the chosen employee on a list drafted by the administrative authority."

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C. Possibility for an employee to gather information and opinions necessary to his decision:

The parties can agree by mutual consent on the assistance of a lawyer. If the employee decides to be assisted, he can inform his employer and vice versa. There is no formality or time-limit. The employer must be informed during the interviews of the possibility to contact employment services.

D. The lack of time-limit between the interview and the signature of the agreement :

There is no time-limit to respect therefore it is possible to conduct an interview where the parties speak, negotiate and sign the agreement.

Chapter 3. Breach of contract form and demand for official approval ("homologation"):

A. Official form :

A breach of contract has to be completed with the possibility of inserting enclosures with the official form to be sent to the Regional department of companies' competition, consumption, labor and employment (« Direction régionale des entreprises de la concurrence, de la consommation, du travail et de l'emploi DIRECCTE »). This form can also be completed on internet.

B. Signature of the form:

The parties have to personally sign the breach of contract that has to be dated under penalty. An original copy has to be signed by the employee: one for the regional department of companies' competition, consumption, labor and employment (« DIRECCTE ») and one for the employer.

C. Content of the agreement :

The agreement must indicate the amount of the compensation due to breach of contract.

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D. Date of the breach :

According to the date of breach, article L1237-13 mentions that it can intervene only the day after the official approval ("homologation").

Chapter 4. Withdrawal:

There is no specific formality for withdrawal, it has to be a letter addressed by any means that has to however attest of the date of receipt. It could be by email as long as it is possible to attest the date of receipt.

Articles 641 and 642 of the French civil procedure code ("Code de procedure civile") and R1231-1 of the French labor code ("Code du travail") establish that as soon as the planned time-limit expires on a bank holiday or a holiday it is extended to the subsequent first working day.

The time-limit starts from the receipt of the withdrawal however this receipt must intervene before the end of the 15 day time-limit.

The consequences of this withdrawal involve that the employment contract continues as if nothing happened.

Chapter 5. Official approval (« homologation ») of the breach of contract:

At the expiration of the withdrawal limit, the most diligent party must send a demand for official approval ("homologation") to the administrative authority with a copy of the breach of contract (article L1237-13 of the French labor code).

The consignment must be done the next day if not it is void. It does not necessitate any specific formality.

The regional department of companies' competition, consumption, labor and employment (« DIRECCTE ») has 15 working days upon receipt to officially approve ("homologuer") the breach of contract. On receipt of the breach of contract, the regional department of companies' competition, consumption, labor and employment (« DIRECCTE ») must send a proof of receipt (however that is not done in practice).

It has to check that the considered date of breach of contract intervenes the next day after the end of the official approval time-limit, it checks the date of signature and end of the withdrawal limit. The regional department of companies' competition, consumption, labor and employment («DIRECCTE »)

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has to check for all the formalities of the breach of contract validity. It can also investigate and call the parties.

The work inspector has two choices, he either accepts or refuses.

The lack of reply in the 15 day time-limit for official approval ("homologation") shall be understood as the acceptation of official approval ("homologation").

The refusal has to mandatorily be explicit but does not have to be motivated.

The refusal of official approval ("homologation") can lead to two situations: the employee continues to work or a second breach of contract can be filed and redone correctly.

The employee can be dismissed if there is a dismissal motive. The refusal to official approve ("homologation") cannot constitute negligence of the employer.

The employment contract is terminated if the official approval ("homologation") is accepted. The contract is breached minimum the next day after the withdrawal time-limit, "envisaged date of the breach of the employment contract" section to be completed in the form. If the official approval ("homologation") demand is not completed, the instruction time-limit does not run.

The instruction time-limit is of 15 working days, if not subject to a return to the regional department of companies' competition, consumption, labor and employment (« DIRECCTE ») during this 15 working days time-limit, tacit acceptation of the breach of contract is considered.

Chapter 6. Litigation:

A. Competence of the Labor Court (« Conseil Prud'hommaux CPH») :

Although the regional department of companies' competition, consumption, labor and employment (« DIRECCTE ») is an administrative authority, it is not of the administrative order that is competent.

The litigations of official approval (« homologation ») and breach of contract are not separate.

All litigation that refers to the agreement, official approval ("homologation") or refusal is exclusively of the competence of the Labor Court ("CPH") excluding all other administrative or remedies of litigation.

If the Labor Court ("CPH") cancels the refusal of official approval ("homologation"), the regional department of companies' competition, consumption, labor and employment («DIRECCTE ») is obligated to official approve ("homologuer"). This department has circumscribed power ("competence liée") and can only approve the breach of contract.

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On the other hand, the Labor Court ("CPH") is not competent to give the agreement official approval ("homologation"), it can only cancel or confirm the refusal to officially approve ("homologuer") (circular of the 17th of March 2009).

However, Courts are not necessarily in line with this and certain labor courts ("CPH") have usurped this right. The French Court of Cassation has still not settled this question.

B. Time-limit to act :

The prescription is of two years, however there are derogations as it has to be 12 months from the official approval (« homologation ») to reconsider the validity of the breach of contract.

The starting point is appreciated on the next day of the instruction time-limit termination.

C. Defect of consent (« vice du consentement ») in breach of contract:

The French Court of Cassation in a case on the 23rd of May 2013 has indicated that in litigious circumstances a defect of consent ("défaut de consentement") is not necessarily constituted except in the case of recognized moral harassment.

When there is a defect of consent ("vice du consentement"), the breach of contract is necessarily reconsidered. In that event, the breach of contract is void and will lead to a dismissal with no real and serious cause.

D. Breach of contract and previous demand of judicial cancellation of the contract:

The employer cannot make a judicial cancellation demand except in a contract of apprenticeship.

The demand of judicial cancellation is at the initiative of the employee, if it is lagging behind, the employee can ask for breach of contract once the official approval ("homologation") has passed and 12 months have passed, the French Court of cassation establishes that if the time-limit is expired, the demand of judicial cancellation has no scope, thus, the demands are rejected.

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Chapter 7: Compensation for the employee:

A. Amount of the specific compensation for breach : at least the legal dismissal compensation:

The specific compensation cannot be inferior to the legal compensation for dismissal, more precisely, 1/5th of a month's salary by year of seniority, to which is added 2/15th of a month's salary by year over 10 years of experience.

For companies in the scope of the 11th of January 2008 professional national agreement ("Accord national interprofessionnel ANI") (MEDEF, CGPME, UPA ect.), the agreement compensation will have to be paid if it is more beneficial than the dismissal compensation.

B. Calculation basis of specific breach of contract compensation :

The basis of calculation is identical to the one of dismissal compensation, hereby:

1. Either 1/12th of the salary of the last 12 months preceding the dismissal
2. Either 1/3rd of the last three months, in this event, any bonus or annual or exceptional gratuity incentive paid to the employee during this period is only taken into account in the limit of an amount calculated in equivalent proportions.

It is always the most favorable one that is maintained.

C. Compensation for employees having at least one year experience :

In the scope of breach of contract, there is only little case-law. The Montpellier French Court of appeal on the 1st of June 2011 establishes that even if the employee has less than one year experience, he is allowed to have a dismissal compensation that will be calculated pro rata. The dismissal compensation is derogatory.

D. Other compensations :

In addition to the center for the registration and revisions ("CERFA") form, an agreement can be made, that allows to foresee everything.

The agreement can foresee the payment of all compensations that the parties have agreed on.

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The employee also has a right to all the elements of salary that are owed by the employer at the date of the breach of contract. For example: compensatory allowances correspond to the balance of the reduction in working hours ("RTT").

Chapter 8: Consequences of the breach:

A. Documents to be given to the employee :

In a classic breach of an employment contract, the employer is obligated to return all the documents that are imposed by law such as employment certificates, national employment agency ("Pôle emploi") certificates, last pay-slip and the receipt for the balance of all accounts.

B. New declaratory obligations concerning breach of contracts:

The obligation to declare a breach of contract has been introduced in 2009 and provided for in article L1221-18 of the French labor code ("Code du travail"). Every staff employer salaried or assimilated must send a declaration to the social security contribution collection office ("URSAFF") at latest on the 31st of January indicating the number of salaried aged of 55 years or over that have benefited of a breach of contract during the previous year.

An absence of declaration is criminally punished by an amount equal to 600 times the hourly rate of the minimum growth wage in France ("SMIC").

There is a fear that these type of breach of contracts are done on senior employees.

C. Right to insurance-unemployment benefits :

The employees whose breach of employment contract resulted from an officially approved ("homologué") breach of contract benefit from the payment of insurance-unemployment benefits in the conditions settled by the law.

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