REINSTATEMENT IN EMPLOYMENT AS A REMEDY FOR UNFAIR DISMISSAL IN FRANCE

by

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1. *Outline of French Labour Law*

As in England, French labour law is of fairly recent origins. In pre-revolutionary times there was no place for legal rights and duties in the master-servant relationship because the authority of the *patron* over his workers was a domestic matter ruled by local community moral standards. This feudal or status relationship was swept away by the Revolution with its ideals of liberty and equality which led to the regulation of all citizens on a classless basis. In pursuit of those goals it seemed wrong for the law to concern itself with regulating a special category of 'labourers' since all men were equal, and the master-servant relationship smacked of former times. The demands of workers for legal equality were met by the removing of guild inspired restrictions and by acceptance of the principle of freedom to contract.

The *Code Civile* of 1805 embodies the new liberalism and its principles incorporate a fundamental concern for the rights and duties of individuals. Much of the private law code deals with protection of ownership and very little space is devoted to hire of work and skill. Changes in society resulting from mass production techniques during the nineteenth century have not been reflected in the Code which still retains its individualist approach. The theoretical legal equality in contract between master and servant did not result in real economic equality. An economically powerful employer could always impose terms on an individual employee. Legal protection of French workers eventuated therefore not through the Code but by legislation, made possible by the early extension of franchise to all male citizens in 1848. This pattern of reform through the statute book was well established by the time unions were freed from previous legal prohibitions in 1884 and it has continued to be the main way in which both individual and collective relations are regulated. Although the mass of unconsolidated labour legislation is sometimes referred to as the *Code du Travail* French labour has not yet been codified despite several attempts from as early as 1912.

Two particularly significant features of the French labour law system are the labour court (*conseil de prud'hommes*) and the works council (*comité d'entreprise*). Autonomous labour law courts have played a greater role in the past than at present. In 1936 a Supreme Court of

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Arbitration was established completely independent from the ordinary court structure. In the brief period during which it functioned it played an important part in confirming on appeal principles peculiar to labour law which had been developed by the *conseils de prud'hommes* and which previously had been overruled on appeal to the *Cour de Cassation* (Supreme Court) by strictly applying civil law principles.[1]

Today, therefore, labour courts are mainly courts of first instance, that is *conseils de prud'hommes* composed of employers and employees under the chairmanship of a judge. In resolving conflicts of rights between employers and employees the *conseils de prud'hommes* have sought to ensure that individual disputes are handled by people with practical experience in the field of labour-management relations, that considerable emphasis is placed on conciliation, that industrial disputes are settled far more quickly than in the ordinary courts, that a far less formal and legalistic procedure is adopted than in the ordinary courts, and that costs are as low as possible. It is generally accepted that the labour courts have been particularly successful in achieving those objectives.[2]

French unions play an increasingly important part in protecting and improving the working conditions of employees. This occurs through negotiation of collective agreements on a national industry basis which, if certain conditions are met, may be extended by decree to the whole industry, even to employers who do not recognise the union or unions involved. The agreements may add to but not detract from conditions negotiated between an individual employer and employee or from collective agreements at the plant level. Unions also perform various representative functions in numerous governmental institutions e.g. those administering social security law.

At plant level, unions nominate representatives on works councils whose members are elected by all the relevant employees. Works councils must be established for all but the smallest enterprises and perform a large number of consultative and advisory tasks ranging from general management of welfare funds to involvement in individual dismissal cases where, as we shall see, their consent or otherwise to a dismissal may have significant legal consequences. Formal worker representation is also provided for by the election of shop stewards (*délégués du personnel*) in a similar way to works councils. It is the duty of a shop steward to present to the employer demands and complaints of the workers in the enterprise, usually those not dealt with by any collective agreement.

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1 *E.g.* court revision of collective bargaining agreements on the ground of changed circumstances, the shifting to the employer of the burden of proof as to termination, limitation of the disciplinary powers of management and re-instatement of employees improperly dismissed. De Vries *Civil Law and the Anglo-American Lawyer* (1976) p. 215.

2 See McPherson and Meyers, *The French Labour Courts: Judgment by Peers* (1966) Ch. VI.

2. *Reinstatement and 'Abusive' Dismissal*

In France the law relating to dismissal from employment originated in the Napoleonic era, with the result that the emphasis was placed firmly on an individual employer's right to dismiss. Although, at first, the contract was terminable at will, by the beginning of this century French courts and *conseils de prud'hommes* were sometimes prepared to award damages for improper termination by resorting to the broad concept of *abus de droit.*

In theory it was possible for French courts to develop 'abuse of rights' to provide a comprehensive protection for employees against unfair dismissal but this has not occurred. Generally speaking the categories of cases have been limited to dismissals motivated by

1) an attempt to curtail the employee's freedom of opinion;
2) any attempt to evade contractual or legal obligations;
3) bad temper or capricious action, for example, where the employee was promised permanent employment and was dismissed after a few days;
4) interference with the employee's private life;
5) retaliation against an employee who had presented a proper claim for an increase in wages, or who had demanded compliance with safety and health regulations or who had brought an action against his employer.[3]

An 'abuse of rights' could exist either where an employer wrongfully dismissed an employee summarily or failed to give sufficient contractual notice in which case the amount was additional to that given for breach of contract, or where the proper period of notice was given or there was a *prima facie* valid ground for summary dismissal but the conduct and motivation of the employer could be described as abusive. But that advantage to the employee was more than offset by a number of limitations which until the 1970s effectively deprived him of any wider protection against unfair dismissal.

In the first place, dismissals caused by redundancies or for economic reasons were not recognised as 'abusive'.[4] Secondly, in all actions for unfair dismissal it was generally for the employee to prove his case and there was no requirement that the employer should give reasons whether oral or written, for the dismissal. Once the employer alleged his reason in broad terms, for example, misconduct or professional incompetence, it was then for the employee to assume the burden of proving that this

3 See Camerlynck and Lyon-Caen, *Droit du Travail,* (Dalloz 1969) p. 160 n. 2. Mentioned in G. de N. Clark, 'Remedies for Unfair Dismissal: A European Comparison' (1971) 20 *I.C.L.Q.* 397. Also F. Meyers, *Ownership of Jobs: A Comparative Study* (1964) Management Series No. 11. Institute of Industrial Relations; Univ. of California.

4 Unless an abusive dismissal occurred before dismissal for redundancy. See, *e.g. Sté, Franco-Belge de Materiel de Chemins de Fer C. Mornet* (1970) 1 J.C.P. 16364 (Fr. soc. Cass. 6 March 1969) where an employee, who was dismissed for redundancy after having been transferred to a post which had ceased to exist, succeeded in a claim for unfair dismissal.

was not true and to show that the employer's conduct was motivated by another reason which was unjustifiable. Finally, the action for abusive dismissal, if successful, resulted only in monetary compensation. It did not give rise to an order for reinstatement in employment. French employers have been particularly concerned to protect what they see as a fundamental aspect of managerial rights — the right to hire, and this applies to former employees as well as to new ones. Consequently, there was no general statutory provision for reinstatement although, as will be later explained, the remedy is not a complete stranger to French labour law.

The generally unsympathetic attitude of the legislature and courts to the plight of dismissed employees has however been reversed to some extent during the last decade. In 1973 by virtue of the *Dismissals Act*[5] employees gained a substantial protection against arbitrary dismissals. Not only must an employer comply with a specific procedure which includes the granting of an interview to explain the intended dismissal and the assistance of workers representative at the interview, but, more importantly, the Act requires that any decision to dismiss must be based on a 'genuine and serious reason' and, if it is not, the dismissal is unlawful rather than merely an abuse of the right to dismiss. In addition, the effective burden of proof has been lifted from the shoulders of the employee and both parties are placed in an equal position before the judge who must evaluate the evidence on both sides before coming to his decision as to whether the proper procedure has been followed.[6] Dismissal of an employee without the employer revealing a serious reason for it is an 'abusive' dismissal.[7] For the grounds of dismissal to be 'real and serious' they must be connected to the performance of the contract of employment (e.g. aptitude) and must actually be the cause of the breach, and they must be such as to permanently harm the proper functioning of the business. In addition, the grounds alleged during the preliminary interview may not subsequently be abandoned in favour of others.[8]

If the proper procedure is followed a court or *conseil de prud'hommes* may still find that the dismissal was abusive on the ground that no serious and genuine reason existed, and the employee will recover

5 Act of 13 July 1973.

6 S. L122-14-3 of the 'Labour Code' 1945. See *e.g., Receveur des Postes Marseilles XI* v. *dame Boutros* [1974] 11 J.C.P. 17829 (App., Aix-en-Provence) where it was held that under the 'Labour Code' as amended by the *Dismissals Act* 19 3, it is for the judge to decide whether the reasons given by the employer justify the dismissal. Consequently, where the employer relies simply on the allegation that the employee was a bad worker and had failed to improve after being warned, the court of first instance had insufficient material on which to base its decision and an inquiry was ordered into all the circumstances of the dismissal.

7 See *e.g., dame Villette* v. *dame Dubroner* [1974] 11 J.C.P. 17722 (Fr. Cass. soc.); *Soc. Cotragaz* v. *Alazard* [1974] 11 J.C.P. 17722 (Fr. Cass. soc.).

8 *Vaquier* v. *Borie* [1976] Dalloz Jur. 410 (App., Limoges 21 March 1975).

damages.[9] Conversely, the dismissal may be abusive because the proper procedure has not been followed although there is a serious reason for the dismissal, and the employee will recover damages. If both failure to abide by the proper procedure and insufficient reason are present the procedural irregularity is usually ignored for the purpose of assessing damages. Even if the dismissal procedure has been followed and the dismissal is justified the employee may still recover an amount from his employer in the form of severance pay. Since 1967[10] all employees whether dismissed summarily or with notice are entitled to a minimum severance pay provided they have two years continuous[11] seniority and have not committed a major offence. Therefore it is only in cases where the proper procedure has been observed and the summary dismissal is justified by the employee committing a major offence that the employee will recover nothing from his employer.

As regards dismissals with notice, s. L122-5 of the 'Labour Code' 1945 provides that an employee is not entitled to the minimum statutory period of notice before termination of his contract of service if he has committed a major offence. The commission of a major offence will therefore deprive the employee of his right to a period of notice and may result in a court finding that his summary dismissal was justified. But even here the employee must still be notified of his dismissal and the correct procedure, as laid down in the *Dismissals Act* 1973, followed by his employer.

In cases where the employee is entitled to a period of notice he must be informed and be permitted to work out the relevant period, and to claim severance pay as explained earlier.[12] The length of the minimum period of notice depends on the length of continuous service, for example, six months service for one month's notice. But this may be made more favourable for the worker by the terms of any collective agreement to which the employee is subject or by customary works rules.[13]

In addition to the above mentioned improvements in the basic rules governing abusive dismissals the French legislature enacted the *Re-*

9 The object of damages is both to compensate the employee and to penalize the employer for his unlawful act. The amount is not affected by the mitigation principle.

10 Ordinance of 13 July 1967.

11 An employee who after three years resigns then later on takes a job with the same employer before bing finally dismissed does not have the necessary continuity of service. (*Loy* v. *Lerenard* [1973] 11 J.C.P. 17359 (Fr. Cass. soc.).

12 The expiry of the period of a fixed term contract is not usually regarded as equivalent to dismissal (but see *contra Peyroche* v. *L.O.S.C.* [1977] Dalloz Jur. 361 (Trib. Inst., Lille 18 April 1977)) with the result that the employee is not entitled to a period of notice and the employer is not bound to renew the contract before it is terminated by effluxion of time. In addition, because there is no dismissal there is no entitlement to severance pay and the laws protecting arbitrary dismissal and dismissal for economic reasons do not apply. But if the employer terminates the contract before the end of the fixed term this may be regarded as a dismissal.

13 The same is true of the amount of severance pay.

dundancy Act of 1975,[14] an expression of the Government's concern at the increasing number of unemployed caused by redundancies. The Act seeks to regulate both collective and individual dismissals for economic reasons in certain circumstances. It does this by requiring an employer to obtain the permission of the relevant administrative authority, usually the Director of Labour and Manpower, before dismissal for an economic reason. The procedure to be followed before seeking the authorisation is fairly complicated especially in the case of collective dismissals where the works committee may have to be consulted. If the dismissal is an individual one and less than eleven workers are employed no steps need be taken before seeking authorisation.[15] It is the duty of the administrative authority *inter alia* to see that the proper procedure has been complied with and to ascertain that the economic reason is genuine before granting authorisation. Once authorisation has been granted the employer must notify the employee by registered letter and the period of notice to terminate the contract commences from the date on that letter. A right of appeal to the Minister of Labour exists and from there to the ordinary courts.

As part of the Government's manpower planning policy, a more recent decree in 1977[16] requires organisations employing more than fifty workers to provide general information monthly to the Director of Labour and Manpower regarding *all* contracts of employment terminated (whether of indefinite duration or fixed term) or commenced during the previous month. This provision is not limited to hirings, firings and departures for economic reasons. Nor is the additional requirement under this decree that prior administrative approval must be sought before any hiring or firing. But in the latter case the provision only operates if the employer has taken any proceedings to dismiss for economic reasons in the previous year, *i.e.* not necessarily connected with the proposed hiring or firing. Once the employer has proceeded to dismiss for economic reasons all later proposed hirings and dismissals of whatever kind must receive administrative approval although that approval may only be given on the basis that there is a valid economic reason for the hiring or dismissal even if other reasons exist. It is still, therefore, necessary for the law on economic dismissals to function because, for example, an employer may be dismissing for economic reasons for the first time or after more than a year. It is also necessary for the law on arbitrary dismissals to be still effective because the 1977 Decree does not purport to deal with that aspect. Both the 1975 and 1973 Acts therefore remain in force and operate in conjunction with the Decree of 1977 to provide a complicated scheme of employment control and job security.

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14 The Act of 3 January 1975. This type of legislation has recently been passed in Australia. See *Employment Protection Act* 1982 (N.S.W.).

15 For a more detailed explanation of the procedures see J. Rojot, 'Job Security and Industrial Relations in France', *Bulletin of Comparative Labour Relations* No. 11 (1981) at pp. 83-86.

16 Decree of 15 December 1977. See s. R. 321-1 of the 'Labour Code'.

Sanctions exist in the form of fines, sometimes including prison terms for failure to comply with the provisions of all three measures. But their effectiveness has been lessened by the possibility of suspended sentences. In addition, the *Redundancy Act* 1975 extends the concept of 'abusive' dismissal by enabling dismissed employees to sue for damages for unfair dismissal without genuine and serious cause where no prior authorisation existed for a dismissal for economic reasons, or where letters of dismissal were posted before authorisation or, in cases of collective dismissal, where there is a failure to consult the workers representatives.

Although the existence of an action for abusive dismissal in cases involving economic reasons is important the law is still deficient in not providing for compulsory reinstatement at the option of the employee in all instances of unfair dismissal. Reinstatement has been an effective remedy only in relation to the dismissal of protected workers and even here the French courts have sometimes been reluctant to use it.[17]

Protected workers include members, prospective and former members of the works committee, workers' representatives, prospective and former workers' representatives, union delegates, former union delegates, union representatives to the works committee and employee members of the works health and safety committee in certain circumstances. The usual procedure for the dismissal of a protected worker is for the employer to seek in advance the approval of the works committee. If the committee decides against the dismissal and the employer is still determined to dismiss he must then obtain the consent of a Labour Inspector whose decision may be reviewed and reversed by the Minister of Labour.[18] The basic provision was enacted in 1945[19] and amended in 1959[20] and 1966[21] to its present form. The law clearly states that, '... in the event of disagreement [with the works committee] the dismissal shall not take place except with the consent of the Labour Inspector ...' which would seem to mean that the dismissal is not effective and the contract of service continues. Indeed this was the interpretation placed on it by the *Cour de Cassation* in ordering reinstatement of protected workers dismissed without the prescribed authority in cases before 1952. In that year however the *Cour de Cassation* held in the *Sortais* case[22] that reinstatement as a remedy was incompatible with Article 1142 of the *Code Civile* which places the emphasis on damages as a remedy for breach of any contractual obligation to work rather than on specific performance. In this respect French law is very similar to the common law

17 For dismissals without serious and real causes the judge may propose reinstatement but it is not compulsory for any of the parties.
18 The dismissal procedure laid down by the *Dismissals Act* 1973 must also be followed for protected employees: *Prat* v. *Manufacture Francoise des Pneumatiques Michelin* [1975] 11 J.C.P. 17981 (App., Riom).
19 Act of 22 October 1945.
20 Decree of 7 January 1959.
21 Decree of 18 June 1966.
22 *Sortais v. Cie Industrielle des Téléphones* [1953] Dalloz Jur. 239. (Fr. Cass. soc.).

in England and Australia where the emergence of reinstatement as a remedy for employer breach of the contract of service in the ordinary courts has generally been prevented by the refusal of judges to treat the contract of service as an exception to the normal rules governing specific performance and breach of contracts, particularly by their persistence in applying the doctrine of reciprocity to defeat an employee's claim to reinstatement on the ground that to award the equivalent to an employer would result in slave labour.

In France there is a definite tendency to a clash of principle between the values embodied in the *Code Civile* and the newer labour law particularly in the area of dismissals. This is understandable when it is recalled that the nineteenth century Code embodies an individualist approach to contracts in contrast to the more humanitarian provisions of the more recent legislation and decrees governing dismissals. The reinstatement issue is merely one aspect of the basically incompatible approaches of the Code and modern labour legislation. Another illustration of the conflict arises when an employer seeks to evade the dismissal of protected persons rule by seeking rescission of the contract in the ordinary courts under Article 1184 of the Code. It has been held[23] that the law preventing the dismissal of workers' representatives without the consent of the works committee or Labour Inspector also operates to prevent the employer from seeking to terminate the contract by any other means including rescission under the Code. The labour legislation is designed to give special protection to employees charged with trade union representative functions in the business. Consequently, an employer cannot seek rescission under Article 1184 nor refuse to reinstate such employees by arguing Article 1142 of the Code particularly if the faults complained of are connected with their representative functions.[24]

On the other hand, there is the view that despite the existence of administrative procedures regarding dismissals of workers' or trade union representatives, an employer is still entitled to resort to the ordinary courts for termination of the industrial contracts of employment under Article 1184 of the Code in the absence of any legislation *expressly* forbidding this.[25] Moreover, the special protection provided by industrial legislation cannot prevail against the right to rescind in the Code because this would have the effect of creating a class of privileged citizens.[26]

The latter argument, of course, denies the very intention of the legislature in enacting the relevant provisions of the statute. However, over

23 *Castagné* v. *Epry* (1974) Dalloz Jur. 598 (Fr. Cass. mixte).

24 *Astic* v. *Etablissements de Teinture et d'Impression de Tournon* [1976] Dalloz Jur. 302 (App., Montpellier 30 June 1975); *Ferrand* v. *Sauvegarde de l'Enfance de l'Adolescence en Nivernais* [1975] Dalloz Jur. 22 (Trib. Gde. Inst., Nevers).

25 *Fenat* v. *S.A. Imprimerie F. Lamotte* [1976] Dalloz Jur. 302 (App., Rheims 4 June 1975); *Albert* v. *Soc. Confection Sevre Vendée* [1975] Dalloz Jur. 219 (App., Poitiers).

26 *Soc. d'Emboutissage de Bourgogne S.E.B.* v. *Zabattini* [1977] 11 J.C.P. 18520 (App., Besancon, 10 March 1976).

the last decade, the decisions which support it are only from regional courts of appeal whereas the single decision of the *Cour de Cassation* on the point is in favour of the predominance of labour legislation.[26a]

Therefore, although the *Sortais* case appeared to have smothered reinstatement for dismissal of protected persons without authority, the remedy continues to flourish. French courts often order an employer to take a protected employee or employees back into his employment on pain of a daily or weekly fine (*astreinte*).[27] This practice is not always effective and can sometimes only be used as a threat. If the employer decides to ignore the order, and persists in the dismissal the employee's remedy will be an action for damages. It is not possible for a court to put the order to reinstate in the form of an injunction because there is nothing comparable to contempt of court in France. Reinstatement by order of the court is not an injunction but the mere declaration of a still valid and binding contract of employment.[28]

As well as giving rise to an action for abusive dismissal and the possibility of reinstatement, dismissal of a protected employee without the necessary consent is a criminal offence under s. 24 of the 'Labour Code' of 1945 which provides for a fine of from 400 to 4,000 francs or imprisonment for from six days to one year, or both and in the case of a second offence within a year the sentence of imprisonment is mandatory. These penalties have been available for many years but it was not until the mid-1960s that the *Cour de Cassation* began to apply them with some degree of regularity. They have even been applied in cases where the dismissal was originally with the local Inspector's assent although later reversed by the Minister.[29] More recently the Criminal Chamber of the *Cour de Cassation* has held that when permission to dismiss a workers' representative has been refused, his employer is bound to reinstate him unless prevented by *force majeure*. A judgment acquitting the employer of failure to do so on the basis that his failure was not intentional, whilst admitting that the obstacle to the worker continuing in his employment was not insurmountable, was therefore set aside.[30]

The *Cour de Cassation* has also resorted to the concept of *voie de fait* (a forcible act contrary to the law) in order to find that a member of a works committee dismissed without the necessary authority and forbidden by his employer to enter the factory, still remains in his employment for the purpose of eligibility as a shop steward and as a member of the next works committee;[31] he is also entitled to wages.[32]

26a Although it hears cases from regional courts of appeal, the Cour de Cassation is not an appellate court. It does not hear a case on its merits but reviews the judgment and can send the case back. See Kahn-Freund, Lévy and Rudden, *A Source Book on French Law* (1973) at pp. 247-8.

27 *Martinez* v. *di Biase* [1974] 11 J.C.P. 17727 (Trib. Gde. inst., Digne).

28 *Comptoir des Revetements 'Revet-Sol' S.A.* v. *Dal Poz* [1973] Dall. 114 (Fr. Cass. soc.).

29 See *e.g., Gaz. Pal.* 1966 2 138 (Fr. Cass crim.).

30 *Urru* [1974] 11 J.C.P. 17685 (Fr. Cass. crim.).

31 *Soc. Produits Chimiques d'Auby* v. *Detoeuf.* 25 Oct. 1968 (Fr. Cass. mixte).

32 *Abysse* 27 May 1970 (Fr. Cass. soc.).

Failure to reinstate a protected worker to his job as well as to his function, for example as a workers' representative, may also be held to be a criminal interference with his function.[33]

French law on the dismissal of protected workers is made more complicated by a provision in the 'Labour Code' of 1945 that, '... in the event of a serious offence the head of the enterprise shall be entitled to suspend immediately the employee in question until a final decision has been reached'. It was possible to interpret this provision as legalising suspension up to the date of an administrative decision not to dismiss so that an order for reinstatement with wages from the date of suspension could not be made by a court. However, in 1966 an amendment was made to s. 22: 'If the final decision is against the dismissal the suspension shall be annulled and entirely without legal effect'.[34] The way was now open for courts to make reinstatement orders effective from the day of suspension but, of course, for those courts taking the traditional *Sortais* line that specific performance would not lie for breach of obligation, the 1966 amendment *per se* was not sufficient. These courts were still prepared to see a distinction in principle between a suspension void *ab initio* and a positive order for reinstatement. But in view of the lead shown by the Criminal Chamber of the *Cour de Cassation* since 1966 the significance of the *Sortais* principle has been substantially eroded.

In conclusion it may be said that whether the case is one of dismissal or suspended dismissal of a protected worker, the absence of administrative approval means that continuity of the contract is preserved along with the right to wages. Protection is also given against interference with the legal role of a protected worker where the employer seeks to exclude him from the premises. Therefore, although theoretical difficulties may still persist regarding the validity of a reinstatement order, there is little doubt that the practical effect of the present law is to sanction and support the concept of reinstatement for protected workers. Admittedly, everything depends on the attitude of the courts, particularly where the maximum fine that can be imposed is prohibitive and the minimum is trivial and ineffective. But until the courts show once again that they are not prepared to support the social function of workers' representatives against the right of the employer to discharge his employees there seems little point in legislating to provide for reinstatement as a remedy.

Where there is an urgent need for such legislative reform is in the area of dismissal of non-protected workers. At the moment, although s. L122-14-4 of the 'Labour Code' provides that a judge may *propose* reinstatement where an ordinary employee is dismissed without real and serious cause it is clear that if either party objects to reinstatement he will not be bound by the proposal, nor is the

33 F. Meyers, *supra.* n. 3, p. 63

34 But suspension is not a dismissal. A worker may therefore be suspended immediately without the prior approval of an Inspector. *Kandelaft* [1973] Dalloz 12 (Fr. Cass. crim.).

judge bound to propose it.[35] Moreover, the effect of the dismissal on the contract of employment of the ordinary worker who is abusively dismissed is different to that of dismissal of a protected worker. In the former case, the act of dismissal is not void since the word 'void' is not to be found in Article 1142 of the *Code Civile* which supports the principle of compensation for unlawful dismissal. The contract is in effect terminated from the date of dismissal and if he is reinstated the employee has no right to wages for the period between dismissal and reinstatement, merely a right to benefits including seniority earned under the previous contract. 'Reinstatement' here is the equivalent of re-engagement or re-employment in a new contract in England under the *Employment Protection (Consolidation) Act* 1978. On the other hand, reinstatement of a protected worker as we have seen is retroactive and has the effect of preserving continuity of the contract for all purposes.

3. *Effect of Collective Agreements*

Collective agreements in France may appreciably add to, though they may not detract from, the statutory protection given to dismissed employees. Unlike England, they are automatically legally binding on the parties and may be extended by the Minister of Labour to cover the national trade or industry as a whole provided he is satisfied that the union and employer concerned are sufficiently representative of the trade or industry concerned.[36] For example, many collective agreements improve on statutory minimum provisions regarding terms of notice under s. L122-5 of the 'Labour Code' and severance pay under the Ordinance of 13 July 1967. More recently these agreements have sought to establish priorities for the re-employment of employees after the termination of their individual contracts by effective dismissals. Furthermore some agreements purport to avoid the statutory provisions on dismissals altogether by providing for employees to resign rather than be dismissed and to be compensated by a lump-sum payment.[37] This procedure has not yet been pronounced on by a court but given the binding nature of collective agreements and the fact that the statutory provisions are acknowledged to be minimum ones there does not appear to be any great objection provided the lump is greater than the statutory compensation.

4. *Reinstatement and Industrial Disputes*

The right to strike protected by the French Constitution is a right which is vested in individual employees. It is not restricted to a union or to union members so that any employee make take part in a lawful strike without being in breach of his contract of employment. The

35 *Jego* v. *Bahuon* [1977] Dalloz Jur. 544 (Fr. Cass. soc.) 9 Feb. 1977.

36 R. David, *English Law and French Law.* (Stevens 1980) p. 176.

37 J. Rojot, *supra* n. 15, p. 94.

contract is suspended[38] for the duration of the strike and when it is over the employer must reinstate[39] the employee. He cannot be validly dismissed for taking part in the strike. But if the employee commits a serious offence while the strike is in progress such as violence, threats or threatening picketing, or the collective action does not constitute a lawful strike because, for example, the industrial action amounts to a sit-in, go-slow or a political strike, the employer is justified in summarily dismissing his employee. In that case the worker will not be reinstated and will not recover damages or severance pay.

It is worth noting that, in the above situation, the serious offence of the employee does not automatically terminate the contract from the date of the offence. The basic rule in French law is (unlike English law) that one party may not accept the other's breach as terminating the contract because a contract may only be terminated by a court. But an exception exists where the seriousness of the offence makes it impossible to continue the contractual relationship.[40] A dismissal after a serious offence committed while participating in a strike will therefore usually terminate the contract immediately and if the worker brings an action for abusive dismissal the court will decide whether or not termination from the date of dismissal is justified.

The fact that the individual contract may be terminated in that way does not appear to be theoretically reconcileable with the rule that the contract is suspended for the period of a lawful strike. If the operation of the contract is completely suspended it seems to follow that all the rights and duties of the parties are temporarily non-existent and that no action however serious on the part of the employee during the strike can be referable to his contract. It would also follow that, in the absence of express agreement to the contrary no wages would be payable during the strike period and that *e.g.*, the striker would not be able to vote as a 'worker' in an election to the works committee. But the French concept of suspension does not correspond with these conclusions. Although the employee cannot usually recover wages or sick pay[41] even during a lawful strike this is attributed not to the non-existence of the contract but to the fact that by definition there is a complete failure to work during a strike and therefore no obligation to pay. Where this is not the case, that is, where the employee has contracted (or a collective agreement has provided) for pay during a strike, he is clearly entitled to wages. The same is true of seniority rights which normally do not accrue during the strike period. And, it is clear that a worker retains his right

38 S. L521-1 of the 'Labour Code' inserted in 1950.

39 If the employer refuses to reinstate, reinstatement will probably only be ordered where the employee is a protected worker. The only remedy in other cases is damages for refusal to reinstate after a strike (*i.e.* for wrongful dismissal).

40 R. David, *supra* n. 36.

41 *Soc. Intercontinental Harvester France* v. *Depauer* [1972] Dalloz Jur. 620 (Fr. Cass. soc.). But the laws on social security permit some measure of compensation for sickness during a strike.

to vote in elections to the works committee because the contractual link though suspended remains and he is still an employee of the firm.

It is therefore consistent with the French approach to suspension that an employee who commits a serious offence while on strike should be held to have justified his dismissal in showing that his action was inconsistent with the continuity of the suspended contract.

Reinstatement after a lawful strike where the employee has not committed a serious offence is conceptually different to either reinstatement or re-engagement in England where an order for reinstatement nullifies the dismissal or refusal to reinstate the contract of employment and acknowledges seniority rights and pay *from the date of dismissal*, whereas re-engagement accepts that the original contract is *terminated* and creates new rights in a new contract. In France reinstatement operates from the time the lawful strike ends and the employee returns to work, and there is no doubt that the original contract is not terminated. However, if the contract of employment in France expressly provides for the continuity of seniority rights and pay during a strike it is for all practical purposes equivalent to reinstatement in England.[42]

42 Reinstatement after a suspension of the contract may be ordered in England for employees dismissed for trade union activities.