



## ABANDONING A JOB POSITION UNDER ALGERIAN LAW : LEGAL AND TAX ASPECTS.

Under contract law, working supposes to deliver physical or intellectual efforts for an employer, which may be a natural person (individual entrepreneur) or a legal entity (generally a registered company, or an association, a representation office, etc) , under his instructions and disciplinary sanction power and in counterpart of a payment, a salary in an agreed time (weekly, monthly, etc).

The drafting of an employment contract in Algeria is not mandatory (as a consequence of the « principle of consent » or « principle of consensus », meaning that the accord of the contracting parties is sufficient in itself to make a contract, in opposition to the « formal contracts », when the regulation imposes a certain formalism to be complied with, such as the sale of an estate or the creation of a company, that have to be done through an authenticated deed before a notary public).

However, it is highly recommended to draft a job contract for setting up the rights and obligations of each party and prevent potential misunderstandings and disputes.

The private deed between the employee and his boss may be registered at the tax administration, in order to give it a certain date. And the employer must declare the employee at the social security services within 10 days as from the date of hiring, to the risk of paying fines and criminal prosecutions under the charge of illegal work.

Moreover, the risk of having no contract under Algerian law presumes that the labour relationship is set up for an undetermined duration (article 11 paragraph 2),

which is very tricky for the employer, and that relation may be proven by any means (article 10) (written instructions, pay statements, mission orders, e-mails, etc).

The Law 90 – 11 regarding the employment relations, which is the reference regulation, states the cases of ending of an employment relationship (article 66). Are mentioned notably the resignation of the employee, his death, his lay-off, his retirement, the economic cutback, the expiry of the fixed-duration contract, etc.

Those are classical and legal cases that put an end to the work relation in almost all countries and legal systems.

But how law deals with the case when an employee does not come to work one day, then the days after, i.e when the worker abandons his job position, generally without any explanations ?

For example he might submit medical certificates stating that he is (would be ?) ill and need to take some days off in order to recover, but after 3 or 4 certificates, he merely disappears and does not give any other reason. The case is frequent.

How could the employer control the truthness of a medical certificate ?

It should be stressed that law is still silent and as things now stand, the employer or the social security services for employees may not, in principle, challenge a medical certificate delivered by a doctor, unless the fraud is obvious and there would be other serious presumptions that the employee is cheating.

The Law 90 – 11 does not expressly deal with the abandonment of work positions. So, we do need to look for the answer in the contract law.

A contract is a binding accord for two or more parties (article 106 of the civil code). There are obligations on each party. The employee is supposed to furnish his efforts (either physical as a construction worker for example, or intellectual as an accountant), and the employer has to pay him consequently.

That are called « synallagmatic » or « bilateral contracts », reversly to the « unilateral contracts » or rather « unilateral engagements », recently recognized by the Algerian civil code.

When a contracting party does not perform its obligations, the other party is entitled not to do hers and raise the « defence of non-performance ». The contract, in that case, is suspended, until the failing party, the debtor, comes back to perform his duties.

So the employer may retain the salary of the defaulting employee if that one does not effectively work.

But when the worker merely fades away, it is a wrongful unilateral termination of the convention. If we except the cases of death and *force majeure*, when the employee cannot express himself (stuck in an unexpected riot for example), he puts himself in a delicate situation in that case, because he has ended suddenly the contract without following a means enabling him to leave legally and correctly, by resigning for example. Indeed some employees prefer abandoning the job than resigning because the resignation implies to comply with the prior notice indicated in the contract (generally 1 or 2 months). This happens frequently when the personal relations has gone bad.

Thus the abandonment of position is a *de facto* situation initiated by the employee who interrupts the contract, but that has legal consequences, as he will not be entitled to claim any right thereafter based on the principle that says « no one may take advantage of his own wrongdoing », among other consequences.

The common error made by many HR people in Algeria is that they consider the abandonment of job as a labour or professional wrongdoing and they engage a disciplinary procedure that ends by the dismissal of the employee, which is legally incorrect.

In that situation, we should simply observe the unilateral termination of the employment contract by the employee, by noticing him once or twice to his last known domicile, preferably through a bailiff. The legal notice observes his absence and invites him to join back the work in a period of 48 hours. Legally speaking, a second notice is not really necessary but it is recommended and appreciated by the judges, if we want to have an upstream vision.

Then, if, after 4 days, there is still no reaction from the employee, the HR service sends to the vanishing employee a last letter ascertaining the unilateral termination of the contract by him and telling him that the remaining prorata salary and the equivalent of the remaining annual leave (s) are put at his disposal at the company.

We may consider that as he left that way, he would not be entitled to these amounts, but legally and in our opinion, they are acquired to him because they correspond to payments for periods where he has worked normally, where the relation was « good ».

We even have decisions of Algerian courts that prevent employees from those payments (that are called a « final balance », « final settlement », « compensation payment », or a « balance of all accounts ») after their abandonment of position

because magistrates considered that it is a violation of the contract and of its execution with good faith from them, and that they should have come back to the company in order to claim their final rights in lieu of litigating their employers. In some sort, that would be an abuse of right from them.

So the employers should not follow the wrongful dismissal procedure in case of an abandonment of work but rather mention an article in their internal regulation dealing with that situation and notice the employee twice then observe the unilateral wrongful termination of the contract by him, and withdraw the employee from their personnel, and of course report that to the social security services and the tax administration.

Now, regarding the tax aspects, how a salary is fiscalized ?

The salary of a natural person in Algeria is taxed to the General Revenue Tax (*Impôt sur le Revenu Global ou "IRG"*) through a progressive scale and is withheld at source by the employer, on the paid salary and returned to the tax office in the 20 first days of the following month (article 129 - 1 of the Direct Taxes Code).

The tax base is composed by the base salary plus all the allowances and the benefits in kind given to the employee (article 69 of the same code).

So in that situation, the employer plays the role of a collector for the tax office, such as in matter of value-added tax (VAT).

Now, how to deal fiscally with the unpaid final payments of the disappearing employee ?

We all know the accounting and taxation « principle of care » that does not enable the business to consider a profit or a burden as realized unless it has occurred or has sufficient and reasonable chances to occur, according to the accruals accounting system. Practically, those remaining payments might be deemed as a tax provision and deduced from the accounting result of the financial year where the abandonment happened, until claimed and effectively paid by the company, and in that case the accountant should consider the amount as a definitive burden and withdraw and cancel the provision by a reverse accounting entry.

So, all this to say the importance of the prior legal assistance all along the process of hiring an employee and setting up the right rules for dealing with the specific situations as that one.

Mehdi Berbagui, Lawyer .