

On the proper use of videoconferencing in your dismissal procedures

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Articles L.1232-2 and following of the French Labor Code do not specify the form that a pre-dismissal meeting must take but a literal interpretation of these Articles (whose wording has not evolved since 1973) seems to only provide for a physical meeting (it mentions the “place” to which the convocation letter must refer or the “attendance” of the advisor).

Does this mean that a meeting by videoconferencing is prohibited?

Whereas lower courts have given scattered answers to this question, the COVID-19 pandemic and resulting lockdown put this topic back on the agenda.

Thus, some courts of appeal have recently ruled lawful the organization of a pre-dismissal meeting by videoconferencing in the context, for example, of the employee’s remoteness (notably Versailles CA June 4, 2020 No. 17/04940).

However, this position is not unanimous and other courts of appeal, notably the Grenoble Court of Appeal (Grenoble CA January 7, 2020), have ruled this procedure illegal notably given the Labor Code’s requirements that do not provide for any arrangement other than a physical meeting.

Confronted with the difficulties that employers may have encountered to conduct their dismissal procedure during the first lockdown, the authorities have taken up the issue, also with cautious.

After validating this method of organization of the pre-dismissal meeting in view of special circumstances, the authorities refused it, in a second step, before finally accepting it in an unpublished q&a but subject to conditions:

- On the one hand, the prior agreement of the two parties on the use of this method of organization.
- On the other hand, the tools used must allow the meeting to be held under proper conditions for the transmission and reception of images and sounds, without interruption throughout the meeting both on the side of the employer and employee and, as the case may be, on the side of the person assisting the employee.
- Moreover, at the beginning of the meeting each participant must clearly state his/her name and capacity and each participate must pledge that no other person is present in the room where said participant is and that there is no contact by telephone or messaging with a third party, at any time during the meeting.
- Finally, reliable and precise minutes must be drawn up at the end of the pre-dismissal meeting, describing the conditions of the meeting, the guarantees provided by these conditions and the content of the exchanges.

Given the decisions of the lower courts and the authorities’ requirements (which we must recall are not binding), a pre-dismissal meeting by videoconferencing remains the exception, as this solution can only be proposed as an alternative to a physical meeting and subject to surrounding it with precautions:

- Justifying its use by circumstances that make holding the physical meeting impossible or difficult (geographical remoteness, health, closure of the premises, etc...).
- Obtaining the employee's express agreement.
- Ensuring that the organization permits the identification of the participants and the confidentiality of the exchanges.
- Moreover, it may be useful to provide for an affidavit stating that no audio or video recording was organized and that no third party attended the meeting.
- Drawing up minutes cosigned by the employer and the employee that state the identity and capacity of the persons present and the precise progress of the meeting to establish that it was held under conditions enabling the employee to make observations.

It would be useful for the French Supreme Court to rule pending a legislative intervention on this issue.

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