

Original Paper

The Secrets of Transactional Dismissal in France

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Abstract

The paper explores transactional dismissal (TD), an illegal but common way of dismissing people in France. TD is often used as a means of making redundant senior managers when mergers, outsourcing or restructuring occurs. The paper first describes the procedure from several inputs (juridical, managerial, psychological, social). It further analyses the discourses of concerned actors (employees, employers, remaining employees, union representatives, lawyers) and interprets how the practice is appropriated and legitimized by the parties.

Actors display an ambivalent discourse about TD. They acknowledge TD from a managerial perspective and consider it as an injustice with distressing psychological consequences. This ambiguity is interpreted as a consequence of the paradox of the firm: nodes of contracts that, in fact, deal with human beings. The paper also underlines the lack of statistics and quantitative data about TD and the “omerta” surrounding the transaction. Such a silence remains essential for the survival of the practice.

Keywords

unfair dismissal, transaction, transgression, silence, senior managers, illegal management practice, management of salary costs

1. Introduction

In France employment essentially proceeds by means of a so called “open-ended labor contract”. As a consequence of the high number of permanent positions, it is difficult for an employer to fire unnecessary staff (Besancenot & Vranceanu, 2009). During restructuring, salary costs reductions or should an employee simply be obliged to leave the company, employers resort to mobilizing a process of abusive dismissal. In this instance, transactional dismissal (TD) is an “arrangement” in which the employee accepts to be fired for professional shortcomings in exchange for financial compensation included in the transaction (Melot, 2005). The transaction contains one or more confidentiality clauses which prevent any communication about its occurrence. Hence, the departure of a manager announced by “*he/she is leaving the company for other opportunities*” often hides an abusive dismissal with a transaction.

Since TD is almost never betrayed, one could assume that it corresponds to a win-win situation for both

employer and employee. However, the practice reveals several contradictions about the relation to work activity and the status of the enterprise. How can an employee be so engaged in his work and, suddenly so detached when dismissed? Why does TD need to be surrounded by such a silence? Why is managerial discourse so enthusiastic about work redundancy and mobility? What type of relation to work legitimizes TD?

This paper explores French TD with a descriptive and interpretive approach. The first section summarizes published work on redundancy and dismissal¹, the corresponding context and the research method. The two following sections describe the procedure and analyses the discourse about TD. The last section discusses the silence around the practice, the legitimacy of TD in a French context and the status of the company.

2. Transactional Dismissal (TD)

2.1 Existing Research

French literature is replete with provocative books with titles such as “*Dernier recours*”(last resort), Champeaux & Foulon, 2012), “*Le salarié jetable*”(disposable employee), Uchitelle, 2006), “*On achève bien les cadres*”(managers are finish off), Ehrenreich, 2005), or “*L’entreprise barbare*”(barbarian enterprise), Durieux, 1999). Yet, none of them grasps TD nor provides a thorough analysis.

There are few scientific works on the abusive dismissal of managers. In the book “*Sorties de cadres*”, Palpacuer et al. (2006) underline the rise of dismissal for professional shortcomings among the firm’s managers. They associate dismissals with the restructuring of multinational groups. Reorganizations allow for an adjustment of manpower in alignment with prospects for profits. HRD’s are acquainted with informal practices in which employees are fired for shortcomings in exchange for consolatory indemnities. These authors also emphasize the weakening of social affective links, a decline of the collectivity and mental pain among employees caused by staff dismissal (Palpacuer et al., 2008).

Guyonvarch (2010-2011) investigates the consequences of dismissal on people from a psycho-social perspective. She denounces a managerial discourse that advocates redundancy and external mobility as an opportunity for professional change. She criticizes outplacement firms which trivialize forced dismissal and weaken the psychological cost of losing a job. In fact dismissed people experience difficulties in reconciling professional mobility and private situations. They endure the contradiction between overinvestment at work and sudden detachment when dismissed. Guyonvarch refers to Coutrot who pinpoints the difficulty of being employed as a subject and then laid off as an object (a position) with an exchange between these two registers (Coutrot, 1998).

2.2 Context of the Research

The crisis in 2008 has reinforced the process of saving on salary costs. For more than 20 years, firms

¹ A dismissed employee is fired for faults or shortcomings

had already optimized their production and functioning costs. During the last decade, a new management wave, manpower and age management, directly targets salary costs. Practices such as outsourcing, downsizing, re-engineering or “noria effect” (replacement of seniors by juniors with lower salaries) allow the reduction in salary costs that range from 37 to 75% of the budget in French corporations. Moreover, restructuring is often accompanied by a new management team (Bruggeman & Paucard, 2008) and this obliges the companies to lay off staff without any real reason for redundancy (Bobbio, 2008).

French legislation authorizes dismissal for faults or shortcomings i.e., personally motivated dismissal (PMD), economic redundancy and, since 2008, termination by mutual consent (rupture conventionnelle). Between July 2008 and September 2012, the type and rate of losses of employment rate are as follows: economic redundancy, 0.8 million; termination by mutual consent, 1 million; PMD, 2.5 million². Dismissal for faults is three times higher than economic redundancy, a rate that doubled between 1995 and 2007 while that of economical redundancy halved. Authors talk about substitution between the two (Palpacuer et al. 2008). Indeed, economic redundancy is expensive and constraining whereas personally motivated dismissal is more flexible and less controlled. Since the raise in PMD is also accompanied by a decrease in judicial recourse, it can reflect a transfer from economic redundancy towards PMD followed by a transaction.

According to the law, PMD must be legitimated on a “*real and serious*” basis and accompanied with “*objective and controllable elements*” for dismissal. Yet, the causes for dismissal are not strictly defined and industrial tribunals decide in case of conflict. Professional shortcomings, unjustified absence, disrespectful language or a refusal to collaborate are considered as real and serious reasons for dismissal. Seniors managers can also be fired for not being in accordance with the strategy of the company or for unachieved targets.

A transaction or private conciliation (1854) allows a conflict to be avoided or terminated. Formally, it cannot solve an abusive dismissal since this is the work of industrial tribunals. Yet, a transaction may deal with the consequences of redundancy such as the problems of finding a new job or competition clauses. One can easily get round the law and, a transaction is considered legal when negotiated later than PMD. According to Melot (2005), “*transaction is a management tool of contract termination and part of the daily procedures of HRD's*”. It avoids legal action, allows for a rapid compensation for the employee, buys his/her silence and is not subjected to administrative controls. The transaction “*has the authority of the thing judged in last resort and cannot be appealed for legal errors or damages*” (article 2052 C). According to a French advocate, “*a transaction buys juridical peace and that has a tremendous value these days*”.

Forced dismissal touches all functions and forms of redundancy. Seniors managers 50+ are particularly

² Data taken from Dares and provided by C. Janin during the conference “Restructurations d’entreprises”, Chaire de M.A.I 19/12/2012

concerned by TD because they can be replaced by younger and cheaper managers. In France, senior managers are not fond of trade unions or of industrial tribunals. They leave the company with a consequent transactional fee that hardly legitimizes a termination by mutual consent. In short, TD is attractive for a company that wants to escape controls or to buy a manager's silence.

During the last decade, French firms have become reluctant to engage permanent staff and it became urgent to increase mobility and flexibility in the labor market. Introduced in 2008, termination by mutual consent allows a work contract to be cancelled when both employer and employee agree to consider it as null and void. The employee obtains the agreed indemnities as for any other types of redundancy and can also receive extra fees. Termination by mutual consent contains three safeguards: assistance, a withdrawal period (15 days) and homologation by the Ministry of Labor (Bertha et al. 2012). Moreover, it can be appealed during a period of 12 months. Senior managers on the verge of retirement are overrepresented in termination by mutual consent as they can benefit from unemployment payments before retirement.

This research on TD takes place in a societal context that is not aligned with managerial processes (Segrestin, 2004). French reluctance towards personal development practices (Brunel, 2008) illustrates this assessment. The critic of managerial practices is virulent (Gaulejac, 2009; Boltanski & Chiapello, 1999) whereas some other nations (The Netherlands) are positive towards them to the point of ignoring their limitations (Bakker & Louweret, 2001). As emphasized by Davoine & Méda (2009) professional activity is much more important in French collective representations than in others European societies. As an example, losing a job is often seen as a personal failure in France.

2.3 Research Method and Analytical Frame

This research in progress since 2010 is based on 10 TDs of senior and middle managers. Their ages range from 40 to 55 years, and are essentially male (8/10) reflecting the sex distribution in these positions in France³. These TDs took place between 2000 and 2010 in the following sectors: distribution (3 TDs), counseling (2TDs, 2 females), pharmaceutical industry (1TD), audiovisual (2TDs), artistic (1TD) insurance (1TD). Three TDs in the distribution sector were thoroughly analyzed by gathering confidential documents and conducting open-ended interviews of the managers concerned. In other TDs, one or several interviews were undertaken. Interviewees were senior executives whose work or competencies were not at stake. Also interviewed were a human resource director, two trade union representatives (CFDT, CFDT executive) and a branch director. This work also benefits from a previous research⁴ in our institute on employment mobility relating to 8 interviewees who were subjected to TD and talked about their experience.

Due to the illegal and confidential nature of the procedure, one is confronted with a sensitive field of

³ In France, women in high management mainly occupy HRD's positions. HRD is very reluctant to talk about TD.

⁴ Research undertaken by F. Berton, LISE.

research (Hennequin, 2012). Interviewees are selected through acquaintanceships and, depending on the cases, interviews are recorded or notes are taken. Interviews focus on the redundancy procedures (with specific questions) and feelings about redundancy (open questions). The research process triangulates analysis of documents, literature gathering and interpretation of interviews. The search in literature targets the legal and financial aspects of dismissal, redundancy, transaction and management processes.

This research follows Geertz's thick description (1973) which combines descriptive and interpretive approaches. It explores pertinent elements of TD and interprets the meaning given by the actors to the procedure. It borrows the concept of "hypocrisy" from Brunsson (2002) who investigates the contradictions between what is said and what is done. This author analyses the mechanism by which a discourse in one direction compensates action directed in another direction. Here we focus on the means by which actors legitimize the contradictions inherent in TD. Finally, this work mobilizes a "home-made" analytical frame centered at the crossing of the articulations between individual and collective on one hand and meaning and action on the other hand (de Bony, 2010). This allows light to be shed on the contradictions or consistencies of the situation together with their legitimatizations.

3. The Procedure of TD

3.1 The Unfolding of the Procedure

TD is the result of two parties wishing to avoid the expenses, risks and publicity of a legal procedure. It is mainly proposed by the company but can also be requested by the employees. In the absence of a professional shortcoming, a real and serious reason must be elaborated before proceeding with dismissal.

The procedure unfolds as follows:

- The employee receives a registered letter informing him of a potential dismissal and calling a meeting in 5 or more days. The letter mentions that the employee can be accompanied by another member of staff.
- During the meeting, the employee listens to the reasons for dismissal and the starting date of unemployment. Afterwards, he receives a registered letter of dismissal confirming the reason for dismissal.
- The employee contests the motive for dismissal by means of a registered letter and asks for a mediation (with ultimate threat of litigation).
- The employee is invited to a mediation meeting.
- The transaction is formalized by the two parties (after a few negotiation meetings)

Dismissal and transaction are subsequent and dissociated since the transaction can proceed only when the redundancy is finalized. During the negotiation on the transaction, the employer and employee decide the on amount of the transaction, recourse to an outplacement bureau and other aspects facilitating the employee's reconversion (company car, telephone etc.). The employee receives legal

indemnities depending on the years of service. In addition, he/she receives a payment for the final balance of account, a work certificate and a redundancy certificate for the unemployment organization (ASSEDIC).

In spite of strict procedures, the actual process can deviate from the formal rules. Sometimes, the manager is informed in advance about the situation and asked to find the reason for his dismissal with his n+1. Negotiation on the transaction depends on the strategy adopted by the parties. Usually both of them have an advocate who does not directly intervene in the negotiation. In case of disagreement, the employee can start a judicial recourse for unfair dismissal as long as the transaction has not been signed.

3.2 Transaction, Content of the Document and Financing

The document summarizes the employee's career in the company, reason for dismissal and the employee's argumentation contesting this reason. Then, a series of provisions describe the reciprocal concessions made to resolve the prejudice caused by the dispute. The last provisions deal with the waiver of judicial recourse, respect of confidential company information and the confidentiality of the transaction. Disclosure can only be broken to administrative, fiscal, social or judicial authorities.

The existence of TD and its corresponding costs are not detectable in company documents. Annual reports provide the number of recruited and departing staff with no mention of the reasons for departures. According to an interviewed human resource director, the budget for the transactions is referenced as exceptional charges for management operations during the following year. Consequently, they do not appear in the official documents of the company.

French law requires that companies of more than 50 employees declare the movement of staff and reasons for dismissals on a monthly basis but TDs do not appear in these statistics since they are counted as dismissals for shortcomings. Companies of less than 50 employees (the large majority) are not obliged to produce such data. Dares⁵ undertakes a trimestral enquiry on the basis of voluntary companies. Hence, these numbers remain fragile. The only document that mentions the existence of a transaction is the certificate for the unemployment bureau. However not every person concerned by TD visits this office.

4. Actor's Discourse on Redundancy

Two categories can be distinguished according to the atmosphere (consensual or conflicting) in which the 10 studied TD took place. One objective of this research being to characterize the nature of the relation to work that legitimizes TD, we retain a favorable situation, a sudden transition between high implication at work and sudden dismissal. This is the case of managers/directors who work more than 50 hours/week, earn substantial salaries and are suddenly fired during a restructuration. In the following section, we essentially take into account these cases.

⁵ Direction de l'Animation de la Recherche des Etudes et des Statistiques

4.1 The Discourse of Senior Managers about Their TD

Interviewed managers maintain that TD is a current practice. One of them has experienced three TD between 2000 and 2010 and says that 80% of managers in large consumer distribution sector have been dismissed. Another says that it was the norm in his previous company with 14 transactions out of 15 dismissed. These affirmations are corroborated by a trade union representative saying that half of the redundancies for shortcomings are not made for legitimate reasons.

When they talk about dismissal, managers deliver two discourses that are inconsistent. On one hand they are in phase with their company and evoke the fatality of the procedure. On the other hand, when asked about their feelings when dismissal is announced, they talk about loneliness, injustice and the difficulty of enduring the situation. Interestingly, the two discourses do not overlap and consequently, the paradox is not obvious.

Interviewed managers consider it normal to be ejected when a restructuring action occurs. For example, they say: *"In the distribution sector this is a common practice, many companies have their ups and downs and we know that we sit on ejector seats"*. Indeed, the higher the position, the more easily they are dismissed. They agree on the fact that the risk is included in the salary: *"Part of our wage corresponds to the risk of dismissal"*.

They accept the situation without resisting because it is unstoppable: *"We know that there is no return hence it is not useful to resist. It is unstoppable, here is nothing to do"*. They also say that they cannot take the risk of defending themselves: *"One cannot leave the company on unfavorable grounds. Your best interest is to accept and leave as soon as possible"*. They are concerned about not risking their professional reputation or compromising the company: *"Leave clean and quick and keep your both head up"*.

The procedure offers the possibility of assistance by someone in the company but managers drop that subject: *"A senior manager does not need to be assisted!" We are not in a collective situation; we remain in a very small cénacle"*. Assistance could also be interpreted as resisting the process. The manager takes an advocate to help him in the background but negotiates alone with his employer. There is no question of refusing and appealing: *"If you appeal to the industrial tribunal you are finished in your sector"*. In this regard, a manager specifies: *"HRD's have their clubs and talk in the corridors: 'So and so is applying for a position in our company what do you think about him'? 'Two years with a tribunal! Don't touch this guy!'"*. In short, transaction is the norm and there is hardly a way to escape it: *"With a transaction you get more money, it goes faster and you do not tarnish the company"*.

The transactional indemnity can be very attractive if the manager finds another job quickly. One of them says: *"I was always calculating: if I find a position within three months it's wholly to my benefit, after six months, I am still winning and if I do not find a job, I go up the wall!"*. Indeed, at 50 years, managers have substantial family expenses: *"With two students and one still at school I cannot afford to lose my salary"*.

The practice is so current that dismissal for shortcomings does not embarrass managers. When asked

about a legitimization of their dismissal they answer: *"I say that there was a restructuration in my company and my position has been abolished and I add: indeed my n+1 is the first in my reference list"*. Or *"I say that there was a wave of redundancies and I was included in the round"*.

While the transaction remains secret, the company still has to communicate the departure of the manager. One person questioned speaks in these terms: *"There is a notification with a laconic formula that says: 'X has decided to leave the firm to give another orientation to his career'". A phrase such as "we wish him." can be added, but, most of the time, nothing. It's a current expression and everyone understands that the guy has been fired"*.

The discourse of the dismissed is clear. The company tries to fire decently, the manager does not make waves and both try to keep holding their heads up. The firm will better recommend the manager if he has not resisted. In short, the practice is illegal, the company cheats, the manager keeps quiet and pockets indemnities.

4.2 The Feelings of Fired Managers

Asked about their feelings when dismissal is announced, managers first talk about the brutality of the situation. One of them says: *"I have received that as a stab in my stomach"*. Then they evoke a feeling of isolation: *"When the words are pronounced, you are alone, you cannot talk about it and those who know keep silent. You are removed from decision making, you draw back. You hold your head up, you are pretending, you have a huge feeling of isolation"*.

Concerning the legality of the procedure, one says: *"It's a real trap and you are an actor in this trap. Your interest is to accept but you endure a feeling of injustice. It is easy to attack seniors, managers that are involved and loyal to their company because we are loyal. The firm is not loyal"*. Or: *"The firm is a big rip-off for the unemployment bureau. Inspectors close their eyes and everyone is responsible. Trade unions are the first ones responsible"*. Or *"It's lying, it's soliciting public money, it's using public money"*.

Interviewees do not spontaneously talk about the bereavement following dismissal. They indirectly address that point when they talk about their subsequent search of a job: *"During recruiting meetings, we say that redundancy has occurred and that it is totally over"*. In a context that advocates pro-activity, involvement into previous work and colleagues seems old-fashioned. One should easily start up again and move on.

4.3 Other Actors Involved in Non-Motivated Dismissal

4.3.1 Trade Union Representative

Trade unions representatives usually know about TD but are sidelined by managers. One of them evokes 20 years experiences in a public company: *"When a boss is dismissed, his clan is also dismissed"*. Asked about the transaction he says: *"Public companies are supposedly more moral but, in our company, they pay even bigger amounts, they don't make so much fuss. Sometimes they try to disguise a collective redundancy: it is a question of image. They don't want to be known as an enterprise that lays off staff."* He also evokes dirty dismissal: *"Sometimes they plot against somebody and build dirty traps."*

I have seen the case of an assistant that was imposed on a director. She denounced him for moral harassment after only 24 hours of work!”

This representative interprets manager’s lenient attitude towards the practice as follows: *“People who have gradually built their position in the company, they meek as a lamb, they have changed. They talk about dismissal in an understated way. They have not accepted but they have internalized. They have behaved as lambs for 20 years the other from small goatee”*.

4.3.2 HRD and Director

Company representatives have been questioned about TD in various meetings and colloquium and this induces either embarrassment or avoidance. Usually, they slip away and answer another question. However one of them openly says: *“TD is convenient for every ones and doesn’t trouble trade unions. When parties agree, trade unions cannot step in. When the process goes out of control, they will intervene. It is a win-win situation. However, managers would often prefer a salary reduction in exchange for stability of employment. Hence they don’t win”*.

An ex-divisional director from an international firm says:

“Sometimes there are dirty situations when we are pressured by hierarchy to fire someone who has not committed any professional faults and, if we don’t accept, we take the risk to be fired. We are between the devil and the deep sea”. Concerning the silence around TD he says: *“There is a form of an “omerta” and the company maintains this “omerta”. The dismissed person is weakened and disgusted. Colleagues need to protect their brood. I have never encountered a dismissal when there was an outcry of colleagues saying: “We must stop him from leaving the company”! However, in this story, the psychological dimension is not to be neglected.”*

5. Discussion

Beyond the need for mobility and flexibility in the French economy, termination by mutual agreement was also implemented to provide a legal frame for TD (Bertha et al. 2012). Despite the one million attained in 2012, one can wonder to what extent it has achieved its goals. Taking into consideration interviewee’s estimates, it seems necessary to measure the rate of TD. When retirement age increases and seniority in companies decreases, it is time to worry about TD between 45 and 65 years

Indeed, TD circumvents legal procedures and avoids supervision, control, evaluation and even official statistics. It is depleted with transgression and could not survive if it was not so genuinely muzzled. TD also cheats with unemployment funding (ASSEDICS) and with the taxpayer. It is harmful for employees at both psychological and social levels. A dismissed employee is isolated in confronting an artificial situation and is soon asked to leave without any appreciation for his years of services. Since the realities of the situation are ignored, the dismissed employee has to overcome his feelings, omit the mourning of his work, forget his social environment, remain positive and find another job. The silence imposed by the transaction and the firm damages the trust between colleagues and undermines the atmosphere in the firm.

Managerial discourse promotes redundancy as an opportunity for change during the development of a professional career. A good manager is proactive and uses dismissal as a springboard to project himself towards the future. In a French context, it seems difficult to make the adjustment involved in swinging from full involvement in work to being dismissed or to accept the exchange between the register of the person (a manager at work) and that of the things (a suppressed position). This exchange of registers is favored by a new form of governance more supple and consensual that reflects a weakening of arbitrations (Moreau Defarges, 2003). It is compatible with weak articulations between the person and her actions as in the case of consensus (de Bony, 2007; 2010). Supiot (2005) criticizes this evolution in these words: “*Today, the objective is no more to state the rules but to create links that condition the behavior of each representative of the law. In this system there is no more sovereign people, each individual becoming an agent of a regulation that is no more deliberated anywhere (p. 272).*”

The dual discourse of dismissed people can be interpreted in the light of the paradox at the core of the company. A company is a node of contracts together with an organization of people and power relations (Robbé, 1999). On a juridical basis, the company is reduced to a circuit of contracts between various persons who control its economic resources. On an economical basis its aims is to maximize profit. It is endowed with considerable power (due to globalization and shareholding) and has almost no regulatory ground. Company headquarters are divided in multiples interests and professional groups in which status, roles and interests seldom match. The potential increase of managerial rationalization, unlimited demand for performance, diverging perceptions of quality and productivity can easily lead to inconsistencies such as TD.

Practitioners should benefit from an accurate vision of TD. In the French societal context in which losing a job is taken as a personal failure and displays a relevant psychological impact, the lack of transparency regarding TD is more dangerous than in other contexts. They should be aware of the fact that, in a French context, money does not compensate for the implication in work. In addition, when comparing the power of a company and an employee confronted with TD, the employee does not stand a chance. Managers deserve to be accurately informed about the realities of this practice and its occurrence in their own companies. In order to react proactively when confronted with TD, managers should be able to anticipate a potential TD when their firm is subjected to mergers, outsourcing and/or restructuring

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