FRANCE

Mediation in individual employment conflicts brought before the Court of Appeal in Grenoble

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Few cases of mediation have been instigated by judges in industrial tribunal cases. The activities of the social chamber of Grenoble between 1996 and 2005 are more significant. The chamber ordered more than 1000 mediations with a resolution rate of more than 75%. 8% of the chamber's total cases were thus definitively resolved.

Mediation is carried out under the supervision of a judge, who retains control of the case.

1) THE JUDGE MAKES A SELECTION OF CASES APPROPRIATE FOR MEDIATION

In Grenoble, cases were examined and mediation was proposed in approximately 20% of cases. That is to say that in 80% of cases, judges did not consider this measure to be appropriate. Mediation is therefore not a panacea.

A unit for selecting cases was established and dossiers were examined upon reception by the service, so as not to waste time.

Cases chosen for mediation must fulfil certain criteria:

- Length of service of the employee: Dismissal does not have the same impact on an individual who has worked for 30 years in an organisation as it does on someone who has worked there for 6 months.
- Family conflicts: Dismissal of a brother, sister or child has a very strong emotional impact, and the dispute is almost never a purely professional conflict. It should therefore be examined in a wider context.
- Maintaining existing links (an employment contract may be ongoing or the employee may have shares in the business).

2) THE JUDGE PROVIDES INFORMATION ABOUT MEDIATION

The information may be given systematically or on a case-by-case basis, at any given moment. More specifically, it may be given during the preparation of the case, either:

1 - by a letter or information sheet sent to the parties. Practice shows that the parties do not respond to this.

2 - a questionnaire to encourage reflection on the benefits of mediation.

3) THE JUDGE PROPOSES MEDIATION

During special *mediation proposition* hearings organised by the social chamber of Grenoble, 40 cases were recruited by audience. The parties were summoned to the hearing, in person, with their lawyers. The summons letter indicated expressly that their presence was necessary. The mediators were present at the hearing, seated alongside the judge.

The judge explained the concept of mediation to the parties, and why this measure was being proposed to them. When the parties hesitated or wanted further explanation, the mediators present retired with them to rooms specially provided for this purpose, so as to give them all the information.

The measure was accepted in around 50 % of cases.

4) THE JUDGE APPROVES THE AGREEMENT

At the end of the mediation, if it has not led to an agreement, the judge is obliged to make a judgement on the case.

If the mediation has resulted in an agreement, the case is nonetheless brought before the judge, so that he can declare the proceedings to be closed.

The parties may, equally, if they wish, apply for official recognition of their agreement (article 131-12 of the Civil Procedure Code), which confers enforceability.

During the approval of the agreement, the judge exercises limited control. He must ensure that the agreement does not threaten public law and order and is not in contravention of the law or of the rights of third parties. Of the 700 agreements which were brought for approval before the court in Grenoble, only one constituted an infringement of the rights of third parties.

The judge must ensure that the application of the agreement is simple and that it does not contain potestative or hypothetical conditions.

The judge must also ensure that the parties do really accept the agreement, and that it has not been concluded in ignorance of the rights.

Mediation should be carried out in adherence with article 6 of the European Convention on Human Rights, and should not contravene the right to a fair trial.

In our opinion, the role of the judge is not to check the content of the agreement, nor the existence of reciprocal concessions, unless the parties have decided to give the agreement the specific form of a transaction.

The results of mediation

Whereas the resolution of a litigation through the application of the principles of law is rigid, that found through mediation is supple, innovative and pragmatic, and thus better adapted to the interests of each party.

It can happen that during mediation an employer agrees to allow the employee to return to work, or to help him or her to find other work, using contacts, or even by paying for a recruitment service.

In one case, an employee sacked for stealing clients from his employer abandoned his demands for compensation in order to buy the business from the employer. The agreement allowed the employee to acquire his clientele in a legal way and allowed the employer, who wished to retire, to find a buyer. The interests of both parties were protected.

70 to 80 % of mediations lead to “win-win” agreements which, since they are accepted by the parties, are put in action immediately.

The parties may chose to apply article 2044 of the Civil Code, or an informal draft agreement.