ITJ | The International Tax Journal

Unfair dismissal, its burden of proof, and resulting effects under Algerian Legislation

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Abstract---This academic study examines unfair dismissal (disciplinary and arbitrary termination) under Algerian labor legislation, focusing primarily on Article 73 of Law No. 90-11 of April 21, 1990, as amended and supplemented by Law No. 91-29 of December 21, 1991. It analyzes the concept of unfair dismissal, the exhaustive list of serious faults justifying disciplinary termination, the burden of proof (which generally rests on the worker to disprove the employer's stated reasons after disclosure), and the legal effects of unfair termination. These effects include, as primary remedies, either reinstatement with retention of acquired privileges or, in case of refusal by either party, financial compensation of no less than six months' wages, without prejudice to additional damages for harm suffered. The study highlights persistent doctrinal and judicial inconsistencies in the application of Article 73 due to its ambiguity, reviews relevant Supreme Court jurisprudence, and concludes by calling for a clearer legislative amendment while affirming the Supreme Court's central role in unifying interpretation pending such reform.

Keywords---Unfair dismissal, Disciplinary dismissal, Serious misconduct, Burden of proof, Reinstatement.

Introduction

Work constitutes the primary element for individuals' livelihoods, serving as the source of their sustenance and that of their children. It has undergone various developments across historical stages, evolving from individual activities to meet personal needs to subordinate waged labor. Initially, labor relations were based on the logic of force, followed by the absolute dominance of the principle of freedom of will in contracting and the supremacy of supply and demand laws, particularly in the early 19th century with the expansion of industrial and commercial activities, especially amid the Industrial Revolution in Europe. For a considerable period, workers remained far removed from any forms of

How to Cite:
Salah, C. (2026). Unfair dismissal, its burden of proof, and resulting effects under Algerian Legislation. *The International Tax Journal*, *53*(1), 294–305. Retrieved from https://internationaltaxjournal.online/index.php/itj/article/view/520

The International tax journal ISSN: 0097-7314 E-ISSN: 3066-2370 © 2026

Submitted: 20 March 2025 | Revised: 09 July 2025 | Accepted: 15 November 2025

protection against mistreatment, oppression, exploitation, low wages, poor and harsh working conditions, and frequent occupational accidents. This necessitated the formation of labor coalitions to advocate for workers' rights, pressuring employers to raise wage levels and thereby improve workers' conditions.

Amid the escalating conflict between labor coalitions and employers, which threatened social peace and security, the state was compelled to intervene by enacting laws to ensure balance and stability in the labor domain. Consequently, labor law was established, expanding in scope and diversifying in provisions to instill a sense of security and reassurance in the relationship between the worker and the employer.

Nevertheless, arbitrary terminations by employers and infringements on workers' rights persisted to a relative extent, particularly under Law No. 90-11 dated April 21, 1990. This prompted renewed state intervention to amend Law No. 90-11 on labor relations, introducing provisions and rules to regulate the termination of labor relations and specify serious grounds for such termination, pursuant to Law No. 91-29 dated December 21, 1991, amending and supplementing Law No. 90-11 on labor relations.

In this context, it should be noted that the termination of the labor relationship between the employer and the worker may occur in ordinary circumstances, such as resignation, which is a right exercisable by the worker at will, provided it is submitted in writing to the employer and the worker does not abandon the position until the end of the prior notice period. Other ordinary terminations include impossibility of performance and total incapacity for work, based on general provisions in the Civil Code and labor legislation, whether absolute or relative, such as in the case of the worker's death—considering the personal nature of the worker in the employment contract—or retirement, which is deemed one of the natural causes for terminating labor relations, whether at the worker's or employer's request, in addition to the aforementioned ordinary cases for termination.

There are also extraordinary cases leading to the termination of labor relations. An indefinite-term employment contract may end due to nullity or legal annulment as provided in the labor relations law. It may also terminate under general rules for bilateral contracts through unilateral rescission based on the free will of the parties.

Furthermore, an employment contract may terminate through disciplinary dismissal, arising from the worker committing serious misconduct during or in connection with work. This type of dismissal is justified to protect the employer's interests and prevent disruption to the rules governing and organizing the employing enterprise. The classification and determination of serious misconducts stipulated in Article 73 of Law No. 90-11, as amended and supplemented by Law No. 91-29, remain subject to doctrinal and judicial controversy due to variations in labor sectors and levels, leading to divergent judicial rulings in qualifying professional faults oscillating between seriousness and simplicity. Accordingly, the problem arises: What constitutes disciplinary dismissal, on whom falls the burden of proof, and what are its effects?

This is what we shall attempt to address through the text of Article 73, as well as relevant doctrinal studies on labor law and the jurisprudence of the Supreme Court, in accordance with the sections below.

1. The Concept of Unfair Dismissal

As previously mentioned, the employer possesses the authority to suspend or dismiss the worker pursuant to the subordination relationship linking the worker and the employer, thereby protecting the employer's interests on one hand and ensuring the stability and efficiency of the system within the enterprise on the other.

However, this authority is restricted within the bounds of the serious faults stipulated in Article 73. Prior to its amendment, Article 73 delegated to internal regulations the determination of faults and corresponding penalties, including the penalty of removal or disciplinary dismissal. This created a significant issue, as the internal regulations of economic enterprises varied in identifying faults warranting dismissal; what constitutes a serious fault in one enterprise, thereby necessitating dismissal, may not in another. Consequently, the legislator, in amending Article 73 pursuant to Law No. 91-29, resorted to enumerating the serious faults resulting in dismissal to safeguard against employer arbitrariness and to avoid another issue prevalent under the pre-amended Article 73, namely enterprises employing fewer than 20 workers, which were not obligated to establish internal regulations.

1.1. What Are the Cases in Which Dismissal Is Considered Unfair?

Article 73-4, inserted by Article 9 of Law No. 91-29, provides that "if the dismissal of the worker occurs in violation of the provisions of Article 73 above, it shall be considered unfair." Accordingly, the case in which dismissal is deemed unfair is:

- If it occurs outside one of the cases stipulated in Article 73, as these cases are enumerated exhaustively, as upheld by the Supreme Court in its decision dated June 4, 1994.[1]
- Article 73-1, inserted by Article 3 of Law No. 91-29, states: "The employer must consider the circumstances in which the fault was committed..." Accordingly, the second case in which dismissal is considered unfair is the employer's failure to consider the circumstances surrounding the commission of the fault. This rule is imperative in its formulation, and the employer may not violate it; otherwise, the action is deemed void, and the dismissal unfair, as affirmed by the Supreme Court in its decision dated March 6, 1989.
- Dismissal of the wage-earning worker in the absence of internal regulations: Article 73-2 provides: "The dismissal stipulated in Article 73 above shall be announced in compliance with the procedures specified in the internal regulations."
- It is evident from this article that the employer cannot issue a dismissal decision without the existence of internal regulations at the employing entity's premises. By implication of the contrary, any disciplinary dismissal issued by the employer in the absence of internal regulations is considered unfair.

In this context, there is the decision of the Social Chamber of the Supreme Court dated December 20, 1994, under No. 111984. The facts of the case are summarized as follows: The Maintenance Unit in Ain El Beida dismissed the plaintiff (N.M.), who challenged the dismissal decision before the Ain El Beida Court, relying on the absence of a substantive formal procedure manifested in the lack of internal regulations. However, the court issued a preliminary public judgment on February 24, 1992, dismissing the claim for lack of foundation. The dismissed worker appealed the judgment to the Oum El Bouaghi Judicial Council, which issued a decision on June 20, 1992, upholding the judgment. The worker then filed for cassation before the Social Chamber of the Supreme Court on October 25, 1992, basing the challenge on a single ground: the employing entity's violation of a substantive procedure represented by the absence of internal regulations. The Social Chamber of the Supreme Court issued a final decision on December 20, 1994, stating as follows:

"Whereas, upon reference to the case file and the contested decision, it appears that the petitioner considers the dismissal he faced as unfair due to the absence of internal regulations at the employing entity. And whereas the provisions of Article 73 of Law No. 90-11 dated April 21, 1990, stipulate that the penalty of removal is imposed in cases of the worker committing serious professional faults according to the conditions specified in the internal regulations, and pursuant to Article 77 of the same law, the internal regulations determine the nature of the professional fault, the degree of its penalty, and the procedures for its execution.

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[1] Decision of the Social Chamber of the Supreme Court under No. 135452, June 4, 1994. Algerian Journal of Labor, No. 22, 1998.

And whereas it is established in the present case that the penalty of removal imposed on the petitioner occurred in the absence of internal regulations, constituting a violation of Articles 73 and 77 aforementioned. For these reasons, the Supreme Court accepts the challenge in form and, on the merits, annuls the contested decision issued by the Oum El Bouaghi Judicial Council dated June 20, 1992."

- If the dismissal of the worker occurs in violation of the legal and/or mandatory conventional disciplinary procedures, it is considered an unfair dismissal. The disciplinary procedures have been previously explained.
- Article 73-3 of Law No. 90-11, as amended and supplemented, provides: "Any individual dismissal carried out in violation of the provisions of this law is considered unfair, and the employer must prove the contrary."

In fact, the dismissal of the worker, as defined by Law No. 91-29 dated December 21, 1991, amending and supplementing Law No. 90-11 dated April 21, 1990, on labor relations, in the text of Article 73, is considered an unfair dismissal decision even if the dismissal decision was executed or in accordance with all legal and mandatory conventional procedures specified in the internal regulations of enterprises. Nevertheless, the dismissal is unfair because the fault attributed to the worker is not established against him. For example, if the employer dismisses the worker from his position on the basis that he insulted him, and the employer relies on some workers as witnesses, but it ultimately transpires that the workers stated in the minutes that they did not hear the insult directed at the employer, then the dismissal procedures are valid, but the fault attributed to the worker is not established. This was confirmed by the judgment issued by the Setif Court dated April 25, 1994, No. 1, Index 18, from which the following is extracted: "It appears from the requests and defenses of both parties and the documents attached to the file that the incident of insult and abuse on which the dismissal decision was based is refuted, rendering the fault not established against the worker. This is because the employer or the responsible party built his claims on the basis that the workers were present, but upon reading the file, the opposite appears, through examination of the minutes and hearing the workers who stated that the worker requested leave to exit and did not engage in insult and abuse. Accordingly, we conclude that the fault is not established and that the decision taken by the employing entity is unfair, declaring its annulment and restoring the situation to what it was before the dismissal decision, because the decision lacks evidence and is not reasoned. Law No. 91-29 amending and supplementing Law No. 90-11 explicitly provides in Article 73-3 that any individual dismissal carried out in violation of the provisions of this law is considered unfair, and the employer must prove the contrary, necessitating in the present case the declaration that the decision is unfair."

In another decision issued by the Supreme Court dated January 17, 2001, regarding the establishment of the fault against the worker subject to dismissal, it stated: "Whereas the appellant criticizes the contested judgment for lacking reasons, as the dismissal decision taken against the appellant is illegitimate because the appellant was on compensatory leave for overtime from April 7, 1997, to April 9, 1997, and on sick leave from April 10, 1997, to April 14, 1997, and the enterprise's services received the medical certificates, yet considered him in a state of abandonment of position, but the judge did not address the appellant's defenses."

Whereas, upon reference to the contested judgment, it appears that the trial judge based his ruling on the appellant not submitting the medical certificates within the deadline and having previously been subjected to disciplinary penalties due to repeated absences.

Whereas such analysis, particularly reliance on disciplinary precedents unrelated to the present case, does not provide the judgment with a legal basis or sufficient reasoning, as the trial judge should have discussed the fault attributed to the appellant and qualified it by determining its degrees of severity and the disciplinary penalty imposed, considering what the law provides, particularly Article 73 of Law No. 91-29 and Article 9 of Ordinance No. 96-21 dated 1996, and the internal regulations in terms of their

conformity with the law, rather than basing the ruling on disciplinary precedents and the deadline for submitting medical certificates, which is disputed by the appellant. Accordingly, it must be said that the contested judgment is flawed by insufficiency, rendering it subject to cassation.

Thus, the non-establishment of the commission of the fault by the worker renders the disciplinary dismissal, even if conducted in accordance with disciplinary procedures, an unfair dismissal. This is the principle established and affirmed by the Supreme Court in several decisions, including the decision dated December 13, 2001: "It is established that if the attributed fault is not proven or non-existent, it renders the dismissal decision unfair even if disciplinary procedures were respected." [2]

- Another case in which dismissal is considered unfair is the dismissal of the worker upon the expiration of the term of the employment contract concluded in violation of Article 12 of Law No. 90-11. A fixed-term employment contract pertains to the performance of works of a temporary or seasonal nature, requiring a limited duration for completion, pursuant to Article 12 of Law No. 90-11, supplemented by Article 2 of Law No. 96-21, which provides: "An employment contract may be concluded for a fixed term on a full-time or part-time basis in the cases expressly provided below:
  - When the worker is employed to perform work related to non-renewable construction or service contracts.
  - When it concerns replacing a permanent worker temporarily absent from his position, and the employer must reserve the job for its holder.
  - When the employing entity requires the performance of periodic works of a discontinuous nature.
  - When justified by an increase in work or seasonal reasons.
  - When it concerns activities or works of a limited or temporary duration by their nature.

In all these cases, the employment contract shall precisely indicate the duration of the labor relationship and the reasons for the fixed term."
Thus, a fixed-term employment contract must not deviate from one of these cases stipulated in Article 12, and the contract must precisely state the reason for fixing the term, as the general rule for employment contracts is that they are concluded for an indefinite term pursuant to Article 11. Consequently, the labor relationship concluded between the worker and the employer ends in accordance with the general principles of fixed contracts upon the expiration of the agreed term, without imposing any obligation on the parties, except regarding the possibility of notifying the intention not to renew the contract by one of the parties. Silence in this case and continuation of performance may be interpreted as a desire to renew and extend the contract, thereby transforming it into an indefinite-term contract.

The fixed-term contract may also be terminated before its expiry by agreement of the parties. In this regard, dismissing the worker without a fault on his part and before the end of the contract term is also considered an unfair dismissal. Thus, this type of worker's contract aligns with indefinite-term contracts in terms of applying the theory of unfair dismissal with its proof.

Furthermore, concluding a fixed-term employment contract outside one of the cases mentioned in Article 12 of Law No. 90-11 renders it an indefinite-term contract pursuant to Article 14 of Law No. 90-11. Consequently, dismissing the worker upon the expiration of the term of the contract concluded in violation of Article 12 and without committing a serious fault constitutes an unfair dismissal.

[2] Decision issued by the Social Chamber of the Supreme Court, File No. 212611 dated February 13, 2001, Judicial Magazine, No. 1, 2002, p. 177.

As for criminal acts punishable under Algerian criminal legislation, which are considered serious faults pursuant to Article 73 of Law No. 90-11, as amended and supplemented by Article 2 of Law No. 91-29—"in addition to serious professional faults punishable under criminal legislation"—the Supreme Court, in a decision dated January 17, 2001, held that a professional fault leading to the termination of the labor relationship and constituting a crime under criminal law cannot be relied upon as a reason for dismissal unless proven by a final judicial judgment having the force of res judicata prior to the dismissal from work. In Case No. 211629 between (M.A.) and (S.M.), the Supreme Court's decision stated: "However, upon reference to the contested judgment, it appears that the first-instance judge based his ruling on the theft charge attributed to the worker being one of the faults punishable under criminal law, which cannot be established against the worker except by a final judicial judgment convicting him. In the present case, this charge remains a mere accusation not established against the worker due to the absence of a judicial judgment.

Whereas it is established from the jurisprudence of the Supreme Court that a professional fault leading to the termination of the labor relationship and constituting a crime under criminal law cannot be relied upon as a reason for dismissal unless proven by a final judgment having the force of res judicata prior to the announcement of the dismissal. Whereas the first-instance judge, in basing his ruling on the dismissal lacking justification due to the absence of a judicial judgment establishing the fault, rendered a judgment consistent with judicial jurisprudence." [3]

1.2. The Burden of Proof for Unfair Termination

First and foremost, unfair termination is realized by establishing one of the following matters:

- Lack of any justification, meaning the termination does not rely on a specific reason warranting the end of the labor relationship between the parties, but rather the termination decision merely expresses one party's desire to dissolve the employment contract.
- Lack of seriousness in the justification for termination: For example, if the employer bases the dismissal decision on a trivial and non-serious justification.
- Invalidity of the justification: Such as dismissing the worker on the pretext of committing a serious fault when this fault is not established against the worker.

However, the question that arises is: Who bears the burden of proving the abuse—the employer or the worker?

Pursuant to the general rules in civil law regarding causation, the terminating party is not obligated to mention the reason relied upon in proceeding with the termination, such that the silence on mentioning the termination reason cannot be inferred as lacking justification, considering what Article 98 of the Civil Code provides: "Every obligation is presumed to have a legitimate cause unless proven otherwise. The cause mentioned in the contract is considered the true cause until proven contrary thereto. If evidence establishes the fictitious nature of the cause, then the party claiming another legitimate cause for the obligation must prove what is claimed."

This corresponds to Article 137/1 of the Egyptian Civil Code. Moreover, abuse cannot be inferred merely from the invalidity of the stated termination reason, as this would open the door for the terminating party to prove another legitimate reason, as inferred from Article 98/2 of the Civil Code. Additionally, the requirements of general rules on the exercise of rights presume the legitimacy of their use unless proven otherwise by the claimant, as they assert contrary to the established principle, [4] which aligns with general rules of evidence in Sharia and law. [5]

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[3] Judicial Magazine, No. 1, 2002, p. 173.

[4] The claimant here means anyone asserting a matter contrary to the apparent throughout the lawsuit, whether the one who filed the lawsuit or against whom it was filed originally.

[5] The creditor must prove the obligation, and the debtor must prove discharge therefrom, based on the rule of respecting the established status quo, that the principle is discharge of liability, and that whoever claims another's obligation contrary to this principle must provide evidence for the claim.

As for the burden of proving dismissal issued by the employer, the rules for termination due to disciplinary fault require the employer to disclose the reasons justifying the dismissal decision, representing an obligation to announce the reason relied upon in dismissing the worker. If the employer refrains from providing it, a presumption of unfair termination arises in favor of the worker. Thus, it is incumbent on the terminating party to disclose the reasons leading to this termination; if not mentioned, a presumption arises in favor of the other party that the contract termination occurred without justification.

However, while the employer is obligated to provide reasons and justifications for the termination—dismissal—they are not required to prove their validity. If the employer states the reason for dismissing the worker, the burden of proving its invalidity falls on the worker, demonstrating that the dismissal lacked justification. If the worker proves the invalidity of the justification relied upon by the employer in the dismissal, this constitutes sufficient evidence of the employer's abuse.

2. The Effects Resulting from Unfair Dismissal

Article 73-4, paragraph 2, of Law No. 90-11, as amended by Article 9 of Law No. 96-21, provides: "If the dismissal of the worker occurs in violation of the provisions of Article 73 above, it shall be considered unfair. The competent court shall rule preliminarily and finally either to reinstate the worker in the enterprise while retaining acquired privileges, or, in case of refusal by one of the parties, grant the worker financial compensation not less than the wage received by the worker for a period of six months of work, without prejudice to potential compensations. The judgment issued in this regard is subject to cassation."

- Article 73-5, inserted by Article 3 of Law No. 91-29, provides: "The worker who did not commit a serious fault is entitled to a notice period, the minimum duration of which is determined in agreements or collective conventions."
- Article 73-6, inserted by Article 3 of Law No. 91-29, provides: "The dismissed worker is entitled, throughout the notice period, to two hours per day, which may be combined and paid, to enable searching for another job."

Thus, from Article 73-4, the effects of unfair dismissal are evident, which we shall analyze as follows:

2.1. Reinstatement with Retention of Acquired Privileges

2.1.1. Reinstatement:

As is known, for the claim of a worker subjected to unfair dismissal to be admissible before the competent judicial authorities, all stages of amicable settlement of the existing dispute between the worker and the employer must be exhausted. Among these stages is a substantive stage before the reconciliation office: after presenting the dispute to this office through the labor inspector, who summons the parties—the worker and the employer—and attempts to find a middle ground satisfying all parties. If each party accepts the amicable solution, a reconciliation minutes is drafted. In case of continued disagreement, a non-reconciliation minutes is drafted pursuant to Articles 19, 36, 37 of Law No. 90-04 on the settlement of individual labor disputes, granting the worker the right to resort to the judiciary by filing a lawsuit before the court adjudicating social matters, requesting a set of demands not reconciled upon, primarily consisting of annulling the dismissal decision, reinstating the worker in the job position, and compensation.

It is clear from Article 73-4, paragraph 2, that the legislator adopted the jurisprudence of the Supreme Court regarding the inevitability of returning the worker to the job position upon annulling the dismissal decision. However, in case of refusal by one of the parties, the worker is granted financial compensation. The question raised in this regard is:

Can a worker dismissed unfairly resort to the urgent section of the social court to impose a coercive fine on the employer in case of the latter's refusal to execute the judicial judgment ordering reinstatement in the job position?

To answer this question, we note that the general principle in the Code of Civil Procedure, pursuant to Article 340 of the Code of Civil Procedure, is that all judgments and judicial decisions bearing the executory formula grant their holder the right to resort to the competent judicial authorities to demand the imposition of a coercive fine. [6]

However, pursuant to Article 73-4/2 of Law No. 90-11 as amended, in case of refusal by one of the parties to reinstatement, the worker is granted financial compensation. Thus, the specific restricts the general: the worker holding a preliminary and final judgment cannot demand the imposition of a coercive fine against the employer who refused to comply with the judgment ordering reinstatement of the worker in the job position.
Nevertheless, it is observed that this right to refuse reinstatement, granted by the legislator to one of the parties, serves the employer's interest more than the workers.

2.1.2. The Concept of Acquired Privileges:
This concept is borrowed from French law; thus, any attempt to define it refers to French jurisprudence, which defines it as the set of individual and collective privileges arising from the law, regulations, employment contract, and collective agreement. [7] However, the question that imposes itself is: When do these privileges become acquired?

French jurisprudence has concluded that these privileges become acquired if the worker enjoyed them while present at the workplace, meaning these privileges are related to seniority. In a decision of the Supreme Court dated January 18, 2000, in File No. 182539, one of its recitals stated: "Acquired privileges are considered established and non-probable rights derived by the worker either from the law, internal regulations, employment contract, or collective agreements, from which the worker benefited throughout the duration of the labor relationship. On this basis, acquired privileges are tantamount to acquired rights."

However, regarding wages, if the employer accepts reinstatement of the worker during the lawsuit, this leads to considering the employment contract as if in effect, thereby deeming the wage payable from the day of dismissal until reinstatement. Nevertheless, the French Court of Cassation decided to grant workers compensation for this period because the worker did not perform work during it. In contrast, the Supreme Court in the aforementioned decision dated January 28, 2000, held: "What is granted to the worker in this specific case, i.e., upon ruling for reinstatement due to the unfair nature of the dismissal, is not compensation, but wages related to the period during which the worker did not work due to the employer, as well as wage supplements and in-kind privileges from which the worker benefited."

In this regard, Judge Dahmani Mustafa comments on this recital: "Regarding considering the wage as an acquired privilege, in our view, it is not so due to its nature, as it is paid in exchange for work pursuant to Article 80 of Law No. 90-11, which provides that the worker has the right to a wage in exchange for the work performed, receiving thereby a salary or income proportional to the work results."

However, assuming arguendo that the wage falls within acquired privileges, is it reasonable to grant the worker bonuses and salaries attached to the wage for a period during which the worker did not work,

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[6] Article 340 C.P.C.: "If the debtor refuses to perform an obligation to act or violates an obligation to abstain from an act, the executor records this in minutes, and the interested party refers to the court to claim compensations or financial penalties, unless financial penalties have been previously ruled."
[7] Abd El Salam Dhib, Algerian Labor Law and Economic Transformations, p. 520 et seq.

especially those bonuses related to work productivity and results? Thus, we must follow the path of the French legislator in this regard, which is to compensate for the wage value.
However, the question raised here is: Must the worker specify these acquired privileges for the judge to rule on them, given that these privileges are stipulated by force of law?
It appears that the answer would be yes, as the judge is bound in duties by the obligation of neutrality and may not substitute for the parties in their requests. But what if the worker does not request them or specify them? Does the judge rule on them sua sponte since they are legally stipulated, thereby including them in the operative part of the judgment, causing difficulties in execution, or quantify them monetarily?
Such questions still pose problems at the court level, pending Supreme Court jurisprudence thereon.

2.2. Claim for Compensation for Damages Sustained by the Worker

Unlike previous legislation, the annulment of a dismissal decision does not necessarily entail the worker's return to the job position. One of the parties to the labor relationship may refuse reinstatement pursuant to Article 73-4, paragraph 2, which provides: "In the event of refusal by one of the parties, the worker shall be granted financial compensation not less than the wage received by the worker for a period of six months of work, without prejudice to potential compensations."
Pursuant to this article, we shall examine this refusal through two main points:

2.2.1. Manner and Timing of Declaring Refusal

Some view the right to refuse reinstatement as established for the benefit of both contracting parties: it serves the employer's interest by allowing the employer to dispense with an undesired worker, and it serves the worker's interest when the worker no longer wishes to maintain a labor relationship with the employer or has secured alternative suitable employment during the dismissal process. In practice, however, the exercise of this legislatively granted right to refuse reinstatement primarily benefits the employer more than the worker, as the worker's refusal to return is practically rare due to the difficulty of finding alternative employment amid the challenging economic conditions faced by enterprises. Thus, the legislator has granted greater power to the employer at the expense of the weaker party in the labor relationship, leaving the worker with no option but to claim the legally prescribed compensations.

In general, refusal of reinstatement must be declared unequivocally during the pendency of the lawsuit; it need not be through a counterclaim, as a declaration in the reply memorandum suffices. However, refusal cannot be declared at the execution stage of the judgment ordering reinstatement; otherwise, the employer incurs the coercive fine provided under Article 39 of Law No. 90-04, which states: "Upon the judgment acquiring executory force, the judge shall determine the daily coercive fine stipulated in Articles 34 and 35 of this law." [8] This principle has been affirmed by the Supreme Court in several decisions, including Decision No. 158118 dated April 14, 1998, and Decision No. 158210 dated July 14, 1998, which establish that recourse to the coercive fine is a right arising when the employer refuses to fulfill obligations imposed by an executory judicial judgment.

2.2.2. Effects Arising from Exercising This Right

The effect of exercising this right is as stated in Article 73-4, paragraph 2 itself: granting the worker financial compensation not less than six months' wages, without prejudice to potential compensations. The judge faces difficulty in determining its amount, as the provision mandates a minimum of six months' wages; thus, the judge is compelled to award at least this amount even if less is requested. Awarding less would constitute an error in the application of the law.

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[8] Article 34 of Law No. 90-04 dated February 6, 1990, on Settlement of Individual Labor Disputes: "In case of non-execution of the reconciliation agreement by one party per the conditions and deadlines in Article 33, the president of the social matters court, upon urgent petition for execution at the first session with regular summons of the defendant, orders expedited execution of the reconciliation minutes, with a daily coercive fine not less than 25% of the guaranteed minimum monthly wage, as determined by applicable legislation and regulations; this fine is enforced only after expiration of the compliance period not exceeding 15 days, and this expedited execution order is enforceable by law despite any appeal." See Article 35 of Law No. 90-04.

Another difficulty arises from the legislator's failure to set a maximum limit, and since the Supreme Court does not exercise control over it—as it pertains to a factual matter subject to the trial judge's discretionary authority—the determination of compensation should consider the worker's seniority, age, difficulties in finding employment, travel for job search, and career privileges.

Granting this compensation must not prejudice the worker's right to additional compensations for damages resulting from unfair dismissal, assessed based on abuse of the right to dismiss. This differs from French legislation—the source of this article—which views the compensation as having a dual nature: a penalty imposed on the employer merely upon refusal of reinstatement (even if the worker suffers no actual harm, having found equivalent employment promptly), and a compensatory character incorporating factors such as the worker's circumstances, career path, unemployment duration, job search travel, and psychological and physiological impacts. These compensations are awarded in a lump sum; if the court grants compensation exceeding the legal minimum, it may be inferred from the operative part that both have been combined.

In summary, an employer may not dismiss a worker except for serious professional fault in the exhaustively enumerated cases under Article 73. The worker committing such a fault is granted guarantees that must be specified in the internal regulations. Any dismissal contrary thereto is unfair. The court adjudicating social matters rules preliminarily and finally either to reinstate the worker in the job position while retaining acquired financial privileges, or to award financial compensation not less than six months' wages in case of refusal of reinstatement by one of the parties.

2.2.3. The Worker's Right to Claim Compensation for the Notice Period

This is provided under Article 73-5 of amended Law No. 90-11, granting the worker who has not committed a serious fault the right to a notice period, the minimum duration of which is set in collective agreements. Article 73-6 of the same law further provides that the dismissed worker is entitled, throughout the notice period, to two paid hours per day (combinable) to search for another job. In this case, the law grants the worker the privilege of a notice period—its minimum determined during the probationary period—with two paid hours daily for seeking alternative employment. The judge must award compensation for the notice period to the dismissed worker only if two conditions are met: .[9]

- The worker has not committed one of the serious faults entailing dismissal without notice or compensation.
- The judge rules for reinstatement in the job position; otherwise, the purpose of granting the notice period ceases, as the basis for compensation in unfair dismissal cases is a worker right invoked when the judge does not order reinstatement. Article 73 of amended Law No. 90-11 (supplemented by Law No. 91-29) does not clarify this explicitly but addresses the notice period in general dismissal cases under Article 73 bis. Thus, addressing this article regarding notice period and compensation is futile if reinstatement is ordered.

2.2.4. Supreme Court Decisions on Compensation for Unfair Dismissal

In a decision dated January 31, 1994, the Supreme Court held: "It is legally established that a worker cannot receive wages for a period not worked, regardless of position, except in cases expressly provided by law or regulation. In unfair dismissal cases, the judge orders reinstatement of the worker in the original position with entitlement to due compensations. As the present dispute concerns unfair dismissal and the trial judges ordered payment of wages for the suspension period, they violated the law, warranting cassation on this point alone." .

[9] Article 73-4, paragraph 2, of Law No. 90-11, as amended and supplemented by Ordinance No. 96-21 dated July 9, 1996, on Labor Relations, Official Gazette No. 43 dated July 10, 1996.

The recitals of this decision state regarding the third ground (violation of law and error in application): The worker was continuously absent from the last lawful leave date until the lawsuit filing; how can wages be paid for this period? The Council violated Law No. 90-11 dated April 21, 1990, particularly Article 53. Article 79 of Law No. 82/06 on individual labor relations (applicable here due to the facts' date) provides that in unfair dismissal, the judge orders reinstatement with due compensations. By ordering wage payment, the trial judges violated this provision, exposing their decision to partial cassation on this legal point.

In another decision by the Social Chamber dated March 10, 1998, the Supreme Court affirmed that in unfair dismissal, the worker may seek annulment of the decision or compensation for harm before the competent court. As the trial judges awarded compensation from suspension until actual return, they ordered continued compensation, which is unlawful, warranting cassation.[10]

Thus, Supreme Court decisions clarify that unfair dismissal entitles the worker to compensation if the employer refuses reinstatement, not less than six months' wages—this being compensation for refusal, not wages (as wages require work per Article 53 of Law No. 90-11)—and it must be fixed, not ongoing. This is in addition to potential compensations, as Article 73-4, paragraph 2, states: "without prejudice to potential compensations," likely referring to damages from unfair dismissal.

In a further decision dated February 10, 1998, File No. 155985, the Supreme Court affirmed that the amount granted to the worker in unfair dismissal is compensation, not wages, stating in its recitals: "The Supreme Court reminds trial judges that the applicable provision is Article 73-4 of Law No. 90-11, as amended and supplemented by Law No. 91-29 dated December 21, 1991, granting the unfairly dismissed worker the right to claim compensation without wages." Having addressed both disciplinary and unfair dismissal, their concepts, and effects, we now turn to the judge's role in overseeing unfair termination.

Conclusion

In concluding this study, we conclude that the Algerian legislator, through Article 73 of Law No. 90-11, as amended and supplemented by Law No. 91-29 on disciplinary dismissal of the worker, has created significant inconsistency in its practical application. This inconsistency manifests clearly in divergent court and judicial council rulings, stemming primarily from the ambiguity surrounding this article and the lack of clarity in its wording and content, opening the door to interpretation and construction.

The Supreme Court has played a significant role in clarifying and interpreting this article to unify its application. However, the matter remains problematic, generating doctrinal and legal debate among labor law scholars, professors, and judges in social divisions and chambers. This awaits renewed legislative intervention to resolve it through a precise, unambiguous amendment to the aforementioned Article 73. Pending that, Supreme Court jurisprudence remains the primary reference for the correct application of this article.

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