



# Mutual termination agreements: recent practice



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EMPLOYMENT AND PENSIONS, RUSSIA

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**P**ursuant to article 78 of the Labour Code of the Russian Federation an employment contract can be terminated at any time by means of a mutual termination agreement entered into between an employer and its employee. In general, this is considered the safest method for terminating an employment relationship in the interest of the employer, since the employee cannot challenge it afterwards.

The Supreme Court of the Russian Federation in its Plenum Resolution dated 17 March 2004 No. 2 "On application by the courts of the Labour Code of the Russian Federation" at

paragraph 20 adopted the following approach. While resolving disputes connected with the termination of an employment contract on the basis of a mutual termination agreement, the courts must consider that such agreement may only be terminated on the basis of mutual consent of both the employer and the employee. The appellate decision of the Moscow State Court dated 26 January 2021 No. 33-3719/2021 overruled the claim of an employee who changed her mind after signing a mutual termination agreement and decided not to terminate the employment contract, since the mutual termination agreement is presumed to be voluntarily signed. The same position can be found in other court decisions<sup>1</sup>.

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<sup>1</sup> In particular, see appellate decision of the Moscow State Court dated 4 August 2020 in the case No. 33-12134/2020, decision of the Second Cassation Court of General Jurisdiction dated 2 March 2021 No. 88-429/2021 in the case No. 2-447/2020, appellate decision of the Saint-Petersburg State Court dated 11 March 2021 No. 33-4590/2021 in the case No. 2-4523/2020.



However, there is also another approach taken by the courts, which however is not that straightforward. In fact, it is not fully clear whether such practice is just the consequence of the reinforced protection of the interests of the employees during the Covid period or can represent a new approach. Anyway, this must be taken into consideration in the current times when mutual termination of an employment relationship takes place.

In this article we will analyse certain practical situations and the relative court decisions resolving the same.

#### 1) *Termination on the same day*

From the legal viewpoint, the only important issue is that final settlement with the employee and execution of all the required documentation must take place on the last working day. At the same time, in case of termination on the same day there is a risk of further challenge of such termination since it could be argued that the employee was taken by surprise.

For instance, such approach was adopted in the decision of the Second Cassation Court of General Jurisdiction dated 27 July 2021 No. 88-16841/2021. In the absence of any legal regulations concerning execution of a mutual termination agreement, the court in this decision considered the fact that the employee was deprived of the possibility to estimate the legal consequences and make a choice to sign the mutual termination agreement which was submitted by the employer on the date of its signing

#### 2) *Postponed termination*

The Court Collegium for Civil Cases of the First Cassation Court of General Jurisdiction in its decision dated 9 November 2020 in the case No. 8Г-23106/2020 resolved a dispute concerning postponed termination.

From the material of the case it results that the mutual termination agreement was executed in October 2018 whereas the agreed termination date was September 2019 (i.e., 10 months after execution of the agreement). In the spring of 2019 a second child was born to the employee and in August (one month prior to the forthcoming termination) the employee signed an application for cancellation of the mutual termination agreement. At the agreed termination date the employment contract was terminated. The courts of first and appellate instances<sup>2</sup> took their decisions in favour of the employer. In its turn, the Cassation Court overruled the previous decisions and remanded the case for a new trial before the lower court taking into consideration the following arguments. The mutual termination agreement with a termination date postponed for 10 months was signed during the period of childcare leave. Upon conclusion of the mutual termination agreement, a second child was born and thus the circumstances changed. Absence of any income, as well as psychological pressure (confirmed by the relevant audio recording) at the time of signing of the mutual termination agreement was also taken into account. Eventually, the court of first instance by way of second trial took a new decision whereby the employee was reinstated in her job. The termination order was declared illegitimate, average lost earnings and compensation for moral damages were awarded to the employee.

In another court case the cassation instance overruled the previous decisions of the lower court

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<sup>2</sup> Decision of the Balashikhinskiy State Court of the Moscow Region No. 2-110/2020 dated 15 January 2020 and appellate decision of the Court Collegium for Civil Cases of the Moscow Regional Court No. 33-9491/2020 dated 13 May 2020.

instances<sup>3</sup>. The mutual termination agreement signed on 16 May 2018 provided as termination date 31 March 2019. On 5 and 13 March the employee, being a single mother with a 9-year old child, sent an application for cancellation of the mutual termination agreement. At the agreed termination date the employment contract was terminated. The Court Collegium for Civil Cases of the First Cassation Court of General Jurisdiction dated 14 September 2020 in the case No. 8Г-5380/2020 remanded the case for a new trial to the lower court, paying attention to the following circumstances. The reasons for signing the termination agreement one year before were not determined. The preceding negotiations with the employee concerning the possible termination were not examined. The reasons for cancellation of the mutual termination agreement were not investigated. Therefore, the free will of the employee could not be guaranteed.

The Court Collegium for Civil Cases of the Eighth Cassation Court of General Jurisdiction in its decision dated 3 December 2020 in the case No. 8Г-18822/2020 declared illegitimate the simultaneous execution of the employment contract and the mutual termination agreement with postponed termination date. The decisions of the lower court instances<sup>4</sup> were overruled. From the material of the case it results that the employer proposed to the employee to execute a fixed-term employment contract. Following the refusal of the employee, a mutual termination agreement was proposed as a condition for entering into the

employment contract for an unlimited duration.

### 3) *Termination of women from “protected categories”*

In the appellate decision of the Court Collegium for Civil Cases of the Moscow State Court dated 18 August 2020 in the case No. 33-30337/2020 legal analogy was implemented confirming the right of an employee, who became aware of her pregnancy upon signing the mutual termination agreement, to cancel said agreement. In particular, the court overruled the decision of the court of first instance<sup>5</sup> and applied the provision of paragraph 1 of article 261 of the Russian Labour Code that prohibits termination of a pregnant woman at the initiative of the employer even through termination under a mutual agreement provided by paragraph 1, part 1, of article 77 of the Russian Labour Code. This approach was afterwards confirmed in the decision of the Court Collegium for Civil Cases of the Second Cassation Court of General Jurisdiction dated 18 February 2021 in the case No. 8Г-29101/2020.

### 4) *“Forced” termination under mutual agreement*

In the decision of the First Cassation Court of General Jurisdiction dated 21 December 2020 in the case No. 88-28288/2020 the court overruled the decisions of the lower court instances<sup>6</sup> and remanded the case for a new trial to the lower court. From the materials of the case it results that termination date took place two weeks after execution of the mutual termination agreement. Prior to the

<sup>3</sup> Decision of the Leninskiy District Court of the city of Nizhny Novgorod No. 2-2010/2019 dated 19 July 2019 and appellate decision of the Court Collegium for Civil Cases of the Court of the Nizhniy Novgorod region No. 33-13285/2019 dated 5 November 2019.

<sup>4</sup> Decision of the Bratskiy State Court of the Irkutsk Region dated 11 June 2020 and appellate decision of the Court Collegium for Civil Cases of the Court of the Irkutsk region dated 7 September 2020.

<sup>5</sup> Decision of the Perovskiy District Court of Moscow dated 18 October 2019.

<sup>6</sup> Decision of the Kirovskiy District Court of Saratov city dated 18 February 2020 and appellate decision of the Court Collegium for Civil Cases of the Saratov Regional Court dated 2 July 2020.

termination date the employee informed the employer of the willingness to cancel the mutual agreement stating that it had been signed under pressure from the management. There were no additional circumstances, such as pregnancy, children, etc. and, moreover, the employee did not provide any direct evidence confirming the alleged pressure. Eventually, the court of first instance (decision of the Kirovskiy District Court of Saratov city dated 16 March 2021 in the case No. 2-897/2021) resolved the dispute for the second time and took a decision that upheld the claim of the employee.

5) *Mutual termination agreement instead of termination due to disciplinary grounds*

The appellate decision of the Court Collegium for Civil Cases of the Chelyabinsk Regional Court dated 15 September 2020 in the case No. 11-8883/2020 established that proposal

from the employer to sign a mutual termination agreement and its preliminary drafting do not constitute any pressure on the employee. In such case, the termination for disciplinary violations is replaced by mutual termination agreement and the employee exercises the right to terminate the employment contract. The same approach can be found in the appellate decision of the Court Collegium for Civil Cases of the Supreme Court of the Bashkortostan Republic dated 24 January 2019 No. 33-1325/2019.


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Summarizing the above, an ambiguous court practice must be considered by the employer when entering into a mutual termination agreement with an employee. It cannot be excluded that the employee may change his/her decision and apply to the court arguing that the agreement was signed under pressure. As a result, the court may declare that the termination is illegitimate.



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