

Webinar

EU Employment Update – April 2015

Presenter



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Agenda

1. In case you missed it...
2. Feature: termination of employment in the EU – avoiding the pitfalls
3. Q&A

In case you missed it...

- Shared parental leave in force on 5 April 2015
 - also changes to adoption leave and pay and “ordinary” parental leave
- Increase in limits on 5 April 2015
 - SSP, SMP, a week’s pay for redundancy (now £475) and unfair dismissal (now £78,335 or 12 months’ salary if lower)
- Public interest test in whistleblowing cases
 - *Chesterton Global Ltd v Nurmohamed*

Feature: Termination of Employment in the EU – Avoiding the Pitfalls



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Introduction

- Historical, political and cultural perspectives impact on employment model
- EU generally is “employee friendly”
- Comparative approach covering:
 - when dismissal can be justified
 - further requirements
 - consequences
 - risk mitigation

Justification for Dismissal



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Justification for Dismissal

Can employers dismiss without any justification or at will?

-  Yes if the dismissal is during the probationary period
-  Yes if the employee is dismissed within the first two years of employment
-  Yes if (1) it is within the first six months of employment (traditionally the probationary period) and/or (2) the number of FTE does not exceed 10
-  Yes if it is during the employee's probationary period. No justification is currently required to terminate fixed term contracts, although this is likely to change in the near future

NB. Even if no justification is required, employers cannot dismiss for a reason that is unlawful e.g. discrimination, whistleblowing, or for asserting a statutory right.

Justification for Dismissal

				
Sickness absence	✓	✓	✓	✓
Conduct	✓	✓	✓	✓
Redundancy/ Restructuring	✓	✓	✓	✓
Performance	✓	✓	?	✓
Retirement	✓	X	X	X
Demand by other persons	X	✓	✓	X
Breach statutory laws/ restrictions	✓	✓	✓	✓

Justification for Dismissal

Sickness Absence

-  Able to dismiss if (1) the employee's absence results in disruption to the business; and (2) the company requires a permanent employee to carry out the work for continuity
-  In special circumstances, employers can also dismiss without notice if an employee is absent for 182 or more consecutive days
-  In order to dismiss fairly the employer must be able to show that the employee is unable to carry out their contractual duties and that it is unlikely that they will return within a reasonable period. Employers must be able to show that they have also considered other factors, including alternative duties, reasonable adjustments and the effect of the employee's absence on the workforce

Justification for Dismissal

Conduct

Gross Misconduct

 Employers can dismiss employees without notice in the event of gross misconduct

 Gross misconduct is defined as conduct that is so serious that it goes to the root of the contract between the parties and is deliberate or wilful

 Depending upon the employee's misconduct, the employee will not be entitled to social benefits, accrued holiday and/or notice on dismissal

Misconduct

 Employers can dismiss on the grounds of a single act of misconduct with notice

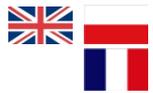
 Employers cannot dismiss fairly for an act of misconduct unless the employee has been given previous formal warnings which are still live

Justification for Dismissal

Redundancy



Employees can be dismissed on the grounds of redundancy if the dismissal is wholly or mainly attributable to a business closure, workplace closure or a reduced requirement for employees to do work of a certain kind



Any selection criteria used must be fair and as objective as possible



Employers must use the statutory selection criteria: age, disability, length of service and the number of dependents (positive discrimination)

Justification for Dismissal

Poor Performance

-   To dismiss fairly, the employer needs to be able to show that it has an honest belief that the employee is incapable of performing their job and that it has discharged its duties in relation to the employee, including:
 - Communicating to the employee the standards expected
 - Providing support and training where required
 - Addressing any issues raised by the employee (disability, bullying etc.)
-  Poor performance is not sufficient justification to dismiss. Employees can only dismiss if the employee does not try to perform as well as they can or in the event that they do not follow instructions

Justification for Dismissal

Retirement

-  Retirement is no longer a fair reason for dismissal
-  Retirement is not a fair reason for dismissal. Whether an employee is entitled to retirement benefits can be taken into consideration during redundancy selection processes, however
-  Retirement is not a fair reason to dismiss. An employer can, however, include a clause in their contracts that automatically ends an employee's employment when they reach statutory retirement age (between 65 and 67)
-  An employer can only dismiss an employee on the grounds of retirement after they turn 70

Justification for Dismissal

Demand of termination by other person

-  Employers cannot rely on the demand of other persons/parties to fairly dismiss an employee
-  Employers can potentially dismiss. Factors that should be taken into consideration include (1) the importance of third party/and their business; (2) how serious the threat is; (3) whether there are any alternatives to dismissal that would alleviate the injustice to the employee

Justification for Dismissal

Statutory Restrictions

 Employers are able to fairly dismiss where continued employment would definitely contravene a statutory restriction (e.g. loss of work permit or the loss of a driving license, which the employee requires to carry out their duties)

Justification for Dismissal

Formal Procedure

 There is no obligation to give employees warnings

  Employers should generally follow a formal procedure when issuing warnings and dismissing employees

 After 2 years' service, employers will need to follow a formal process, which varies depending upon the issue being addressed

  Employees should be given details of the allegations against them and
 an opportunity to respond before any decision is reached

Further Requirements



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Further Requirements

Consultation with/consent of employee representatives

-  Mandatory consultation is required in the case of: (i) redundancy; and (ii) dismissal of a protected employee (e.g. staff or union representatives, etc)
-  Mandatory collective consultation where 20 or more employees are being dismissed for reason of redundancy in 90 days; employees have the right to be accompanied to disciplinary hearings by a fellow employee or trade union representative
-  Works councils (if established at the employer) need to be consulted regarding any planned dismissal
-  Mandatory consultation is required in the case of: (i) termination of indefinite employment contract (where there is a recognised trade union); and (ii) collective redundancies; union's consent is required when terminating a union's activist, pregnant employee or employee on maternity leave; works council's consent is also required when terminating a council member's employment

Further Requirements

Consent of authorities

-  Prior approval from the Labour inspector/ authorities is required (i) in order to dismiss a protected employee and (ii) where the employer has 50 or more employees - if 10 or more employees are being made redundant. The Labour authorities must also approve social measures offered by the employer and all mutual termination agreements before they are signed
-  Employers are required to inform the Government if it is proposing to make 20 or more redundancies over a period of 90 days or less
-  In exceptional circumstances (e.g. maternity leave), consent from relevant authorities is required
-  Relevant authorities' consent is required when terminating certain employees e.g. a town councillor, member of Parliament, senator, doctor - a member of the regional physicians' council

Further Requirements

Gross misconduct dismissals

-  Employee needs to be dismissed within 14 days from the date on which the employer learnt about the breach
-  Employee needs to be dismissed within 1 month from the date when the employer learnt about the breach

Further Requirements

Notice periods

Statutory notice periods depend on length of service

-  From 1 month to 2 months (more than 2 years of service); collective Bargaining Agreements often provide for longer notice periods
-  From 1 week (between 1 month and 2 years of employment) increasing by 1 week for each year of service up to a maximum of 12 weeks (after 12 years of employment); employment contracts often provide for longer notice periods (1 month for junior employees and up to 12 months for board level management)
-  Statutory notice periods vary from 4 weeks to 7 months (after 20 years of employment)
-  Indefinite contracts:
 - 2 weeks when the employment is less than 6 months;
 - 1 month if the employment lasts for at least 6 months; and
 - 3 months when the employment lasts for 3 or more years;Fixed-term contracts: 2 weeks

Further Requirements

Termination letter – contents

-  Statement setting out the reason for the employee's dismissal needs to be included in the termination letter
-  Such statement is not required unless otherwise agreed in the applicable collective bargaining agreement. In the case of termination for cause, the employee may demand written reasons
-  Mandatory statement of reasons for employees on statutory maternity leave; in all other cases, written reasons for the employee's dismissal must be provided within 14 days of it being requested (only applies where the employee has at least 2 years' service)

Further Requirements

Termination letter – form



Written form - signed by person(s) authorised to represent employer



No specific form is required (unless otherwise agreed in individual employment contract)

Further Requirements

Termination letter – delivery

-  Dismissal must be notified to the employee by registered letter with acknowledgment of receipt
-  Fax and email is not valid service
-  Employer needs to be able to prove the delivery
-  No particular delivery requirements
-  The letter should to be delivered in person (preferably - with written confirmation of receipt). Sending the letter by post or courier is not recommended

Consequences of Dismissal



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Consequences of Dismissal

Lawful dismissal

- Severance

 If the employee is dismissed due to redundancy or for personal reasons the employee is entitled to a severance of 20% of the average monthly total compensation per year of service or more in accordance with the applicable collective bargaining agreement

  There is a statutory severance payment where the reason for dismissal is redundancy. The maximum amount is PLN 26,250 (ca. EUR 6,250) in Poland / £ 14,250 (ca. EUR 19,750) in the UK. In Poland, only employers with at least 20 employees are obliged to pay the statutory severance

 The employee is not entitled to any severance payment

Consequences of Dismissal

Unfair / wrongful dismissal

- Reinstatement

 Reinstatement is possible in all jurisdictions, although in Germany it is the only remedy. In practice, employees are rarely reinstated

 On the request of the employee, he/she can be reinstated unless reinstatement is impossible or unreasonable. The court is bound by the employee's request for reinstatement if the employee was covered by special dismissal protection (e.g., pregnancy, union activist, employee in pre-retirement age)

 Reinstatement can be ordered if it is requested by the employee. Whether the tribunal actually orders reinstatement depends on circumstances of the specific case and various criteria (e.g., practicability of reinstatement)

Consequences of Dismissal

Unfair / wrongful dismissal

- Reinstatement
-  The employee can demand reinstatement if a dismissal is null and void (e.g. dismissals in breach of maternity protection rules or based on discrimination) as opposed to a merely unfair dismissal. In most cases, employees ask for damages instead of reinstatement
-  Reinstatement is the only remedy. However, employees almost always prefer to settle the dispute via a payment of a severance instead of actually starting working for the employer again

Consequences of Dismissal

Unfair dismissal

- Severance / Compensation

-  The employer shall pay a basic statutory award, which is based on age, length of service and remuneration. The tribunal may also make a compensatory award based on financial loss caused by the dismissal. The compensatory award is subject to a cap of the lower of £78,335 or 52 weeks' pay
-  The court may award compensation which, as a general rule, amounts to 3 months' remuneration
-  The employer is not obliged to pay compensation. In practice, the dismissal protection disputes very often end with a settlement providing severance which varies from 0.3 to 2.0 monthly salaries per year of service

Consequences of Dismissal

Unfair dismissal

- Severance / Compensation

- ■ In the event of an unfair dismissal , the minimum compensation amounts to 6 months' salary. If a dismissal is null and void (e.g. discriminatory dismissal) the minimum amount is 12 months' salary. Depending on various criteria (e.g. type of dismissal, age, seniority, family status), the actual amount can be much higher than the minimum

- Release from work duties / Garden leave

- ■ The employer can release the employee from its obligation to attend work immediately after notice is given. However, in the UK and Germany this is only possible if agreed in the employment contract. In any event, contractual remuneration shall be paid for the period of release

Risk Mitigation



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Risk Mitigation

Waiver of dismissal protection in employment contract?

 It is not possible for an employee to waive their right to claim unfair dismissal in the employment contract :

dismissal rules are of public order, any waiver of legal dismissal protection in advance is null and void and would thus not be enforceable

Risk Mitigation

Settlement/Release Agreements

Employees can waive their right to bring contractual and statutory claims on termination in exchange for payment of compensation. Settlement agreements must comply with a number of statutory requirements to be valid

-  In order to enter into settlement agreement negotiations and for any agreement to be valid and binding the employee needs to be formally served with a dismissal letter, which the employee needs to then challenge

Risk Mitigation

-  Employees cannot effectively waive their right to bring remuneration-related claims (e.g. payment for overtime, unpaid salary, etc.) or discrimination claims
-  Settlement agreements are not traditionally used. If an employer wishes to “settle” a claim, the parties enter into a mutual separation agreement, which provides the employee with compensation, rather than a dismissal. Only actual claims can be settled by a release

Q & A

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