



# How to terminate the employment of non-performing employees in Europe

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# Agenda

- Can employees be dismissed for poor performance? If so, what should you do?
- What are the risks and possible claims?
- Practical hints and tips

# Case Study

A multi-national company is purchased. The new owners swiftly find out that they have senior sales managers who are not performing in various European jurisdictions and introduce improvement and re-engagement plans for the poor-performing managers. Five months later there is still no evidence of improvement.



**Can the senior sales managers be dismissed?**

**How much will this cost if it goes wrong?**

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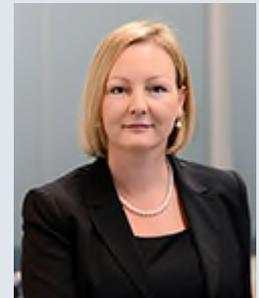
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# United Kingdom

# CAN WE SACK THE SALES MANAGER?

- Yes – the Court/Tribunal will not prevent this
- Query whether dismissal is fair?
- To achieve a fair dismissal for poor performance ensure:
  - Inform the Sales Managers of poor performance and discuss in meetings. Follow up in writing.
  - At least two warnings and a fair opportunity to improve
  - Set clear, measurable objectives – not too stretching
  - Process likely to take at three to six months depending on the role

# Potential risks and claims

- May raise a grievance
- Breach of Contract: limited to financial loss during the contractual notice period
- Unfair Dismissal – compensation - the lesser of 1 year's remuneration and a statutory cap of £76,574 plus basic award of maximum £13,920
- Discrimination – unlimited, but based on financial loss with a small award for injury to feelings
- No jury trial, no punitive damages
- Key to reducing risk and chances of a successful claim is following a fair process

# Information needed to assess risk

- Contract of Employment and Staff Handbook (How long is the notice period? Are there Post Termination Restrictions? Is there a Capability Policy?)
- Details of salary and any other benefits
- Copies of past appraisals, and documents relevant to the quality of the employee's previous performance
- When did the employment begin (two years' continuous employment required to qualify to bring unfair dismissal claim).
- Any possible basis for discrimination claim e.g. race, gender, religion or other belief, sexual orientation – have there been significant health issues/absences, e.g. stress/anxiety?
- Information regarding the performance management process

# Is settlement a better option?

- Could be offered alongside a disciplinary and performance process
- Offer enough to make litigation not worth it, bearing in mind uncertainty, stress, legal costs and damage to reputation
- Settlement Agreement must be in prescribed form and employee must take legal advice
- Agreement can confirm/modify post termination restrictions



# Germany

# Can you terminate the employment?

- Employee protected by Unfair Dismissal Act if
  - company has more than 10 full time employees and
  - has been employed more than 6 months
- ⇒ Reason for termination required
- Reasons under Unfair Dismissal Act
  - person-related reasons (e.g. illness)
  - operational reasons (e.g. redundancy)
  - conduct-related reasons (e.g. infringements of contractual duties)

# Can you terminate the employment?

- Lack of performance is no such conduct-related reason:
    - Providing specific level of performance is no contractual duty under German labor law
    - Employee only obligated to fulfil his contractual duties by working to the best of his personal ability
    - Proof that he failed to meet this requirement in practice impossible to provide
    - Performance plan or re-engagement plan not compliant with German labor law.
- ⇒ **Low performance as such is not a fair reason for dismissal!**

# What are the options?

- Termination for conduct-related reasons (search for infringements)
- Termination for operational reasons, requirements:
  - entrepreneurial decision
  - redundancy of position or shifting tasks to others with free capacities
  - no other free position in company, even on a lower level
  - social selection to search for employee least worth protecting
- Termination agreement
  - consent of manager required
  - in practice no agreement without severance payment

# How much does it cost when it goes wrong?

- Remedy for unfair dismissal is reinstatement
- Risk for company:
  - being obligated to take employee back for re-employment and
  - to pay for salary between end of notice period and judgement
- Generally no legal claim for a severance payment
- In practice:
  - almost 90% of unfair dismissal claims are settled in first instance
  - further 34% of such claims are settled in second instance

# Good to know about German Labor Court proceedings

- Unfair dismissal claims very common in Germany
- In general, 2 to 6 weeks after commencement of proceedings a preliminary hearing takes place; no prior pleading of company necessary.
- No court fees apply in first instance in case of a settlement
- In any case, in first instance each party pays for his own lawyer (legal expense insurance for employees common in Germany)

# “Reasonable” amount of severance payment

- Rule of thumb: ½ month – 1 month salary per year of service
- However: amount of severance payment is subject to free negotiations. “Reasonable” amount depends on
  - legal risk that termination would be deemed as invalid by court
  - ⇒ **The better a termination is prepared the lower the severance payment**
  - time until the terminated employee finds a new job with same salary, the sooner the employee would find a new job
    - the lower the risk for company to pay salary after end of notice period in case he loses his case
    - the sooner employee will agree to a settlement

# Avoid mistakes on formalities

- Notice of termination must be in writing, i.e. wet-ink signature
  - ⇒ no termination via fax or email, with scanned signatures or as attachment to email
- Notice of termination must be signed by duly authorized person, e.g. Managing Director (“*Geschäftsführer*”) of German GmbH
  - ⇒ consider timing to observe notice period; notice must often be given at the end of a month at the least
- Termination valid even if notice period miscalculated
- If Works Council (“*Betriebsrat*”), i.e. employee representation board on company level, exists: consultancy prior to termination necessary



# France

# Can you terminate the manager?

- Yes, it's possible to dismiss in France
  - No reinstatement of employee ordered by French labor court
  - If insufficient grounds to dismissal recognized by French labor court, award of damages
    - Automatic 6 months' salary if employee has two years' seniority and company has 11+ employees
    - Otherwise, employees needs to prove damage suffered
      - No jury trials, no punitive damages
- French labor courts tend to be employee-favorable

# Strict formal dismissal procedure

- Convocation to pre-dismissal preliminary meeting
- Preliminary meeting to be held one week after
  - Employee entitled to come accompanied by other employee or outside advisor at meeting
  - Disclosure of reasons for envisaged dismissal at meeting
- Notification of dismissal
  - Sent by registered mail as from the 3rd day after preliminary meeting
  - Need to refer to professional insufficiency and set out precise facts in letter

# Reasons for dismissal

- Dismissal of employee for professional insufficiency
  - *E.g.*, incompetence, lack of required skills, targets not fulfilled, unsatisfactory work
  - Not for fault (if for fault, statute of limitations of 2 months)
- Need to prove professional insufficiency by concrete and verifiable facts
  - Evidence: e.g., financial data showing targets not reached, errors of employee, client claims or comments, affidavits of other employees, email/meeting to discuss issues with employee's work
    - Compare with situation of employees in similar position
  - No need to necessarily put employee on Performance Improvement Plan but may be helpful to prove insufficiency

# Reasons for dismissal

- Need to prove that:
  - All means (e.g., training, coaching tools) have been given to employee to carry out his mission/targets
  - Outside reasons (e.g., economic situation) don't explain employee's incompetence
- If dismissal for insufficient results
  - Targets must be attainable
  - Look at yearly results over a certain period of time: 3 years
  - Compare situation with that of other employees in same situation

# Costs

- Notice period
  - Usually 3 months (sometimes more if provided in contract)
  - As from presentation of dismissal letter
  - Employee may be exempted from having to work during his/her notice
- Dismissal indemnity
  - Calculated according to the employee's seniority
  - Labor Code provides 1/5th month salary per year of seniority
    - 1/5 + 2/15th after 10 years'
    - Applicable collective labor agreement usually provides for higher indemnity

# Related risks

- Filing of a dispute by employee before the labor court for wrongful dismissal
  - If recognized by labor court, automatic 6 months' damages if employee has more than 2 years' seniority and company of +11 employees
  - Otherwise, need to prove damages
- Settlement are quite frequent
  - Settlement agreement must be entered into after dismissal is notified
  - Settlement indemnity subject to 8% CSG/CRDS tax payable by the employee (although sometimes negotiated otherwise)
    - Cap of € 76,080 applicable to dismissal and settlement indemnity amount in 2015

# Alternative solution: mutual termination

- So-called « *rupture conventionnelle* »
- Procedure
  - Parties sign a 2 page form providing for mutual termination
  - 15 calendar days after, form is sent to French labor authorities (Direccte)
  - Direccte has 15 working days (including Saturdays, excluding Sundays and public holidays) as from receipt to review form
    - Amount of termination indemnity and termination date checked
  - Form to provide a termination date at least one day after the Direccte review period

# Mutual termination

- Minimum termination indemnity to be paid equal to conventional dismissal indemnity
  - Termination indemnity subject to so-called « forfait social » of 20% payable by employer
- No formal release of employee but employee usually doesn't contest termination
  - Parties can't settle on termination of employment, only on issues related to execution of employment (e.g., bonus claims)



# Italy

# Settlement Agreement

Also in Italy as in United Kingdom, Germany and France, a settlement agreement with the manager in order to establish the conditions for the termination of the employment agreement is the easiest, cheapest and most advisable solution to avoid law suits and damages to the reputation of the company. Also the Judge usually advises the party to find a settlement agreement before the issuing of the decision!

# Dismissal of a Manager – Burden of Proof

Of course the employer can dismiss the non-performing manager with different procedures, but in case of law suit before the Court the employer will have the burden of proof of truthfulness, validity and suitability of the reasons of the dismissal and not to have violated the principles of correctness and good faith.

# Dismissal for Justified Subjective Reason of Non-Performing Manager

- a) Procedure established by Section 7 of Italian Law 300 of 1970 (the so-called “Workers” Protection Bill): (1) Sending a written warning of poor performance; (2) Dead-line of five days for the manager’s justifications in writing and for the discussion about poor performance before disciplinary measures and dismissal;
- b) It is advisable to send at least two warnings and give a fair opportunity to improve the performance;
- c) When five days expire the employer can dismiss the manager, if her/his justifications are not considered valid by the employer.

# Dismissal for Justified Subjective Reason of Non-Performing Manager

- d) The dismissal must be given in writing to the manager (Section 2 paragraph 4 of Law 604/1966);
- e) The dismissal of the manager must be justified;
- f) In case of fair dismissal for poor performance, the manager has the right to have:
  - (1) A period of advance notice established by the employment agreement or by the collective bargain agreement;

# Dismissal for Justified Subjective Reason of Non-Performing Manager

(2) Or, alternately, an allowance in lieu of the period of the advance notice, in which she/he has not worked (the criterium for the calculation of the allowance in lieu is based on the average of the considerations of the last three years or of the minor period of work; the different criteria established by the collective bargain agreement are applied if they are more advantageous than the other in the employment agreement);

(3) Plus the "final termination indemnity" (in Italian known as "*T.F.R.*"), which involves for the manager the variable remuneration in cash (bonus etc.) and in kind (company car and accomodation etc.).

# Dismissal for Justified Objective Reason of Manager – Economic Reason

- a) The Employer could dismiss the manager in the context of a restructuring of the company when there is a suppression of the professional position for economic reasons.
- b) The dismissal must be given in writing to the manager.
- c) The Employer in this case must give evidence of the economic reasons for the suppression of the professional functions and, consequently, of the dismissal.
- d) Also in case of lawful dismissal for economic reasons the manager is entitled to receive a period of advance notice, or, alternatively an allowance in lieu and the final termination indemnity as explained above.

# Law suits

- a) The manager can challenge the dismissal before the Employment Court or an administrative-mediation board, as established by the collective bargain agreement.
- b) In case of unfair dismissal the manager will not be reinstated in his professional position, but the Judge could establish a further compensation of damages to be paid by the employer (from a minimum of 12 monthly salaries to a maximum of 24, or otherwise established in the collective bargain agreement).
- c) Only in case of discrimination (dismissal based on gender, race, sexual orientation, religious or political beliefs) the manager could be reinstated in her/his professional position or in the alternative be entitled to receive an additional 15 monthly salaries plus a further indemnification of not less than 5 monthly salaries.

# Questions?



# CPD POINTS

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