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TERMINATION OF EMPLOYMENT IN FRANCE, GERMANY AND THE UK

The legal landscape for termination of employment is one that every employer needs a working knowledge of. In this briefing we answer ten key questions on termination of employment, which reveal how the rules operate in France, Germany and the UK[1]. While there are similarities in the overall approach of the three jurisdictions (for example, only allowing employers to terminate employment for specified reasons, and according special protection to similar categories of employees) there are also some key differences.

How can employment relationships come to an end?

Under French law, termination of employment is only automatic under a fixed-term contract or on the death of the employee. In all other cases, the employment must be formally terminated by the employee (through resignation or retirement), the employer (by dismissal or retirement), or by mutual agreement. Similar rules apply during a trial period, if any.

Additionally, if an employee can prove that the employer has grossly failed to meet its contractual obligations, the contract of employment can be terminated by a court at the request of the employee. This may for instance be the case if the employer fails to pay the agreed remuneration, or implements a significant change to the employment which is not accepted by the employee.

Termination events stipulated in employment agreements (such as age, occurrence of a defined event) are rare and unenforceable in France.

Similarly under **German law**, employment will end automatically and without notice of termination required at the end of a fixed-term for which it was concluded, or if the employee dies. It can also end due to notice of termination (*Kündigung*) by either party or by mutual agreement (*Aufhebungsvertrag*). Finally, employment contracts will often provide for automatic termination at the end of the month in which the employee reaches the statutory retirement age.

1 Please note: this briefing does not consider issues relating to redundancy or discrimination.

In **the UK**, there are also several methods by which employment may be terminated. The most common are dismissal by the employer, resignation by the employee, and by agreement between the employer and employee (including a settlement agreement). Termination may also occur by the fulfilment of a condition in the employment contract, whether the expiry of a fixed-term, or the occurrence of a summary termination event. This may include a compulsory retirement age, although these have become much more rare (and problematic) in the UK since the rules permitting compulsory retirement at age 65 were abolished in 2011.

Less commonly, employment may be terminated in the UK by operation of law. This would include some insolvency/closure scenarios, and also where the employment contract is 'frustrated' (usually where the employee suffers a prolonged or sudden serious illness or disability, or is imprisoned). It would also include the death of the employee.

On what basis can employment be terminated by an employer?

Statutory requirements

Under French law, employers can terminate employment contracts (i) for reasons related to the employee (for example poor performance, serious misconduct, illness, reaching of retirement age), or (ii) for reasons based on the economic situation of the company (reduction of jobs in order to preserve the company's competitiveness or to recover from economic difficulties - which is beyond the scope of this briefing).

In all cases:

- The employer must be able to invoke an "actual and serious" ground for the termination. The ground is "actual" in this sense if it is objectively supported by appropriate documentation ("lack of enthusiasm at work", for instance, would be considered purely subjective and unquantifiable and consequently cannot constitute a valid ground for termination). A ground qualifies as "serious" if termination is an appropriate and proportionate measure in the situation at stake (i.e. minor economic difficulties or minor breaches of contractual obligations will not reach the necessary threshold).

French courts tend to apply these principles strictly and are very demanding in terms of supporting documentation evidencing the employer's position.

- Statutory notice periods apply (see section 4 below) and severance payments are payable (see section 7 below), except from in cases of gross or serious misconduct, which is subject to very high standards.

Under **German law**, the rules which must be complied with depend on whether the relevant employer must comply with the German Termination Protection Act (*Kündigungsschutzgesetz – KSchG*). Employers who are not subject to KSchG can principally terminate employment in compliance with the statutory notice periods (see section 4 below) and without additional requirements, unless stipulated otherwise in the employment agreement or in an applicable collective agreement. In rare cases, employers can terminate employment for cause (*aus wichtigem Grund*) without observation of a notice period. However, the relevant standards are extremely strict and in principle require the committal of a criminal offence, or an extremely severe breach of a contractual duty.

Employers who regularly have more than ten employees (not counting trainees) are subject to the KSchG. For these employers, the above position only holds true during the first six months of employment. Thereafter, employers may only terminate employment relationships on one of three grounds:

- Reasons lying within the conduct of the employee (*verhaltensbedingte Kündigung*). This requires employee conduct in violation of the obligations under the employment contract and for which the employee can be held accountable. Such conduct can be constituted by poor performance (although this is very difficult to prove), repeated unexcused absences, insults or physical attacks against colleagues, commission of unlawful acts, and violation of ancillary employment-related obligations. The termination may not be used to sanction past conduct – it is only permissible if necessary to forestall similar future conduct and therefore principally requires that the employer has reacted to earlier similar conduct of the employee by issuing a warning letter (*Abmahnung*). The letter has to describe the unwanted conduct and explicitly state that recurrence will result in a notice of termination. A warning can only be dispensed

with in exceptional cases, for example of misconduct that an employer cannot be expected to tolerate, or if a change of conduct is unrealistic.

- Reasons lying within the person of the employee (*personenbedingte Kündigung*). This requires that the employee has lost the skills required for performance of, or the ability to perform the tasks required under his employment contract. A typical example is (long-term) sickness, another is imprisonment.

- Overriding operational reasons (*betriebsbedingte Kündigung*). This essentially requires a redundancy situation (and is beyond the scope of this briefing).

The standards are fairly high. A termination will only be effective if it is the last resort. The employer must have exhausted any other reasonable remedies, for example offering a different job or adapting a job / workplace to the requirements of any physical condition. Further, in a weighing of interests (*Interessenabwägung*), those of the employer in terminating the employment must prevail over those of the employee to retain his job.

Under **UK law**, as a simple matter of contract law, the employer may terminate employment for any reason. However, employees who have been continuously employed for at least two years have a right not to be unfairly dismissed. This means that unless the employer can establish that one of the five statutory reasons for dismissal applies, an employee may claim to be unfairly dismissed and seek financial compensation. The fair reasons are:

- The employee's misconduct;

- The employee's lack of capability (including through sickness);

- Redundancy (which is beyond the scope of this briefing);

- Breach of statutory restriction (for example, where the employee requires a work permit or regulatory licence in order to undertake his duties, but that permit or licence is revoked).

- "Some other substantial reason" (SOSR). This is narrowly interpreted, but may include situations including the expiry of a fixed-term contract, dismissal following a reorganisation, or dismissal in order to effect a change to terms and conditions.

There are also procedural requirements which an employer must comply with in order to avoid a finding of unfair dismissal (see section 4 below).

Contractual requirements

In **France**, additional requirements may apply based on company-wide agreements or on the terms of an employment contract. These are usually increased notice or severance requirements, but can also be in the form of additional procedural obligations (for instance, in some sectors employees dismissed for gross misconduct may have to be heard by a joint sector committee before their dismissal becomes effective), or provide for a minimum period of guaranteed employment.

Such additional requirements are considered as valid and enforceable, except in extremely rare situations where it can be demonstrated that they *de facto* suppress the employer's right to terminate the employment relationship.

In **Germany**, further requirements can be applicable based on (i) applicable collective agreements, such as collective bargaining agreements (*Tarifverträge*) or shop agreements (*Betriebsvereinbarungen*), as well as (ii) individual employment contracts. Often, collective agreements will contain limitations on terminations for certain groups of employees. One typical example is the restriction of terminations of older employees with long tenure to terminations for cause (*aus wichtigem Grund*).

In **the UK**, the employment contract may contain additional restrictions on the basis or reason for termination (although this would be rare in practice). Such restrictions may also be present in a collective agreement concluded with a recognised trade union, although such agreements are also rare in the UK. The contractual provisions governing termination are usually limited to notice provisions (see section 4 below). Where these are not complied with, this gives rise to a claim for wrongful dismissal.

Do different rules apply to notices of termination if given by an employee?

In **France**, less strict rules apply to notices of termination given by employees than to those given by employers: In essence, terminations by employees only need to be declared in a way that there is no doubt about their existence and the date of their issuance. In practice, this translates into a requirement that they be made in writing and the receipt acknowledged by the employer or sent by registered mail.

Terminations by employers have stricter requirements. In particular, they have to be preceded by a formal conciliation procedure and the notice of termination itself has to fulfil a number of formal requirements. Further to that, company-wide agreements and employment contracts may extend notice periods applicable to terminations by the employer, whereas they cannot increase those for terminations by employees since principally, statutory employee rights may not be curtailed.

Under **German statutory law**, much stricter rules apply to terminations by an employer than to those by an employee. Unless stipulated otherwise in the relevant employment contract or an applicable collective instrument (*Tarifvertrag, Betriebsvereinbarung*), an employee can terminate his employment with four weeks' notice, to expire on the 15th day or at the end of a month, irrespective of the length of his service. In practice, most employment agreements will provide that the statutory extensions to the notice period for terminations by the employer (see below) will also apply to terminations by an employee and/or lay down longer notice periods applicable to both parties.

Minimum notice periods for terminations by employers are prescribed by the German Civil Code (*Bürgerliches Gesetzbuch – BGB*). These increase with an employee's length of service, from four weeks (to the 15th day of or to the end of a month) up to seven months (to the end of a month) after 20 years of employment. For up to the first six months of employment, a trial period can be agreed, during which the notice period is two weeks, and notice can be given at any time. The parties may agree on stricter rules benefitting the employee, but may not ease the rules for the benefit of the employer.

In **the UK**, the period of notice required to terminate a contract is whatever is specified in the contract. It is possible (and common) for there to be different notice requirements from the employer and the employee. The usual length of notice is between three and twelve months, depending on the seniority of the employee (amongst other factors). There is no requirement to give notice where the other party has committed a repudiatory breach of contract.

If no notice period is specified in the contract, a 'reasonable' period of notice will be implied. In addition, there is a statutory minimum period of notice which must be given, and which overrides any lesser period stated in the contract. The statutory minimum periods apply where the employee has been employed for at least one month. They are:

- Notice required from the employee: one week
- Notice required from the employer: one week for every complete year of service, subject to a minimum of one week and a maximum of twelve weeks.

What are the formal notice requirements to be followed?

Under **French law**, declaration of termination by the employer must be preceded by a mandatory conciliation procedure: First, the employer has to conduct a preliminary meeting with the employee (with sufficient advance notice) to discuss his dismissal. This is followed by a waiting period (usually two business days) after which the employer can issue the notice of termination. The notice must precisely state the reasons for the termination (which must be the ones discussed at the preliminary meeting). It must be drafted with good care, as if there is a dispute, courts will assess the validity of the termination exclusively on the basis of the terms set out therein. Finally, the notice of termination must be sent by registered mail with acknowledgement of receipt.

Additional rules may apply in special situations such as redundancies (not addressed in this briefing), summary dismissal, termination during the trial period, termination for illness (which, in particular, requires the employee to be diagnosed unfit for work by a labour practitioner), trainees, or so-called "protected employees" (in particular pregnant women and staff representatives).

Notices of termination take effect at the time of their receipt by the other party. The receipt also constitutes the starting point for calculation of the notice period. Once declared, a notice cannot be withdrawn unilaterally.

German statutory law requires that a notice of termination must be given in writing and signed by hand. It can be delivered in person, by mail or courier or similar. Terminations that carry no original signature (initials are not enough) or are sent by electronic means have no legal effect. The employer is usually not required to state the reasons for termination in the notice. This is different for terminations of trainees, and other rules may also apply on the basis of individual or collective agreements. Like in France, notices of termination take effect at the time of their receipt by the other party.

If the employer has a works council, the council must be informed of and heard on all reasons for a termination before it is issued, otherwise the termination is void. This needs to be taken into account for purposes of timing, as the council has one week to deliberate (three days, in the case of a termination for cause). If the council objects to the termination, a copy of the objection must be provided to the employee together with the notice of termination.

Once a notice of termination has been received by the other party, it cannot be cancelled (*zurücknehmen*) unilaterally. If the requirements for an annulment (*Anfechtung*) are not fulfilled, cancellation is only possible by agreement of the parties.

In **the UK**, there is no statutory requirement for notice of termination to be given in writing. The notice need not state the reason(s) for termination, although the reason(s) must be given in writing within 14 days following a request by an employee who has at least two years' service, or in all cases where the employee is pregnant or on maternity leave at the time of her dismissal. There is also no statutory requirement about the method of delivery of the notice.

However, the contract itself will usually contain provisions which require notice to be given in writing, and specify methods of delivery (including by electronic communications, potentially). The contract may also specify when the notice takes effect, although for statutory purposes this

will be when the employee actually reads it (or has a reasonable opportunity to do so). A notice of termination, once given, may not be withdrawn unilaterally, but only by mutual consent.

Aside from notice, there are additional procedural requirements which must be followed by the employer in order to avoid liability for unfair dismissal. The employer must act reasonably in treating the specified reason (see section 2 above) as sufficient to justify dismissal of that employee. This will require a fair and reasonable dismissal process, which for example in cases of misconduct typically involves conducting a reasonable investigation, informing the employee of the allegations against him, holding a disciplinary hearing and providing an opportunity to appeal the employer's decision.

Are there any special protections for particular employees?

In **France**, several categories of employees enjoy special protection:

- Staff representatives (and employees discharging certain duties, such as acting as judge at an industrial court) benefit from special termination protection requiring that (i) the works council be consulted on their dismissal, and (ii) the prior express written authorisation by the Labour Authorities failing which their dismissal is null and void.

- Pregnant women cannot be terminated during maternity leave and severe restrictions apply during the first four weeks after their return to work.

- Termination for health reasons must be supported by the Labour practitioner, and restrictions to termination may apply for employees who suffer an occupational accident.

Under **German statutory law,** the termination of severely handicapped employees, pregnant women and young mothers, as well as employees who have requested or are taking parental leave require the prior consent of a public authority to be effective. Members of employee representative bodies and compliance officers (for example, data (*Datenschutzbeauftragter*) or environmental protection officers (*Umweltbeauftragter*), even for some time after the end of their term in office) may only be terminated for cause (*aus wichtigem Grund*). The termination of works council members additionally requires the consent of the council. Candidates for employee representative bodies

and members of the relevant election committee, as well as work safety officers (*Arbeitsschutz- / Sicherheitsbeauftragte*) enjoy more limited protection.

In **the UK**, a dismissal will be 'automatically' unfair if it is made on a prohibited ground. These include dismissal for taking maternity or other family leave, for acting as a trade union / employee / health and safety representative, for exercising statutory rights, or for making a protected disclosure ('whistleblowing'). The employee in these circumstances will not need the usual minimum two years' service.

In addition, there is an implied restriction on the employer's right to terminate employment while the employee is incapacitated, where to do so would have the effect of preventing that employee qualifying for a permanent health insurance benefit. In these circumstances the employer may only dismiss for 'reasonable and proper cause', which would include termination for misconduct and redundancy.

Can a payment be made in lieu of notice?

In **France**, the employer can relieve the employee from the duty to work during the notice period if it pays the employee a compensation in lieu of notice which is equivalent to what the employee would have earned if he had worked during the notice period. In this context, disputes often arise if employees have claim to a variable remuneration, commission payments for example. In such cases, usually, a commission payment is made that is equivalent to variable remuneration payment(s) received during the preceding year (sometimes adjusted to take into account deferred commissions which would become due before the expiry of the notice period).

Under **German law**, the basic position is that no payment can be made in lieu of notice. However, the employer and employee may mutually agree in a severance agreement that the employment relationship will end at a particular point in time, and that in compensation for the loss of job (or in return for termination to a time preceding the expiry of the applicable notice period) the employee is paid a severance payment.

In **the UK**, a payment in lieu of notice (or PILON) can be made, if this is permitted by the terms of the contract. Otherwise, to make such a payment rather than observing the notice period would be a breach of contract. Employment contracts often provide the employer with the option (not the obligation) to make a PILON. The contract would also prescribe the calculation of the payment; it could be a payment of salary only, or of salary plus an amount in lieu of other benefits (such as pension contributions, benefits in kind). It would not usually include an amount in lieu of bonus, certainly for senior executives of listed companies (where this would be contrary to institutional investor guidance).

Is there any entitlement to severance payments?

Pursuant to the **French Labour Code** all employees with at least one year of service who are terminated by their employer must be paid a minimum severance payment of 1/5th of their average monthly remuneration per year of service, plus 2/15th of such remuneration for any time period exceeding ten years of service. This minimum formula is frequently increased by collective bargaining agreements, and sometimes also in employment contracts.

The severance is payable, in all cases of termination by the employer (except in the event of gross or serious misconduct) - and irrespective whether the ground of termination invoked by the employer in the notice of termination in fact justifies his termination. An employee whose unfair dismissal claim succeeds in court will be awarded damages on top of the severance paid at the time of the termination.

Employees dismissed for reason of redundancy (especially when a social plan is applicable) are entitled to the benefits provided by the redundancy plan in addition to their severance payment.

In **Germany**, there is no general entitlement to severance payments. Aside from those agreed in termination agreements, claims to severance payments on termination may arise (i) on the basis of social plans agreed between the employer and its works council in order to mitigate the consequences of an operational change (which are outside the scope of this briefing) and (ii) by court order in termination protection proceedings if a labour court holds that a termination is not legally effective, but a return to the job would be an unreasonable burden for the employee.

Typically, such payments will amount to 0.5 – 1.0 times their monthly remuneration per year of service.

In **the UK**, there is also no general entitlement to a severance payment, unless it is prescribed by the terms of the employment contract (and this would be rare in the UK). Such payments used to be relatively common for senior employees, including on a change of control of the employer, but these have fallen out of favour with institutional investors and are now rarely seen. Separate entitlements (both statutory and contractual) would usually arise on redundancy; these are outside the scope of this briefing. In addition, the employee will have a right to notice under his contract and if such notice is not given, a claim for damages in respect of his remuneration for that period. The parties may also agree to make a severance payment under a settlement agreement, in consideration of the employee agreeing to waive any claims it may have against the employer.

What are the remedies in case of non-compliance?

In **France,** unfair dismissals are sanctioned with damages for the loss suffered by the employee. The amount is at the discretion of the court, with a minimum of six months' compensation for employees with at least two years of service in companies having eleven or more employees. In certain cases the minimum can lie at twelve months' compensation. There is no legal maximum, but it is rare (though not unheard of) for courts to award more than two years' pay in damages.

In limited cases, employees can be granted reinstatement. A typical example would be employee representatives obtaining the cancellation of the labour authorities' authorisation of their dismissal.

Claims in connection with the termination of employment contracts must be raised in court within two years from the moment when the employee had or should have had knowledge of the factual basis for such claim. A shorter time limitation of one year applies if the termination formed part of a mass redundancy procedure, and a longer one (five years) applies in certain other cases (such as claims for discriminatory dismissal).

In **Germany**, employees must raise termination protection claims in court within three weeks from receipt of a notice of termination. In the case of notices requiring the consent of an authority to be

effective, the time period begins with receipt of such decision by the employee. If no claim is filed within the exclusion period, the notice of termination will be deemed legally effective.

If termination protection proceedings result in the finding that a termination was not effective, the employment must continue as before notice of termination was given. However, the parties will often agree to terminate the employment with payment of a severance amount.

In **the UK**, the remedy for wrongful dismissal (where the dismissal is not in accordance with the contractual provisions) is compensation in the amount that would have been payable to the employee if the contract had been terminated lawfully. This is typically limited to payment for the notice period (if this has not already been paid).

For unfair dismissal, the usual remedy is compensation. This consists of:

- a basic award (calculated via a formula based on the employee's age, length of service, currently capped at £13,920); and
- a compensatory award (based on an employee's financial losses). This is currently capped at the lower of £76,574 or 52 weeks' pay (although it may be uncapped in certain circumstances, for example on a whistleblowing claim).

The employee may also seek reinstatement (to the same job) or re-engagement (to a comparable or otherwise suitable job). This would only be ordered if it is practicable for the employer to comply, which would depend on the facts in each case.

Claims for unfair dismissal must normally be brought in the employment tribunal within three months of the dismissal.

What are the rights and duties of the parties during the notice period?

Under **French law**, principally, the notice period shall be performed as usual. During such time, the employee may claim all benefits due to him while on the payroll (for example a 13th monthly compensation payment, vesting of options, etc.). This is irrespective whether he has been relieved from the duty to work by the employer.

An employee who has been relieved from the duty to work during the notice period, and who is paid compensation in lieu, is free to join another employer before the expiry of the notice period (thereby cumulating his new remuneration and the compensation in lieu of notice) unless the new employer is a competitor and the employee is bound by a non-compete obligation.

For employees working during the notice period, many collective bargaining agreements provide for time off, usually paid, to be used to seek new employment.

Under **German law**, after receipt of a notice of termination, all rights and duties of an employment relationship remain in effect until the expiry of the applicable notice period. The employee must continue to work, and the employer must continue to provide the regular compensation and other benefits. As a rule, employers may only send employees on garden leave if so agreed in the underlying employment agreement, in a collective agreement, or if the employer has an overriding interest in doing so (for example, if the employee has committed a criminal offence against the employer).

At the request of the employee, he must be granted adequate paid time off for the purpose of finding another job – irrespective of which party gave notice of termination.

Similarly under **UK law**, during the notice period the employee remains employed and subject to all of his usual rights and duties. The employer may have the right to place the employee on garden leave. This would usually require an express contractual right, but could apply even without such an express right in some circumstances.

The court cannot force an employee to work during his notice period. It can however stop him working for a competitor during this period, or from receiving pay unless he agrees to work in accordance with his contract.

However unlike in France and Germany, there is no right to time off to attend job interviews during the notice period, unless the employee is being made redundant.

What are the rules about settlement of claims on termination?

Under **French law**, out-of-court settlements (usually on claims for unfair dismissal) are permissible but subject to strict conditions: they can only be entered into after the dismissal procedure is complete, i.e. at a time when the employee can fully assess whether it is in his best interest to sue or to settle, and have to provide for a reasonable compensation which has to be higher than the mere statutory or contractual entitlement of the employee.

Under **German law**, all claims under an employment relationship should be settled at the end of the employment relationship. Where that is not done, a statutory limitation period of three years (counting from the end of the year in which the relevant claim arose) applies. In respect of some claims, shorter exclusion periods may apply. Additionally, employment agreements will typically provide for shorter exclusion periods (commonly three months for a first written claim and a subsequent three for bringing a matter to court).

In **the UK**, an employee can settle contractual claims via a simple contractual agreement with the employer. However, statutory claims cannot be waived unless certain conditions are satisfied. Broadly, the requirement is that the employee must enter into a written settlement agreement which relates to the particular complaint or proceedings, having received independent legal advice.

Conclusion

It is unsurprising that, in all three jurisdictions, the employer is subject to stricter requirements when terminating employment than those which apply to employees. Employers with employees in any (or all) of the three jurisdictions must make sure that these requirements are properly observed, if the dismissal is to be effective (and additional liability is to be avoided).

This material is for general information only and is not intended to provide legal advice.

Further information

If you would like to find out more about any of the issues raised in this briefing, or require advice in relation to a specific matter, please contact:

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