



Employment law and Mobility of Workforce

Legal grounds for economic dismissal in: Cyprus

Introduction

The Termination of Employment Law 24/67 ("the Law") governs dismissals in Cyprus. By virtue of section 3 of this Law, a dismissal for any reason, other than one specified in section 5 of the Law, is unlawful and the dismissed employee has the right to seek compensation from his employer.

Section 5 of the Law lays down the reasons for which an employer may lawfully dismiss an employee and where no compensation would be payable. Financial or economic difficulties faced by the employer are not among the reasons specified in section 5.

However, "redundancy" is among the reasons listed in section 5. Dismissal for reasons of redundancy is therefore lawful and the employer does not have to compensate the employee for the loss of his job.

Redundancy

"Redundancy" is defined under section 18 of the Law. Section 18 specifies the grounds upon which an employer may make an employee redundant. Not all of the grounds set out in section 18 are related to the financial situation the employer's business finds itself in. For example, it is possible for an employer to make an employee redundant when he relocates his business to another location or if the department in which the employee is working closes down or if due to the re-organisation of the business a lesser number of employees is required.

However, three of the grounds for redundancy are directly related to the financial situation the employer's business is in. If the employer has difficulties selling his goods or services on the market or if he is not processing sufficient orders for his goods or services or if there has been a decline in his turnover, he is entitled to make employees redundant.

The above mentioned grounds for redundancy have been very strictly interpreted by the Courts in order to prevent abuse by employers and to protect employees. It has been held that a temporary decline in the volume of sales is not a sufficient ground for dismissal. It must be shown that the volume of sales has been decreasing over a period of at least 2-3 years. The same applies to difficulties in selling goods or services on the market and lack of orders.

Further and more importantly for our purposes, it has been held that redundancy cannot be invoked to justify a dismissal if the dismissal was effected for the sole purpose of increasing profits. It has been held that a dismissal to save costs, as opposed to a dismissal in order for the business to survive a financially difficult period, does not qualify as a redundancy.

Conclusion

In Cyprus it is well established that an "economic dismissal" to save money and increase profits is unlawful. However, it is equally well established that an "economic dismissal" to enable the employer to face long lasting financial difficulties is lawful. Such a dismissal is called a "redundancy". If the employee is unlawfully dismissed, the employer will have to compensate him/her for the loss of his job. In the case of a lawful dismissal on grounds of redundancy, the Redundancy Fund (a Government body) and not the employer will compensate the employee. The amount of compensation in both cases will depend on the period of service of the employee.

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France

Under Article L.321-I of the French Labour Code, redundancies (either individual or collective) must be justified by a "real and serious cause", the absence of which may result in the employer being liable for damages for "unfair dismissal".

French courts are becoming increasingly strict in relation to the grounds relied upon by employers who have dismissed employees for economic reasons, to the point where the courts can be said to interfere in the management of the company. Below is a summary of the definition of the grounds and criteria used by the French courts (i) and the risks attached to redundancies not justified by real and serious economic grounds under French law (ii).

1. Definition and criteria under French case law

"A redundancy for economic reasons is a redundancy carried out by an employer for one or more reasons not inherent to the employee himself, resulting from the suppression or revision of employment or from change of an essential element in the employment contract refused by the employee, particularly as a result of economic difficulties or technological changes".

Even if recent case law has adopted a wider interpretation of the grounds justifying an economic redundancy¹, French courts are in general becoming increasingly strict in relation to the reasons (and the reality of the reasons given by the employer) relied upon by employers who have dismissed employees for economic reasons, to the point where the courts almost interfere in the company's management.

Under French law, the restructuring of a company belonging to a group (either French or foreign²), unless motivated by financial losses at the group's activity sector level³, must be aimed at preserving competitiveness **within the sector of activity**⁴ to which the company belongs⁵. The competitiveness of the company must have declined to the point of threatening its survival. Redundancy for economic reasons cannot be justified exclusively by the wish to improve the company's competitiveness in the market. The French labour courts have restricted the company's ability to make employees redundant for economic reasons even further. Indeed courts require that the measures taken to preserve competitiveness be based on objective business strategy criteria in view of the specific nature of the business sector involved⁶, and not merely be taken to increase profits⁷.

It is therefore highly recommended to give the highest care to the preparation of the economic and financial justification for the redundancy procedure before starting such a procedure. This preparation requires a huge amount of information that will be requested by the employee representatives (and communicated to the Labor Inspector (State department dealing with labour law rules' compliance) who will, in particular, ensure compliance with the information and consultation procedure with the employee representatives and authorize the dismissal of protected employees) before the employment protection plan can be implemented. This justification for the redundancy procedure has to be detailed in the economic and social memorandum ("Note économique et sociale"). This very important document is the basis on which the economic

justification is established. Each employee may challenge this economic justification of the redundancy procedure before the courts as well as the Works Council (mandatory institution to be created while the company has hired at least 50 employees).

2. Risks

2.1 On a strict legal standpoint

Taking into account the French case law, it will not be sufficient for a French company belonging to a Group to point to its structural losses to justify the redundancies. The French company will have to demonstrate either the economic difficulties of the Group's division to which the company belongs, or the necessity to preserve the competitiveness of this division.

Moreover, the French Supreme Court strictly examines the origin of the losses to ensure that these are not due to mismanagement from the employer or the group⁹.

It is to be noted that both the Works Council and the Labour Inspector have to be notified and participate in the redundancy process and can start an investigation into the economic justification for the redundancies.

2.2 On a financial standpoint

If an employee decides to challenge the redundancies after the completion of the redundancy procedure and refer the matter to the Courts, this could generate costs for the company including the **following minima**¹⁰:

- Damages for any **redundancy** held to be **unfair** i.e. carried out without a real and serious economic reason, in accordance with the provisions of article L. 122-14-4, para. 1 of the Labour Code. According to this article, "if [the] dismissal is held to be without serious grounds, the Court may propose the reinstatement of the employee, and the continuation of all benefits acquired. Should either party refuse reinstatement, the Court shall award damages to the employee. These damages, which may not be less than the salary paid over the preceding six months, are payable, without prejudice, where appropriate, to damages due under the terms of article L. 122-9."

This article only applies to employees with over two years' service within the company. In the event of an unfair dismissal, employees with less than two years of seniority may claim **damages calculated on the basis of the loss suffered**, which will be assessed by the courts¹¹. When assessing this loss, the courts may, in particular, take account of the loss of income suffered by the employee between the date of his dismissal and the date at which alternative employment was found.

- The employees can challenge their redundancies within the 12 months following the last Works Council's meeting.
- Reimbursement by the company to the Unemployment Fund of the **unemployment benefits** paid to dismissed employees, **up to a maximum of six (6) months**.
- **Costs of court proceedings** *stricto sensu* (lawyers' and procedural fees).

In light of the above mentioned risks companies should seek legal advice before considering either an individual or a collective redundancy for economic reason in France.



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¹Article L. 321-I of the French Labour Code

²Cass. Soc., 11 Janvier 2006 N° 05-40977 «Pages jaunes»

³Cass. Soc., 12 June 2001, n° 99-41.571, n° 99-41.839 and 10 December 2003, n° 01-47.147 «Sté Bostich Simax Groupe Stanley Tools c/Colle»

⁴Cass. Soc., 25 June 1992, Gaz. Pal. 1992.2, panor. p.233

⁵Cass. Soc., 10 July 2002, n° 00-44.020

⁶Cass. Soc., 5 April 1995, n°93-42.690 «Sté Thomson Tubes & Displays c/Steenhouete et autres» and 29 March 2000, n° 1605 D, «Baniel et autres c/ SA FMC Food Machinery»

⁷Billon v. SA Beton Contrôle, 27 June 1995, n°95-42.729

⁸Cass. Soc., 26 November 1996, "Marquis Hotel limited partnership"; 25 June 1997, "Hôtel Concorde v. Dridi and others"; Cass. Soc., 30 September 1997, n° 94-43.733, "Société Rosières c/Tordjman"; Cass. Soc., 19 July 2000, n°98-43.679

⁹Cass. Soc., 16 January 2001, n° 98-44.647

¹⁰Articles L. 122-14-4 and L.122-14-5 of the Labour Code

¹¹Article L. 122-14-5 of the Labour Code

Germany

The German Act on the Protection against Dismissal ("Kündigungsschutzgesetz") provides employees with a general protection against dismissals.

According to Sec. 1 of this Act, a dismissal has to be socially justified by special reasons which may either lie in the person or the behaviour of the employee or in economic reasons. Economic reasons are defined as urgent operational requirements which are opposed to the employees' continued service.

A dismissal which is not socially justified will be null and void.

However, this Act applies only if the employment relationship has at the time of the delivery of the notice letter already existed for more than 6 months. Furthermore only employees in larger enterprises are protected. Due to a change in law in the year 2003, employees who started their employment before 1st January 2004 are only protected if their company employs more than 5 employees. Employees who started their employment after 31st December 2003 are only protected if more than 10 employees are employed. In case the Act does not apply, the employer is in principle free to dismiss employees without any restrictions.

The most frequently relied upon reason for dismissals in Germany is based on urgent operational requirements. These can follow from in-plant circumstances (e.g. rationalization measures, conversion or reduction of the production) or external circumstances (e.g. lack of orders or decline in turnover). The employer may react to the internal and/or external circumstances by deciding to dismiss one or more employees. According to German jurisdiction, the courts are not entitled to delve into whether this management decision is reasonable or not.

However, an operational reason is only urgent if it is strictly necessary, equitable and appropriate to give notice of termination. It also needs to be in the interest of the business after the employer has balanced the interests of both parties. The employer also needs to consider whether the operational reason can be met by other technical, organisational or economic measures than a dismissal.

Since each individual dismissal has to be socially justified, it would not be sufficient for the employer to prove the existence of such urgent operational requirements in the abstract. It is necessary that as a result of such an operational reason, the job status of the employee will become obsolete. Whereas, for example, the complete shut-down of the whole business will obviously have the consequence that all employees will no longer be required, a reduction in turnover does not necessarily justify a dismissal.

Finally according to Sec. 1 par. 3 of the Act, the employer has to take social reasons into consideration in relation to each individual dismissal. By law such social reasons are length of service, age, maintenance obligations and severe disability of the employee. When

choosing from a pool of employees, each of whom are marked for dismissal due to urgent operational reasons, the employer is required to select the ones with the less favorable social data, especially the young employees with less length of service. When the employer does not take these social reasons sufficiently into consideration in his selection, the dismissal would not be socially justified despite the urgent operational reasons.

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Italy

In Italy different rules apply depending on the circumstances surrounding the redundancy.

When the following special requirements are met, namely:

- 1) The company has 15 or more employees
- 2) The redundancies involve at least 5 employees in a unit or in more than a unit in the same territorial district in a period of 120 days

then the **Law 223/91 on collective dismissals** applies.

The two possible grounds for **collective dismissal** are set out at Sect. 24 and are as follows:

- Production downsizing or transformation
- Discontinuance of the business

Labour Courts have given guidance on these grounds:

- As a general condition, there must be a coherent and strong relationship between the number of people involved in the redundancy procedure and the grounds for collective dismissal
- The downsizing of the production can be due because of another organisation which caused offices, departments or production phases to be shut down. An economic crisis involving the company is not a pre-requisite for a collective redundancy to be justified
- The operation has to be effective and not an expedient prearranged one with the sole goal of reducing costs by reducing the workforce

When the above special requirements are not met, the **common rules on individual dismissal** apply.

A company can therefore proceed with a workforce reduction by following the rules provided for the special type of individual dismissal called **dismissal for "objective justified motive"**. Such dismissals are based on objective reasons mainly concerning company organization and production activity.

These objective reasons (to be proved by the employer) can be:

- Discontinuance of the business
- Loss of contracts, with reference to the workers involved in these contracts

Case law:

- **Case 1:** A hospital had to dismiss employees as a consequence of a reduction in the level of contributions received from the National Health Service for special clinical treatments offered in that hospital. The Supreme Court of Cassation held that the dismissals were lawful, as they were justified exclusively by the desire to increase profits but aimed instead to help the hospital survive a difficult situation affecting in a material way its normal production activity.
- **Case 2:** The decline in contracts suffered by a building company gave rise to the closure of a building site. The Labour Court of Florence held that the consequent dismissals were lawful, provided the employer could prove that it was not possible to use the employees in other building sites within the company.

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Netherlands

In The Netherlands "economic reasons" may be grounds for dismissal. The specific conditions for economic dismissal are, however, not defined in the law and may be several.

It is for the employer to prove that there are valid economic reasons for an economic dismissal. More specifically, the employer has to prove that effective and sustainable operations require that one or more employees are to be made redundant. Common reasons for an economic dismissal are a decrease in demand, a decline in turnover and/or necessary organizational changes.

If the employer succeeds in proving that dismissals are justified by economic reasons it may dismiss the number of employees justified by the proven economic grounds. However, the employer will have to do so in a certain order. Per age group the employees with the shortest period of service are to be dismissed first. The division of the dismissals into the different age groups should be such that the age composition before and after the dismissals remains the same as much as possible.

Finally, the employer has to prove that it has done everything possible to prevent dismissals, i.e. by re-employment of employees. In this respect, but within reasonableness, it may be required of the employee that he agrees to a lower position.

If, in a period of three consecutive months, twenty or more employees are dismissed on economic grounds, specific rules apply. Among other things, the employer must, in such a case, consult the involved employee representatives/trade unions and the employer has to report the intended collective dismissal to the district manager of the Centre for Work and Income (CWI).

The employer is free in the way it proves the economic reasons for dismissals, the efforts made to prevent dismissals and the order of the dismissals.



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United Kingdom

Introduction

The law governing redundancy in the UK is set out at section 139(1) of the Employment Rights Act 1996 (ERA 1996). The essence of a "redundancy situation" is that the employer requires fewer employees. Redundancy is one of 5 potentially fair reasons for dismissal under ERA 1996. In order for a redundancy dismissal to be lawful the employer has to follow a fair procedure and, if the employee has more than 2 years service, make a statutory redundancy payment (SRP).

Redundancy

There are three "redundancy situations". These are when termination of employment is wholly or mainly attributable to the fact that:

1. The employer has ceased or intends to cease carrying on the business for the purpose for which the employee was employed (i.e. the business disappears)

2. The employer has ceased or intends to cease carrying on the business in the place where the employee was employed (i.e. the place of work disappears)
3. The requirements of the business for employees to do work of a particular kind has ceased or diminished (or is expected to) either generally or at the place where the employee works (i.e. the employer requires fewer employees to do the job either generally or in the place where the employee actually works).

There is no obligation on the employer to show that the redundancy situation has been caused by any particular circumstances. ERA 1996 underlines this point and states at section 139(6) that the reduction of workforce may be permanent or temporary and for whatever reason. This means that dismissals are possible not only because of a downturn in trade but also because the employer wishes to increase its profits. Provided the decision to make employees redundant is made in good faith, Employment Tribunals are unlikely to question it.

All employees must be individually consulted on a redundancy situation and the employer should make attempts to find suitable alternative employment for those employees identified as potentially redundant. If the employer proposes to dismiss 20 or more employees then additional statutory procedures have to be followed which, amongst other things, involve consulting with employee representatives/trade unions on specific issues and notifying the Department of Trade and Industry 30 days before the first dismissal takes place.

As with all parts of employment law, there is a degree of overlap with other areas and redundancy is no different. In particular, employers have to be careful that they do not treat employees less favourably in contravention of legislation prohibiting discrimination on certain grounds and that the procedures followed meet the requirements of the statutory minimum dismissal procedures.

Finally, the calculation of SRP is based on a statutory formula based on the age, length of service and salary of the employee. The employer may also have provided for additional contractual redundancy pay entitlement.

Conclusion

Although employers have to comply with certain procedures (which become more onerous if they are proposing to dismiss more than 20 employees), redundancy legislation in the UK leaves a lot of freedom for companies to dismiss their employees for economic reasons.



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This Newsletter is intended to introduce and explain on a regular basis new areas of Employment law and Mobility of Workforce which are of general interest to all of our clients. It is jointly written and produced by PLG's Employment law and Mobility of Workforce International Network which includes legal practitioners in several PLG firms and their contacts worldwide. We always welcome comments and questions on any matters raised in PLG Employment law and Mobility of Workforce News. Further information is available on all topics but nothing in PLG Employment law and Mobility of Workforce News is to be regarded as a definitive statement of the law or as specific legal advice and reliance should only be placed on particular advice obtained from the relevant practitioners in the light of all relevant facts and circumstances. Readers are requested to direct their enquiries to the author of the relevant article.

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