Hire and fire

Protection against unfair dismissal in Germany: applicability and requirements

By Sabine Feindura

In Germany, employees enjoy protection against unfair dismissal if and as far as specific conditions are met: The Act Against Unfair Dismissal *(Kündigungsschutzgesetz, KSchG),* for example, applies only to employees with more than six months' seniority in companies with more than 10 employees based in Germany and under a common management. According to *KSchG,* a substantial reason for the dismissal must be named and it must meet a long list of requirements tied to whether the reason concerned operations, misconduct or the person of the employee. In addition, other specific acts protect particular groups of employees, with each act carrying its own set of requirements: for example, disabled employees, members of a works council, pregnant women, employees on parental leave and the like.

Scope of application

Employees based in Germany enjoy general protection against unfair dismissal (as provided by *KSchG)* only if

- their employer – on his or her own or jointly with an affiliated company – employs more than 10 employees based in Germany under a common management (that may be abroad), and
- the concerned employee has rendered at least six months' service for this employer (including the employer's predecessor before transfer of undertakings or contractual transfer of employment).

There is one exception: If the concerned employee had started employment before January 1, 2004, general protection against unfair dismissal would apply if more than five employees (including the concerned employee) had been employed before this date and were still employed at the point the termination notice was given.

Part-time employees are to be taken into account by means of a specific counting method. Part-time employees who work up to 20 hours a week count toward the protection requirement (more than 10 employees or, respectively, five – see above) as 0.5, whereas part-time employees who work up to 30 hours a week count as 0.75. Employees who work 30 hours a week and more count as 1.0. Applying this counting method, the value of 10.25 is enough to trigger general protection against unfair dismissal for all employees with more than six months' service.

As a consequence, as long as

- the employer – on his or her own or jointly with an affiliated company – does not employ more than 10 employees (or, respectively five of the same employees since before January 1, 2004 – see above) in Germany under a common management

or

- the concerned employee had not yet been contracted for more than six months (regardless of the number of employees), →

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termination is permissible without giving or having substantial grounds for dismissal. In this respect, it does not matter whether the employment contract provides for a probationary period or not; a contractual probationary period (maximal duration: six months) merely shortens the period of notice to a statutory minimum of 14 days.

Grounds required if general protection applies

If general protection against unfair dismissal *(KSchG)* applies, the employer must be able to give very specific grounds in case the concerned employee challenges the termination by filing a lawsuit in a German labor court within 21 days after receiving notice of termination. If no lawsuit is filed within 21 days after receiving notice of termination, the termination can no longer be challenged regardless if there are sufficient reasons or not. Sufficient grounds for a termination can relate to the person of the employee, misconduct of the employee or operations.

Grounds for termination in the person of the employee

Reasons in the person of the employee may, for example, include absences caused by a frequent short-term or extensive long-term incapacity to work. Other examples would be a foreign employee's lack of a work permit, the loss of a driver's license or other permit necessary to perform the contractual tasks of a job or imprisonment of the employee as a factual obstacle. In general, a termination for person-related reasons is permissible, if

- it is nearly certain the employee will not be able to fully perform his or her contractual obligations over the long term (negative prognosis) and, in the process,
- the employer's interests are substantially affected in a negative way and
- the employer's interests outweigh the employee's interests in the specific case.

Termination for misconduct

A conduct-related termination is permissible if the employee has seriously violated important contractual duties in a way that makes it unacceptable for the employer to continue employment of the individual. The dissolution of employment must also seem reasonable under due consideration of the employer's as well as the employee's interests. Examples of such misconduct include theft from the employer or from colleagues; fraud, for instance regarding working time; infringement of safety rules; drunk driving while on the job; working for a competitor; and sexual harassment. Low performance may justify a conduct-related termination only if the employee is fully able to perform well, which is actually difficult to prove.

In most cases, a termination for misconduct is only effective if the employee had previously received a written warning for a similar breach of a contractual duty. Only in very rare cases may notice of termination be given right away without having previously issued a warning: when the employee's behavior or negligence constitutes a very serious violation of his or her duties and the employee cannot expect such misconduct to be tolerated. In all other cases, the employee must be given the opportunity to acknowledge his or her mistake and to adjust his or her behavior. Should the misconduct be minor, more than one warning must precede the termination.

Termination for reasons related to operations

Termination on the basis of operational requirements is permissible when factual reasons lead to business decisions that result in the redundancy of one or more employees or jobs. These reasons may be external (for example, a drop in sales) or internal (for instance, a restructuring, new machines or software replacing certain employees).

If only some employees with similar tasks will be laid off, the employer is only allowed to terminate those employees who are considered less affected by the termination than the others. This social choice is determined on the basis of four equally weighted statutory social criteria related to the employee: seniority (duration of employment), age, obligation to support family members and disability, if any. The employer is not allowed to apply other criteria but does have some freedom of assertion in determining who will be laid off in accordance with the four criteria.

Protection against unfair dismissal for specific groups of employees

Besides the general protection against unfair dismissal laid down by *KSchG,* other acts provide protection against unfair dismissal for specific groups of employees. These groups include severely disabled persons, pregnant women, mothers in the four months after giving birth, employees on parental leave, members of a works council, employees →

serving in the military and employees affected by a transfer of undertaking.

Termination of an employee who has been certified as substantially disabled (or has applied for such recognition and will be certified in the future) requires the prior consent of the relevant local integration office. Employees are not, however, obliged to inform their employer about their disabilities. The consent of the relevant local integration office will only be granted if the termination does not discriminate against the concerned employee in terms of his of her disability.

Unless exceptional authorization is granted upfront by the relevant administrative authority, any termination of a woman during her pregnancy or four months after giving birth is void. The same applies to employees on parental leave.

As stated earlier, the general protection against unfair dismissal provided by *KSchG* only applies to companies with more than 10 employees under common management in Germany (for an exception, see above). Smaller companies only have to respect
(a) special protection against unfair dismissal to the degree this is applicable,
(b) statutory and contractual periods for issuing notice and
(c) certain formal requirements like wet ink signature(s) from the company's authorized representative(s) on a notice of termination letter.
Further requirements must be met only if a works council has established them, but works councils are rare in small companies.

Hearing the works council

According to Section 102 (1) of the Works Council Constitution Act *(Betriebsverfassungsgesetz, BetrVG),* the works council, should one exist at the company, must be fully informed of all the circumstances related to a termination, especially the reasons for it. Afterward, the works council must be given an opportunity to give the employer its opinion on the intended termination before the employer issues the notice of termination. It does not matter what the works council's opinion is, only that the council had been fully informed and that the employer acknowledges council's opinion before issuing the notice.

Summary dismissal

German law not only provides for termination with due notice but also for summary dismissal. This, however, is reserved only for extreme cases. If the employer cannot be expected to continue the employment relationship even for just for the duration of the applicable notice period because the employee engaged in serious misconduct (for instance, one involving a criminal offense), the employer may terminate the employment relationship without giving advance notice. Such a summary dismissal must be issued no later than two weeks after the serious grounds for dismissal have been acknowledged by those employer representatives who are authorized to decide whether or not to terminate the employment. In most such cases, a prior warning for a similar misconduct is again necessary.

Conclusion

Many uncertainties may emerge in the event of a termination of employment. Business owners and managers will not be able to deal with the variety of complex situations that may arise as the German system of protection against unfair dismissal is quite impenetrable. German law provides for a wide range of legal measures that prevent the establishment of a hire-and-fire mindset. Nevertheless, employers would benefit from obtaining legal information about this subject as it may help businesses avoid unnecessary lapses and prolonged employment disputes and processes. <–

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