

# TOP 5 TERMINATION MISTAKES ACROSS EUROPE

GLOBAL EMPLOYMENT LAW WEBINAR SERIES

June 27, 2019



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# TOP 5 TERMINATION MISTAKES IN THE UK

MANDY PERRY, PARTNER





# 1 – Use Probation – The Importance of Timing

- In the UK, employees obtain statutory employment protection after 2 years
- Probationary period – use it or lose it
- The statutory week and notice
- Beware discrimination or whistleblowing



## 2 – Choose your Reason

- Don't gather as many reasons as you can
- Try not to 'mix' different reasons
- Be truthful
- Provide information



## 3 – Don't Prejudge

- Rules of natural justice
- Consultation, process and 'proposals'



## 4 – The Tap on the Shoulder

- Pre-termination conversations
- The without prejudice rule

# TOP 5 TERMINATION MISTAKES IN GERMANY

ANDRÉ ZIMMERMANN, PARTNER







# 1 – Not Providing Written Notice of Termination

- Written form (**wet ink signature!**) required
- Email, DocuSign, SMS, WhatsApp will not suffice
- Signature (not initials!)
  - Legal representative of employing entity, such as managing director (*Geschäftsführer*) or registered proxy holder (*Prokurist*)
  - Alternatively: individuals known to be authorized to dismiss (e.g. Head of HR)
  - Other persons: original signed power of attorney to be enclosed with notice
- Generally no obligation to include the reason for termination
- Correct legal entity, correct letterhead (double-check!)
- Evidence of proper service of notice



## 2 – Not Observing Applicable Notice Period

- Statutory minimum notice period
  - Two weeks during probationary period (first six months of employment), if agreed
  - After probationary period four weeks to 15<sup>th</sup> or last day of a month
- Statutory minimum notice period increases after two years of service (maximum statutory notice period is 7 months to month end after 20 years)
- Statutory vs. contractual notice period – longer notice period applies
- Stating wrong termination date generally results in termination with effect as of correct termination date



## 3 – Ignoring The Works Council

- If a works council (WC) exists, it must be notified **before** any notice of termination is given (otherwise dismissal is void!)
- Reasons for dismissal must be presented to WC comprehensively
- Only notification is necessary, WC's consent not required
- WC to present concerns within a week, three days' deadline for termination for good cause
- WC's objection to dismissal does not hinder employer to give notice of termination or render dismissal invalid



## 4 – Ignoring Special Protection Against Dismissal

- Applies to specific categories of employees
  - Pregnant employees/mothers until end of the fourth month after delivery
  - Severely disabled employees
  - Employees on parental leave
  - WC members
  - Employees with specific functions (e.g. DPO)
- **Prior** approval of the competent authority to be obtained
- Approval only in “exceptional cases” and if dismissed is based on grounds not related to the pregnancy/severe disability etc.



## 4 – Ignoring Special Protection Against Dismissal (cont.)

- Dismissal of WC members
  - During term and for a year after its expiry dismissal only for good cause with immediate effect
  - Requires WC's consent or court approval, if consent has been refused



## 5 – Offer Severance Though Employee Not Protected

- General Dismissal Protection under the Dismissal Protection Act (*Kündigungsschutzgesetz – KSchG*) only applies to
  - Employees with more than **six months** of service
  - In an operation (*Betrieb*) with **more than ten employees** employed on a regular basis
- Unless employee enjoys special dismissal protection, no need to offer a severance!
- If DPA does not apply and employee does not enjoy special dismissal protection, dismissal will only be invalid in exceptional cases where it is arbitrary (e.g. Dismissal due to union membership)

# TOP 5 TERMINATION MISTAKES IN FRANCE

NADÈGE OWEN, OF COUNSEL



# 1 – ACTING AS IF DISMISSAL IS EFFECTIVE BEFORE COMPLIANCE WITH THE FORMAL TERMINATION PROCESS



# 1 – Acting as if Dismissal is Effective before Compliance with the Formal Termination Process

Example of a “non-complex” termination process:



During this timeframe, the **termination is merely contemplated**.

## Do's & Dont's:

- Do use conditional / say the dismissal is envisaged;
- Don't announce the termination as if decided to staff;
- Don't announce/initiate a permanent reallocation of the employee's tasks to other team members;
- Don't announce the replacement of the employee.

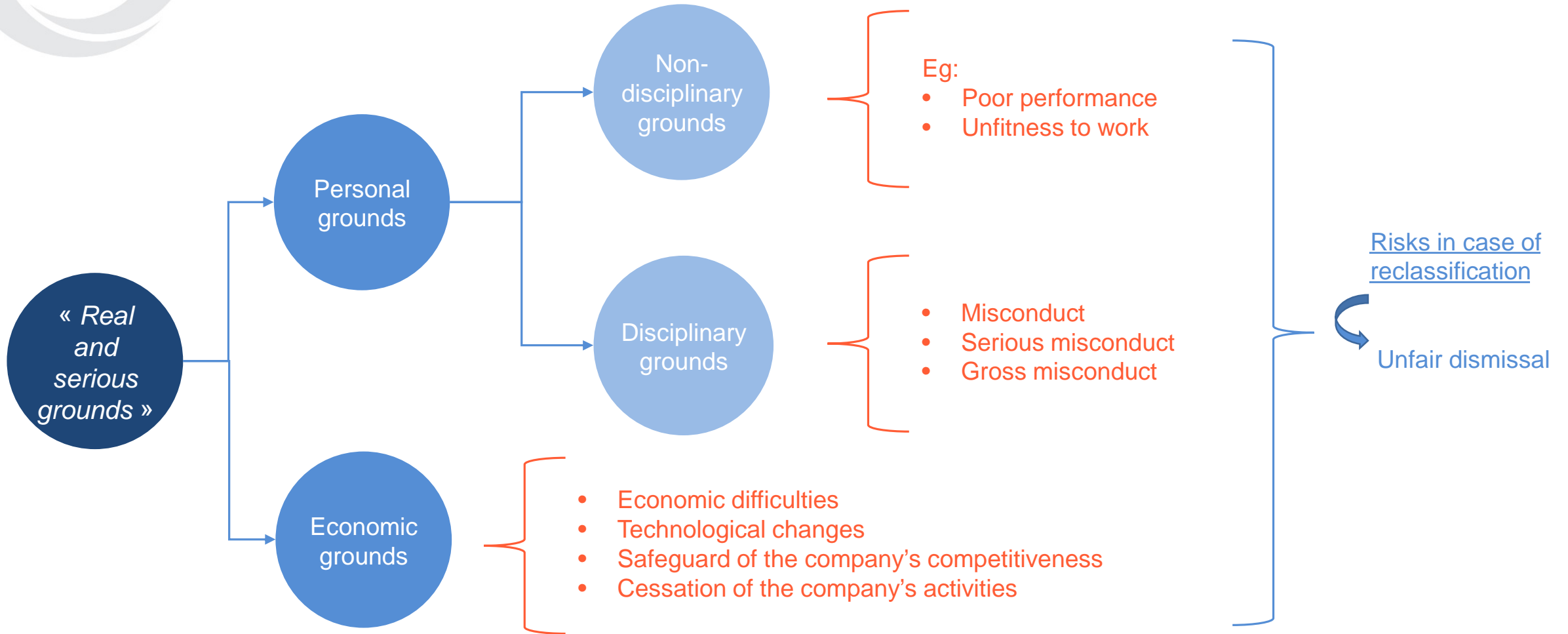
## Risks/Sanctions:

- Irregular or unfair dismissal;
- Additional damages for vexatious circumstances.



## 2 – FAILING TO IDENTIFY THE APPROPRIATE GROUNDS FOR THE TERMINATION

## 2 – Failing to Identify the Appropriate Grounds for the Termination

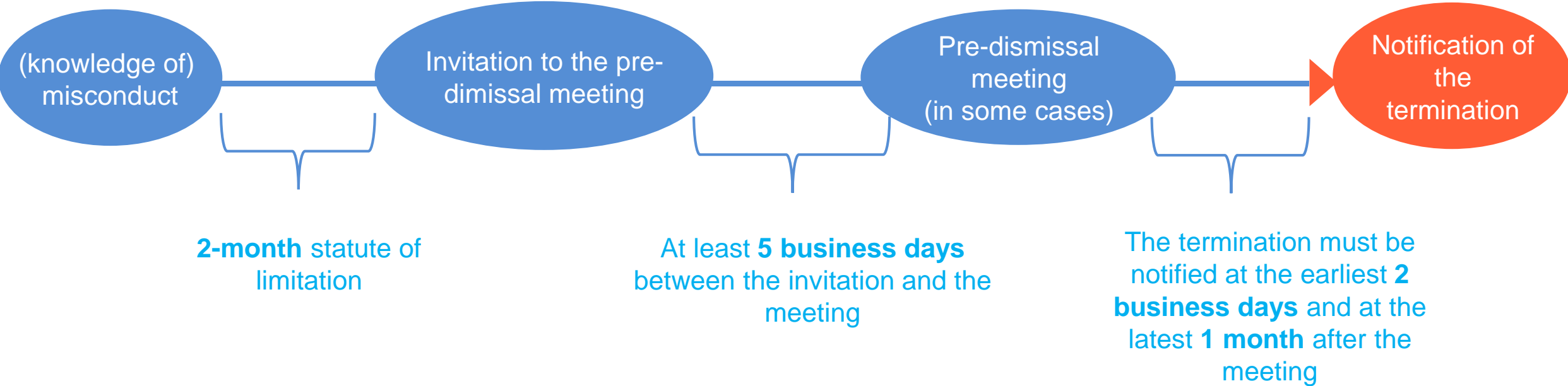


The termination letter must specify the grounds of termination

# 3 – FORGETTING OR MISCALCULATING THE APPLICABLE TIME LIMITS

### 3 – Forgetting or Miscalculating Applicable Time Limits

Example of a disciplinary process :



**NB:**

Worked days (« *jours ouvrés* »): Monday-Friday

Business days (« *jours ouvrables* »): Monday-Saturday

Calendar days (« *jours calendaires* »): Monday-Sunday

# 3 – Forgetting or Miscalculating Applicable Time Limits

## Other examples

Collective bargaining agreements

- Various industry-wide CBAs provide for specific time limits e.g. the banking CBA, architecture CBA
- Industry-wide CBAs may also provide for additional steps to the dismissal procedure subject to various time limits (e.g. consultation of a specific committee or of a disciplinary commission).

« *Small* » economic dismissal

- After the pre-dismissal meeting, the employer may only notify the termination after:
- **7 business days** for non-executive employees;
  - **15 business days** for executive employees.

# 4 – FAILING TO INFORM & CONSULT EMPLOYEE REPRESENTATIVES

## 4 – Failing to Inform & Consult Employee Representatives

The employer must consult with employee representatives prior to the dismissal in various circumstances :

Termination of protected employees (e.g.: SEC members, election candidates...)

Main risks:

- Obstruction offence\*
- Refusal of the authorization to dismiss from labor inspector

Termination for unfitness to work

Main risks:

- Obstruction offence\*
- Unfair dismissal with a minimum of 6 months' salary in damages (work-related unfitness) or an amount subject to the « *Macron Scale* » (non work-related unfitness)

Economic termination of 2 or more employees over 30 days

Main risks:

- Obstruction offence\*
- If a social plan is required (10 or more dismissals): refusal of the labor administration to validate the plan

\*Fine of up to €7,500 for the legal representative and up to € 37,500 for the company



5 – FAILING TO TAKE INTO ACCOUNT THE  
EXISTENCE OF A SPECIFIC PROTECTION  
AGAINST TERMINATION

## 5 – Failing to Take into Account the Existence of a Specific Protection Against Termination

Protected employees: (e.g.: SEC members, trade union representative...)

The termination of such employees may require:

- The **prior consultation** of the WC/SEC; and/or
- The **prior approval** by the labour administration.

Maternity

- During the maternity leave, the employee benefits from an **absolute protection against dismissal**;
- After the maternity leave, the employee benefits from a **relative protection** (for **10 weeks**): dismissal for gross/willful misconduct or impossibility to maintain the employment contract unrelated to the maternity.

Illness /Accident

- If the employee is on leave for a work-related illness or accident there are **limited restrictive grounds for termination**: gross/willful misconduct or impossibility to maintain the employment contract unrelated to illness.
- CBA may provide restriction for termination of employees on **sickness leave unrelated to work**.

# TOP 5 TERMINATION MISTAKES IN ITALY

MARIO SCOFFERI, OF COUNSEL



# 1 – The Relevance of the Employment Agreement and Company Policies

## Employee obligations towards the employer

- (i) **Arising from the law**  
diligence (Art. 2104 ICC)
- (ii) loyalty (Art. 2105 ICC)

- (i) **Arising from the agreement**  
employment agreement and NCBA
- (ii) company policies (and disciplinary code)



**A breach of his/her obligations expose the employee to sanctions**

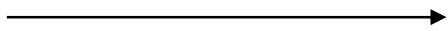
Art. 2106 Italian civil code «Breach of the (employee's obligations) may lead to the application of disciplinary sanctions, depending on the seriousness of the violation»



Clear company policies and farsighted agreements are an important step to properly reacting to employees' misconducts

## 2 – Propose to the Employee to Leave the Company Before the Dismissal is Served

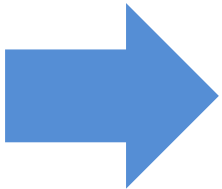
Dismissal



- (i) has to be served in writing (otherwise it is non-existent);
- (ii) takes effect only once it is known by the employee in such a mandatory way



Until the dismissal has been duly delivered, the employment relationship proceeds according to its normal terms



it is therefore highly risky to inform the employee of the company's intention to terminate the employment relationship before the dismissal is served

(e.g.) **illness**: during illness period, the employee is entitled to keep his/her job and receive the relevant salary up to 12 months, totally bore by the company (as far as an executive is concerned)

**AND/OR** collects information and documents to better argument his/her claim

# 3 – Confusing Wrong Behaviors with Misconducts

**Not every disagreeable behavior is a breach of the duties of the employment relationship**

→ e.g. drug usage: if committed outside of working hours and place it cannot be considered a breach of the employee's obligations



**To ground a dismissal, the employee's misconduct has to be serious and job-related**

→ Except for severe crimes (e.g. theft, robbery, violence, etc.)

## 4 – Low Attention to Drafting the Dismissal Letter

**Art. 7, Law n. 300 of 1970**

*«The employer may not adopt any disciplinary measure against the employee without having previously notified to him/her the relevant reprimand»*



### **Letter of reprimand has to be:**

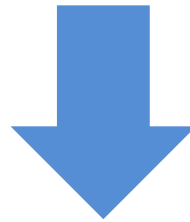
- (i) Timely** (i.e. in respect of the time the employer knows employee's misconduct);
- (ii) Specific** (i.e. it has to precisely identify each fact that the employer wants to contest and sanction)

→ if all the facts are not indicated and in the most specific way possible, the dismissal risks could be disproportionate

# 5 – Property Estimates the Economic Risk

As a result of the dismissal, the employer usually has to pay the indemnity in lieu of the notice period and (in case of unfair dismissal) a supplementary indemnity.

**Economic consequences of a dismissal are calculated on a «*global monthly basis*»**



NCBA	Reference salary
For executives of industrial companies	(i) effect on the end-of-service allowance; (ii) additional monthly salary; (iii) variable remuneration (e.g. bonus, commissions, SOP)
For executives of commercial companies	(i) holidays monthly accrued; (ii) effect on end-of-service allowance; (iii) additional monthly salary; (iv) variable remuneration (e.g. bonus, commissions, SOP)



# TOP 5 TERMINATION MISTAKES – SELECT JURISDICTIONS

CHANANI SANDLER, SENIOR ASSOCIATE



# Comparing Countries – Performance Based Terminations

## Specific Procedures to be Followed

- Ireland
- Israel
- Switzerland

## Termination Without Cause Permitted; Statutory Payments Required

- Denmark
- Spain

## Negotiated Exits in Many Cases (Mutual Termination)

- Austria
- Czech Republic
- Finland
- Netherlands
- Norway
- Spain
- Sweden



# Top 5 Mistakes

- Procedural Countries: failure to issue invitations and following hearing process
- Termination Without Cause Countries: terminating without following applicable process and making final payment(s)
- Negotiated Exit Countries: failure to use probationary period / fixed term agreements
- De Facto Terminations
- Communication of termination as “for cause”

**Questions?**  
**Thank You**

