

together

Managing International Mass Terminations
During an Economic Downturn

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Welcome

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Particular Pressures in an Economic Downturn

- General lack of available alternative work
- Great deal more anxiety/stress
- Possible "stress" absence
- Increased likelihood of disputes/litigation
- Greater likelihood of redundancies being collective/mass
- Greater likelihood of cross-border redundancies
- Greater readiness for courts to accept the business case but:
- Greater scrutiny of process thus:
- Greater emphasis on preparation and co-ordination - bringing its own challenges

UK - Redundancies

- “Redundancy”: potentially *fair* reason for dismissal
- Cessation/expected cessation/downturn of business/work for purpose for which employee is employed/in the place so employed
- Requirements of business for employees of particular kind/in place where employees so employed have ceased or diminished or expected to do so
- s.139 Employment Rights Act 1996: Governs definition of “redundancy” for individual fairness (substantive and procedural)

UK - Redundancies

- Collective redundancies - governed by s.188 of Trade Union and Labour Relations (Consolidation) Act 1992. At same establishment, proposing to dismiss “*as redundant*” 20 employees or more within 90 days or less.
- Fair reason to dismissal “*as redundant*” under s.188 is potentially wider than fair reason for dismissal under s.139 ERA:
 - Cease/diminishment in work; but also
 - Role change;
 - Changes to terms and conditions.
- Include all those affected by change to calculate threshold - even if employer proposes to redeploy some.

UK - Redundancies

- Collective consultation: genuine and *with a view to agreement*
- BUT not codetermination/negotiation
- With:
 - Appropriate representatives of employees concerned
 - Recognized trade union or, if none,
 - Employee representatives (ad hoc election by appropriate ballot)
- About:
 - Ways of avoiding and mitigating impact of proposed redundancies
 - Reducing number of redundancies
 - Mitigating consequences of dismissal

UK - Redundancies

- Collective information obligation - as a minimum:
 - Reason for proposed redundancies
 - Likely number involved and descriptions
 - Total number of employees of each description
 - Proposed method of selection
 - Proposed implementation and time lines
 - Method of calculating contractual severance

UK - Redundancies

- Timing of collective consultation “*in good time*” but at least within:
 - 90 days - proposing more than 100 redundancies within 90 days
 - 30 days - proposing 20 or more redundancies but less than 100.
- Protective awards: penal and cumulative with any other protective awards (e.g., on a business transfer) - 90 days actual pay per affected employee
- Don't forget: individual consultation

UK - Redundancies

- Notification of collective redundancies to government
 - Form filling and filing exercise - important!
 - At same point as collective consultation should start
 - Failure is a criminal offense

UK Redundancies - Practical Tips

- The Business Rationale - fulcrum/foundation for all that happens subsequently
- Define “establishment”
- Get board/high-level affirmation
- Communicate **early** and **transparently**
- Consider other consultation/negotiation obligations
- Check selection criteria for objectivity/measurability/consistency and nondiscrimination (age, sex, race, etc.)
- Check results of likely selection for nondiscrimination

Germany - Mass Terminations

- Specific challenges in international RIFs
 - Different timelines
 - Cross-border interdependencies
 - European works councils
 - Employees are interconnected, at least in Europe
 - Integrated approach vs. country-specific approach
 - Consistent communication package (employees, customers, suppliers, press)

Germany - Mass Terminations

- Not applicable to businesses with 20 or fewer employees
- More than 5 employees terminated in a business with more than 20 and fewer than 60 employees
- At least 10% or more than 25 employees terminated in a business with at least 60 and fewer than 500 employees
- At least 30 employees terminated in a business with at least 500 employees (additional minimum of 5% for implementation agreement and social plan)

Germany - Mass Terminations

- Mass termination plan
- Information and consultation with economic committee and works councils about mass termination
- Negotiations with works councils on:
 - **Implementation agreement—details and timing of RIF**
 - **Social plan—to compensate or alleviate the impact of the RIF on the employees**

Germany - Mass Terminations

- Conciliation
 - Required if negotiations fail to result in an implementation agreement
 - Conciliatory body must be involved and heard prior to any step towards RIF implementation to avoid damages
 - Equal number of employer and works council representatives plus neutral chair (usually labor court judge)
 - Mixed role: mediation, decision making power only for social plan (higher thresholds may apply)

Germany - Mass Terminations

- Premature implementation—damages
 - Implementation before reaching implementation agreement or final conciliation body hearing:
 - Damages to affected employees of up to one year's remuneration
 - Works council may obtain court order temporarily suspending implementation of RIF (not in all states)
 - Fine of up to €10,000

Germany - Mass Terminations

- Implementation agreement or final conciliation body hearing clears path for management to adopt mass termination plan and for implementation.
- However employees may go on strike for a social plan in the form of a collective bargaining agreement.
 - May significantly delay implementation
 - Drives up costs

Germany - Mass Terminations

- Selection of employees to be dismissed
 - Compulsory criteria: length of service, age, number of dependents, disability (if any)
 - List of individual employees selected for dismissal can be made part of implementation agreement (makes successful challenge of termination by employees substantially more difficult)
- Identify possibilities for redeployment

Germany - Mass Terminations

- Mass termination notification of federal employment agency
 - Send draft notification to works council
 - File notification with agency, with works council's comments or after expiration of two weeks
 - Termination notices to employees given prior to agency notification are invalid

Germany - Mass Terminations

- Information and consultation with works council about individual termination notices
 - Undisclosed information may not be used to justify termination in any ensuing labor court case
- Termination notices served
- Termination notices take effect
 - Once notice period expires (statutory minimum notice periods)
 - One month from agency notification at the earliest

Germany - Mass Terminations

- Costs
 - Pay and benefits until end of notice period
 - No statutory severance pay but usually social plan severance (negotiated with works council or determined by conciliation body)
 - If employees challenge termination in court, court will order reinstatement and back pay if termination does not meet statutory requirements—in most cases employees settle without (additional) severance

Mass Terminations in France

- Difficulty of Process in International Context:
 - No uniform law on termination in the EU
 - Need for coordination
 - Particularities of the French market must be taken into account
- Information and Consultation with Works Council:
 - Complex requirements
 - Impact on timing
- Additional Obligations to:
 - Draw up a social plan
 - Try to reclassify employees
 - Apply selection criteria to workforce to be reduced

Consultation with the Works Council

- Consultation procedure with the Works Council is twofold:
 - Phase 1: consultation on the general operation (reason leading to the termination (including description of context (economic difficulties, competitive threats)) will justify termination (fair economic reason) (formerly known as “Book IV”) and
 - Phase 2: specific consultation on the redundancies (formerly “Book III”).

Phase 1: Works Council Procedure - General Operation

- Works council must be informed and consulted
- Notice / consultation
 - Required before any management decisions regarding the organization and general operation of the business are taken
 - Process is compulsory (but management is not bound by the opinion rendered by the works council)
- Three steps:
 1. Inform of works council
 2. Consultation with the works council
 3. Management decision

Phase 1: Works Council Procedure - General Operation (cont.)

- Failure to comply may lead to:
 - Criminal sanction against management (fine of €3,750 and/or one year of imprisonment)
 - Civil court may order suspension of management decision until works council has been adequately informed and consulted

Phase 2: Works Council Procedure – Collective Dismissals

- Terminations on economic grounds impose burdens on the employer
 - Involvement of employee representative bodies / selection criteria / resettlement of employees / rehiring priority / involvement of labor authorities and creation of a social plan (in case of collective layoffs)
 - Termination-related costs
 - Terminations may be declared null and void
 - Court-awarded damages in case of wrongful termination

Phase 2: Works Council Procedure – Collective Dismissals (cont.)

- Giving reasons for the dismissal
- Discussion of selection criteria for employees to be dismissed
- Exploring alternative employment solutions
- Measures to avoid termination or limit the consequences thereof—including social plan if more than 10 employees are to be laid off in a company having more than 50 employees

Phase 2: Works Council Procedure – Collective Dismissals (cont.)

- Other obligations, e.g., setting out a plan of “prospective HR management” (GPEC)
- Labor authorities control process/social plan content
- No adequate social plan - Risks Include:
 - **Timing affected**
 - **Terminations declared null and void in court**
 - **Reinstatement or damages**

Termination Costs

- Pay and benefits until end of notice period
- Statutory right to severance pay—depending on seniority/age provisions in the applicable collective bargaining agreement
- Additional efforts pursuant to the social plan
- Subsidy to local employment market (subject to certain thresholds)
- Court-awarded damages:
 - Minimum of six months' salary to employees with more than two years of service (if there is a failure to apply selection criteria or explore fair reclassification possibility, or the absence of “fair economic reason”)
 - Repayment of unemployment benefits to public unemployment agency (cap of six months' benefits)

Contact for Further Information



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