Labour law restructuring: how to manage dismissals under French Law

by Viviane Stulz

France, like many other European countries, is unfortunately known (and sometimes dreaded) by foreign employers for the complexity of its labour law. Considered as overly protective of employees' rights by some and as an obstacle to free entrepreneurship by others, French law raises complex issues. Dismissals are by far the field with the most pitfalls. However, this complexity is not insurmountable and dismissal procedures can be successfully carried out if precautions are taken.

Under French law, there are multiple causes to terminate contracts of employment, but there are only two major causes for dismissing an employee: either a 'personal reason', i.e., a reason that pertains to the employee himself, or an 'economic reason', i.e., a reason that derives from a company decision; furthermore, in all instances, whether personal or economic, the reason put forward by the employer to terminate the contract of employment must be sufficiently serious. This does not mean, however, that a dismissal that does not fulfil the required criteria is null and void and cannot be done, but 'only' that a court could sanction the company to pay damages for unfair dismissal; it is therefore a question of cost rather than one of feasibility.

Dismissals for personal reasons are varied: disobedience (insubordination), unauthorised absence, poor performance, faults, etc.

The scope of dismissals for economic reasons includes business closures, collective redundancies, restructuring of the employer's business, or a change in the geographical location of the business. It has to be noted that the need to reorganise the business (including, for instance, the need to move the offices outside the region) does not constitute a valid cause in itself, failing economic difficulties, so in such a case any dismissals, although critically necessary, may result in a judgment of unfair dismissal.

French law is specific on the appreciation of economic and financial difficulties: the employer must be in a position to justify that dire economic problems are faced, not only by the French business or French company faces, but also throughout the group worldwide (although limited to the same business sector as the French company). This means, therefore, that if the group is profitable, the French company, although in deficit, may not have a valid reason to terminate contracts of employment. In practice, this will generally result in a court ordering damages for unfair dismissal after the dismissals have been notified – no doubt increasing the level of financial risk. In addition, if the size of the restructuring justifies the implementation of a social plan (social measures to assist the employees in finding alternative employment), it will lead to a substantial increase in the cost of such a social plan. At worst, the lack of valid reasons for collective redundancies will delay the procedure as cannot be locked into a fixed time schedule. In 99.99 percent of cases, it is a matter of being patient and having the financial resources – but dismissals, even collective redundancies, are always feasible.

In all circumstances (except dismissals for serious or gross misconduct), the employer must give prior notice to the employee before the termination takes effect, the notice period being generally between

1-3 months. If work is waived, the employee must receive his normal remuneration with all allied benefits and perks, but is entitled to work for another employer during that period, even a competitor in the absence of a non-competition clause in his contract; this is a provision that will generally surprise foreign employers.

The length of the procedure will vary depending on the reason for the dismissal. A dismissal for a personal reason will last approximately two weeks (time to summon the employee to a pre-dismissal meeting and to send him the dismissal letter). This means that an employee cannot be 'fired on the spot', as may be the case in the US for instance. Even where the employer discovers a serious or gross misconduct, the procedure must be complied with and the employee convened to a pre-dismissal meeting where he can defend himself – although in that case he can be put off work immediately pending the procedure, until the pre-dismissal meeting.

The procedure observed for massive collective redundancies will generally last for several months due to the uncertainty on the duration of the process and require the information and consultation of both the Health & Safety Committee and that of the Works Council; no decision may be made until such consultations have been completed. For example, a social plan procedure should last a couple of months, but in practice may take between six and 12 months before notifications of the dismissals are sent out. The difficulty is the absence of certainty on such timing, which is difficult to understand for foreign employers or parent companies. It is a time consuming and costly procedure, but if managed correctly in a constructive manner by local management, without undue haste, the employer will reach its goal within a reasonable time period.

The procedure for collective dismissals includes consultation with the Works Council, (or failing that, the staff delegates). Feared by most foreign employers, the trade unions and Works Councils can actually be an asset for the employer; although France does not follow the 'codetermination' system in force in Germany, it pays for the employer to take the Works Council's views into consideration and work in cooperation with it, where feasible.

Save in the case of a social plan procedure, the dismissal of employees in France is not overly expensive. On termination of the employment contract the employee is entitled to receive payment during the notice period or compensation in lieu and severance payment. The severance payment (due except in the case of dismissal for gross or serious misconduct) increases with seniority. The minimum severance pay provided for by law is one-fifth of the gross monthly salary for the first 10 years of service and one-third thereafter. Collective bargaining agreements or contracts of employment often provide for higher severance pay. The employee may not opt out of such benefits by contract.

The law and most collective bargaining agreements are not overly generous but negotiations and settlement agreements between the parties will increase these amounts. It is quite common for an executive who accumulates 20 or 30 years of seniority to claim damages of one or two years' salary in the event of an individual dismissal.

The key to mitigating the risks relies on strict compliance with the applicable procedure, whether pursuing an individual or an economic dismissal. In the case of collective redundancies, the factor for success is taking time to deal with the consultation process of the staff representatives and to take their

opinion into account. It is better to work closely with them rather than try to fight them. From experience, opposition ultimately leads to wasted time.

Viviane Stulz is a partner at Actance. She can be contacted on +33 (0)1 44 94 96 00 or by email: v.stulz@actanceavocats.com.