

# TERMINATION OF EMPLOYMENT DIGEST

<b>INTRODUCTION</b>	<b>5</b>
The objectives of the Digest	5
Scope of the Digest	2
The format of the summaries	2
<b>PART I: TERMINATION OF EMPLOYMENT BY THE EMPLOYER: THE DEBATE ON DISMISSAL</b>	<b>5</b>
Introduction	5
The international debate on dismissal	7
The impact of dismissal on employment	10
<b>INTERNATIONAL SURVEY OF LEGISLATIVE APPROACHES AND ISSUES</b>	<b>14</b>
Unfair/unjustified dismissal	14
Notice	18
Avenues for Redress	20
<b>REMEDIES IN THE EVENT OF UNFAIR OR UNJUSTIFIED DISMISSAL</b>	<b>22</b>
Reinstatement	23
Compensation	25
Severance pay	27
<b>COLLECTIVE DISMISSALS FOR ECONOMIC, TECHNICAL, STRUCTURAL OR SIMILAR REASONS</b>	<b>28</b>
Consultation with workers' representatives	30
Notifying the Authorities	32
Measures to avoid the effects of dismissals: The role of social dialogue	33
<b>FINAL CONSIDERATIONS</b>	<b>35</b>
<b>PART II : COUNTRY SUMMARIES</b>	<b>37</b>
Argentina	37
Australia	45

<b>Austria</b>	<b>49</b>
<b>Bangladesh</b>	<b>56</b>
<b>Belgium</b>	<b>59</b>
<b>Bolivia</b>	<b>65</b>
<b>Brazil</b>	<b>69</b>
<b>Bulgaria</b>	<b>76</b>
<b>Cambodia</b>	<b>81</b>
<b>Cameroon</b>	<b>85</b>
<b>Canada (Federal)</b>	<b>91</b>
<b>Caribbean countries</b>	<b>95</b>
<b>Chile</b>	<b>100</b>
<b>China (Hong Kong Special Administrative Region)</b>	<b>104</b>
<b>China</b>	<b>108</b>
<b>Colombia</b>	<b>113</b>
<b>Côte d'Ivoire</b>	<b>118</b>
<b>Cyprus</b>	<b>122</b>
<b>Czech Republic</b>	<b>126</b>
<b>Dominican Republic</b>	<b>130</b>
<b>Egypt</b>	<b>136</b>
<b>Ethiopia</b>	<b>140</b>
<b>France</b>	<b>145</b>
<b>Gambia</b>	<b>149</b>
<b>Germany</b>	<b>154</b>
<b>Ghana</b>	<b>161</b>
<b>Guinea</b>	<b>164</b>
<b>Hungary</b>	<b>168</b>
<b>India</b>	<b>172</b>
<b>Indonesia</b>	<b>179</b>

<b>Iraq</b>	<b>184</b>
<b>Islamic Republic of Iran</b>	<b>186</b>
<b>Israel</b>	<b>189</b>
<b>Italy</b>	<b>192</b>
<b>Jamaica</b>	<b>198</b>
<b>Japan</b>	<b>202</b>
<b>Kenya</b>	<b>205</b>
<b>Lesotho</b>	<b>209</b>
<b>Malaysia</b>	<b>213</b>
<b>Mauritius</b>	<b>217</b>
<b>Mexico</b>	<b>223</b>
<b>Namibia</b>	<b>229</b>
<b>Nepal</b>	<b>234</b>
<b>Netherlands</b>	<b>239</b>
<b>New Zealand</b>	<b>245</b>
<b>Nigeria</b>	<b>250</b>
<b>Pakistan</b>	<b>254</b>
<b>Panama</b>	<b>258</b>
<b>Peru</b>	<b>265</b>
<b>Philippines</b>	<b>271</b>
<b>Poland</b>	<b>274</b>
<b>Republic of Korea</b>	<b>278</b>
<b>Senegal</b>	<b>281</b>
<b>Singapore</b>	<b>287</b>
<b>South Africa</b>	<b>290</b>
<b>Spain</b>	<b>296</b>
<b>Sri Lanka</b>	<b>302</b>
<b>Swaziland</b>	<b>304</b>

Introduction

---

<b>Sweden</b>	<b>308</b>
<b>Switzerland</b>	<b>312</b>
<b>Syrian Arab Republic</b>	<b>317</b>
<b>United Republic of Tanzania</b>	<b>320</b>
<b>Thailand</b>	<b>323</b>
<b>Tunisia</b>	<b>328</b>
<b>United Kingdom</b>	<b>333</b>
<b>United States</b>	<b>340</b>
<b>Venezuela</b>	<b>346</b>
<b>Viet Nam</b>	<b>353</b>
<b>Zambia</b>	<b>358</b>
<b>Zimbabwe</b>	<b>363</b>

Notice

**This *Digest* is based primarily on information available until January 1998.**

**The *Digest* will be periodically updated, in light of eventual labour law revisions relating to the contract of employment and its termination.**

## Introduction

### *The objectives of the Digest*

*Termination of Employment Digest* was formulated in response to requests from Governments, employers, trade unions, labour practitioners and academics for comparative information on legislation governing termination of employment. In an environment of heightened global competition, and financial crises in some countries resulting in mass layoffs, this subject is now more topical than ever. In reviewing the legislation of 72 jurisdictions, the *Digest* highlights commonalities between approaches taken to individual and collective dismissals, as well as differences in relation to key points.

The central objectives of this *Digest* are twofold. First, it is intended to provide an international overview of legislation on termination of employment, illustrating the different approaches taken to the subject in various national systems. The *Digest* has a wide scope, covering jurisdictions from all geographic regions and levels of development. The countries have been selected to provide a diversity of systems, in geographic, developmental and legal terms. The *Digest* aims to provide an introduction to the legislation governing termination of employment in a form which is accessible to the lay reader as well as the lawyer, and therefore tries to avoid technical discussions wherever possible. The *Digest* particularly targets the constituents of the ILO: government officials, employers=representatives and workers=representatives.

Second, it provides the reader with an introductory summary of the legislation on termination of employment of each of the countries covered by the *Digest*. Due to the number of countries covered and restrictions of space, it is not possible to provide an in-depth picture of the law relating to the termination of employment for each country. There are, of course, for a great many countries, extensive texts devoted to the subject of termination of employment. The purpose of the *Digest* is thus to introduce the reader to the approach followed in each country to termination issues and present an overview of the legislation governing these issues. It is meant to be read in the context of a broader range of measures to prevent or respond to worker displacement.<sup>1</sup>

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<sup>1</sup> These include unilateral or collectively negotiated reduction of working time, measures to avoid layoffs, retraining, job creation schemes and the like. See, for example, C. Evans-Klock et al.: A Worker retrenchment: Preventive and remedial measures®, in *International Labour Review* (Geneva, ILO), 1999, Vol. 138, No. 1, pp. 47-66.

## ***Scope of the Digest***

The *Digest* provides a summary of the legislation on termination of employment for each country and does not, generally, cover case law or collective agreements on the subject. The reasons for this approach are practical: constraints of space and the difficulty of gaining an accurate picture of the case law on termination from the information sources available, particularly for developing countries. However, where a brief reference to case law or collective agreements is necessary to prevent a misleading picture of the law, and reliable information is available, this has been added.

The *Digest* deals only with employees in the private sector. In the vast majority of both common law and civil law legal systems, the legal position of public employees with regard to security of employment and termination has been regulated quite differently than private sector employees. While there seems to be a modern trend to narrow the distinction between public and private sector employees in many countries, the administrative law aspects of the dismissal of public servants are beyond the scope of this *Digest*, and these employees are therefore not included.

The term *termination* refers to the ending of employment both at the initiative of the employer and for other reasons, such as resignations or frustration of the employment contract. Generally, terminations at the initiative of the employer are referred to as *dismissals*, except where the national legislation uses a different term, or the context otherwise requires.

Part I places termination of employment legislation in the perspective of today's labour market. It offers a comparative overview of the main features of legislation governing termination of employment and how its development has been perceived over time. The summaries for the 72 jurisdictions are grouped alphabetically in Part II, which forms the bulk of the text.

## ***The format of the summaries***

The country summaries are divided into eight sections: (1) sources of regulation; (2) scope of legislation; (3) contracts of employment; (4) termination of employment; (5) termination of employment at the initiative of the employer; (6) notice and prior procedural safeguards; (7) severance pay; and (8) avenues for redress.

*Sources of regulation* outlines the legislative sources of regulation on termination of employment, including, if applicable, important regulations promulgated under statutes.

*Scope of legislation* outlines the ambit of the applicable legislation, both in terms of the persons covered or excluded and industrial, sectoral or occupational exclusions.

*Contracts of employment* included because of the close relationship between employment

security legislation protecting against arbitrary dismissal and legislation placing controls on the termination of, and use of, so-called atypical or contingent forms of employment, such as part-time work, fixed-term contracts and temporary contracts.<sup>2</sup> Legislative provisions specifically governing these forms of employment are set out in this section.

**ATermination of employment@** deals with termination of employment which is not at the employer's initiative.

**ATermination of employment at the employer's initiative@** covers dismissals. This section includes dismissals specified by statute as invalid, any reasons specified as justified, and any other legislative provisions governing the substantive standards to be applied to dismissals. It also includes information available on specific provisions for collective dismissals.

**ANotice and procedural safeguards@** addresses any procedural safeguards which must be complied with before termination (such as requirements for hearings or consultation) and any statutory notice periods which must be complied with.

**ASeverance pay@** deals with any statutory severance pay, not being damages or compensation for unfair or unjustified dismissal, which must be provided on termination.

**AAvenues for redress@** covers the procedure for challenging dismissals and the remedies available, once a dismissal has been found by the adjudicating body to be unfair or unjustified.

Obviously, for some countries, the situation in practice with regard to termination of employment may differ somewhat from the legislative provisions. A full picture of termination of employment in a particular country would of course need to include information on the incidence and types of terminations, the workings and results of dispute resolution procedures, the application of collective agreements and the decisions of relevant courts.<sup>3</sup>

The legislation governing termination of employment, like all labour legislation, reflects societal

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<sup>2</sup> As these forms of employment become more prevalent, the term **Aatypical@** is increasingly a misnomer.

<sup>3</sup> For recent consideration of these issues, see S. Cazes et al.: *Employment protection and labour market adjustment in OECD countries: Evolving institutions and variable enforcement* (Geneva, ILO, 1999).



values and labour market conditions in a given period. As these evolve, this legislation will change as well. By tracking legislative developments, the *Digest* illustrates the diversity of approaches taken to the important topic of termination of employment and provides the basis for further investigation.



# **PART I: Termination of employment by the employer: The debate on dismissal**

## ***Introduction***

An employee's right not to be unfairly or unjustifiably dismissed is a modern cornerstone of the law relating to the termination of employment. However, while widespread amongst a variety of national legal systems, this right is not universal. For example, some countries with developed economies (including Austria, Belgium, Denmark and the United States) do not recognise such a general right.

Between countries which do recognise this right, there is a wide variation in both its legal and constitutional status, and in the conceptions and justifications which are considered to underlie it. The right not to be unfairly or unjustifiably dismissed is variously reflected in national legal systems as a constitutional right (particularly in Latin America, as discussed below), a right created by statute, a right developed by the courts or a policy secured by collective agreements only.

Within the common law legal tradition, the regulation of termination of employment may be seen as being based on various justifications.<sup>4</sup> The first is a concept of individual justice between the employer and employee, whereby employers are prohibited from making arbitrary dismissal decisions. The second, particularly apparent for collective dismissals for economic reasons, is a market intervention and economic regulation rationale, with legal intervention justified by reference to a desire to minimise the costs of such dismissals to the employee. Third, legal regulation can be seen as protecting public rights, such as the right to join a trade union and the right not to be discriminated against on certain prohibited grounds such as gender and race. Fourth, in some jurisdictions a clear regulatory framework can be viewed as a mechanism by which employers may be protected from excessive litigation costs that might otherwise arise from employment termination. Finally, to the extent that dismissal regulation promotes employment security, such regulation can be seen as encouraging employers to invest in the training and development of workers.<sup>5</sup>

In contrast, in many civil law systems, particularly in Latin America, the right to employment security is seen as an essential element human rights promotion. Within this legal tradition, the right not to be unfairly dismissed is seen as part of a broader human right to employment and job security.<sup>6</sup>

International human rights instruments broadly acknowledge the theoretical framework underlying

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<sup>4</sup> See, for example, the justifications discussed by H. Collins: *Justice in dismissal: The law on termination of employment* (Oxford, Oxford University Press, 1992).

<sup>5</sup> For a recent discussion on the potential benefits and costs of employment protection legislation generally, see the Organization for Economic Cooperation and Development (OECD), *Employment outlook* (Paris), June 1999, pp. 68-69.

<sup>6</sup> For example, in Latin America alone (a region in which labour law assumes constitutional prominence), 13 national constitutions, out of a total of 20 countries, incorporate labour rights, namely, Argentina, Bolivia, Brazil, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru and Venezuela.

protection against arbitrary dismissal. Article 23 of the Universal Declaration of Human Rights<sup>7</sup> recognizes the right of all persons to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Similarly, Article 6 of the International Covenant on Economic, Social and Cultural Rights<sup>8</sup> recognizes the right of all persons to have the opportunity to gain their living by work which they freely choose or accept, and obliges States to take steps to achieve steady economic, social and cultural development and full and productive employment.

At the national level, several constitutions in Latin America,<sup>9</sup> for example, have assimilated these fundamental rights into special chapters or sections, bestowing on these rights a status which is sacrosanct.<sup>10</sup> In this legal tradition, there are a number of labour codes and statutes on employment, which complete the pyramid of protective legislation, and underscore the importance of the recognition and respect for these rights.<sup>11</sup>

The Constitution of the International Labour Organization proclaims that all human beings have the right to pursue their material well being ... in conditions of ... economic security.<sup>12</sup> In tandem with the basic declarations on fundamental rights, international and regional instruments highlight the need for States to adopt measures aimed at attaining full employment.<sup>13</sup> ILO instruments promote formulation and development of government policies promoting full, productive and freely chosen employment.<sup>14</sup> Within this conceptual framework, employment stability is seen as a key element in promoting the right to employment and is highlighted in many national constitutions.

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<sup>7</sup> Dated 10 December 1948.

<sup>8</sup> Dated 19 December 1966.

<sup>9</sup> Such as Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay and Peru. See also M. Carrillo: *Derecho Constitucional del Trabajo. Constitución, Trabajo y Seguridad Social*. (Lima, Asociación Laboral para el Desarrollo, 1993), p. 65.

<sup>10</sup> O. Ermida Uriate: 'Constitucionalización del derecho laboral', in *Asesoría laboral* (Lima), Feb. 1993, No. 26, p. 18.

<sup>11</sup> In countries where economic and social rights are not constitutionally recognized (such as a number of countries with an Anglo-Saxon tradition), the lack of such protections may be balanced by the recognition of civil and political rights. For example, through anti-discrimination laws in India, it has been held by the courts that civil and political rights should be interpreted jointly with the economic and social rights, in order to render them more effective.

<sup>12</sup> Declaration of Philadelphia, para. II (a), Annex to the Constitution of the International Labour Organization.

<sup>13</sup> See, for example, the European Social Charter of 18 October 1961; the American Declaration of the Rights and Duties of Man, Article XXXVII; and the Declaration of Philadelphia, op. Cit., para. III(a).

<sup>14</sup> See the Employment Policy Convention, 1964 (No. 122), and Employment Policy Recommendations, 1964 (No. 122) and 1984 (No. 169).

## *The international debate on dismissal*

Because of its economic and social implications, and in spite of regulation at the highest level, the termination of employment by the employer is one of the most sensitive issues in labour law today.<sup>15</sup> Protection against dismissal is seen by most workers as crucial, since its absence can lead to dire economic consequences in most countries.<sup>16</sup>

However, many employers and employers' associations view strict regulation of the termination of employment as restricting the hiring of new workers (an issue that will be addressed in further detail below). They see it as hampering the ability of an enterprise to respond flexibly to change and to improve, and therefore as undermining an enterprise's productivity and efficiency.

The conflict between the contrasting conceptions makes this issue all the more pressing for governments and the social actors, especially when amending labour legislation,<sup>17</sup> since labour market flexibility has assumed great prominence on the international and national socio-political landscape.

Nevertheless, the debate is not new; the regulation of employment termination has been under scrutiny since the advent of labour law as a legal discipline; its content has simply been modified to accommodate developments and economic changes. It is not surprising that in a period marked by high levels of structural unemployment, a new round of thinking on the content and scope of employment regulation has emerged.

In the nineteenth century, throughout continental Europe and in countries within its sphere of influence, the first standards on termination of employment were to be found in civil code provisions concerning the hiring of services. Those laws provided for absolute freedom in hiring and dismissal in response to the prevailing theories of economic liberalism. Motivated by a desire to protect workers, that early body of legislation regulated the prohibition on contracts *à for life*,<sup>18</sup> expiry of fixed-term contracts and, in the case of contracts of indeterminate duration, provided for the freedom of either party to terminate the employment relationship without cause, requiring only prior notification of such an intention.

This last rule is the foundation of what we now refer to as *employment at will* (as still exists, for example, in most of the United States). This concept, combined with the doctrine of managerial

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<sup>15</sup> See, for example, P. Ichino: *The labour market: A lawyer's view of economic arguments*, in *International Labour Review* (Geneva, ILO), 1998, Vol. 137, No. 3, pp. 299-311.

<sup>16</sup> In most developing countries the loss of employment results in the lack of means to earn a decent living. It is worth recalling that few national standards provide for a minimum income or an adequate system of unemployment benefits.

<sup>17</sup> The topic is undoubtedly of prime importance in all countries. For example, recent social unrest (including general strikes, work stoppages and demonstrations) in the Republic of Korea was caused by a proposed reform of standards on dismissal designed to increase labour flexibility.

<sup>18</sup> A concept which, in its effect, is similar in nature to slavery.

prerogative, confers on employers discretionary power over the continuation of the employment relationship. It continues to be reflected in the common law concepts of *Wrongful* and *Summary* dismissal, which contrast with *Unfair* or *Unjustified* dismissal. The latter concepts were developed to restrict the scope of employers' *At will* powers.<sup>19</sup>

The rise of the labour movement, increasing levels of industrial disputes and the growing recognition of the need to protect workers sparked a change in the thinking of legislators who, at the dawn of the twentieth century, began to modify the substantive provisions of regulation in this area. For example, in 1917 the Mexican Constitution established that dismissal should be based on valid reasons.<sup>20</sup>

The restriction of dismissal without cause was gradually broadened in countries whose legal systems were based on the Napoleonic Code and, by the 1940s, most States within this legal tradition had enacted legislation on the justification of dismissal, notice (generally extending existing notice periods) and the payment of severance allowances.

During the economic expansion of the 1960s, and later during the 1970s, protective standards on employment security were regularly incorporated into national labour laws, and the content of those standards was strengthened or broadened in countries with a tradition of labour legislation.<sup>21</sup> However, once this period came to an end, the global economic crisis in the 1980s provoked severe criticism of the protective approach that had been taken to employment. The resulting notion of deregulating dismissal as a panacea for unemployment remains alive today.

In parallel with developments at the national level, the ILO International Labour Conference in 1950 adopted a resolution noting the absence of supranational standards, thereby paving the way for a series of actions which led to the adoption of the Termination of Employment Recommendation, 1963 (No. 119).<sup>22</sup> This Recommendation was the first international standard aimed specifically at employment termination. Later, in 1974, recognizing the importance of the instrument which had been adopted, the Committee of Experts on the Application of Conventions and Recommendations concluded that the Conference should again discuss the matter in order to draw up another instrument taking into consideration new developments since the adoption of Recommendation No. 119. This led to the adoption in 1982 of the Termination of Employment Convention (No. 158) and Recommendation (No.

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<sup>19</sup> Nevertheless, it must be stressed that, especially after the 1970s, courts in the United States restricted the use of *At will* powers of dismissal, applying exceptions based on the principles of public policy, implied contract, good faith and civil liability. (See ILO: *Protection against unjustified dismissal*, Committee of Experts on the Application of Conventions and Recommendations General Survey, International Labour Conference, 82nd session, Geneva, 1995, para. 85).

<sup>20</sup> L. Bronstein: *Protection against unjustified dismissal in Latin America*, in *International Labour Review* (Geneva, ILO) 1990, Vol 129, No. 5, pp. 593-610.

<sup>21</sup> For example, during the 1970s a number of European Countries introduced statutory restrictions on the termination of special categories of workers such as shop stewards.

<sup>22</sup> For further details on the evolution of standards on dismissal in the ILO and the subject matter of the applicable instruments, see ILO: *Protection against unjustified dismissal*, op. cit., paras. 3-15.

166).<sup>23</sup> A more recent instrument, the Part-time Work Convention, 1994 (No. 175), provides that part-time workers are to have conditions equivalent to those of comparable full-time workers with regard to termination of employment.

National and international standards simultaneously continued to change and adapt, although the principle of protecting employment security was generally maintained. While opposition to this principle is increasing in some countries, most jurisdictions now have statutes or regulations on termination of employment,<sup>24</sup> often supplemented by collective agreements,<sup>25</sup> codes of practice on equal opportunity, work rules and, especially in common-law countries, case law.

However, the mere existence of regulation does not ensure its application in practice.<sup>26</sup> In some instances issues have arisen as regards enforcement, and, in some countries, there exists growing criticism both of the alleged irrelevance of such regulation to the economic requirements of employers and of the constraints such regulation imposes on dismissal. Indeed, the debate on the regulation of employment termination is very much alive. In this Part of the *Digest* we briefly survey some common denominators (and differences) across national legislation on termination of employment and highlight some of the links between legislation and the practical aspects of termination of employment. However, neither this overview nor the *Digest* as a whole attempts to be an exhaustive study on national legislation. Our intention is to present an overview of the issues and debate on termination of employment, as reflected in the differing national legislative approaches, to identify the problems and issues and, from a practical perspective, to enhance thinking on the subject for future action. There are many preconceptions about the law relating to dismissal which handicap the adoption of timely measures and potential good practices which would facilitate economic development as well as the protection of workers against unfair or unjustified dismissal.

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<sup>23</sup> In addition to these specific instruments, there are a number of others which, to a certain extent, protect employment security. See, for example, the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Workers=Representatives Convention, 1971 (No. 135) and Recommendation, 1971 (No. 143); and the Rural Workers' Organisations Convention, 1975 (No. 141), and Recommendation, 1975 (No. 149), all of which deal with protection against acts of discrimination for trade union membership or activity. The Maternity Protection Convention, 1919 (No. 3); the Maternity Protection Convention (Revised), 1952 (No. 103); the Maternity Protection Recommendation, 1952 (No. 95); and the Workers with Family Responsibilities Convention, 1981 (No. 156) and Recommendation, 1981 (No. 165), also address employment security. The Protection of Workers=Claims (Employers Insolvency) Convention, 1992 (No. 173), and Recommendation, 1992 (No. 180), include severance pay among the claims to be protected.

<sup>24</sup> These laws usually take the form of either general labour laws or specific laws on termination.

<sup>25</sup> In this context, collective agreements are primary sources of regulation covering the trade union organized workforce in, for example, the United States, Canada and Israel. In Canada, federal law lays down minimum standards which, in practice, are extensively complemented by collective bargaining.

<sup>26</sup> See, for example, Cazes et al., op. cit. pp. 15-21.

## *The impact of dismissal on employment*

It is difficult to establish the empirical foundations which will allow us to identify the causal relationship between employment security protection and the overall level and structure of employment and unemployment.<sup>27</sup> There is, however, good reason to believe that adequate employment security and moderate protection may curtail the unnecessary loss of employment due to unjustified dismissals and restrict redundancies for technological and economic reasons, thereby contributing positively to increased levels of employment. Moreover, recent OECD data undermine the notion that employment protection legislation significantly affects overall levels of employment and unemployment.<sup>28</sup> Cost-benefit studies of the regulation of termination (there are both direct costs such as compensation and indirect social costs of dismissals) must therefore avoid rash, simplistic statements and should be conducted at the macroeconomic level.

Nevertheless, in some instances excessively protective regulation has curbed functional mobility and training possibilities, which are considered of paramount importance in the modern labour economy and productive structure. The excessive regulation of dismissal could constitute a dual obstacle to the promotion of employment. It may deter employment of less skilled or marginal workers. For example, excessive regulation could lead employers to fear onerous dismissal costs, and make them reluctant to recruit new staff, particularly from the most vulnerable strata of the population. This could lead to stagnation among these workers who might over time lose the capacity to learn, to be trained or to adapt to new situations. In this regard, one of the potential costs of dismissal regulation could be the trapping of a portion of a country's workforce in long-term unemployment or a pattern of unemployment alternating with temporary jobs, thereby worsening income disparity and labour market inequality.<sup>29</sup> In addition, excessive or inappropriate dismissal regulation may deter the hiring of persons with disadvantaged positions in the labour market, such as women, disabled persons or the elderly. This may also encourage discriminatory attitudes and endanger fundamental anti-discrimination rights in the medium term. The result of such discriminatory attitudes by employers in long-term economic terms is clear: a lack of competitiveness and employment stagnation.

Analysis of the current economic environment in many countries has given rise to a perceived need to increase competitiveness and thereby combat rising unemployment. The question arises as to what practical impact regulation on dismissal has on these efforts. Indeed, can it be said that protective standards directly contribute to lagging competitiveness and unemployment and impede economic expansion? Empirically speaking, an answer in the affirmative is questionable. According to recent OECD findings, for example, while employment protection legislation may affect the dynamics and composition of employment, the impact of this legislation on overall unemployment levels tends to be

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<sup>27</sup> ILO: *Industrial relations and employment*, Committee on Employment and Social Policy, Governing Body, 262<sup>nd</sup> Session, Geneva, 1995.

<sup>28</sup> See OECD, op. cit., Ch. 2.

<sup>29</sup> *ibid.*, p. 69.



muted.<sup>30</sup>

Surveys of European employers show that they believe that strict regulation of employment protection impairs job creation.<sup>31</sup> However, analytical studies have tended to undermine such views. Recent legislative reform in Europe and Latin America has focussed on, *inter alia*, deregulating the labour market,<sup>32</sup> enhancing flexibility, simplifying procedures for fixed-term contracts,<sup>33</sup> eliminating administrative authorization for new recruitment and collective redundancies,<sup>34</sup> and lowering severance pay.<sup>35</sup> Yet, despite these measures, reduction of underemployment and unemployment has not been achieved.<sup>36</sup> On the contrary, countries such as Spain,<sup>37</sup> Argentina<sup>38</sup> and France show clear signs that deregulation has had no positive impact on employment levels.

Although the former Government of the United Kingdom has claimed positive results from deregulation (based on reduced government intervention and increased flexibility), assertions that deregulation has led to a decline in the unemployment rate and an increase in the quality of average employment came under severe attack.<sup>39</sup> Analysts maintain that most of the newly created jobs are part-time, poorly paid or of a precarious nature, a situation which is likely to heighten labour insecurity and social malaise and have a negative influence on consumer demand.

In terms of the hurdle that regulation poses to dismissal, it is significant that job losses between 1990 and 1995 and the upward trends in unemployment rates have reached alarming proportions in

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<sup>30</sup> *ibid.*, p. 86.

<sup>31</sup> ILO: *World employment 1995* (Geneva, 1996), p. 172.

<sup>32</sup> Including a general trend in the 1980s and 1990s to liberalize the use of temporary work agencies. See OECD, *op. cit.*, p. 59.

<sup>33</sup> See, for example, Argentina, France, Germany, Peru and Spain. See also OECD, *op. cit.*, p. 59.

<sup>34</sup> See, for example, France and Spain.

<sup>35</sup> See, for example, M. Ozaki (ed.): *Negotiating flexibility* (Geneva, ILO, 1999); C. Vargha and P. English: *Le réforme du droit de travail en Afrique francophone* (Washington DC, Banque Mondial, 1999).

<sup>36</sup> Such reforms have generated an increase in fixed-term contracts at the expense of permanent contracts, producing a greater number of unemployed or precariously employed. For example, in France the number of fixed-term contracts rose in the first half of the 1990s from 2 to 9 per cent of the total number of employment contracts. In Spain during the same period, there was a 16 per cent increase, from 16 per cent of all employment contracts to a total of 32 per cent (Eurostat European Labour Force Survey).

<sup>37</sup> Reforms in August 1995 simplifying dismissal procedures have not led to an increase in employment. The rates of unemployment have unfortunately remained stable in the last 5 years at between 19 and 23 per cent, according to data supplied by the Ministry of Labour and Social Security.

<sup>38</sup> Where unemployment rose by 10 per cent between 1993 and 1996.

<sup>39</sup> IDS: *AEmployment Europe*, in *European Union Review*, Feb. 1996, No. 410, p. 14.

numerous countries. The causes vary widely and are influenced by the fact that many dismissals are due, as mentioned earlier, to the termination of *new* fixed-term contracts. In Spain, for example, the National Employment Institute statistics on applicants for unemployment benefits in 1995 confirmed that 80 per cent of applicants had lost their jobs through the non-renewal of their fixed-term contracts, while only 10 per cent had established claims for unjustified or unlawful dismissal. Only 3 per cent of remaining dismissals stemmed from collective dismissal and 1 per cent involved dismissals on objective grounds.<sup>40</sup>

In 1994 in the United Kingdom, only 10 per cent of the total number of legal proceedings initiated for termination of employment were considered unjustified, and 53 per cent of these unjustified dismissals took place in enterprises employing fewer than 50 workers.<sup>41</sup> The number of persons affected by collective redundancies for economic reasons in 1994 was 250,000, and of this number, 49,000 were able to be immediately reassigned.<sup>42</sup>

The 1995 review of labour standards in Chile, conducted by the Ministry of Labour and Social Security, showed that dismissals due to the requirements of the undertaking<sup>43</sup> represented 70 per cent of the total number of dismissals for that year.

Moreover, in Germany a significant proportion of job losses since the early 1990s have been due to economic reasons, particularly measures adopted to streamline the activities of enterprises in combination with proposals for relocation.<sup>44</sup>

In terms of the cost of dismissal regulation and its effect on employment levels, unjustified and unfair dismissals can, in some jurisdictions, result in significant compensation awards. However, data from various European Ministries of Labour indicate that in 1989 for example, 56,000 actions were brought for unjustified dismissal in France, 136,000 in Germany and 33,000 in Great Britain. Notably, in relation to the total number of employed persons, these figures represented only 3.1, 5.9 and 1.5 per thousand, respectively.<sup>45</sup>

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<sup>40</sup> Objective grounds for dismissal include incompetence, lack of adaption to technical change, repeated absences from work and an objectively verifiable need to reduce the workforce. (See the Workers' Charter of Spain, secs. 51-53).

<sup>41</sup> *Employment Gazette*, October 1994.

<sup>42</sup> *Great Britain Labour Force Survey*, 1994.

<sup>43</sup> A new reason was introduced by the 1990 reform replacing the discretionary power of the employer to terminate employment without stating a reason. *Sec. 161(10)* establishes the following as a valid reason for termination: the requirements of the undertaking, establishment or service due to streamlining or modernization, shortfall in productivity, changes in market or economic conditions which make it necessary to dismiss one or more workers, and the failure of the worker to adjust to the technical requirements of the job.

<sup>44</sup> See, for example, Five years of privatization in eastern Germany, in *European Industrial Relations Review*, 1996, No. 266, p. 21.

<sup>45</sup> See H. Mosely: Employment protection in Europe in *InforMISEP*, Winter 1993, No. 44, p. 25.

Moreover, there are indications that factors such as wage levels and the macroeconomic context itself have a greater impact on employment levels than dismissal costs.<sup>46</sup> In 12 of the 15 Member States of the European Union (excluding the United Kingdom, Luxembourg and Sweden) labour productivity grew proportionately faster than average labour costs.<sup>47</sup> This was attributed to the adoption of restrictive wage policies and measures aimed at increasing flexibility through the reduction of working hours and the use of incentives for hiring young persons. In the calculation of these direct and indirect labour costs, the cost of dismissal has not been included, which in itself is a strong indicator of its relative insignificance.

Indeed, according to some analysts, employment security stimulates investment and does not create bottlenecks in the labour market. Instead, it encourages employers to invest in training and up-skilling their workers.<sup>48</sup> It can also encourage genuine structural adjustment. Stability and flexibility are interdependent.<sup>49</sup> In fact, labour market regulation has economic benefits, which implies that economic flexibility can be facilitated by the existence of relatively extensive regulation of the labour market.<sup>50</sup>

A further economic issue of current importance, but which is beyond the scope of this *Digest* to discuss in detail is the possible trade off between dismissal regulation and labour market policy. Dismissal regulation does not exist or operate in a vacuum. The restrictions in workforce adjustment flexibility that it implies are often counteracted by alternative avenues for workforce adjustment such as early retirement schemes and invalidity pensions.<sup>51</sup> High levels of dismissal protection indeed often coexist with alternative mechanisms of this nature. Significantly, these alternative mechanisms have increasingly been viewed as costly, leading to restrictions in most European countries. Unless cost-effective alternatives can be developed, these countries may see rising unemployment levels for their workers. Developments of this kind would be most significant for older workers with considerable periods of service who have tended to benefit most from dismissal regulation and accompanying labour market measures.

More generally, some countries (e.g. Denmark) have low statutory dismissal protection but high levels of social protection (especially income protection in case of unemployment) and there seems to be a general trade off between dismissal and social protection.<sup>52</sup>

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<sup>46</sup> As disclosed by recent OECD findings, employment protection legislation may have little impact on employment rates once other relevant factors (such as wages, income support, taxes and spending on active labour market policies) are controlled for. See OECD, *op. cit.*, pp. 75-82.

<sup>47</sup> IDS: *op. cit.*, p. 11.

<sup>48</sup> See, for example, OECD, *op. cit.*, p. 68.

<sup>49</sup> ILO: *Creating economic opportunities* (Geneva, 1994), pp. 87-116. See also Ozaki, *op. cit.*

<sup>50</sup> ILO: *World employment 1995*, *op. cit.*, p. 194.

<sup>51</sup> See P. Auer: *Social dialogue and employment success*. (Geneva, ILO, 1999) pp. 50-57.

<sup>52</sup> See Cazes et al., *op. cit.*; Auer: *op. cit.*

In addition to identifying the costs of dismissal as a significant burden, employers often cite the need to increase the flexibility of the dismissal process and to simplify its procedures. Some employers have further claimed that dismissal regulations are irrelevant to the dynamics of employment contracts. The feeling in certain quarters is that these rules should respond more effectively to the needs of the enterprise as they arise at all points in the economic cycle, in order to enhance the match between production cycles and employment levels. However, this sentiment does not include an assessment of the effect and impact of the rules and procedures governing employment termination. An overview of the national legislative provisions which exist is needed before such assessments may be attempted.

## **International survey of legislative approaches and issues**

This section provides a brief survey of the different national legislative approaches taken to the various issues surrounding dismissal and highlights the impact of these aspects of dismissal, with particular emphasis on the regulations governing unjustified dismissal, notice and compensation, and the provisions relating to plant closure and other forms of collective redundancy.

### ***Unfair/unjustified dismissal***

Most standards in force in the area of termination of employment arose out of the need to protect the worker. For this purpose, a series of conditions to guarantee the fairness of dismissal were established, putting an end to the discretionary power of the employer to terminate employment without stating a reason. Most current regulations dealing with employment termination require the fulfilment of not only prior procedural requirements before dismissal, but also impose an obligation on the employer to substantiate the reasons justifying dismissal.<sup>53</sup> In fact, legislation in most countries regulates these aspects in great detail. In countries such as Canada, Denmark, Israel and the United States, such regulation is contained in, or is extensively supplemented by, collective agreements at the national or sectoral level.

From a legal perspective, the employment contract may be seen as a bilateral legal transaction the fulfilment and execution of which, according to the general theory of contract law, cannot be left to unilateral declarations and expressions of will by either of the contracting parties. As this is precisely what happens with termination of employment, the contradiction may be resolved through a requirement for justification. In other words, there must be a reason which prevents the continuation of the contract and which provides a legal foundation for the employer's unilateral wish to terminate the employment contract.

The scope of labour regulations may include, according to the approach taken in the national system, all workers in the private sector. However, it is common to have public servants regulated by a different statute (often justified by their special nature and relatively protected status). The employment

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<sup>53</sup> For specific details on countries and legislation regulating procedures and certain elements of dismissal, see ILO: *Protection against unjustified dismissal*, op. cit.

status of members of the armed forces and the police is likewise often regulated by other statutes. Moreover, in some countries legislation on dismissal expressly excludes family workers,<sup>54</sup> persons in senior management positions and positions of trust (where dismissals without any statement of reason are allowed),<sup>55</sup> apprentices,<sup>56</sup> and workers covered by special contracts such as seafarers,<sup>57</sup> fishermen,<sup>58</sup> agricultural workers,<sup>59</sup> home workers<sup>60</sup> and domestic servants.<sup>61</sup>

From a different perspective, some bodies of legislation on the employment relationship are applied solely on the basis of a minimum number of workers employed by the undertaking. For example, there is currently a trend to simplify and make the process of dismissal less onerous for small enterprises.<sup>62</sup> In Germany the Protection against Dismissal Act 1951 (as amended in 1996) governs only establishments regularly employing more than ten employees for at least six months of continuous service. The adoption of the Improvement of Employment Opportunities Act of 1985 also excludes part-time workers who work for less than 15 hours each week. Likewise, in Austria, legislation on protection against dismissal applies only to undertakings with more than five employees.<sup>63</sup>

Dismissal is generally defined similarly in the various bodies of legislation. A vast majority of countries allow a part from dismissal due to *force majeure* termination of employment for economic reasons (unrelated to the will of the parties) and termination based on the conduct and/or capacity of the worker to perform his or her job (disciplinary dismissal).<sup>64</sup> However, these common reasons appear to

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<sup>54</sup> See, for example, Egypt, Spain, Swaziland and Sweden. This is primarily due to the intimate nature of family relationships.

<sup>55</sup> See, for example, Canada (federally), India, Namibia, Spain and Sweden.

<sup>56</sup> See, for example, Germany, Lesotho and Swaziland.

<sup>57</sup> See, for example, Japan and Senegal.

<sup>58</sup> See, for example, the United Kingdom.

<sup>59</sup> Such as in Austria.

<sup>60</sup> See, for example, Gambia.

<sup>61</sup> Such as in Egypt, the Republic of Korea, Swaziland, Syria and Tunisia. The exclusion of workers hired under special contracts does not, however, always guarantee the existence of alternative standards. In general, domestic workers do not enjoy protection and, due to the presumed pseudo-family relationship, there is often no requirement to state reasons for their dismissal. See A. Blankett: *Domestic workers: The need for special regulations*. Working paper (Geneva, ILO, 1998).

<sup>62</sup> In countries such as Venezuela and Italy the regulation of dismissals in small businesses have been relaxed.

<sup>63</sup> Enterprises of this kind are covered by the standards on works committees, contained in the Collective Labour Relations Act 1974.

<sup>64</sup> In many countries the requirement of cause for dismissal does not apply during probationary periods of employment. Implicit in this approach is the view that the nature of a probation period is such that either party is free to terminate the employment relationship if they so wish.

be accommodated in various labour standards in very different ways depending partly on the legal tradition of the countries concerned.

In some countries the prohibition against unfair or unjustified dismissal is formulated as a general expression to be interpreted by the courts. This is so in France, for example, where dismissal must be based on *serious grounds*, and in Germany, where dismissal must be accompanied by *social safeguards*. In Italy, dismissal must be based on *valid reasons*, while in Mali, Senegal and the Côte d'Ivoire it must be based on *just cause*. On the other hand, in most Latin American countries, and also Belarus, Croatia and Spain, among others, the accepted reasons are detailed, specific and relatively extensive.<sup>65</sup>

Legal theory has often questioned the vagueness of a general concept which gives the courts broad powers to establish and develop general principles on as central a topic in the economic sphere as termination. Viewed from another perspective, it could also be said that definitions which are too precise have also attracted harsh criticism, because they run the risk of excessively restricting the managerial control of the employer if the regulation is interpreted narrowly.<sup>66</sup> A compromise solution, as adopted by the United Kingdom, and which conforms with the principles of the Termination of Employment Convention, 1982 (No. 158), is to combine the general principle with a broadly formulated definition, or one which refers *grosso modo* to the reasons on which dismissal may be based.

Often legislation requires a worker to have performed a certain length of service in order to benefit from protection in the event of dismissal, as a measure of stability and routine in a job is considered a prerequisite to the exercise of a right of this kind. Demonstrating this approach, the United Kingdom recently reduced the qualifying period.

In spite of the vigorous debate as to the appropriateness and contours of dismissal regulation, the need for a valid reason is not often the source of widespread disagreement since, in general, all sectors seem to agree on the need for justification for dismissals. Nevertheless, recent International Monetary Fund reports on the economic situation of some countries point to a perceived need to restrict and clarify such reasons.<sup>67</sup>

In addition to a requirement of justification, many countries establish a series of procedural requirements, with varying levels of detail, for carrying out individual dismissals and for ensuring the protection of the persons who might be dismissed. In Belgium, Benin and Germany (and in cases of summary dismissal based on misconduct or incapacity, Greece and Iraq), written notification of dismissal is required. Written notification of the reasons for dismissal is required in the Netherlands, the United

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<sup>65</sup> For example, the Labour Codes of the Dominican Republic and Paraguay list, respectively, 21 and 25 different causes for dismissal.

<sup>66</sup> However, these lists of reasons are rarely restrictive, since they often include a general clause which provides that any serious violation of the clauses of an employment contract or of the provisions of applicable work rules of the enterprise will constitute valid grounds for dismissal.

<sup>67</sup> For example, the report on Spain issued in December 1996 recommends, in addition to greater flexibility of the labour market, the clarification of reasons for dismissal.

Kingdom and New Zealand (if requested by the employee), San Marino and Senegal; a combination of written notice and justification is mandated in France, Italy, Luxembourg, Peru, Portugal, Romania and Spain, while in countries such as Australia, no formal procedure is required. In some countries with a common law tradition (particularly those where employment law has been influenced by administrative law developments),<sup>68</sup> the worker is entitled to be heard by the employer prior to a decision to dismiss being made, so that the worker has an opportunity to respond to the issues in relation to which dismissal is being considered.<sup>69</sup>

In civil law systems, regulations governing preliminary procedures can also be detailed. In France, for example, the employer is required to hold an interview with the worker at risk of dismissal, at which the worker may be assisted.<sup>70</sup> Any resulting dismissal must then be executed in writing, specifying the reasons for dismissal. Furthermore, the document recording the dismissal must be duly registered. In contrast, German legislation does not lay down formal dismissal procedures except with respect to consultation with workers' councils.

In some countries an obligation to consult with staff representatives (a usual practice in the case of collective dismissals) supplements the general dismissal requirements, including in instances where dismissal is for misconduct or poor performance.<sup>71</sup> Other countries require prior authorization of dismissals.<sup>72</sup> In Ecuador and Haiti, if the employer has not given notice and wishes to dismiss a worker, prior permission from the administrative authority is needed. In Venezuela, legislation provides for the communication of dismissal to a magistrate with jurisdiction over employment security, but in practice the justification for dismissal is determined *a posteriori*. In France and Greece a simple declaration to the administrative authority is considered sufficient.

Prior requirements and special procedures for dismissal are common in the case of termination of employment of specially protected workers, such as trade union representatives,<sup>73</sup> women who are pregnant or in confinement, disabled workers and in the case of dismissals that might be viewed as discriminatory.

The existence of relatively extensive preliminary procedures seems to depend on the tradition of the country concerned. However, despite tradition, in some countries the extent to which various

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<sup>68</sup> This principle also applies to many other countries such as France and Peru.

<sup>69</sup> See, for example, Bangladesh, India, New Zealand and Pakistan.

<sup>70</sup> Up to 1991, the applicable statute excluded undertakings employing fewer than 11 workers from the obligation to conduct an interview.

<sup>71</sup> See, for example, Austria, Luxembourg, Portugal and Spain.

<sup>72</sup> Such as in the Netherlands.

<sup>73</sup> Who often may be dismissed only with just cause and after prior authorization of the administration or labour court which verifies the reason(s) for dismissal in collaboration with the workers' representation bodies in the enterprise in question.

procedures, such as registers or preliminary hearings, are applied is questionable. Indeed, criticism of these procedures is often based on the practical application of the underlying precepts, and, as such, the effectiveness of some of these procedures in some countries is clearly open for debate.

Several analysts have taken the view that preliminary hearings are unnecessary and are opposed to prior administrative authorization in cases of individual dismissals in small enterprises, since they believe that such requirements restrict and impede the managerial control of the employer and adversely affect economic productivity. Experience in some countries, however, reflects a rather different perspective. In fact, European trade unions have noted that the gradual removal of these preliminary procedures works against the interests of the worker who is often not well informed of his or her rights.

## *Notice*

Notice is an obligation imposed on the employer during the process of termination of employment to minimize the element of surprise of an act which should not be sudden.<sup>74</sup> It also enables the worker to adjust to his or her new situation and to facilitate his or her search for new employment.<sup>75</sup> This concept existed in earlier contract law before the advent of labour legislation. The concept continues to persist in civil and commercial law. It aims to prevent rash decisions to cancel contracts.

Notice *per se* does not constitute justification for termination (it is not based on the admissibility or validity of a dismissal, but on the protection of the party being dismissed), and does not release the employer from any applicable obligation to base a dismissal on a justifiable cause. Nevertheless, not all countries require notice in every instance of dismissal,<sup>76</sup> and in some countries where justification is mandatory, notice is of secondary importance.<sup>77</sup>

Although many countries require notice, the degree of obligation imposed, the duration of the notice period and the forms it takes vary according to legal tradition and national practice. In general, notice is only required for contracts of indeterminate duration because contracts for a specified task, service or period are deemed to expire as soon as the term has passed or the service or task has been performed.

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<sup>74</sup> Notice in this context means notice given by an employer prior to dismissal, and the period which a worker must respect in submitting his or her request for termination, if the worker does not wish to be regarded as having deserted his or her post.

<sup>75</sup> In some jurisdictions a reasonable period of free time, on pay, is granted for the worker to seek new employment. See, for example, Belgium, Brazil, Cyprus, Poland, Portugal, Sweden, Tunisia and the United Kingdom.

<sup>76</sup> For example, in some countries (e.g. India), the obligation to give notice is restricted to cases of dismissal without just cause.

<sup>77</sup> Traditionally, under common law, termination of employment with notice was often an alternative to dismissal for cause (summary dismissal).



The length of notice frequently depends on several criteria, particularly if collective agreements govern notice requirements. Common criteria used to determine notice periods include:

- C length of service;<sup>78</sup>
- C the basis on which the worker is paid (e.g. daily, weekly, monthly or bimonthly);<sup>79</sup>
- C the category or occupational classification of the worker (e.g. manual labourers or office employees);<sup>80</sup> and
- C age.<sup>81</sup>

In many jurisdictions, a combination of factors of this kind will be taken into account.<sup>82</sup> Often, the observance of notice provisions is legally enforced through an obligation to pay compensation, in the form of damages, in lieu of notice, if notice periods are not observed.<sup>83</sup> As mentioned earlier, in some jurisdictions, the governing legislation requires notice to be in written form<sup>84</sup> and copied to the administrative authorities.

The obligations of notice and severance pay together often form the basis upon which dismissal is described as an onerous institution. According to a survey on legislation and national collective agreements conducted in the European Union,<sup>85</sup> the estimated average cost of termination of employment Cexcluding unemployment benefitsC was 22 wage-weeks per worker in 1990.<sup>86</sup> The survey also noted that greater benefits tended to be received by older workers, illustrating that length of service is a dominant principle in the area of notice, and by white-collar workers in comparison with blue-collar workers.<sup>87</sup> The argument has often been advanced at the national level that there is a need to reduce

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<sup>78</sup> See, for example, Argentina, Australia, Cyprus, France, Finland, Hungary, Iceland, Luxembourg and Paraguay.

<sup>79</sup> See, for example, Bangladesh, Brazil, Kuwait, Mauritius and Niger.

<sup>80</sup> See, for example, Austria, Denmark and Greece.

<sup>81</sup> In Sweden notice for workers between 25 and 45 years of age is between two and six months (if the worker has been employed for more than six months) and 12 months (if the worker has been employed for more than two years).

<sup>82</sup> In Belgium consideration is taken of both occupational category and length of service, whereas in Qatar the basis of payment and the length of service are considered important.

<sup>83</sup> See, for example, in Australia, Belgium, Bolivia, Dominican Republic, India and Niger.

<sup>84</sup> See, for example, the provisions regarding agricultural workers in Nicaragua. See also Bronstein, *op. cit.*, p. 274.

<sup>85</sup> Mosley, *op. cit.*, p. 23.

<sup>86</sup> Italy was recorded as having the highest average: 45 wage-weeks; Ireland, the lowest: eight wage-weeks.

<sup>87</sup> With 27 wage-weeks on average for the former and 17 for the latter.

and modify these dismissal costs. These figures however warrant closer analysis before any conclusions can be drawn.

While it may be true that the average cost of termination is 22 wage-weeks, this figure represents different types of contracts and working populations and does not reflect the real cost of ordinary dismissal. In fact, the least costly forms of dismissal are those relating to the dismissal of young workers and blue-collar workers which, according to national statistics, are the working population groups most affected by dismissal. If the impact of hiring young persons is observed, the lower cost of dismissal is perhaps one of the reasons which makes hiring young workers attractive.<sup>88</sup>

The argument that the costs of dismissal, including notice, are excessive, has, however, been politically influential. For example, in 1996 the social actors in Finland moved to lower these costs by adopting new legislation which limited to one month the notice period to be given to workers who had been employed for less than 12 months. This amendment was said to be justified by the need to enact legislation that facilitates job-creation. On the other hand, the United Kingdom recently reduced its qualifying period for unfair dismissal protection and increased the maximum amount that may be awarded.

### *Avenues for Redress*

Protection of an established right is meaningless without the possibility of redress in the event of violation. As such, the *right* and the *exercise* of an avenue of appeal against a dismissal are essential elements of worker protection against unjustified or unfair dismissal.

The capacity to review dismissals is usually conferred on impartial bodies which vary in their nature and jurisdiction from one country to another. In some countries, the right of a worker to approach a particular body will depend on factors such as whether he or she works in the private or public sector, whether termination was carried out with notice or prior authorization, and the nature of the instrument under which the worker is seeking relief (whether labour laws, civil laws, contractual clauses on discrimination, a collective agreement, and so on).

The impartial bodies specializing in labour related claims may be labour or employment courts<sup>89</sup> or bodies at the administrative level. Labour inspectorates sometimes act as quasi-judicial tripartite bodies, while in some jurisdictions appeals may be brought to arbitration tribunals or adjudicators,<sup>90</sup> private

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<sup>88</sup> According to Mosley, the average pay and notice due to younger workers with less than two years=work experience in the European Union was five weeks.

<sup>89</sup> See, for example, Belgium, Cameroon, Dominican Republic, Gabon, Germany, India, Mali, New Zealand, Pakistan, Poland, Portugal, Senegal, Swaziland, United Kingdom, Zimbabwe and Venezuela, among others. In Venezuela, since the promulgation of the Basic Labour Act of 1990, there have been labour courts responsible for handling appeals and other matters relating to dismissals.

<sup>90</sup> In Lebanon, Mexico, Panama and Philippines, for instance.

arbitrators,<sup>91</sup> or special bodies formed under collective agreements.<sup>92</sup> The composition of these bodies varies between countries. They may consist exclusively of labour magistrates,<sup>93</sup> they may be tripartite,<sup>94</sup> or they may consist of courts or institutions of general jurisdiction. In Cuba, for example, labour disputes are heard at first instance by district courts with general jurisdiction, although appeals against their decisions are brought before the labour division of the Court of Appeal.<sup>95</sup>

An assessment of the efficiency of each of these institutions and the possible advantages of any of the options is difficult. For example, specialized labour tribunals may have the advantages of providing summary procedures at no cost to the participants, technical expertise, and broad powers of investigation and proof.<sup>96</sup> However, the effectiveness of labour tribunals varies depending on the system in each country; many have become excessively formal and slow (deliberations in some countries may last for years) and this impedes effective action. It appears that the justice systems in some jurisdictions may lack the human and material resources to be able to efficiently deal with the number of claims filed.

The efficacy of other types of bodies is also difficult to assess since their practical application differs from one country to the next. No two tripartite boards are identical, and forms of conciliation and arbitration vary. One important basis of comparison is the speed and effectiveness of the judgments produced. Procedures established through collective agreements can have the advantage of speed, although they may lack a degree of objectivity. Moreover, private arbitration has been viewed somewhat apprehensively in countries that have traditionally regarded employment as a public matter falling under the jurisdiction of public administration. On the other hand, arbitration in the United States is viewed as having the benefits of quicker, less formal procedures and rules of evidence than those governing judicial authorities.<sup>97</sup>

Some countries provide for prior preliminary procedures of conciliation or mediation,<sup>98</sup> while in

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<sup>91</sup> Such as in Canada and the United States. In the case of collective agreements under which dismissal may generally be effected only for just cause, appeals can often be brought before a private arbitrator after the complainant has exhausted all internal remedies. These agreements frequently provide that the decision of the arbitrator is final.

<sup>92</sup> For example, it is not unusual for collective agreements to include specific mechanisms for conciliation.

<sup>93</sup> As in Barbados, Croatia, Ethiopia, the Russian Federation, Spain, Switzerland and most Latin American countries.

<sup>94</sup> As in Belgium, Germany and Mexico, for example.

<sup>95</sup> Bronstein, *op. cit.*

<sup>96</sup> For a labour court judge's view of termination of employment, see W. Blenk (ed.): *European labour courts: Current issues*. Labour-Management Series No. 70. (Geneva, ILO, 1989).

<sup>97</sup> See, for example, Anderson and Robinson: *Arbitration the answer in wrongful termination cases?* in *Labour Law Journal*, 1991, Vol. 42, No. 2, p.121.

<sup>98</sup> Ethiopia, Spain, Hungary, New Zealand, Spain and South Africa, for example.

others such procedures are required *instead* of legal proceedings, and may be either optional<sup>99</sup> or, more commonly, compulsory.<sup>100</sup> Such conciliation is often conducted under the auspices of the administrative authority (the labour inspectorate in Mali and Senegal, for instance) or through a specialized body.<sup>101</sup> In Germany and France, the process of conciliation is a phase prior to appeal, while in Italy, conciliation is compulsory prior to proceedings in enterprises employing fewer than 60 workers, and voluntary within the framework of an appeal.<sup>102</sup>

The success of an appeal against a dismissal can depend to a large extent on proof and, accordingly, the issue of who bears the burden of proof can be crucial. In private law, the burden of proof generally rests on the plaintiff, but necessarily transposing this doctrine to the field of labour law could be viewed as unfair since in an employment relationship the position of the two parties is not equal, with the employer often controlling access to information about the dismissal. This view accords with the approach generally taken to the burden of proof in the context of labour law, although it must be said that a range of approaches exists. For example, some civil law systems apply the rule on *pro operario* benefit to employment contracts (while in others the burden of proof remains with the complainant).<sup>103</sup> Common-law protection is generally based on a tradition whereby the employer has an obligation to prove the legitimacy of termination for cause. Then again, in some jurisdictions the approach taken to proof depends on the category of worker. In Belgium, for example, the concept of improper dismissal can be applied only to wage-earners and not to salaried employees, who must justify their action and present the necessary proof. Other countries recognize certain presumptions in favour of the worker which the employer must refute, especially in cases of discriminatory termination of employment or anti-trade union discrimination. Finally, in some jurisdictions the burden rests on neither party; rather the body responsible for the resolution of the dismissal claim is under an obligation to study the evidence and employ the means necessary to obtain the information needed upon which to make an impartial decision.<sup>104</sup>

## Remedies in the event of unfair or unjustified dismissal

The diversity in regulation of dismissal between countries is further reflected in the fact that remedies and compensation vary considerably. However, the lack of data on the number of workers to whom

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<sup>99</sup> In Ethiopia, for example, conciliation is optional except in certain limited cases (such as workforce reduction) where it is mandatory.

<sup>100</sup> As in South Africa.

<sup>101</sup> In Mexico conciliation is conducted by tripartite conciliation and arbitration boards.

<sup>102</sup> See *sec. 5* of Act No. 108 of 1990, and *sec. 410* of the Code of Civil Procedure. See also ILO: *Protection against unjustified dismissal*, op. cit., para. 192.

<sup>103</sup> In Switzerland, for example, the worker must provide to the presiding court evidence of any alleged wrongful dismissal.

<sup>104</sup> See, for example, the Philippines and Tunisia.

such legislation is applied makes it difficult to conduct a critical analysis of the practical impact of these remedial sections.<sup>105</sup>

Nevertheless, it is of interest to consider the range of remedies available under national statutes in cases where a dismissal is held to be unfair or unjustified. In order to reflect the principle of employment security, some countries provide for the annulment of termination, which often, by definition, requires the reinstatement of the worker to his or her position of employment. The Termination of Employment Convention, 1982 (No. 158), supports this practice. However, if this is found to be impractical, a finding of unfair or unjustified dismissal may be remedied by financial compensation to offset the complainant's loss of employment. Such remedies are, in general, not rigidly applied, and may be combined according to quite diverse criteria.

Sanctions or remedies may also play a less crucial role if the system of protection is based on the requirement of prior approval by an administrative or judicial body. Such is the case in the Netherlands, where protection is granted through prescribed administrative authorization prior to dismissal.

### ***Reinstatement***

Reinstatement aims at ensuring employment security and is accepted as a statutory right in many countries, particularly with regard to workers enjoying special protection from dismissal, such as trade union representatives,<sup>106</sup> pregnant women or workers found to have been subject to discriminatory dismissals.<sup>107</sup> In such instances, even if legislation does not call for mandatory reinstatement, there is often compensation for dismissal which exceeds the standard maximum statutory limits. The decision handed down in August 1993 by the Court of Justice of the European Communities in the *Marshall* case, advocating substantial compensation awards as a special means of protection, reflects and endorses this approach.

In some countries, reinstatement will only be awarded in specific situations, often depending on the size of the enterprise, the length of service of the worker,<sup>108</sup> the nature of the worker's employment, and the effect the dismissal has had on the relationship between employer and employee. In Italy, for example, reinstatement is always applied in the event of discriminatory dismissal, but in the case of ordinary unjustified dismissals, reinstatement is required only in work centres employing more than 15

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<sup>105</sup> For example, in a number of jurisdictions workers on probation periods—which may last up to two years in countries such as the United Kingdom—and employees of small enterprises are excluded from the scope of this type of legislation.

<sup>106</sup> See, for example, *sec. 391* of the Labour Code of the Dominican Republic.

<sup>107</sup> See also *secs. L.122-45* of the French Labour Code.

<sup>108</sup> In Mexico, for example, a worker must have worked for at least one year in order to be eligible for reinstatement; in Brazil this period is ten years.

workers, or five in the case of agricultural establishments.<sup>109</sup> The Federal Labour Act of Mexico exempts an employer from reinstating a worker if it is proven before the Conciliation and Arbitration Board that due to the work he or she performs, or the nature of the work itself, the employee is in direct and permanent contact with the employer or a normal employment relationship would be impossible. In Venezuela, the Basic Labour Act prescribes mandatory reinstatement only for enterprises employing more than ten workers, while in Panama reinstatement is not compulsory in agro-industrial establishments with fewer than 20 workers, 15 in the manufacturing industry, and ten in all other cases. Before its 1990 amendment,<sup>110</sup> the Substantive Labour Code of Colombia provided for reinstatement, although the presiding judge could order compensation if he or she believed that reinstatement was not advisable because of conflicts arising as a result of dismissal.

Reinstatement is prescribed as mandatory for *all* workers in some countries (such as in Cuba, Honduras and Portugal), even if this obligation is not always effective in practice. In most jurisdictions, however, the judge at least has the discretionary power to order reinstatement (such as in Ireland and in France and Germany for enterprises with more than ten employees), although in some countries the consent of the employer may be necessary for the application of this remedy (such as in Spain).

In practice, the rate of reinstatement for ordinary employees has tended to be low. Indeed, whilst legislation in a number of countries purports to emphasise reinstatement as a remedy (as do many collective agreements, such as in the United States and Canada), reinstatement tends to be sparingly awarded, with compensation granted more frequently.<sup>111</sup> The effectiveness or ineffectiveness of reinstatement depends on many factors, and in countries where there is a lengthy procedure to establish the nullity or admissibility of a dismissal, it can prove to be an unlikely remedy. Additionally, because of the closeness of the employment relationship, reinstatement is often considered unsuitable for persons who were employed in positions of trust, domestic work and smaller enterprises.<sup>112</sup>

Some experts base their argument in support of reinstatement on its restorative nature. In their view, since reinstatement re-establishes the employment relationship to its normal state, unjustified termination does not represent a real interruption. The problem, however, is the very act of reinstating a worker in the enterprise from which he or she has been dismissed. Is this an appropriate measure for maintaining good labour relations? In practice, according to an empirical study conducted in the Province of Quebec, Canada,<sup>113</sup> 80 per cent of the workers who were to be reinstated in fact exercised

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<sup>109</sup> Reinstatement is also required for employers who regularly employ more than 60 workers within the municipality in which dismissal has been effected.

<sup>110</sup> Through Act No.50.

<sup>111</sup> Bronstein, *op. cit.*.

<sup>112</sup> A fact reflected in the legislation in various countries where the size of the enterprise impacts on the granting of reinstatement.

<sup>113</sup> G. Trudeau: 'Is reinstatement a remedy suitable to at-will employees?' in *Industrial Relations*, 1991, Vol. 30, No. 2, p. 302.

their rights, and experienced no particular difficulties, which, to a certain extent, is proof of the potential effectiveness of reinstatement as a remedy, in spite of arguments that it threatens harmonious labour relations or is unworkable.

Nevertheless, the current trend in many jurisdictions is toward discretionary reinstatement as the most appropriate solution in meeting the needs of the parties to the relationship, leaving the final decision up to the discretion of the adjudicating body. This approach is intended to allow the presiding body to combine the goals of protecting the worker from unjustified dismissal, while preserving the flexibility to maintain harmonious labour relations.

In some countries, a reinstatement order is expressly supported by sanctions for non-compliance. These include prosecution for the offence of resistance to authority (or contempt of court), which may lead to an employer's arrest, and the use of writs.<sup>114</sup> However, while many legal systems incorporate the ability to enforce orders for reinstatement judicially, given the low levels of reinstatement ordered in practice, the practical value of these provisions is probably limited.

Generally, as a supplementary measure, wages that have not been paid during the appeal proceedings must be paid in all cases where reinstatement is the principal remedy. In order to avoid protracted deliberations, there are often very short limitation periods on employees bringing appeals against dismissal and an upper limit on compensation due by the employer (usually calculated in terms of a number of wage-weeks). Furthermore, the employment of a reinstated worker is deemed to have been uninterrupted by the termination, with the employee entitled to those conditions of employment (such as credit for long service and social security entitlements) which have accrued in the interim. In order to avoid excessively long proceedings due to inefficiencies in the judicial system, some countries require that a portion of the overdue wages should be paid by the State.<sup>115</sup>

## ***Compensation***

The remedy of compensation aims at offsetting the financial (and often, but not always, non-financial) effects of unjustified or unfair dismissal. In Spanish the word *indemnización* (compensation) is also used to designate economic payments which are paid to the worker<sup>116</sup> at the end of the contract, irrespective of whether termination is justified or not. (This latter concept is discussed separately in the next section.)

The legal basis of compensation is the harm suffered by the worker from loss of employment, but there are very few laws which impose the obligation of proving the extent of damages suffered by the

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<sup>114</sup> As in Honduras.

<sup>115</sup> See, for example, Spain.

<sup>116</sup> This possible confusion does not occur in either English or French law (the distinction between *dommages et intérêts* (damages) and *indemnisation* (indemnity) is clearly defined by legal doctrine).

employee,<sup>117</sup> since damages are often assessed on a set scale calculated under terms established by law.<sup>118</sup> In some countries monetary compensation is the only remedy for unjustified dismissal.<sup>119</sup>

Many laws stipulate that the amount of compensation should be fixed with due consideration to various elements, in particular, the worker's length of service,<sup>120</sup> the nature of the employment, the age of the worker and any acquired rights, such as pensions, or rights to bonus payments.

The size of the enterprise is also considered by some statutes in the determination of the amount of compensation to be awarded. For example, in France, a worker who has been employed for more than two years in large enterprises is entitled to six months' wages. In contrast, in small enterprises, compensation will be determined by proof of harm caused. In Italy, in enterprises of more than 15 workers, compensation is higher than in smaller enterprises.

Other criteria, such as supplements to unemployment benefits, are also used to determine compensation levels. Moreover, as noted previously, many countries establish minimum and maximum limits to compensation, while in other legal systems maxima and minima are not specified by statute, but are left to the discretion of the presiding judge or body.<sup>121</sup>

Although lower in some instances, compensation for unjustified dismissal is often calculated using the rate of one month's wages for each year of service,<sup>122</sup> with some countries using higher rates, such as five months=<sup>123</sup> or even six months=<sup>124</sup> wages per year of service.<sup>125</sup> However, the compensation actually awarded is typically in the vicinity of one year's wages.<sup>126</sup> It is unusual for a court to order an employer

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<sup>117</sup> Bronstein, *op. cit.*.

<sup>118</sup> The Haitian Code provides an example of a system that requires proof. It provides that in the event of unlawful or wrongful termination of the employment contract by one of the parties, the other will be entitled to damages, separate and apart from compensation in lieu of notice. These will be awarded by the Court, at the request of the Labour Board. They must be substantiated and may not under any circumstances exceed an amount equivalent to 12 months of work.

<sup>119</sup> Such is the case in most French-speaking African countries as well as in Denmark and Luxembourg. For further information on this point, see Vargha and English, *op. cit.*

<sup>120</sup> In some Latin American countries this compensation is known as a long-service bonus (Bronstein, *op. cit.*).

<sup>121</sup> As in Gabon and Mali, for example.

<sup>122</sup> See, for example, Bolivia, Camerons, Chile, Costa Rica, Germany, Guatemala and Uruguay.

<sup>123</sup> Such as in Chile.

<sup>124</sup> Established by collective agreement in Belgium and Denmark.

<sup>125</sup> Spain has some of the highest general levels of compensation: 45 days=wages for each year of service.

<sup>126</sup> This is, in some respects, a misleading figure. In practice, unlawful dismissals usually involve younger workers, who are generally entitled to lower levels of compensation.



to pay compensation higher than the general statutory maximum,<sup>127</sup> except in the case of workers enjoying special protection, to whom reference was made earlier, or if otherwise permitted by law.

### *Severance pay*

In general, severance pay is an allowance paid by the employer<sup>128</sup> for terminating an employment relationship, regardless of the reason for termination. The rules governing such allowances are varied and often complex. They are intended to offer income protection in countries where the social security system does not provide it, or where such protection is inadequate, even though such payments may appear, to those outside the country, to be gratuities for services rendered by workers.

Severance allowances<sup>129</sup> are viewed (particularly by employers) as among the most onerous of social costs, particularly for those enterprises which, due to economic difficulties, are forced to reduce their staff. The need to make severance payments can further jeopardize the firm's economic position. However, there seems to be general agreement, even among those who are sceptical of the value of such social protection, on the need to guarantee a minimum income to a worker while he or she looks for a new job, or to provide capital which will enable him or her to start his or her own business. This allowance is regarded in some countries as a type of mandatory savings scheme, or as a share in the total value of the enterprise which is increased through the efforts of the worker, or even as relief for the sudden loss of employment and source of income. Critics of such schemes seem to focus mainly on the amounts involved and the responsibility for the funding of such compensation.

Many countries have enacted legislation on severance pay and on the possibility of regulating severance payments through collective agreements. Moreover, some collective agreements and conventions have actually increased allowances prescribed by law, as in Greece where, under a two-year framework agreement signed on 4 March 1996, severance pay granted to workers with more than 15 years' service in an enterprise was increased. Similarly, in African countries with a French legal and labour relations background, inter-occupational agreements set the minimum level of compensation. Allowing collective agreements to modify severance pay in this manner provides the parties with greater freedom to determine the allowances to which workers are entitled.

In general, severance payments must be paid by the employer or by a fund set up for that purpose through the employer's contributions. Some countries regard severance allowances as a right acquired

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<sup>127</sup> In Uruguay, however, if there has been moral damage, or if a dismissal has been offensive or effected in bad faith and the employer has been guilty of an abuse of rights, he or she will be ordered to pay additional compensation. (See O. Ermida: *El despido abusivo*, in *Derecho Laboral* (Montevideo), 1984, Vol. XXVII, No. 135, pp. 506-523).

<sup>128</sup> While social security schemes are generally financed jointly by workers and employers, or by the State, severance pay is generally an obligation of the employer.

<sup>129</sup> As mentioned, severance pay differs from compensation paid for unjustified dismissal and from compensation in lieu of notice.

by the worker, in that it must always be paid, even in the case of voluntary resignation or dismissal for serious misconduct (as in Venezuela). Most statutes however restrict the payment of severance allowances to a certain extent, excluding them from the scope of obligations in relation to dismissals for just cause.<sup>130</sup>

The amount of the allowance may be fixed (as in the Czech Republic), but is usually calculated according to the worker's level of wages and length of service, and in accordance with very specific rules. In terms of length of service, some countries restrict the granting of severance pay to workers who have been employed for one year,<sup>131</sup> two years,<sup>132</sup> three years,<sup>133</sup> five years,<sup>134</sup> ten years,<sup>135</sup> 15 years,<sup>136</sup> or even 20 years.<sup>137</sup> Moreover, the maximum allowance payable is often restricted,<sup>138</sup> and there may also be a specified minimum.<sup>139</sup>

There are often special rules on compensation for termination of employment for economic, structural or technical reasons, and staff reductions. Some of these rules result in an increased severance allowance or supplementary compensation.<sup>140</sup>

## Collective dismissals for economic, technical, structural or similar reasons

While this *Digest* focuses mainly on the termination of individual contracts of employment, an overview of legislation on dismissal would be incomplete without a brief summary of the typical features and procedures for collective dismissal. The Termination of Employment Convention, 1982 (No. 158), covers some of these aspects, considering collective dismissals for economic reasons to be potentially

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<sup>130</sup> See Bangladesh, Bolivia, Côte d'Ivoire, Malaysia, Senegal and Swaziland, among others.

<sup>131</sup> Such as in Benin, Mali, Peru and Venezuela.

<sup>132</sup> Such as in Gabon.

<sup>133</sup> Such as in Hungary.

<sup>134</sup> Such as in Bolivia and Malawi.

<sup>135</sup> Such as in Panama, if the worker is over 35 and 40 years of age, respectively, for men and women.

<sup>136</sup> Such as in Mexico.

<sup>137</sup> Such as in Switzerland, where the worker must also be over 50 years of age.

<sup>138</sup> In Spain, the limit is 12 months=wages.

<sup>139</sup> See, for example, *sec. L.122-9* of the Labour Code of France.

<sup>140</sup> See, for example, Benin (*sec. 28*, inter-occupational agreement); Mexico (*sec. 436*, Federal Act); and Sweden (Act of 13 December 1984).

justifiable dismissals which require, because of their social and economic implications, special rules to protect the workers affected by them.

Legislative provisions on dismissals for economic, technological or structural reasons are also a source of debate among advocates of greater labour flexibility. These provisions tend to reflect the goals of equity and social protection (as reflected in dismissal procedures), and, in consideration of the possible economic, social and even political effects of mass dismissals, the government's concern for public order and avoiding industrial unrest. Regulation aims at easing tensions created by this type of redundancy, through consultation and information procedures in the enterprise and with administrative authorities. The requirements of reasonable notice may assist employees in completing the task for which they were engaged and in finding alternative employment. They also play a role in consultations and negotiations over steps to avoid mass termination or at least mitigate its effects.<sup>141</sup> Indeed, obligations regarding notice periods in this context generally extend the usual time-limits for notice periods.<sup>142</sup>

Legislation in the field of collective dismissals varies considerably between countries,<sup>143</sup> and is controversial, particularly in relation to administrative authorization. This is even more so where governments or employers emphasize the need for change.

The definition of economic, technological and similar reasons varies depending on the country concerned and commonly takes into account situations such as plant closures, suspensions, production difficulties or cutbacks, phasing-out of industrial processes, changes in procedures or jobs, readjustments and restructuring, which are all reasons unrelated to the employees themselves. Relocation (the decision to close an establishment in one country and to transfer its production to another), has been recently accepted as a justifiable reason for dismissal in some countries,<sup>144</sup> a decision which some have sought to justify on the grounds of protecting the productivity of the enterprise and on the existence of a social plan with "adequate placement opportunities".

When the employer is obliged to terminate several employment contracts, objective criteria must generally be established for selecting those who are dismissed. For this purpose, various laws have devised mandatory criteria as a protective measure for workers. The establishment of such criteria can

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<sup>141</sup> See Evans-Klock, *op. cit.*

<sup>142</sup> European Community Council Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies, for example, establishes the need to increase the normal notice period in such cases to 30 days.

<sup>143</sup> Ranging from countries that have no official procedures for collective dismissals, such as Barbados (although there is a protocol in the hospitality industry, which was signed in 1995), to countries which have detailed regulations conforming to quite specific principles (such as legislation enacted to conform to European Community Council Directive 75/129/EEC).

<sup>144</sup> See, for example, in France, in the Lyon Court of Cassation case, 5 April 1995, *Thomson Tubes and Displays (Colour Video) v. Steenhoute et al.*

also be achieved through collective bargaining<sup>145</sup> and work rules. The most usual criteria (apart from immunities granted to specially-protected workers or those who are most vulnerable to any form of dismissal (see above)), are length of service<sup>146</sup> and the skills of the worker. However, factors which may increase the difficulty faced by a worker in re-entering the job market<sup>147</sup> are increasingly taken into account in industrialized countries.<sup>148</sup> Other criteria such as diligence and aptitude are also taken into consideration by some statutes and collective agreements.<sup>149</sup>

In some countries legislation and/or collective agreements establish specific provisions aimed at limiting the dismissal of certain workers (apart from those who are specially protected). An example of this is the agreement of the German mechanical and metalworks industry in North Wurtemberg and North Baden, which expressly prohibits dismissal of workers aged over 53 years and with more than three years= service with the plant.

Along with varying systems of preferences, some countries establish a priority system for the reinstatement of retrenched employees for a specific period when employers begin new hiring. In general, priority is given to workers with comparable skills (such as in France) or of the same professional grade (as in Benin and Mali).

### ***Consultation with workers' representatives***

With dismissal for economic, structural or technological reasons, the employer is generally expected to consult with workers=representatives on the measures it intends to adopt. The obligation to consult in this context is often prescribed by statute, although inter-occupational collective agreements and framework agreements can and do play a key role and are often supplemented by industrial or sectoral agreements.

The obligation to consult on mass dismissals is provided by some countries within a more generic right of information which the workers' representatives have in relation to the running of the enterprise, especially as regards its functioning and management plans.<sup>150</sup> Under these more generic rights,

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<sup>145</sup> Such as in New Zealand. However, in spite of the fact that criteria for redundancy selection is often established by collective bargaining, the topic of preferences and criteria for collective dismissal is often raised in challenges to redundancy dismissals.

<sup>146</sup> However, length of service or age may operate in different ways depending on the legislation. In some cases older workers are protected as ~~not subject to dismissal~~, while, for example, the Labour Code of Tunisia places older workers at the top of the staff reduction list, if they are eligible for early retirement.

<sup>147</sup> Such as family responsibilities or disability, among others.

<sup>148</sup> *Sec. L.321-1* of the French Labour Code, for example, establishes this criterion.

<sup>149</sup> See, for example, in some collective agreements in the United States.

<sup>150</sup> Such as in Germany (Works Councils Act); Belgium (national collective agreement No. 9 of 1972 on works councils); and Switzerland (Participation Act of 1 May 1994).

employers must inform workers=representatives about structural changes or changes in work methods; that is, on any action which in the short or medium-term may lead to a reduction of the workforce. This obligation is sometimes limited to enterprises with a specific number of employees.<sup>151</sup>

The workers= representatives often must be consulted on the number of dismissals, the order in which they will be carried out and on the criteria established for determining this order.<sup>152</sup> Frequently, information also includes measures or social plans which the employer intends to adopt to mitigate the adverse effects of termination and/or to facilitate the reassignment of workers who have been made redundant as well as possible pension or adjustment schemes.<sup>153</sup> In fact, in many countries there are two rounds of consultation. The first is embarked upon to find solutions to avoid dismissal, and the second examines the number of proposed dismissals and the order in which they are to be carried out.

The European Community Council Directive 75/129/EEC,<sup>154</sup> on the approximation of the laws of the Member States relating to collective redundancies, provides that information submitted to workers=representatives must be in written form, stating the number of persons to be affected, the reasons for such dismissals and the time-frame anticipated for the redundancies. Additional requirements of information and consultation apply in cases of transfer of enterprises.

In some countries, the requirement to provide information to workers=representatives also applies to individual dismissals for economic reasons,<sup>155</sup> while elsewhere, such as in the United States, this obligation applies only in the case of mass dismissals.

The information provided pursuant to these procedures is in general purely indicative (such as in Colombia and the United States), even though in some countries it is provided to workers for future negotiation (as is the case in China, Côte d'Ivoire and Namibia).

The value of consultation in the process of termination is inestimable since it is based on dialogue, the foundation of non-contentious labour relations. However, while advocates of flexibility do not generally object to consultation in principle, they have tended to support recent amendments to some legislation that has contributed to the reduction of consultation to a mere process of disseminating general information.<sup>156</sup> This might, in the medium-term, jeopardize harmonious labour relations.

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<sup>151</sup> For example, in Germany the law on work councils places the obligation of sharing with the work council detailed information on any change in the enterprise which may have an impact on personnel, but this applies only to enterprises of a certain magnitude.

<sup>152</sup> Such as in Côte d'Ivoire, the Czech Republic and Guinea.

<sup>153</sup> See the legislation in Cameroon, France, Gabon, Germany, Luxembourg and Senegal, among others.

<sup>154</sup> Dated 17 February 1975.

<sup>155</sup> See, for example, in the Czech Republic, Guinea and Mali.

<sup>156</sup> In the Côte d'Ivoire, for example, the information disclosed is descriptive. See Vargha and English, *op. cit.*.

## *Notifying the Authorities*

In order to supplement consultation procedures, a number of countries<sup>157</sup> have enacted an obligation to notify the labour authorities of all (or certain categories of) redundancies for technological, economic, structural and similar reasons.<sup>158</sup> Even though this obligation often applies only to collective dismissals (and only to mass dismissals in the United States), it can just as easily apply to individual dismissals.<sup>159</sup>

The usual authoritative body to which notifications are submitted is the labour inspectorate,<sup>160</sup> but it may also be a public employment service<sup>161</sup> or the Ministry of Labour itself.<sup>162</sup>

Formal criteria generally govern notification of this kind, including when notification is to be given, the form of the notification and its content. Notification usually includes matters such as the names of the workers affected, their wages and level of seniority, and the reasons for their dismissals. The purpose of notification may be simply to inform the competent authorities,<sup>163</sup> or to inform them in order to obtain tangible assistance,<sup>164</sup> or to facilitate the monitoring role of the authorities to ensure that the prescribed criteria are respected.<sup>165</sup> Moreover, in some cases, notification functions as a request for authorization to proceed with dismissal.<sup>166</sup>

Some analysts have harshly criticized notification procedures. A focus of this criticism is that these procedures, possibly unavoidably, affect the formal sector while leaving the informal sector untouched, and therefore may affect multinational enterprises more than other enterprises. Another focus for

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<sup>157</sup> Including Austria, Benin, Burkina Faso, Cameroon, Colombia, Côte d'Ivoire, Cyprus, Czech Republic, Equatorial Guinea, Finland, France, Gabon, Germany, Guinea, Italy, Lebanon, Luxembourg, Mali, Mauritius, Mexico, Namibia, Panama, Peru, Poland, Portugal, Senegal, Slovak Republic, Spain, Switzerland, United Kingdom and the United States.

<sup>158</sup> In some countries this is the only prescribed procedure.

<sup>159</sup> As in Chile and Mali.

<sup>160</sup> As in Chile, China and Senegal.

<sup>161</sup> See, for example, India, Israel and Norway.

<sup>162</sup> As in Benin, Colombia and Lebanon.

<sup>163</sup> As in Guinea, when the dismissals involve fewer than workers.

<sup>164</sup> As in Lebanon and Senegal.

<sup>165</sup> As in Côte d'Ivoire.

<sup>166</sup> For example, in Gabon, Greece, Guinea, the Netherlands, Spain (for procedures relating to more than ten workers) and Portugal.

criticism is the alleged impact of such procedures on job creation.

Criticism also focuses on the power given in some legislation to the authorities in order for the procedure to be set in motion. Some regard this power as an impediment to the restructuring of enterprises, in that it delays or even impedes the necessary implementation of restructuring.

Most recent legislative reforms tend to eliminate (as in Senegal and other francophone African countries) or diminish (as in Spain, in the case of enterprises employing fewer than ten workers, and Zimbabwe) the role of the administration, or to eliminate the administration's decision-making capacity when granting authorization. In its practical application, this has generated a certain measure of social discontent on the part of workers. Article 14 of the Termination of Employment Convention, 1982 (No. 158), does not refer to the role of the administration, but limits itself to emphasizing the need to communicate the timing and form of the dismissal, with an explanation of the reasons, and leaves it up to governments to decide on the most effective means of applying these provisions.

However, the protection of workers and ensuring that employment is terminated only for valid reasons are the two main elements underlying all prescribed procedures. Accordingly, these criteria can be used to ascertain whether or not the participation of the administrative authority (which often works under strict time constraints for judgments to be handed down) is the most effective way to safeguard the legitimate interests of workers. If adequate consultation with the workers is carried out on a basis of real social dialogue, nothing prevents this from being a sufficient guarantee of the effectiveness and equity of the procedure governing collective dismissals.

### ***Measures to avoid the effects of dismissals: The role of social dialogue***

Termination of employment is often regarded as a measure of last resort for the employer, thereby protecting not only the business, but also the investment represented in terms of the skills and experience of staff.

In this sense, from the end of the period of (almost) global economic growth in the 1960s, individual governments have applied diverse measures aimed at restricting possible redundancies or, in the event that they do occur, to ensure that such redundancies cause the least possible harm to the workers involved. When the Termination of Employment Recommendation, 1982 (No. 166), was drafted, the measures proposed for economic crisis situations were aimed at developing voluntary ways of reducing the number of workers that corresponded to the national practices at the time. These included early retirement, natural attrition,<sup>167</sup> reduction of overtime work and work-sharing. However, the rise in unemployment and the aggravation of economic difficulties have led to the implementation of new methods, including social plans provided for in national legislation aimed at mitigating the effects of

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<sup>167</sup> Comprised of limiting recruitment and spreading the reduction over a sufficient period to bring the workforce down to the desired level. This procedure was adopted in, amongst other places, Poland (see ILO, Interdepartmental Project on Structural Adjustment: *Public sector adjustment through employment: Retrenchment policies and practices in Poland*, Occasional Paper No. 20 (Geneva, 1993), p. 32).

termination of the employment relationship.<sup>168</sup>

At present, a number of adopted measures aim at, *inter alia*, the reassignment of workers and the reduction of work time, since negotiation between the social actors is often the means by which the scope and need for the implementation of measures is determined.

However, while it is true that various statutes place an obligation on employers to reassign workers,<sup>169</sup> these are, generally, isolated instances and the feasibility and practical application of these obligations is debatable. This is perhaps due to a lack of social consensus supporting the enforcement of the legislation coupled with a shortage of jobs.

In practical terms, collective bargaining and framework agreements have become basic instruments in some countries for the development of not only procedures governing the implementation of collective dismissals, but also of legislative reform of termination of employment generally. In general, procedures for collective dismissal that have emerged out of agreement between the social actors have been maintained peacefully and have won approval and consensus support. This suggests that in a context of globalization and economic competition, it is necessary to arrive at agreed measures on the implementation of collective dismissals.<sup>170</sup>

To illustrate, since 1993 a series of employment agreements, based primarily on the reduction of working hours, have been developed in Germany. Negotiated in the metal engineering sector, particularly in the automobile industry,<sup>171</sup> these agreements provided that the enterprise in question would not carry out collective dismissals for a specified period, in exchange for a reduction of working time and wages, provided also that workers were assured a guaranteed monthly income.

In Belgium, many collective agreements signed by joint committees contain agreements to avoid dismissals. In the chemical industry, the joint committee drew up a list of the possible options which included early retirement, work-sharing, career interruption and so on.<sup>172</sup>

These practical examples and others from recent years demonstrate that the success of proposals can depend largely on industry agreement. Yet, other approaches to this issue have also been attempted. In May 1996, the Government in Sweden introduced a general policy plan to fight unemployment. That

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<sup>168</sup> See Evans-Klock et al., *op. cit.*

<sup>169</sup> In Romania there are provisions for skills retraining; in Azerbaijan, the employer is obliged to find another post within the enterprise and must obtain the consent of the worker before effecting the transfer; in Finland, the possibility of obtaining alternative employment must be examined.

<sup>170</sup> See E. Lee: *The Asian financial crisis: The challenge for social policy* (Geneva, ILO, 1998).

<sup>171</sup> The most famous, because of its innovative aspects, was concluded in the Volkswagen group in 1993. Trade unions in the sector reproduced these agreements with different enterprises during 1994 and 1995 (with Mercedes Benz and General Motors, among others).

<sup>172</sup> See ILO: *Protection against unjustified dismissal*, *op. cit.*, para. 332.



plan included training programmes, tax cuts, and reform of laws on dismissal to reduce open unemployment by 50 per cent by the year 2000. The proposal was part of a government initiative based on legislative flexibility and was harshly criticized by the trade unions, which rejected the plan as a coercive method which had no regard for workers' interests. Although this reform was rejected, there was, however, constructive dialogue on the formulation of measures to lower unemployment. A further approach was taken in the Catalan Autonomous Community. A 1996 pact was concluded between trade unions and employers which established a committee to study widening the objective reasons for dismissal prescribed in the Spanish Workers' Charter, a move designed to reduce the costs of many dismissals hitherto considered unlawful.<sup>173</sup>

Legislative reforms on dismissal are now at the centre of social debate, since plans to relax legislative controls on dismissal are sure to attract radical opposition from trade unions, and governments are sure to experience intense pressure from employers' organizations to increase flexibility.<sup>174</sup> To date, consensus-based legislative reforms have been the only ones to succeed since unilateral dictates have been harshly criticized by trade union associations (as has happened in Sweden and Peru<sup>175</sup>) and have been the cause of conflicts and social unrest.<sup>176</sup> From this perspective, it may be desirable for changes to occur through bilateral or trilateral agreements which give the initial "green light" and endorse the need for reform. Provided dialogue is not put at risk, governments may nonetheless see benefits in adopting measures that promote employment, facilitate the growth of enterprises, make working time more flexible (as in France), encourage part-time work with supplementary compensation for loss of income (as in Finland) and implement any other legal steps which promote sustainability of the enterprise and contribute to development and social peace.

## Final considerations

In taking into account the divergent conceptions from different legal traditions, the principle of a worker's right to employment security is consistent with the employer's freedom to manage. In order to reconcile these interests, various legislation has tried to introduce a social dimension to employment, by erecting a system of safeguards against unjustified or unfair dismissal. Although this may not, in practice, guarantee the reinstatement of the worker, it usually leads to a right to compensation and other forms of

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<sup>173</sup> In this context, the compensation payable by the employer is 45 days' wages for each year of service in the case of unlawful dismissal and 20 days' wages in the case of dismissal on objective grounds.

<sup>174</sup> Recent reforms that have increased levels of social protection, which are already perceived as being high, (for example, the reforms in the 1990s in some Latin American countries including Paraguay and Venezuela) have been met with discontent on the part of employers' organizations, which perceive such reforms as rigid and as a handicap to economic development.

<sup>175</sup> The current lack of support and weakness of the trade union movement in some sectors and countries means there may be reduced conflict when government measures are implemented. Peru has had three legislative reforms on flexibility in the past three years and few industrial disputes. This was perhaps attributable to disunity and weakness within the thirteen workers' associations rather than acquiescence to the reforms.

<sup>176</sup> Such as in the Republic of Korea. See Lee, *op. cit.*

relief which can restrict the practice of arbitrary dismissals.

The existence of rules on dismissal, of necessity, may dissuade the employer from dismissal, and may impose additional costs on the employer and/or delay the implementation of the decision to terminate employment. However, there is no convincing proof that these direct costs have a negative impact on employment and unemployment levels. In practice, in many industrialized countries, collective restructuring involves social plans which cushion the costs of dismissal through special subsidies (financed by public institutions) and relocation plans which allow workers to take on new jobs. At the same time, the number of unlawful individual dismissals has apparently declined in many countries. One cause of this decrease appears to be the liberalization of fixed-term contracts and other atypical employment relationships which avoid recourse to dismissal by offering the possibility of new contracts which are easily or automatically terminated.

In developing countries the lack of effective control by the authorities of unlawful dismissals (partly due to shortages of human resources), combined with the lengthy appeal procedures and the inadequacy of compensation levels (which are often soon outdated because of high rates of inflation) can make it difficult to effectively apply the rules on unlawful dismissal.

The economic impact of tax rates, import restrictions, interest rates, the supply of raw materials and world commodity prices can outweigh labour costs. Thus, policies of stability<sup>C</sup>including employment security<sup>C</sup>may benefit employers<sup>=</sup> in the medium term.

Recent industrial relations literature appears to be taking a new look at redundancy and employment protection legislation (including dismissal regulation) and has highlighted the benefits of employment security and long-term contracts. These benefits may include cooperative employment relationships, greater internal flexibility, acceptance of technological change, enhanced skills acquisition, and better incentives to invest in the improvement of staff training.<sup>177</sup> From this perspective, change should be based on consensus and an adequate system of industrial relations that respects legal standards, facilitates the effective participation of workers<sup>=</sup> representatives in the operation of the enterprise and offers economic benefits and protection to workers.

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<sup>177</sup> P. Osterman: *Employment futures, reorganization, dislocation and public policy*. (Oxford, Oxford University Press, 1988). See also, OECD, *Employment outlook*, op. cit., Ch. 2.

## **PART II : COUNTRY SUMMARIES**

### ***Argentina***

#### **Sources of regulation**

The Constitution of Argentina<sup>178</sup> is the primary source of labour law in Argentina. *Art. 14bis* establishes that labour in its several forms shall enjoy the protection of the law which safeguards workers against arbitrary dismissal and stability of public employment. It also provides that trade union representatives will enjoy the guarantees necessary for carrying out their union tasks and those relating to their employment security.

Specific sources of labour law are contained in the 1976 Act No. 20744 governing contracts of employment (ECA), supplemented by the National Employment Act (NEA), and in Act No. 24013 of 13 November 1991, which was passed to establish programmes and measures of employment promotion. In addition, Act No. 24467 of 25 March 1995 governs small and medium-sized industries and introduces specific provisions on the termination of the employment relationship, while Decree No. 2072/94 of 25 November 1994 regulates procedures for the prevention of crises and outlines measures to be adopted in the event of collective dismissal.

Professional rules and works rules, collective agreements or awards having the same force and effect (*sec. 1*, ECA), international treaties and case law supplement this body of legislation.

#### **Scope of legislation**

The provisions of the ECA do not apply to persons employed by the national, provincial or municipal civil service (except where they are expressly included within its scope or within that of collective labour agreements), domestic servants and agricultural workers (*sec. 2*, ECA).

#### **Contracts of employment**

In accordance with *sec. 21* of the ECA, there is deemed to be a contract of employment, regardless of its form or designation, whenever a physical person undertakes to perform actions, tasks or services for the account and under the authority of another person, for a specified or unspecified period and in return for remuneration. The clauses of such a contract, as regards the form of the work and the conditions in which it is to be performed, are subject to the mandatory provisions of the law, to the relevant regulations, collective agreements or awards having the same force and effect, and also to usage and custom.

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<sup>178</sup> Published in the *Boletín Oficial*, 23 Aug. 1994.

*Sec. 23* of the ECA also establishes that an employment relationship exists whenever a person performs actions, tasks or services for the account and under the authority of another person, voluntarily and in return for remuneration, regardless of the formal basis of the relationship.

The existence of a contract of employment is presumed where services are performed, unless the circumstances, relationships or causes out of which it arose indicate the contrary. There is also such a presumption where the terms used to express the contract are not provided for in labour law, on condition that the circumstances are such that the person performing the services cannot be regarded as an employer (*sec. 23*, ECA).

The classic form of contract is one of unspecified duration (*sec. 90*, ECA); the NEA confirmed the principle of unspecified duration as a primary characteristic of a contract of employment, giving preference to contracts of indefinite or unspecified duration in case of doubt as to the terms and conditions governing employment contracts (*sec. 27*, NEA). This type of contract may remain in force until its termination upon the retirement of the worker (*sec. 91*, ECA). Alternatively, a contract of unspecified duration may be for seasonal work concluded where the relationship between the parties, based on the activities that are characteristic of the normal functions of the enterprise or operation, exists only for specific periods of the year and is liable to be repeated for a given period in the course of each year because of the nature of the activity carried on (*sec. 96*, ECA, and *sec. 66*, NEA).

Other than these types of contracts, there are contracts for specified periods, which may take various forms, including fixed term, when the duration is expressly fixed or where the nature of the tasks or activities justifies its termination. This type of contract may not be concluded for more than five years (*secs. 90 and 93*, ECA). There also exist casual work contracts, possible in the context of exceptional and temporary requirements whose duration cannot be foreseen at the time of concluding the contract (*secs. 99 and onwards*, ECA and *secs. 68 et seq.*, NEA). Fixed-term contracts can also comprise contracts for the launching of a new activity or for the rendering of services in a new establishment, or on a new production line in an existing establishment (a new type of contract, *sec. 47*, ENA); contracts providing initial employment for youths, concluded between employers and young persons up to the age of 24 years, who have undergone previous training and are looking for initial employment (new types of contract, *sec. 51*, NEA); on-the-job training contracts concluded between employers and young persons up to the age of 24 years who have no previous training and are looking for their first employment (new type of contract, *sec. 58*, NEA); and fixed-term employment contracts for the promotion of employment, which are concluded between employers and workers registered as unemployed in the Employment Service System or who have ceased to render services in the public sector as a result of administrative rationalization measures (new contractual condition, *sec. 43*, NEA).<sup>2</sup>

Act No. 24467, promulgated on 23 March 1995, with the objective of promoting growth and development of small and medium-sized industries, establishes in *sec. 89* that small enterprises may make use of the accepted terms and conditions of employment prescribed in the NEA (see above), with the proviso that it does not affect compensation prescribed in *sec. 38* of the NEA (see below).

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<sup>2</sup> One of the main innovations of the NEA is the recognition of the possibility of concluding contracts of specified duration even when they cover or fill posts or tasks of a permanent nature (*secs. 43 and 109*, NEA). Thus, the legal text invokes the principle of employment stability for exceptional requirements which have to do with the promotion of employment.

As far as the probation period is concerned, Act No. 24465 of 23 March 1995 lays down that a contract of indeterminate duration is considered probationary during the first three months, and collective labour agreements may extend this time limit up to six months (this provision has been incorporated into *sec. 92bis*, ECA).

## Termination of employment

*Secs. 240 et seq.* of the ECA list the circumstances in which employment contracts may be terminated, other than at the initiative of the employer, as follows:

- C unilaterally by the worker;
- C by mutual agreement of the parties;
- C for reasons of *force majeure*;
- C on the death of the worker or employer;
- C on expiry of the agreed term, on account of bankruptcy or liquidation of the employer, and
- C on the worker's retirement.

## Termination of employment at the initiative of the employer

A contract of employment may be completely terminated before its expiry irrespective of the type of contract concluded, with the payment of a compensatory indemnification to the worker, additional to that due to him or her on the grounds of length of service with the enterprise, and respecting the concept of advance notice of varying duration depending on the length of service completed by the worker (*sec. 231*, ECA).

Either of the parties may terminate the contract of employment if the other fails to discharge his or her obligations under the contract to an extent that is prejudicial to it and if the seriousness of this failure means that the relationship cannot continue. Argentinean legislation, unlike other legislation in the region, opts for an open definition of termination of **A**good cause<sup>@</sup>, without indicating specifically the conduct or acts that will be considered as **A**good cause<sup>@</sup> for firing a worker. Where a challenge arises, the decision is thus left up to the judge who has to resolve the issue taking into consideration the circumstances of the case. Presiding judges assess cases at their discretion, giving due regard to the nature of the relationships established by a contract of employment as provided in the ECA (*sec. 242*, ECA). When an employer decides to dismiss a worker for good cause, notice of the fact must be given in writing with a sufficiently clear indication of the grounds invoked for the termination of the contract. Where the termination is challenged by the other party, no changes in the grounds indicated in the notice are permitted (*sec. 243*, ECA).

A worker's abandonment of his or her work may be regarded as constituting a failure to discharge his or her duties only if he or she is found to be absent after formal notice has been served on the worker instructing him or her to resume work within a period appropriate to the circumstances of the case (*sec. 244*, ECA).

Where a dismissal is ordered for reasons of *force majeure* or on account of a shortage or reduction of work that is duly proved to be beyond the employer's control, the worker is entitled to

receive compensation. In such cases the first workers to be dismissed will be those with the shortest length of service (*sec. 247, ECA*).

Where a worker terminates his or her contract for good cause, he or she is entitled to the compensation provided for in the ECA (*sec. 246, ECA*).

Under the provisions of the ECA, no woman is allowed to work for the 45 days before and 45 days after giving birth. A woman worker must notify her employer of her pregnancy and provide a medical certificate stating that her confinement will probably take place within the period indicated. She is to retain her employment during the period indicated and is entitled to the allowances granted by the social security schemes. She must also be guaranteed stability of employment, which will constitute an acquired right from the date on which she notifies her employer of the fact that she is pregnant (*sec. 177, ECA*).

It is presumed, in the absence of proof to the contrary, that dismissal of a female worker is carried out on the grounds of maternity or pregnancy if it took place within seven and a half months before or after confinement, if and when the woman has fulfilled her obligation to notify and prove, through certification, the fact that she is pregnant and, if applicable, the birth of the child. Under such circumstances, she should be paid compensation equivalent to one year's wages in addition to any other compensation required by law (*secs. 177 and 182, ECA*).

The ECA also provides for employment stability in the event of marriage, considering null and void any dismissal which takes place within three months before or six months after a worker's marriage, on condition that the employer has been duly notified of it in the prescribed form. Where an employer fails to comply with this prohibition, he or she must pay compensation equal to one year's remuneration which should be added to any other remuneration prescribed by law (*secs. 180, 181 and 182, ECA*).

A worker belonging to a board of management or holding representative office in an occupational association with trade status, in bodies which require trade union representation, or holding political office in the Government, is entitled to automatic leave without pay, and the employer must keep his or her job open and reinstate him or her when he or she ceases to perform his or her duties. The worker is to enjoy security of employment throughout the term of office and for one year thereafter, unless there is good cause for dismissal (*sec. 48, Act No. 23551*).<sup>3</sup>

Trade union representatives in an enterprise may not be suspended, have their working conditions changed, or dismissed throughout their terms of office and for one year thereafter, unless there is good cause for doing so. Security of employment for trade union representatives begins from the time of his or her candidature for a representative office in a trade union is submitted, and he or she may not be dismissed or suspended without good cause, nor may his or her conditions of work be modified for a period of six months (*secs. 48 and 50, Act No. 23551*).

Where, on expiry of the periods for which work may be interrupted on account of a bona fide accident or illness, a worker is unable to return to work, the employer should keep his or her post open for one year, counting from the expiry of such periods (*sec. 211, ECA*).

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<sup>3</sup> Act No. 23551 of 14 Apr. 1988 on trade unions.

Where a worker fulfils the qualifying conditions for retirement pensions and begins the necessary formalities, the employer must maintain the employment relationship until the appropriate fund grants the benefit, for a maximum of one year (*sec. 252, ECA*).

An employer must keep a worker's post open if the latter is obliged to perform compulsory military service because of an ordinary call-up, mobilization or special call-up, and should continue to do so from the date of the call-up and until 30 days after the completion of the service (*sec. 214, ECA*).

### **Notice and prior procedural safeguards**

A contract of employment may not be terminated at the instance of either of the parties without prior notice or, in the absence of such notice, without compensation, which, where the contract is terminated at the instance of the employer, will be additional to the compensation due to the worker because of his or her length of service with the undertaking. Notice should be given by the employer one month in advance where the worker has been employed up to five years with the same employer, and two months in advance where he or she has had more than five years' service (*sec. 231, ECA*).

The only formal requirement for dismissal with good cause is the submission of written notice of the fact of dismissal with a clear indication of the grounds invoked for the termination of the contract. There is no legally prescribed time limit for the submission of this notice (*sec. 243, ECA*).

Prior to the notification of dismissals or suspensions on the grounds of *force majeure*, or for economic or technological reasons, the prescribed crisis prevention procedure (as stated in *sec. 98 et seq., NEA*) should be initiated. If no agreement is reached, or if the agreement is not officially approved, the employer must give ordinary notice in accordance with the terms prescribed by the ECA for dismissal without good cause (see above).

Supplementing the provisions of the NEA, Decree No. 2072/94 (plan for enterprises in crisis) of 25 November 1994, states that when the procedure for crisis prevention is initiated at the instance of the employer and affects enterprises employing more than 50 workers, the initial application should, as a minimum, clearly state the measures the enterprise proposes to overcome the crisis or to minimize its effects. In particular, the employer must indicate the measures he or she proposes in each of the following cases:

- C effects of the crisis on the job and proposals for preserving the job;
- C functional schedule and wage mobility;
- C investments, technological innovation, production adjustment and organizational changes;
- C retraining and skills upgrading for the workforce;
- C internal and external reassignment of excess workers and the assistance scheme for reassignment;
- C reformulation of operational conditions, concepts and remunerative structures and content of posts and functions;
- C agreed contributions to the integral system of retirement and pension benefits; and
- C assistance in the creation of productive ventures for excess workers.

Similarly, if the proposal made by the employer to overcome the crisis includes staff reductions, the submission must indicate the number and category of workers to be made redundant and quantify the compensation packages offered to each worker concerned (*sec. 1, Decree No. 2072/94*).

There are also provisions which state that when the termination of a contract results from an agreement reached between the employer and the trade union representing the workers, the Ministry of Labour and Social Security, at the time of approval, should grant increases in the unemployment benefits, in the amounts fixed by regulation, and within the budget resources available (*sec. 4*, Decree No. 2072/94).

The termination of employment at the expiry of the agreed term of fixed-term contracts requires between one and two months' notice if the contract had been concluded for more than one month. Contrary to that which occurs in other situations, failure to give notice may not be covered by compensation in lieu of notice, but will incur the consequence of transformation of the contract into a contract for an unspecified period (*sec. 94*, ECA).

The employer is not required to give prior notice of termination of contracts for casual work (*sec. 73*, NEA).

An employer who has concluded contracts under promotional terms and conditions must give 30 days' prior notice of termination of the contract or pay compensation of half a month's wages in lieu of notice where the duration of the contract does not exceed 12 months, and one month's wages in respect of longer contracts (*sec. 37*, NEA).

In small enterprises the period of notice is calculated from the day after it has been submitted in writing and will last for one month regardless of the length of service of the worker (*sec. 95*, Act No. 24467).

## **Severance pay**

In the absence of notice, or if insufficient notice is given, the employer must pay the worker compensation equivalent to the remuneration corresponding to the periods of notice prescribed by law (see prior procedural requirements, dismissal without good cause, above), which will be counted from the first day of the month following the day on which notice is given (*secs. 231 and 233*, ECA).

Where a contract of employment is terminated by the employer without notice and on a day which does not coincide with the last day of the month, the compensation payable to the worker must be combined with an amount equal to the wages for the remaining days of the month in which the dismissal occurred (*sec. 233*, ECA).

An employer who orders a worker's dismissal without good cause, either with or without notice, must pay the worker compensation equal to one month's wages for every year of service and every fraction of a year greater than three months, taking as a basis for the calculation the highest monthly remuneration normally and regularly received during the last year or during the period for which the services were performed, whichever is less.

The amount of such compensation should not exceed the equivalent of three times the monthly sum resulting from the average of all remuneration provided for in the collective labour agreement applicable to the worker at the time of his or her dismissal in respect of a legal or agreed day's work, excluding length of service.

In the case of workers who are not protected by collective labour agreements, the limit established in the preceding paragraph will be the one corresponding to the service agreement applicable to the



establishment where the work is being performed, or to the most favourable agreement, where more than one exists.

In the case of workers paid on commission or with variable remuneration, the service agreement to be applied should be the one pertaining to such workers or applicable to the enterprise or establishment where they are performing services, whichever is the more favourable. The amount of such compensation should in no circumstance be less than two months' wages (*sec. 245, ECA, and sec. 153, NEA*).

Where an employer orders the dismissal of a worker with good cause and, in the judge's estimation, can provide justification for the decision, the dismissal will proceed without entitlement to compensation (*secs. 242, 243 and 244, ECA*).

Where a dismissal is ordered for reasons of *force majeure* or on account of a reduction of work that is duly proved to be beyond the employer's control, the worker is entitled to receive compensation equal to half that provided for in cases of dismissal without good cause (see above) (*secs. 247 and 245, ECA and sec. 153, NEA*).

If the worker can prove that his or her withdrawal from the employment contract was based on good cause, he or she will be entitled to compensatory indemnification (*secs. 232 and 233, ECA*) and to severance pay (*sec. 245, ECA*) (see above).

In fixed-term contracts, an unjustified dismissal which occurs before the expiry of the contract will give the worker the right, apart from the compensation corresponding to the termination of the contract in such circumstances, to damages in accordance with ordinary law.

When a contract is terminated after due notice has been given and after the contract has been fully performed, the worker is entitled to compensation prescribed for cases of dismissal without good cause, on condition that the contract has been in force for at least one year (*secs. 95 and 250, ECA*).

There will be no entitlement to compensation where the employment relationship ceases as a result of the termination of the work or task assigned, or the cessation of the grounds giving rise to the contract (*sec. 73, NEA*).

In the case of contracts concluded under special terms and conditions, except those of initial employment of youths and on-the-job training, the termination of employment will give rise to compensation corresponding to half of the monthly wage, taking as a basis for the calculation the highest monthly remuneration normally and regularly received during the period for which the contract was in force, in addition to compensation in lieu of notice.

Although employment contracts in small enterprises are contracts concluded under special promotional terms (see above), the compensation prescribed under *sec. 38* of the NEA does not apply (*sec. 89, Act No. 24467*).

## **Avenues for redress**

Litigation of individual legal disputes, regardless of who the parties are (including the Government), through claims or counter-claims based on contracts of employment, collective labour agreements, awards having the effect of collective agreements, legal provisions or labour law regulations, and actions

between employers and workers relating to an employment contract, although based on provisions of ordinary law applicable to it (*sec. 20*, Act No. 18345<sup>4</sup>), fall within national labour regulations.

Under the provisions of *sec. 105* of Act No. 18345, final rulings and all decisions which put a partial or complete end to the action are subject to appeal, since such rulings and decisions are not subject to appeal when the value they seek to challenge on appeal is equivalent to four times the sum of the minimum living wage in force at the time the action was brought (*sec. 106*, Act No. 18345). When the ruling or decision against which the appeal is made is due to disciplinary reasons, no payment will be required (*sec. 108*, Act No. 18345).

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<sup>4</sup>Act on the organization and procedure in national labour regulations.

## *Australia*

### **Sources of regulation**

The central piece of federal legislation governing the termination of employment in Australia is the Workplace Relations Act 1996 (WRA) (as supplemented by the Workplace Relations Regulations 1996 (WRR)). In addition, the states of Australia, with the exception of Victoria, have unfair dismissal legislation which employees covered by state awards may be entitled to use. Collective agreements and awards may also form a supplementary source of regulation of termination of employment.

Other legislation relevant to termination of employment in the private sector is the Sex Discrimination Act 1984, the Racial Discrimination Act 1975, the Human Rights and Equal Opportunity Commission Act 1986 and the Disability Discrimination Act 1992. Given the extensive list of grounds on which employment may not be terminated in the WRA (*sec. 179 CK(2)*, WRA), employees covered by the it may be able to elect under which legislation to bring a claim of discriminatory dismissal. Anti-discrimination legislation also exists in many states of Australia.

Employees who are not covered by the WRA, or state legislation, may bring a wrongful dismissal claim at common law. Case law decided under the WRA, and under the previous legislation, is also a source of regulation, particularly the Termination, Change and Redundancy Test Case 1984 (TCR Case), a decision of the Full Bench of the Industrial Relations Commission dealing with redundancy issues for award employees.

### **Scope of legislation**

With respect to allegations that a dismissal was harsh, unjust or unreasonable, the WRA and WRR cover (apart from employees of the State) employees covered by federal awards and employees of constitutional corporations. They include waterside workers, maritime employees, and flight crew employed in the course of interstate or international trade or commerce (*sec. 170 CB(1)*, WRA). Regarding an allegation that a dismissal was discriminatory, in breach of notice, or in violation of the notice requirements in relation to collective dismissals, the WRA and WRR cover all such employees who are not excluded (*sec. 170 CB(2), (3) and (4)*, WRA). The WRR *excludes* the following employees from the WRA (*Reg. 30B*, WRR):

- C employees engaged for a specified period of time or specified task;
- C probationary employees;
- C casual employees engaged for a short period<sup>179</sup>;
- C trainees; and
- C non-award employees earning more than A\$64,000 per year.

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<sup>179</sup> That is, a period of less than 12 months on a regular and systematic basis for that employer, or any period such that the employee had a reasonable expectation of continuing employment (*Reg. 30B(3)*, WRR).

In addition, daily hire employees in the building and meat industries, seasonal weekly hire employees in the meat industry and certain seafarers are excluded from the notice requirements of the WRA but are covered by the anti-discrimination provisions.<sup>2</sup>

## Contracts of employment

For the purpose of establishing the ambit of the WRA, the WRR contains definitions of fixed term employees, casual employees, probationary employees and trainees.<sup>3</sup> Each of these classes of employee is excluded from the WRA. Notably, a probationary period cannot last for more than three months, unless such longer period is reasonable having regard to the nature and circumstances of the employment. Casual employees cannot be employed on a regular and systematic basis over a period of greater than 12 months, or for any period which induces a reasonable expectation of continuous employment.

## Termination of employment

Employment can terminate, without being considered a dismissal

- C by mutual agreement of the parties;
- C by the death of one of the parties;
- C if the employee resigns by giving any agreed period of notice;
- C if the employment contract is frustrated by a supervening event beyond either party's control; or
- C for fixed-term or casual contracts, upon the expiry of the agreed term or task.

## Termination of employment at the initiative of the employer

The employer can terminate the employment of those who are not covered by the WRA, any unfair dismissal legislation, or any award or collective agreement governing termination by giving the contractual period of notice or, if no notice period has been agreed, reasonable notice.

Under the WRA, an employer must:

- C ensure the dismissal is not harsh, unjust or unreasonable (for those employees to whom this requirement applies (see above));
- C ensure the dismissal is not on a prohibited ground (see below);
- C ensure statutory notice periods are complied with (see below); and,
- C for dismissals of 15 or more employees on economic, technological or structural grounds, consult with any unions of which its employees are a member and notify the government.

*Sec. 170 CK(2)* of the WRA sets out grounds on which termination is prohibited, including:

- C temporary absence of work because of illness or injury (as defined by *Reg. 30C(1)*, WRR);

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<sup>2</sup> That is, these employees are not covered by *secs. 170 CL and 170 CM* of the WRA but are covered by *sec. 170 CK(2)* which deals with prohibited grounds of dismissal (*Reg. 30BA*).

<sup>3</sup> Respectively defined in *Reg. 30B(1)(a) and (b)*, *Reg. 30B(1)(d) and 30B(3)*, *Reg. 30B(1)(c) and Reg. 30B(1)(e)*.

- C union membership or activity;
- C non-membership of a union;
- C acting, or seeking to act, as an employee's representative;
- C the filing of a complaint or participation in proceedings against the employer;
- C absence from work during maternity or parental leave;
- C race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and
- C refusal to negotiate, agree to or amend a workplace agreement.

However, a termination based on the above grounds will be lawful if it is based on the inherent requirements of the position (*sec. 170 CK(3)*, WRA) or, for employees of religious institutions, if the termination is in good faith and to avoid injury to the religious susceptibilities of adherents (*sec. 170 CK(4)*, WRA).

### **Notice and prior procedural safeguards**

The WRA sets out statutory notice periods which must be complied with, unless a payment in lieu of notice is made or the dismissal is on the grounds of serious misconduct (*sec. 170 CM(1)*, WRA). The notice periods range from one to six weeks and depend on the employee's length of service and whether the employee is more than 45 years old (*sec. 170 CM(2) and (3)*, WRA).

For dismissals of 15 or more employees for reasons of an economic, technological, structural or similar nature, notice of contemplated dismissals must be given to the Commonwealth Employment Service (*sec. 170 CL*, WRA). In addition, an employer must consult any trade union of which any of its employees is a member regarding contemplated dismissals, including the reasons for the terminations, the employees likely to be affected, the timing of the terminations and measures to avert or minimize the effects of the terminations (*sec. 170 GA*, WRA).

*Sec. 170 CG(3)* of the WRA sets out the procedural aspects that the Commission will consider in determining whether a dismissal was harsh, unjust or unreasonable (see above for those employees who are able to make such an allegation). These include:

- C whether there was a valid reason for the termination related to the capacity or conduct of the employee or the operational requirements of the employer;
- C whether the employee was notified of that reason;
- C whether the employee was given an opportunity to respond to any reason related to his or her capacity or conduct; and,
- C for terminations relating to unsatisfactory performance, whether the employee had been warned about unsatisfactory performance (*sec. 170 CG(3)*, WRA). In addition, *sec. 170 CA(2)* of the WRA states that the aim of the procedures and remedies under that Act is to ensure a fair go all round to employers and employees.

### **Severance pay**

The WRA and WRR only specify notice periods and do not require redundancy compensation or severance pay. Redundancy compensation levels, severance pay, and redundancy procedures and selection criteria may be provided pursuant to the provisions of an award. The minimum level of redundancy benefits for employees covered by awards was established by the TCR case. Such provisions are usually included in an award following the consideration by the Commission of an application made by one of the parties to an award, usually a trade union.

### Avenues for redress

The body which will determine any complaint about a dismissal depends on the grounds of the complaint. If the employee alleges a dismissal was harsh, unjust or unreasonable the complaint will be heard by the Industrial Relations Commission (*sec. 170 CE, WRA*) if, and only if, the Commission is unable to settle the complaint by conciliation (*sec. 170 CF, WRA*). If, on the other hand, the employee is alleging discrimination or breach of notice requirements (either for collective or individual dismissals), the Federal Court will hear the matter; but again, if, and only if, the Commission is unable to settle the matter by conciliation (*ibid.*). If both grounds are alleged, the employee must elect the forum in which to pursue the complaint. However, the Commission may not hear an application if an effective alternative remedy under another federal law or state law exists (*sec. 170 GC, WRA*).

If the Commission determines that a dismissal was harsh, unjust or unreasonable, it may (having regard to the employer's financial circumstances and the employee's length of service) reinstate or re-engage the employee, order damages in lieu of reinstatement, or order compensation for lost remuneration provided such compensation does not exceed the amount that employee earned from that employer in the last six months, up to a maximum of six months pay or A\$32,000, whichever is the lesser (*sec. 170 CH, WRA*). The Commission also hears complaints about non-consultation of unions for collective dismissals and, where there has been a failure to consult, it may make any order to restore the parties, as far as possible, to the position they would have enjoyed had there been consultation (*sec. 170 GA(2), WRA*).

If the Court finds that a dismissal is discriminatory it may award any of the following: a penalty, reinstatement or compensation (*sec. 170 CR, WRA*). When the Court finds that the requisite notice period has not been given it can award damages in lieu of notice (*sec. 170 CR(4), WRA*). Finally, the Court may order an employer not to terminate certain employees (*sec. 170 CR(3), WRA*) if the Commonwealth Employment Service has not been notified of pending collective dismissals.

## *Austria*

### **Sources of regulation**

Several statutes comprise the Austrian law on termination of employment at the initiative of the employer. The most important are the Civil Code (CC), *sec. 1162*, the Works Constitution Act (WCA) and the White Collar Employees Act.

Individual employment relationships are not uniformly regulated by the same statute. The general rules laid down in the CC only apply when no special statutes apply. Thus, special occupational regulations concerning dismissal are also found under: *sec. 72*, Commerce Regulations (for industrial workers); *sec. 17*, Estate Employees= Act; *sec. 13*, Domestic Employees Act; *sec. 18*, Janitors= Act; *secs. 2 and 4*, Journalists Act; *sec. 30*, Theatrical Artists Act; *sec. 27*, Agricultural Employment Act; *sec. 7*, Private Vehicle Drivers= Act; *sec. 202*, Mines Act; *sec. 20*, Inland Navigation Act, Job Security Act, Disabled Persons Act, and the Maternity Protection Act.

Collective agreements and individual employment contracts may also provide special protection for the employee where the provisions are more favourable to the employee than those of the aforementioned legislation.

### **Scope of legislation**

General rules governing labour contracts are contained in the CC but are subordinate and only apply in the absence of special statutes.

General protection against dismissal is laid down in *secs. 105 et seq.*, WCA, and only applies to employees in establishments where five or more employees are regularly employed, which is the same limit for establishing a works council (*sec. 40*, WCA). For protection against socially unacceptable dismissal, the employee must have been employed in the establishment for at least six months (*sec. 105(3)(2)*, WCA).

Not covered by the WCA, and hence not subject to general protection against dismissal, are persons employed in the agriculture sector, private households, journalists, actors and the public service (including railways and telecommunication and members of the armed forces). While the public sector is covered by special statutes providing a far more effective protection against unwarranted dismissal than in the private sector, persons employed in the agricultural sector as well as in private households are effectively excluded from general dismissal protection.

The following employees are also expressly exempted from the protection laid down in *sec. 36(2)*, WCA:

- C members of the authority responsible for the statutory representation of a corporate body;
- C senior salaried employees with decisive influence in the management of the establishment;
- C persons employed principally because of their upbringing, treatment, cure or resettlement, so long as they are not employed under a contract of employment;

- C persons employed on instructions from an administrative or judicial authority ordering their detention in custody while awaiting trial, imprisonment or preventive detention;
- C persons whose employment is mainly motivated by religious, charitable or social considerations, so long as they are not employed under a contract of employment; and
- C persons employed for short periods for purposes of their education or training.

### **Contracts of employment**

From a legal point of view, a contract of employment is based on the principle of freedom of contract under civil law. Freedom of contract means that it is up to the parties whether or not and with whom they conclude a contract and what the agreement consists of.

Employment contracts may take various forms. The contract may be for temporary work, for a fixed or unspecified term or duration. Fixed-term contracts cannot be terminated early, except for serious cause or in accordance with the contract. There is also provision for lifetime and permanent employment as well as employment under a trainee or apprenticeship relationship.<sup>180</sup>

### **Termination of employment**

Contracts of employment may terminate, other than at the initiative of the employer:

- C by mutual agreement;
- C by resignation;
- C on request, during a probationary period; and
- C on the expiry of a fixed-term contract.

### **Termination of employment at the initiative of the employer**

Austrian law incorporates a distinction between a summary dismissal, which immediately terminates the employment contract, and an ordinary dismissal with notice, which ends the employment contract at the end of the period of notice. Generally, no ground is required for ordinary dismissals. A ground is required for summary dismissals, but there is no remedy of reinstatement.

Each contractual party is free to end a contract whenever they wish to. This can be done by mutual dissolution or unilateral termination of the contract. However, this freedom is curtailed by specific occupational legislation intended to protect the employee from unfair dismissal.

Summary dismissal presupposes that one party cannot objectively be expected to continue the employment relationship, not even for the period of notice. Whether such serious grounds exist in particular cases is laid down in many different ways but not uniformly for all employees (*sec. 1162, CC*).

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<sup>180</sup> R. Strasser: Austria, in R. Blanpain: *International encyclopaedia for labour law and industrial relations* (The Hague, Kluwer Law International, 1999), Vol. 2, p. 59.



*Sec. 82, Commerce Regulations*, lists the following as sufficient grounds for summary dismissal of workers:

- C deceit on the part of the employee when entering into the contract;
- C incompetence to do the work;
- C chronic alcoholism despite repeated warnings;
- C betrayal of professional secrets and certain criminal acts;
- C prejudicial work on the side (moonlighting); and
- C persistent neglect of duties or leaving work without permission.

*Sec. 27, White-Collar Employees Act*, also lists the following as grounds for summary dismissal:

- C untrustworthiness or disloyalty on the part of the employee;
- C competing with the employer or accepting gifts (bribes);
- C incapacity to work, or failure to carry out work; and
- C attacking the employer.

Other reasons for summary termination are given in the Business Code for manual workers, and the Salaried Employees Act for non-manual/salaried employees.

Provided that termination with notice is permitted, there is no requirement to show cause or good reason in order to give notice.

According to *sec. 105(3)* of the WCA, a dismissal could be *Asocially unjustified* if it harms the legitimate and fundamental (social) interests of the employee or is based on the employer's reaction to certain legitimate actions of the employee.

Dismissal is also illegal in circumstances involving:

- C activity as an employer's representative or participation in a strike;
- C race, colour, sex, marital status, sexual orientation, religion, political opinion, ideological conviction, national or social origin;
- C activity as a safety representative;
- C pregnancy or maternity (women may not be dismissed throughout their pregnancy or for a period of four months after the birth or four weeks after the end of the leave to which a mother is entitled to after delivery (*sec. 10, Maternity Protection Act*));
- C military service (employees may not be dismissed from the time of call-up until one month after the completion unless the court had given prior consent because of the closure of the employer (*secs. 6 et seq., Job Security Act*)); and
- C violation of ethical standards. Notice can be unethical depending on the motives of the person giving notice. According to the prevailing view, unethical notice is null and void, pursuant to *sec. 879, CC* (counter to court decisions).

By a Ministerial Order of 1979, and pursuant to its *sec. 2*, there is a collective dismissal if the number of employees is to be reduced within four weeks:

- C by at least five employees in undertakings of 20-99 employees;
- C by at least 5 per cent of employees in an establishment with 100-599 employees;
- C by at least 30 employees in an establishment with at least 600 employees; or
- C by at least five employees older than 50 years.

## Notice and prior procedural requirements

Notice can be given verbally, in writing or by conclusive behaviour (i.e. behaviour that on an objective assessment makes it clear to the employee that the employment relationship is to end). Notice is only valid if the other party duly receives it. It is not necessary to give reasons for giving notice.

The period of notice to which an employer is bound is typically in proportion to the period of employment (seniority principle). However the periods of notice differ for white-collar and blue-collar workers, and in addition there are also special periods of notice for particular occupations. Collective agreements also frequently establish notice periods which are more beneficial to employees than the applicable statutes.

White-collar workers are entitled to the following periods of notice (which must run to the end of a trimester unless the two parties agree to let the period of notice run to the 15th or last day of a particular month) (*sec. 20(2)*, White-Collar Employees= Act):

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Service	Period of notice
Up to 2 years	6 weeks
More than 2 years	2 months
More than 5 years	3 months
More than 15 years	4 months
More than 25 years	5 months

In the case of blue-collar workers, *sec. 77*, Commerce Regulations, specifies that in the absence of any other arrangement, notice shall be 14 days. This provision, however, is not enforceable and may be shortened by contract or collective agreement.

The CC stipulates a minimum 14 days= notice unless the employee concerned is paid on a daily basis or by piece-rate, in which case only one day=s notice needs to be given. If the employee is paid on a weekly basis or has at least three months=service, notice must be given on the first day of the working week so that termination takes effect on the last day of the working week (*secs. 1159, 1159b*, CC).

In view of the above, longer notice periods are laid down in many industry-level collective agreements and some company agreements.

In current court practice, any period of notice which is less than that stipulated or which is set for an earlier date than permissible is considered as termination of an employment relationship at an early date. It is therefore treated as *unfounded premature dismissal*. As such, the employee is entitled to pay for the remaining period of time, that is, until the date when a regular termination of the employment relationship, in accordance with the period of notice, is possible.

Summary dismissal should be declared immediately if a party has valid grounds. By delaying, the employer loses the right to terminate summarily. The employer is not required to inform and consult with the works council before dismissal but must do so within three working days of the dismissal.

Works council members and candidates, pregnant employees, employees on maternity leave and military service personnel may only be dismissed with the prior consent of the court (*sec. 120(f)*, WCA).

Pregnant women can be dismissed with the consent of the court in cases of the closure of a company or a department (*sec. 10(3)*, Maternity Protection Act). People with disabilities and victims of political persecution may be dismissed only with the prior consent of the invalidity board of the federal State concerned (*sec. 8*, Disabled Persons Employment Act).

The employer must inform and consult with the works council which then has five working days to react to the proposal. It can react in one of the following three ways: it can agree to the proposed dismissal; protest against it; or show no reaction. The way it reacts influences the appeal procedure, but once the information and consultation requirements have been fulfilled the dismissal may go ahead (*sec. 105*, WCA). If the employer gives notice after notifying the works council, but before the end of the five-day period or before the works council has stated its reaction, the dismissal is invalid (*sec. 105(2)*, WCA).

The works council is to be consulted, as with individual dismissals (*sec. 105*, Works Constitution Act), and shall be informed as soon as possible of any collective dismissals or intended alterations to the establishment, and shall discuss such alterations with the employer (*sec. 109(1), (2)*, WCA).

The works council may make proposals to prevent, eliminate or alleviate any consequences of the alteration that are to the workers' disadvantage; in so doing, it shall also take into account the economic requirements of the establishment (*sec. 109(3)*, WCA).

Provision for measures to prevent, eliminate or alleviate the consequences may be made by works agreements in establishments where at least 20 employees are permanently employed. Where agreement cannot be reached between the employer and the works council on the conclusion, amendment or revocation of any such works agreement and no arrangement for all settlements have been made by collective agreement or determination, a decision shall be taken by a disputes board if either of the parties so requests.

The local employment office has to be notified in writing of the employees concerned (e.g. age, gender, education, actual occupation), at least 30 calendar days before notice is given. If the employer gives notice without notifying the employment office, the notice given is null and void (*sec. 2(2)-(4)*, Ministerial Order concerning informing employment offices in case of staff reduction in conjunction with *sec. 105*, WCA).

Periods of notice are as for individual dismissals.

## **Severance pay**

Severance pay is due only if the employment relationship is terminated after a period of at least three years' service in the organization (*sec. 1162b*, CC). The amount of severance pay is paid according to length of service as listed below; however, collective/company agreements or individual contracts of employment may improve on these payments.

<b>LENGTH OF SERVICE</b>	<b>SEVERANCE PAY</b> <b>(month's salary)</b>
<b>3 years</b>	<b>2</b>
<b>5 years</b>	<b>3</b>
<b>10 years</b>	<b>4</b>
<b>15 years</b>	<b>6</b>
<b>20 years</b>	<b>12</b>

Extra payments may be accessed through additional entitlements derived from collective and/or company agreements, or through the works council's successful negotiation of a social plan with the employer.

Employees are not entitled to severance pay if they resign or are justifiably dismissed.

### **Avenues for redress**

Jurisdiction over disputes concerning unfair dismissal lies with the system of labour courts (*sec. 105(4)*, WCA; *sec. 50(1)*, Labour and Social Courts Act).

If the works council states its acceptance of a dismissal, there is no appeal against a socially unjustified dismissal (*sec. 105(6)*, WCA).

If the works council expressly protests against the intended dismissal, within one week of receiving notification, the right of appeal belongs primarily to the council (on the understanding that the employee concerned has asked the council to lodge an appeal) (*sec. 105(4)*, WCA).

If the works council does not comply with a request for appeal, the employee who was given notice has the right to lodge an appeal within one week, i.e. up to the end of the period granted to the works council.

Once appeal proceedings have started, the council's right to appeal passes automatically to the employee concerned if the council withdraws an appeal without the employee's consent. In this case, the employee can continue the appeal proceedings *within 14 days of being informed of the withdrawal*.

If the works council does not state its position, the employee who has been given notice immediately gains the right to appeal within one week of receiving notice (*sec. 107*, WCA).

In the absence of a works council, the right of appeal goes automatically to the employee concerned, right from the start. The period for appealing is within one week of receiving notice. There is no obligation to continue with the employment relationship until the disputed dismissal is resolved (*sec. 105(5)*, WCA).

Two principal avenues of appeal exist. Under *sec. 105(3)* of the WCA, unfair dismissal can be claimed on the grounds that it is:

- C** socially unjustified (applicable only in the case of employees with at least six months=service); or
- C** in response to certain legitimate actions on the part of the employee (e.g. trade union activity/membership, candidature for or membership in a works council, holding office as a health and safety representative, etc.).

For appeals concerning dismissals resulting from legitimate actions on the part of the employee (see *sec. 105(3)*, WCA), the employee must provide convincing proof to show that the dismissal was induced by those actions.

In cases where a socially unjustifiable dismissal is claimed, the employer can refute it on the grounds that it is necessary for operational reasons; there is an obligation, however, to provide substantial proof (*sec. 105(3)*, WCA).

Compensation for unfair dismissal is usually limited to reimbursement of actual loss of earnings between dismissal and ruling; in the case of unfair summary dismissal, pay for the notice period is required. If the court accepts the appeal, the dismissal is immediately declared invalid and, theoretically, the old working relationship resumes.

## ***Bangladesh***

### **Sources of regulation**

The Employment of Labour (Standing Orders) Act, 1965 (as amended in 1985) (ELSA), and the Industrial Relations Ordinance, 1969 (as amended in 1975) (IRO), regulate termination of employment in Bangladesh..

### **Scope of legislation**

The ELSA applies to all shops or commercial establishments, all industrial establishments and all other establishments where five or more workers are employed. It excludes from its scope shop workers or persons employed in commercial enterprises owned and directed by the State (*sec. 1, ELSA*).

### **Contracts of employment**

Employment contracts are divided into various types of work relationships: apprentices, the *baldi* (a person employed in the post of a temporary or permanent worker during his or her absence), casual workers, permanent and temporary workers. The period of probation for a worker is six months for work of a clerical nature and three months for other probationers (*secs. 2 and 4, ELSA*).

### **Termination of employment**

A distinction is made in the ELSA between the *Adischarge@* of an employee and his or her *Adismissal@*. While the former means the termination of services of a worker for reasons of physical or mental incapacity or continued ill health or similar reasons not amounting to misconduct, the latter means the termination of services of a worker for misconduct (*sec. 2(f) and 2(g), ELSA*).

### **Termination of employment at the initiative of the employer**

An employer is only required to justify termination of employment where it falls under the categories of *Adischarge@* or *Adismissal@* as defined under the ELSA. For termination unrelated to such reasons, that is, mere termination, the employer is only required to give notice as defined under the statute (*sec. 19, as modified by the 1985 Amendments*). In addition to this, the employee is to be paid compensation at the rate of 30 days=wages for each completed year of service (*sec. 19(1) as amended, ELSA*).

A worker may be lawfully discharged from employment for reasons of physical or mental incapacity or continued ill health or other reasons of incapacity unrelated to misconduct. Workers may

also be dismissed without notice or compensation if guilty of misconduct or a criminal offence (*sec. 17(1)*, ELSA). The statute outlines several categories of misconduct including willful insubordination or disobedience, theft, fraud or dishonesty, bribe-taking, habitual late attendance, habitual negligence and falsifying or tampering with the employer's official records (*sec. 17*, ELSA). Workers may also be dismissed for participating in a ~~lego-slow~~ or illegal strike provided that permission is obtained from the Labour Court (*sec. 17(f)*, ELSA).

Termination of employment on the grounds of trade union membership or activity is unlawful in Bangladesh (*sec. 25*, ELSA).

All workers who have been in continuous employment for more than one year are entitled to written notice indicating the reasons for retrenchment or pay in lieu of such notice where retrenchment is contemplated. A copy of such notice must also be sent to the chief labour inspector. *Sec. 13* of the ELSA also provides that the employer shall ordinarily give priority against retrenchment to workers who have been first employed, thus dismissing first those who were employed last.

In the event of fire, catastrophe, machinery breakdown, power outage, epidemic, civil commotion or other causes beyond the employer's control, the employer may stop work. The employer shall then notify the workers affected as soon as practicable (*sec. 6*, ELSA). For the first three weeks of stoppage the workers are to receive full wages. After three weeks of stoppage employees may be laid off and receive compensation equal to half of the total of the basic wage and dearness allowance (and equal to one-quarter after 45 days). If a worker is laid off for more than 45 days during a year, the employer may retrench him or her (*sec. 9*, ELSA).

### **Notice and prior procedural safeguards**

Long notice requirements are laid down for permanent workers in the form of 120 days' notice for monthly paid workers and 60 days' notice for other permanent workers. Such notice must be in writing, but payment in lieu of notice (*sec. 19*, ELSA) may be substituted. Workers who are dismissed for misconduct or for committing an offence for reasons specified as valid in the ELSA are not entitled to notice.

Where a worker is alleged to have committed misconduct, he or she must be given the opportunity to defend himself or herself against the allegations made. Firstly, the allegations must be made in writing and the worker must be given a copy and an opportunity to explain his or her conduct in no less than three days. This includes a right to an oral hearing. He or she may, however, be suspended from employment pending inquiry into the charges. However, such suspension may not exceed a period of 60 days where the matter is pending before a court and the worker must be paid a subsistence allowance equivalent to half of his or her average income (*sec. 18*, ELSA).

### **Severance pay**

Workers who have been employed in continuous service for more than one year are entitled to severance pay equivalent to 30 days' wages for every completed year of service or for every part thereof in excess of six months in addition to any other benefit, such as pension payments to which they may be entitled. Under the ELSA as amended in 1985, workers who have been dismissed for misconduct or for

a criminal offence, are also entitled to severance payment if their service amounts to more than one year, at a rate of 14 days= wages for every completed year of service, or for any part thereof in excess of six months, or gratuity, if any, whichever is higher (new *sec. 17*). Where a worker is entitled to benefits from a Provident Fund, termination of employment for whatever reason may not disentitle him or her to such benefits.

### **Avenues for redress**

In general, only workers who have been **Adischarged@** or **Adismissed@** (i.e. workers who have been dismissed on grounds of incapacity or misconduct), as opposed to mere **Aterminations@** by simple notice, can claim unfair dismissal in the courts. However, employees who have been merely **Aterminated@** may still claim for breaches of the requisite notice period, or for terminations on the grounds of trade union membership or activity (*sec. 25, ELSA*).

Complaints about dismissals may go in the first instance to a Labour Court within 30 days (*sec. 25, ELSA*, and *sec. 34, IRO*). Labour courts are tripartite courts established by the Government (*sec. 35, IRO*).

Where dismissal on the grounds of misconduct or trade union activities is held to be unlawful, the worker is entitled to any wages that may have been withheld from him or her during any period of suspension pending inquiry. Compensation in the form of damages is the most common type of remedy. The Labour Court may also order the reinstatement of the worker.

Any party aggrieved by an award may appeal to a Labour Appellate Tribunal within 30 days of the delivery of the decision (*sec. 37, IRO*). The decision of the Tribunal in such an appeal, as well as the decisions of the Labour Courts other than those granting an award, are final (*sec. 37(4), IRO*, and *sec. 25(d), ELSA*).

In addition, the conciliation machinery of the Labour Department is employed in helping to resolve labour disputes relating to termination of employment.



## ***Belgium***

### **Sources of regulation**

Dismissal is governed under Belgian law by the provisions of the Act of 3 July 1978 respecting employment contracts and by the orders relating to this Act. Some collective labour agreements, concluded under the auspices of the National Labour Council (CNT) and joint committees (CP), have restricted or modified the exercise of the legal right to terminate employment.

Special rules on collective dismissal have been laid down under Collective Labour Agreement No. 24 of 2 October 1975,<sup>181</sup> concluded by the CNT and by a Royal Order of 24 May 1976.<sup>182</sup>

### **Scope of legislation**

The Act of 3 July 1978 governs contracts of employment concluded by wage-earners, salaried employees, commercial travellers and domestic servants. It also applies to workers employed by the State or by any province, town, commune, federation of communes, public establishment administered by a commune, publicly recognized institution or private educational establishment subsidized by the State, who are not subject to a public code of rules.

*Secs. 2, 3, 4 and 5* of the Act of 3 July 1978 define the concepts of **A**wage-earner's contract of employment, **A**white-collar and **A**blue-collar contracts of employment, **A**commercial traveller's contract of employment and **A**domestic servant's contract of employment.

### **Contracts of employment**

A contract of employment may be concluded for a specified period or clearly specified piece of work or for an unspecified period. A contract of employment may not be concluded for life (*sec. 7*, Act of 3 July 1978).

A contract of employment concluded for a specified period or for a clearly specified piece of work should be set down in writing. In the absence of a written document, the contract is subject to the same conditions as a contract concluded for an unspecified period (*sec. 9*, Act of 3 July 1978). Where the parties have concluded several successive contracts of employment for a specified period without their having been interrupted for any reason attributable to the worker, the parties are deemed to have concluded a contract for an unspecified period, unless the employer can establish that the contracts were justified by the nature of the work or other legitimate reason (*sec. 10*, Act of 3 July 1978).

Contracts of employment for white-collar and blue-collar earners, salaried employees, commercial travellers and domestic servants may contain a trial clause which must be stated in writing. The trial

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<sup>181</sup> Amended by Collective Labour Agreement No. 24 *quater* of 21 Dec. 1993.

<sup>182</sup> Amended by a Royal Order of 9 Mar. 1995.

period for blue-collar earners may not be less than seven or more than 14 days (*sec. 48(1) and (2)*, Act of 3 July 1978). In the case of white-collar employees, it may not be less than one month or more than three or six months, depending on the remuneration (*sec. 67(1) and (2)*, Act of 3 July 1978). The first 14 days of domestic servants=contracts of employment are regarded as a trial period (*sec. 109*, Act of 3 July 1978).

### **Termination of employment**

Pursuant to *sec. 32* of the Act of 3 July 1978, the contract may be terminated:

- C by the expiry of the term;
- C by the completion of the work for which the contract was concluded;
- C by the will of either party, if the contract was concluded for an unspecified period, or if there is a serious cause for its termination;
- C on the worker's death; or
- C by *force majeure*.

*Sec. 33* of the Act of 3 July 1978 states that the death of the employer does not terminate the contract.

### **Termination of employment at the initiative of the employer**

In Belgium, an employer may dismiss a worker without giving a reason for termination, provided that he or she gives notice or pays compensation as prescribed by law.

During the trial period, notice for the dismissal of blue-collar workers may be given any time after the eighth day up to the end of the trial period. Termination may occur without notice or compensation. In the case of white-collar workers, termination is possible either by notice given seven days in advance or by the payment of compensation in lieu of notice corresponding to seven days= wages.

Where a contract has been concluded for an unspecified period, either of the parties may terminate it by giving notice. The notice of termination must indicate the starting date and length of notice (*sec. 37(1) and (2)*, Act of 3 July 1978).

According to *sec. 35*, either of the parties may terminate a contract without notice or before the expiry of its term if there is just cause for doing so. Any serious misconduct making it immediately and finally impossible for the employer and the worker to cooperate at work constitutes serious cause.

A contract may not be terminated for serious cause either without notice or before the expiry of its term if the occurrence that would have justified such termination has been known for at least three working days to the party seeking to terminate the contract.

Improper dismissal@ means the dismissal of a blue-collar worker who has been engaged for an unspecified period if the reasons for the dismissal are unrelated to his or her skills or conduct or are not based on the operational requirements of the undertaking, establishment or service (*sec. 63*, Act of 3 July 1978).

While the employer is not obliged to give reasons for dismissal (except for just cause or in the case of certain Aprotected@workers), he or she cannot act in an arbitrary manner. In the event of a contested

termination of employment, the burden is on the employer to prove that the termination is not unfair and it is up to the judge to render a decision.

The applicable statutes do not define the concept of *improper dismissal* with respect to white-collar workers. According to case law, dismissal is improper if it is done in a malicious manner, with the intention of causing harm to the employee, or is effected in such a rash manner that it leaves no doubt as to the existence of bad faith.

*Collective dismissal* means any dismissal ordered for one or several reasons not attributable to the individual worker and affecting over a period of 60 days a number of workers:

- C at least equal to ten in undertakings employing between 20 and 100 workers;
- C at least 10 per cent of the number of workers in undertakings employing an average of between 100 and 300 workers;
- C at least equal to 30 in undertakings employing an average of at least 300 workers.<sup>3</sup>

There are two categories of workers who enjoy protection against dismissal: those covered by the general prohibition and those protected for particular reasons. Staff representatives on the works council of the undertaking and members of the committee on occupational safety and health may be dismissed for economic or technical reasons or for just cause only, and for no other reason. Certain other workers are protected from dismissal because of their positions or circumstances.

- C A trade union delegate may be dismissed only on grounds unrelated to the exercise of his or her functions.
- C A pregnant woman may not be dismissed as from the date on which the employer is informed of the state of pregnancy until the end of the month following the post-natal maternity leave, except for reasons unconnected with the physical state resulting from the pregnancy or confinement (*sec. 40, Labour Act of 1971*).
- C A worker who is called up for service in the armed forces may be dismissed only on grounds unrelated to the worker's fulfilment of military obligations (*sec. 38(3), Act of 1978*).
- C An industrial doctor may be dismissed only on grounds related to his or her competence or for reasons which cause no harm to his or her technical or moral independence.
- C A worker who has filed a complaint to the Inspectorate of Social Legislation, or has brought an action before the Labour Court with the object of ensuring compliance with equality of treatment between men and women with respect to conditions of employment, may be dismissed only for reasons unconnected with the complaint or action (*sec. 136, Act of 4 August 1978*).
- C A worker holding a political office may not be dismissed, except on grounds unrelated to the fact that the worker holds a political office (*sec. 5, Act of 19 July 1976*).
- C A worker who has obtained a *total interruption of career* may be dismissed only for sufficient cause.

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<sup>3</sup> Royal Order of 24 May 1976, Royal Order of 26 Mar. 1984, Royal Order of 11 June 1986, Collective Labour Agreement No. 10 of 8 May 1973, Collective Labour Agreement No. 24 of 2 Oct. 1975, Collective Labour Agreement No. 24 *quater* of 21 Dec. 1993. See the section on *Collective dismissals* C Procedure for the procedure to be followed for collective dismissals.

- C A worker on paid study-leave may be dismissed only on grounds unrelated to this circumstance (*sec. 117*, Act of 22 January 1985).

### Notice and prior procedural safeguards

The period of notice varies depending on the category of worker. Different rules apply to blue-collar workers, white-collar workers and domestic servants.

The period of notice should be 28 days for blue-collar workers who have served for less than 20 years in the undertaking, and 56 days in the case of workers who have been employed in the service for at least 20 years (*sec. 59*, Act of 3 July 1978). Pursuant to *sec. 60* of the Act of 3 July 1978, if the wage-earner has worked in the service of the undertaking for less than six months, and if it is stated in the contract of employment, the notice period may be shortened to a minimum of seven days.<sup>4</sup>

The period of notice for white-collar workers is to be calculated on the basis of remuneration and the length of service completed by the white-collar worker (*sec. 82*, Act of 3 July 1978). Where the annual gross remuneration does not exceed BF864,000,<sup>5</sup> the period of notice to be given should be at least three months if the employee has been engaged for five years; this period is increased by three months on the commencement of each further period of five years=service with the same employer. If the employee is 65 years old, the notice period is six months. Where the annual remuneration is over BF864,000, the periods of notice may be fixed by agreement, but such periods may not be less than those specified above. In the absence of an agreement, legal proceedings may be initiated in order to determine a suitable period of notice, which will be determined on the basis of age, length of service, duties and remuneration.

The provisions of *sec. 59*, Act of 3 July 1978, apply to domestic servants=contracts of employment. During the trial period the employer may terminate the contract without paying compensation (*sec. 117*, Act of 3 July 1978). In order for dismissal with leave to be valid, it must be done in writing and state the beginning and duration of the notice period.

Works councils, trade unions or joint committees must be informed of or consulted on the dismissal of protected workers.

- C The works councils must be consulted for the dismissal of an employee over 60 years of age.
- C The union delegation must be informed of dismissal of employees over 60 years or for the dismissal of a trade union delegate for serious cause.
- C The trade union organization must be informed of the dismissal of a trade union delegate on any grounds.
- C The competent joint committee is to be informed of the dismissal on economic and technical grounds of members of the works councils and members of the committee on occupational safety and health.

For unprotected workers there is no information or consultation obligation, nor is there a requirement for the existence of an agreement with the bodies representing the staff.

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<sup>4</sup> In certain branches of activity, notice periods are shortened or lengthened by Royal Order (such as in work carried out in hotels and garages).

<sup>5</sup> This figure dates from 1994. Remuneration is adjusted according to the agreed salary index.

Where an employer who intends to order a collective dismissal gives written notice to the workers=representatives, he or she must give notice of the fact, by registered letter, to the director of the regional department of the National Employment Office (*secs. 6 and 7, Royal Order of 24 May 1976*). The notice should indicate:

- C the name and address of the undertaking;
- C the nature of the undertaking=s activities;
- C the competent joint committee for the undertaking;
- C the number of workers employed;
- C the reasons for the dismissal;
- C the number of workers to be dismissed, classified by sex, age group, occupational category and department;
- C the period over which the dismissals are to become effective; and
- C the consultations held with the workers=representatives in accordance with Collective Labour Agreement No. 24.

The employer should provide the workers=representatives with a copy of the notice, and they may submit their comments, if any, to the director of the regional department of the National Employment Office (*sec. 8, Royal Order of 24 May 1976*).

Collective dismissal is subject to a period of 30 days=notice after the date on which the employer notified his or her intention of ordering a collective dismissal (*sec. 9, Royal Order of 24 May 1976*).

Recent changes to the procedure for collective dismissals were introduced in January 1998 clarifying the obligation of employers to consult with workers=representatives and creating an obligation on employers to analyse and formally respond to any proposals from workers=representatives. In addition, sanctions for non-compliance are strengthened to include the reimbursement of any subsidies paid by the federal Government to the employer to create jobs.

## **Severance pay**

In the event of collective dismissal, workers are entitled to compensation from the employer (*sec. 7, Collective Labour Agreement No. 10 of 8 May 1973*). The amount of compensation is equivalent to one-half of the difference between the net basic remuneration<sup>6</sup> and the unemployment benefits which the worker can claim. Such compensation is due for a period of four months (*sec. 11, Collective Labour Agreement No. 10 of 8 May 1973*).

## **Avenues for redress**

In the event of a dispute, it is possible to appeal to the Labour Court.<sup>7</sup> In the case of dismissal for serious cause, the party initiating the dismissal must bear the burden of proof of the reason cited, and in

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<sup>6</sup> The net basic remuneration corresponds to the gross monthly remuneration up to a maximum of BF37,925, minus the personal social security contribution and tax deduction (*sec. 9 of Collective Labour Agreement No. 10 of 8 May 1973*).

<sup>7</sup> The Court is comprised of three judges, a professional magistrate, a workers=representative and an employers=

the case of unjustified dismissal, the employee who is claiming compensation must prove the existence of an invalid reason.

Where a blue-collar worker is wrongfully dismissed, the employer must pay compensation corresponding to six months=remuneration, in addition to notice or compensation in lieu of notice (*sec. 68, Act of 3 July 1978*). In the case of white-collar workers, the employer must pay compensation in lieu of notice plus damages.

In the event of unjustified dismissal, the worker is entitled to compensation in lieu of notice corresponding to the duration of the notice period plus compensation assessed at a flat rate (Order No. 1387 of 15 May 1990 concerning compensation for dismissal).

If notice or dismissal without notice is annulled, the worker is entitled to compensation in lieu of notice, which is equal to the remuneration corresponding to the duration of the notice period to which he or she is entitled (or the difference between the notice given and the period due). If the notice of dismissal does not mention the starting date and length of notice, the employer is required to pay compensation in lieu of notice.

In the event of premature termination of a contract of employment for a specified period, without serious cause, the employer is obliged to pay compensation equivalent to the outstanding remuneration up to the expiry of the contract. This amount should not exceed twice the remuneration corresponding to the duration of the notice period which should have been respected if the contract had been concluded as one of unspecified duration.

There is no entitlement to reinstatement, except for members of the works council and the committee on occupational safety and health, who may request reinstatement if wrongfully dismissed. If the employer refuses to reinstate them, he or she must pay them special compensation.

## ***Bolivia***

### **Sources of regulation**

The Labour Code in force in Bolivia is the oldest labour legislation in the region. It was promulgated by a Supreme Decree (SD) on 24 May 1939 and elevated to the rank of an Act (GLA) on 8 December 1942. The GLA governs both collective and individual labour relations. However, various decrees and regulatory standards, including regulations provided under Act No. 224 of 23 August 1943 (RD), have since introduced amendments and supplementary provisions, tailoring the standards to take new developments into account.

The Constitution (latest version: Law No. 1585 of 12 August 1994) establishes and protects inalienable labour rights: the rights to work, health and assembly, the inviolability of social rights, to make petitions, individually and collectively, and so on (*arts. 5, 6, 7, 8, 156 et seq.*). Apart from ensuring the protection of the State for labour and capital, *art. 157* of the Constitution states that **A...** the law shall regulate their relationship [labour and capital] by establishing rules concerning ... compensation for length of service, discharges ... and other social and protective benefits for workers. It is a function of the State to create conditions which will guarantee security of employment ... to all@

Although there is a right to collective bargaining, only a few collective agreements are in existence. There is nothing to prevent the inclusion of clauses and terms on dismissal, but most agreements focus on remuneration issues.

### **Scope of legislation**

Bolivian labour legislation governs labour relations in the private domain which take place through a contract of employment in either oral or written form. It applies to all workers except for permanent and temporary agricultural workers (who are governed under the law by special provisions) and public servants (who are governed by Decree Law No. 07375 of 5 November 1965, and are defined by SD No. 08125 of 30 October 1967 as any civil servants remunerated by the National Treasury, regardless of the institution for which they work). The legislation nevertheless applies to employees of public undertakings and institutions in which they are not considered civil servants.

### **Contracts of employment**

There is said to be an employment contract when salaried employees and blue-collar workers render their services to another person, the employer, for the carrying out or operation of a task or enterprise, except **C** as mentioned **C** in agricultural work (*sec. 1*, GLA, and *sec. 1*, RD).

As in the other countries of the region, a *probationary period* is considered an initial stage of the employment contract which gives the employer the opportunity to assess the aptitude of the worker, and, in turn, allows the worker to decide whether the conditions of work are satisfactory. Either of the parties

may end the employment contract at any time without prior notice during this period. The maximum duration of this period is three months (*sec. 1*, GLA, and *sec. 1*, RD). Successive employment contracts concluded for short periods of a shorter duration than the probationary period acquire the status of contracts of indeterminate duration from the conclusion of the second contract, provided that they pertain to the normal work of the undertaking (Ministerial Decision No. 193/72 of 15 May 1972). For the purpose of termination of employment, the length of service is calculated from the date on which services were engaged, including the months considered as probation (*sec. 1* of the Act of 3 Nov. 1944). According to Supreme Decree No. 17289 of 18 Mar. 1980, applicants with credentials of their professional qualifications, and those accepted for employment on the basis of a merit or proficiency examination, persons rehired and workers employed for a certain time or short term, are exempted from the probationary period prescribed in *sec. 13* of the GLA.

As regards the *duration* of contracts, the GLA, Ministerial Decision No. 283/62 of 13 June, Ministerial Decision No. 193/72, and Legislative Decree No. 16187 of 16 February 1979 establish that contracts are essentially concluded for an unspecified period (*sec. 12*, GLA), but may be limited depending on the nature of the task to be completed or the service to be rendered, taking into account that contracts of fixed duration are not permitted for the permanent and normal tasks of the undertaking.

Contracts of specified duration may not exceed one year, but may be renewed for an additional year, provided that the employer proves the absolute necessity of such renewal to the administrative authority. If work continues after the term has expired, the contract will be regarded as being of indeterminate duration (*sec. 21*, GLA).

Successive contracts of employment become contracts of indeterminate duration from the third contract, provided that they do not involve the normal tasks of the undertaking. This is also the case with seasonal contracts and contracts for tasks and services for consulting and construction undertakings which are extended until the completion of the task or the specified services.

## **Termination of employment**

Bolivian legislation contains provisions on termination of employment in the event of the death of the worker and tacitly by mutual dissent. The GLA also provides for termination by the worker without just cause (*sec. 12*, GLA and SD No. 6813 of 3 July 1964) by giving notice at least 30 days in advance (failure to give notice places an obligation on the worker to pay the employer compensation equivalent to 90 days=wages). Termination of the employment contract for just cause is prescribed only in the case of reduction of wages or salaries, and the worker must receive compensation corresponding to his or her length of service (*sec. 2*, SD of 9 March 1937).

## **Termination of employment at the initiative of the employer**

Bolivian legislation defines the notice the employer may give in order to dissolve the employment contract without stating a reason (*secs. 12, 13, and 16*, GLA; *sec. 9*, SD No. 224 of 23 August 1943; *sec. 11*, LD of 24 May 1937; *sec. 1*, Act of 23 November 1944; SD No. 6813 of 3 July 1964).

Contracts concluded for an indeterminate period and for a specified period may both be terminated by the employer without a valid reason, by giving 90 days= notice or a compensatory



indemnity equivalent to the wages for the corresponding period. Such compensation is not due and no notice is required if the worker, through his or her actions, gives reason for dismissal (see below). Notice is also not required if legal proceedings to settle collective disputes are pending.

Notice may only be given in banking institutions for employees who have worked for less than five years. Employees of more than five years=service may be dismissed for serious disciplinary misconduct, proved before a special court which renders decisions at the first instance.

There is no need for compensation or severance pay when employment has been terminated for the following reasons (*secs. 16 and 17, GLA, sec. 9 of Regulatory Decree No. 224 of 23 Aug. 1943, secs. 3 and 4, Legislative Decree No. 2565 of 6 June 1951*):

- C deliberate material harm caused to the instruments of work, machinery, products and merchandise;
- C disclosure of industrial secrets;
- C forgetfulness and carelessness affecting industrial health and safety;
- C total or partial non-compliance with the employment contract, company by-laws or agreement;
- C breach of confidence, robbery or larceny by the worker;
- C unjustified absence from work for more than six consecutive days;
- C voluntary resignation of the worker before completing the period of notice;
- C acts of violence, insults and immoral conduct of the worker; or
- C collective abandonment of work, if the workers fail to comply with the order issued by the competent authority.

Termination is also allowed for reasons related to the requirements of the undertaking, but no special standards have been formulated in this regard, except the relocation allowance which took temporary effect as a transitional measure (until 31 December of 1985, SD No. 21060 of 29 August 1985).

Trade union immunity is treated in the Constitution as a guarantee to union leaders during the exercise of their mandates, for which they may not be prosecuted or arrested (*art. 159, Constitution*). Similarly, trade union representatives may not be dismissed without prior judicial process, which also provides an opportunity for the employer to identify legal justification authorizing dismissal (*Legislative Decree No. 38 of 7 February 1944*).

Bolivian legislation also establishes family immunity to guarantee a woman's right to retain her job during pregnancy and up to one year after childbirth (*sec. 1, Act No. 975 of 2 May 1988*). As a result, if she is dismissed, she is entitled to the same compensation prescribed for termination of employment by the employer without valid reasons (see above).

### **Notice and prior procedural safeguards**

If there are no valid reasons for dismissal, the employer is required to give notice or pay the worker compensation in lieu of notice (see above). If dismissal is based on a valid reason, notice is not required, in which case there are no statutory conditions or formalities serving as guidelines for the dismissal.

## Severance pay

When a worker retires against his or her will, the employer is obliged to pay compensation corresponding to one month's wages or salary for each year of service. If the period is less than one year, payment is proportional to the months worked, deducting the first three months considered as a probationary period, except in the case of contracts of specific duration from which no time will be deducted. This right covers only workers who have completed five or more years of continuous service and is forfeited in the event that the worker has committed any of the following acts:

- C deliberate material harm to the instruments of work;
- C disclosure of industrial secrets;
- C forgetfulness and carelessness affecting industrial safety and health;
- C total or partial non-performance of the agreement; or
- C robbery or larceny committed by the worker.

The loss of the right to compensation is applicable only to the current five-year period without affecting those rights accumulated beforehand, which are considered acquired rights. Compensation is paid taking into account the average wages or salaries for the last three months prior to dismissal. It is payable within 15 days of termination of the employment relationship (*Sec. 13*, GLA; *sec. 1*, Act of 9 November 1940; *secs. 11 and 12*, GLD No. 224 of 23 August 1943; *secs. 6, 8 and 11*, SD No. 1592 of 19 April 1949; *secs. 2, 3 and 4*, SD No. 7850 of 1 November 1966; *secs. 1 and 3*, SD No. 11478 of 16 May 1974; *sec. 4*, Act No. 16187 of 16 February 1979; SD No. 21437 of 10 November 1986; SD No. 21678 of 18 August 1987; *secs. 1 and 2*, SD No. 22081 of 7 December 1988).

## Avenues for redress

Bolivian legislation contains no provisions for reinstatement in the event of unjustified dismissal. It provides only for the payment of compensation or severance allowance upon the termination of service.

The labour courts are responsible for handling claims in the area of dismissal, and the process is governed by the 1979 Code on Labour Procedure.

## ***Brazil***

### **Sources of regulation**

The Constitution of the Federal Republic of Brazil (FC) of 1988 is the primary source of labour law. Chapter II, which deals with social rights, contains comprehensive provisions on the rights of workers (*art. 7*), security of tenure (*art. 7(1)*) and protection against arbitrary dismissal.

The source of labour law on termination of employment is to be found in the Consolidation of Labour Laws (CLL), adopted in Legislative Decree No. 5452 of 1 May 1943. It contains standards of substantive and procedural law on termination of employment. An additional source of labour law dealing with compensatory indemnification for termination of employment by the employer is Act No. 8036 of 11 May 1990, which establishes the Guarantee Fund for Length of Service (see below).

The decisions of the labour courts and arbitration awards (*art. 114*, FC), international treaties and case law supplement these sources of law. Case law is a subsidiary source when it is compatible with the fundamental principles of labour law (*sec. 8*, CLL).

### **Scope of legislation**

Public employees of the Federal Union, the states and counties, staff working in these administrative bodies, and employees of parastatal administrative bodies subject to special conditions of service which put them in the same category as public employees<sup>183</sup> are excluded from the scope of application of the CLL (*secs. 7(c) and (d)*, CLL).<sup>184</sup>

Persons employed in the banking and cinematography industries, the telephone services, musicians, railway workers, crews of vessels of the national merchant marine and vessels engaged in river and lake navigation, workers employed in cold storage, stevedoring and dockers= services, miners, journalists, teachers, chemists, women workers and young persons are subject to special labour protection rules (*Part III*, CLL).

### **Contracts of employment**

An individual contract of employment is a tacit or express agreement respecting the employment relationship (*sec. 442*, CLL). Such contracts may be concluded either orally or in writing, for a specified or unspecified period. A contract for a specified period is a contract in which duration is fixed in advance or which depends upon the performance of specified services or on the occurrence of a particular event, the approximate date of which can be foreseen. Contracts for a specified period are

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<sup>183</sup> In this respect, the Constitution confers the right to security of employment to public employees with at least five years= continuous service in the public sector (*arts. 18 and 19* of the Transitional Provisions of the Constitution).

<sup>184</sup> *Secs. 7(a) and (b)* of the CLL have been repealed. They formerly excluded domestic workers (*art. 7*, FC) and rural workers (*art. 7*, FC) from the scope of the CLL. These workers are now covered by the legislation.

valid only if they govern services whose nature or transitional character justifies the fixing of their duration in advance, transitional activities carried out by the undertaking, and contracts of a probationary nature (*sec. 443, CLL*).

Contracts concluded on a probationary basis may not exceed 90 days (*sec. 445, CLL*). The first year of a contract for an unspecified period is deemed to be a trial period and compensation for termination of employment is not payable until it has been completed (*sec. 478, CLL*).

### **Termination of employment**

The CLL does not stipulate the conditions for the termination of employment (other than at the employer's initiative), but it does refer to such conditions in the provisions governing compensation. Employment may be terminated, other than at the initiative of the employer, as follows:

- C by the worker;
- C for reasons unrelated to the wishes of the parties;<sup>3</sup>
- C through the operation of law;
- C by mutual consent of the parties;
- C upon the retirement or death of the worker; and
- C on expiry of the contract period or completion of the task.

Termination of employment by the worker includes resignation. In this regard, the law provides that if the worker has been employed for more than one year the letter of resignation or the attestation releasing the worker from the employment contract, signed by the worker, will be valid only when it is submitted with the support of the competent trade union or presented to the competent authority of the Ministry of Labour (*sec. 477(1), CLL*).

Resignation for valid reasons is also permitted and a worker is entitled to consider his or her contract cancelled and claim the compensation due in the following cases (*sec. 483, CLL*):<sup>4</sup>

- C if he or she is required to perform services which are beyond his or her powers or are prohibited by law, contrary to morality or not covered by the contract;
- C if he or she is treated with excessive severity by the employer or his or her superiors;
- C if he or she runs an obvious risk of serious injury;
- C if the employer fails to fulfil his or her contractual obligations;
- C if the employer or his or her representative commits any act detrimental to the honour and good repute of the employee or a member of the employee's family;
- C if the employer or his or her representative assaults the employee, except in case of legitimate self-defence or defence of another; or
- C if the employer reduces the work of an employee who is paid at piece or task rates in such a manner as to affect materially the amount of the wages earned.

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<sup>3</sup> For example, *force majeure* (*sec. 502, CLL*) and closure of the undertaking (*sec. 497, CLL*).

<sup>4</sup> These circumstances coincide with indirect (constructive) dismissal, whereby the employer deliberately uses indirect means to make the worker resign from his or her job.

In the situations envisaged by the fourth and seventh grounds above, the employee may request cancellation of the contract and payment of the corresponding compensation, whether or not he or she continues to work in the undertaking until the final ruling has been handed down.

In addition, the employee is entitled to suspend work or cancel the contract if he or she has to perform any statutory duty which is incompatible with the continuation of the employment. In the case of an individually owned undertaking, the employee is entitled to cancel the contract of employment in the event of the death of the employer.<sup>5</sup>

### **Termination of employment at the initiative of the employer**

The following are considered valid reasons for the termination of an employment contract by the employer (*sec. 482, CLL*):

- C dishonesty;
- C misconduct or bad behaviour;
- C habitual engagement by the employee in commercial transactions on his or her own account or for another without his or her employer's permission, if this involves competition with the undertaking in which he or she is employed or is prejudicial to the performance of his or her work;
- C a sentence passed on the employee by a criminal court without suspension of the execution of the penalty;
- C idleness of the employee in the performance of his or her duties;
- C habitual drunkenness or drunkenness while on duty;
- C disclosure of a secret of the undertaking;
- C breach of discipline or insubordination;
- C desertion of post;
- C any act detrimental to the honour or good repute of another which is committed during employment, or an assault under the same conditions, except in case of legitimate self-defence or defence of another;
- C any act detrimental to the honour or good repute of, or an assault against, the employer or a superior, except in case of legitimate self-defence or defence of another; or
- C habitual indulgence in games of chance.

If it is established by an administrative inquiry that the employee is guilty of acts which are detrimental to national security, such proof would also constitute valid grounds for the dismissal of the employee.

Further, the law prescribes the following series of situations as grounds for the employer to terminate a contract:

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<sup>5</sup> When the operations of the undertaking are wound up because of the death of the employer, the employees may claim, depending on the circumstances, compensation based on the highest remuneration paid to the worker during the period of service or twice the normal compensation, as provided by *secs. 477 and 497* of the CLL.

- C abusive acts committed by strikers during a strike action, depending on the nature of any prejudice caused as regards the rights of others (*art. 9(2)*, FC). In this sense, mere participation in a strike action does not constitute serious misconduct, but active participation in a strike which is recognized as illegal, or in violent or restraining acts which impede the access of others to the workplace, is a valid reason for dismissal;<sup>6</sup>
- C in the case of banking employees, the persistent failure to pay debts which are lawfully due (*sec. 508*, CLL); and
- C the unjustified refusal of the employee to obey the employer's policies on occupational safety and health and on the use of personal protective equipment against harmful substances, supplied by the employer, which are measures taken to safeguard the health of the worker himself or herself (*sec. 158*, CLL).

The Constitution promotes the protection of the employment relationship and includes provisions for compensatory indemnification to remedy cases of arbitrary or unjustified dismissal (*art. 7(I)*, FC). This provision represents relative security through a guarantee that the worker will be compensated at dismissal. However, the worker's security of tenure, against the wishes of the employer when there is no justification for dismissal, still applies to workers with more than ten years' service who would have been protected against dismissal before the promulgation of the 1988 Federal Constitution, under the terms stated by law, which provides that employees who have worked in the same undertaking for more than ten years may not be dismissed, except on account of a serious offence or *force majeure*, duly established (*sec. 492*, CLL).

The Constitution also contains provisions on trade union immunity. It prohibits dismissal of a unionized employee, except on account of a serious offence, from the moment he or she registers as a candidate for a leadership or representative position in the trade union and for one year thereafter (*art. 8(VIII)*, FC).<sup>1</sup>

The law also establishes that workers' representatives on the Internal Accident Prevention Commission (CIPA) may not be arbitrarily dismissed (*sec. 165*, CLL). This is also enshrined in the Constitution, which prohibits arbitrary or unjustified dismissal of employees elected to the position of a director of the CIPA, from the date of registration as a candidate until one year after the end of his or her term of office (*art. 10(IIa)*, FC, Transitional Provisions).

Similarly, the Constitution protects pregnant workers from the date the pregnancy is confirmed until five months after confinement, and declares dismissals on the grounds of pregnancy null and void (*art. 10(IIa)*, FC, Transitional Provisions). Moreover, the fact that a woman marries or becomes pregnant is not regarded as a legitimate reason for the termination of her contract of employment (*sec. 391*, CLL). By the same token, a pregnant woman is entitled to terminate the contract of employment if it is proved by a medical certificate that the work she performs is prejudicial to her condition (*sec. 394*, CLL).

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<sup>6</sup> See Act No. 7783 of 28 June 1989, and court judgement in TRT-4.a, Reg. 4th Round, Proc. 9.016/87, 31 May 1988.

<sup>1</sup> This is also the case for legislation relating to trade union officers and alternates from the time of registration of their candidature up to 90 days following the expiry of their term of office.

Security of employment is guaranteed through reinstatement to employees who, because of an employment accident or occupational disease, were obliged to suspend the employment relationship (*Act No. 8213 of 24 July 1991*).

### **Notice and prior procedural safeguards**

Pursuant to *sec. 487* of the CLL, a party who wishes to cancel the contract without lawful cause is bound to give notice to the other party of his or her intention as follows:

- C** eight days in advance if wages are paid weekly or at shorter intervals;
- C** thirty days in advance if wages are paid fortnightly or monthly, or if the employee's length of service in the undertaking exceeds 12 months;

If the employer fails to give due notice, the employee is entitled to his or her wages for the period of notice, and that period is always deemed to be included in the period of employment. If the employee fails to give due notice, the employer is entitled to deduct the amount of wages corresponding to the period of notice. In the case of wages paid at piece rates, the calculation for the purposes of these two instances is to be based on the average of the wages for the last 12 months of employment.

Note that notice must be given in the event of indirect (constructive) dismissal.

If the contract is cancelled by the employer during the notice period, the employee's normal hours of work must be reduced by two hours a day during the period of notice, without any reduction in wages. A worker who decides to continue working normal working hours is also allowed to be absent from work for one to seven days depending on the case (see *secs. 487(I) and (II)*, CLL (see above)).

After the submission of notice, termination of the contract will take effect upon expiry of the term of notice. However, if the party which gave notice reconsiders his or her decision before the expiry of the term of notice, the other party is entitled either to accept or reject the withdrawal of the notice. If the withdrawal is accepted, or if work continues to be performed after the expiry of the term of notice, the contract continues in operation as if notice had not been given (*sec. 489*, CLL).

If, during the period of notice given to the employee, the employer commits any action which justifies immediate cancellation of the contract, he or she is obliged to pay the wages for the period of notice, without prejudice to any compensation which may otherwise be due (*sec. 490*, CLL). An employee who, during the period of notice, commits any action deemed by law to be a lawful ground for the cancellation of the contract forfeits the right to wages for the remainder of the period of notice (*sec. 491*, CLL).

### **Severance pay**

The Constitution guarantees the right to compensatory indemnification for arbitrary or unjustified dismissal (*art. 7(I), FC*). For those workers who, before the adoption of the Constitution (1988) had acquired the right of security of tenure (see above) after ten years of service, the CLL is applicable and prohibits dismissal except on account of a serious offence or *force majeure* (*sec. 492*, CLL, and *sec.*

14, Act No. 8036 of 11 May 1990),<sup>8</sup> as well as providing other guarantees for security of employment prescribed by law.<sup>9</sup>

Employees who are not permanent and who have not chosen the Guarantee Fund for Length of Service (FTGS) are currently governed by the CLL, under the following terms (*secs. 477, 478 and 497, CLL, and sec. 14(1), Act No. 8036*):

- C compensation is based on the highest remuneration which the employee has received in the undertaking (*sec. 477, CLL*);
- C compensation for the cancellation of a contract of indeterminate duration must be equal to one month's remuneration for each year of actual service or any fraction of a year exceeding six months;
- C if the wages are paid by the day, compensation is calculated on the basis of 30 days;
- C if the wages are paid by the hour, compensation is calculated on the basis of 240 hours a month;
- C if the worker is paid by commission or entitled to a supplement, compensation is calculated on the basis of the average amount of the commission or percentage received during the last 12 months of employment;
- C if the worker is employed at piece rates or by the job, compensation is calculated on the basis of the average time usually spent by the person concerned in the performance of his or her task, according to the work which would be done in 30 days (*sec. 478, CLL*); and,
- C in the case of contracts for which a time-limit has been fixed, if the employer dismisses the worker without a valid reason, he or she is obliged to pay the worker, by way of compensation, a sum equal to half the remuneration to which he or she would have been entitled on the expiry of the contract. For the purpose of the application of the legislative provisions, the variable or uncertain part of the wages is to be calculated in the manner prescribed for the calculation of the compensation payable for the cancellation of a contract of indeterminate duration (*sec. 479, CLL*).

Employees who do not have security of tenure, and who have come to an agreement with the employer to choose the FTGS, will be governed by the rules prescribed for the FTGS respecting the minimum limit of 60 per cent of the compensation prescribed by the CLL (*sec. 14(2), Act No. 8036*).

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<sup>8</sup> Act No. 8036 of 11 May 1990 groups in one piece of legislation the regimes of the Guarantee Fund for Length of Service and the CLL. It provides that, after 5 October 1988, all workers will have the right to an interest-bearing account, adjusted for inflation, in which an employer makes monthly deposits of 8 per cent of the employee's wages in the previous month. Security of tenure acquired before 15 October 1988 (date on which the Constitution was promulgated) is thereby safeguarded. It further states that the period of service of workers who entered into contracts under the protection of the CLL before the Constitution took effect will be compensated on the basis of the provisions of the CLL.

<sup>9</sup> As, for example, under *secs. 497 and 498* of the CLL, by virtue of which, in the event of the closing of the undertaking, establishment, branch or agency, or of necessary downsizing, for reasons other than reasons of *force majeure*, a permanent employee who is dismissed is entitled to twice the amount of compensation due in the event of the cancellation of a contract of indeterminate duration. Note that an application for the dismissal of a permanent employee is valid only if it is made with the cooperation of the trade union concerned, or, if there is no union, before the competent local authority of the Ministry of Labour (*secs. 498 and 500, CLL*).



The FTGS regime is applicable to all other workers and it provides that (*sec. 9, Decree No. 1382*)<sup>10</sup> if the termination of a contract of employment is unjustified (even if it is indirect (constructive)), produced by mutual fault, or through *force majeure*, or if the normal expiry of the contract is confirmed (including in the case of temporary workers), the employer is obliged to pay directly to the worker an amount corresponding to the deposits made for the month of the dismissal and the preceding month, even if the worker has not collected wages (*sec. 9, Decree No. 1382*).<sup>10</sup> This is without prejudice to any legal proceedings that may follow dismissal.

### **Avenues for redress**

Pursuant to *sec. 643* of the CLL, disputes arising out of relations between employers and employees should be settled by the labour courts. The Labour Appeal Court, regional labour courts, and the conciliation and arbitration boards or the courts of ordinary jurisdiction have jurisdiction (*sec. 644, CLL*). Recourse to the labour courts is compulsory, without exemption, except for good and sufficient reason (*sec. 645, CLL*). The conciliation and arbitration boards<sup>11</sup> are competent to judge and settle (among others) disputes in which the recognition of the security of tenure of the employee is claimed and disputes relating to compensation for the cancellation of a contract of employment (*sec. 652, CLL*). The regional courts, on the other hand, are responsible for conducting conciliation proceedings and handing down judgement in the last instance on appeals against decisions of the conciliation and arbitration boards and the ordinary courts dealing with labour matters (*sec. 678(1)(c), CLL*).

In terms of remedies, if both parties are to blame for the act which brought about the termination of employment, the labour court may reduce the compensation to half the amount which would otherwise be due (*sec. 484, CLL*).

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<sup>10</sup>Decree No. 1382 of 31 January 1995, which amends the regulatory standards of the Guarantee Fund for Length of Service (*Diario Oficial*, 1 February 1995).

<sup>10</sup> Decree No. 1382 of 31 January 1995, which amends the regulatory standards of the Guarantee Fund for Length of Service (*Diario Oficial*, 1 February 1995).

<sup>11</sup> In localities which do not fall within the jurisdiction of the conciliation and arbitration boards, the judges of ordinary jurisdiction shall be responsible for the administration of justice in labour matters (*secs. 668 and 669, CLL*).

## ***Bulgaria***

### **Sources of regulation**

Termination of employment is regulated in Bulgaria under the Labour Code (LC) (as consolidated in 1996), Chapter 60.

### **Scope of legislation**

The LC is extensive in scope both with respect to persons covered and subject matter. As a consequence of Bulgaria's history, the area of labour relations is heavily regulated, as are other spheres of economic activity. Labour relations are considered part of the responsibility of the State. Although the concept of 'state enterprise' is being replaced by the labour law principles of free enterprise systems, it still remains prominent. However, workers may conclude collective agreements governing termination provisions, provided that these provisions do not undermine the minimum standards established by the LC. Such contracts have effect only upon the employees and/or members of the trade union that are parties to the contract (*sec. 57, LC*).

The LC specifically states that it applies to 'all legal employment relationships with Bulgarian enterprises and joint ventures', including 'employment relationships between Bulgarian citizens and foreign enterprises' located either in Bulgaria or abroad in so far as not otherwise provided (*sec. 10, LC*).

### **Contracts of employment**

Contracts of employment are presumed to be of unlimited duration unless specifically agreed otherwise (*sec. 67, LC*). Moreover, *sec. 68* of the LC limits fixed-term contracts to the following cases:

- C for a definitive period of not longer than three years, unless the legislation provides otherwise;
- C until completion of some specified work;
- C for substitution for an employee who is absent from work; and
- C for a job which is to be filled through a competitive examination, for the time of the competitive examination.

A contract of limited duration becomes a contract of indeterminate duration where the employee continues to work more than five days after the expiry of the contract's term without a written statement of objection from the employer, provided the job is vacant (*sec. 69, LC*).

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C mutual consent of the parties, expressed in writing;
- C expiry of a fixed-term contract;
- C completion of the specified work for which the employee was employed;
- C the death of the person with whom the employee has concluded a contract of employment; or
- C the death of the employee.

### **Termination of employment at the initiative of the employer**

Dismissal from employment must be effected for a valid reason (*sec. 325, LC*). The LC enumerates several detailed examples of valid and invalid reasons. However, the law does not precisely limit the term *A valid reason* and leaves room for other instances where dismissal may be deemed valid or invalid as determined on a case-by-case basis.

A number of *A employee obligations* are spelled out under *sec. 126* of the LC while *sec. 187* includes examples of disciplinary violations. These include:

- C lateness;
- C absenteeism;
- C failure to fulfil the requirements of the job;
- C non-compliance with safety standards;
- C damaging the employer's property; and
- C production of low quality products.

A breach of such obligations will be a disciplinary offence and may constitute grounds for dismissal if committed regularly or if sufficiently serious.

Workers may be dismissed summarily for disciplinary offences if they:

- C come at least one hour late to work or leave at least one hour early three times in a month;
- C are absent without approval from work for two successive days;
- C abuse the employer's confidence and disclose confidential employment data; or,
- C while working in the trade or service area, cause loss to a consumer by acting deceptively in terms of price, weight or quality of goods or service (*sec. 190, LC*).

Dismissal is also lawful provided notice is given where:

- C the employee refuses to follow the enterprise or a division when it relocates;
- C the position held by the employee has to be vacated for reinstatement of an unlawfully dismissed employee;
- C the requirements of the job change and the employee does not meet the new requirements;
- C the obligations under the contract of employment are impossible to fulfil;
- C the employee lacks the necessary skills for the job;
- C the enterprise closes down;
- C there is a partial closing down or staff cuts;
- C there is a reduction of the volume of work;

- C there is work stoppage for more than 30 days;
- C an employee does not have the necessary education or vocational training for the assigned work; or,
- C in some cases, when the employee has elected to retire on a full pension (*sec. 328, LC*).  
Finally, the employee may also be summarily dismissed (that is, without notice) if:
  - C he or she is prevented by a sentence or administrative order from being able to practice a profession or occupy his or her post;
  - C his or her academic rank or degree has been withdrawn and his or her contract of employment was given on the grounds of such qualification;
  - C he or she has been deprived of the right of residence in the area where he or she works or he or she is compulsorily settled in another populated area; or
  - C he or she refuses to take up a suitable offer of employment in cases of labour readjustment (*sec. 330, LC*).

*Sec. 8(3)* of the LC contains a general anti-discrimination in employment clause. This clause outlaws any form of discrimination on the grounds of nationality, ethnic origin, sex, race, political and religious affiliations, participation in trade unions or other public organizations and movements, or social and property status.

*Sec. 327* of the LC also makes provision for constructive dismissals, that is, the ability of the employee to claim a dismissal by the employer (and appropriate compensation) by reason of the employer's conduct. This can be done if:

- C the employee is unable to fulfill his or her position due to illness and the employer does not provide other suitable work;
- C the employer defers payment of remuneration due;
- C the employer changes the place or character of the work, or the stipulated remuneration, or fails to meet other employment obligations in situations where he or she is not permitted to do so;
- C the employee assumes paid elective office or research work on the basis of a competitive examination;
- C the employee is enlisted for a regular military service;
- C the employee continues his or her education as a regular student; or
- C the employee is employed as a substitute for an absent employee and takes up employment elsewhere under a contract of employment for an indefinite term.

### **Notice and prior procedural safeguards**

*Sec. 325* of the LC specifies limited instances where the contract of employment may be terminated without notice. These include those circumstances listed above, together with others, including:

- C when the dismissal of an employee is found to be unlawful and he or she is reinstated to his or her previous job by ruling of the court, but he or she does not report to work within the term stipulated;

- C upon return of a substituted employee to work;
- C when a position is listed to be occupied by a pregnant employee or an employee reassigned for rehabilitation, and a candidate entitled to that position appears;
- C upon the appointment of an employee who has been elected or has passed a competitive examination for the position; and
- C in case of inability of the employee to perform the assigned job because of illness resulting in permanent disability. In this case the contract of employment shall not be terminated whenever the employer can provide another job, suitable to the employee's health status, and the employee consents to perform it. All other cases of dismissal require notice.

The employer is obliged to give the employee a fair hearing with respect to any disciplinary charge which may lead to dismissal. This includes the right of the employee to forward his or her arguments in writing. Dismissal on the grounds of a disciplinary offence may only be imposed within two months of the discovery of the breach. Detailed procedures such as the need for the disciplinary order to be signed by the employee and a requirement for registered mail are imposed under *sec. 195* of the LC.

The LC also stipulates additional considerations to be taken into account where dismissal is proposed, such as the family and material situation or health condition of the employee. Where there are two employees of equal qualification, the one with the more disadvantaged situation should not be dismissed. Similarly, where there are workers of equal qualification, those with spouses on unemployment benefit or who are the sole breadwinners should be given preference for retaining the job (*sec. 329*, LC).

In many instances, dismissal may only be carried out with prior authorization from the governmental labour authority. This applies to situations where the employee:

- C is a female who is pregnant, a mother of a child less than three years old or a wife of a person under conscription;
- C is a resettled employee;
- C suffers from a disease specified by statute;
- C lacks the necessary skill for the job; or
- C does not qualify for changed requirements of the job, and where the contract of employment is impossible to fulfil (*sec. 333*, LC).

An employee who is a trade union member or leader (and for six months after that) can only be dismissed with consent from the central leadership of the respective trade union (*sec. 33*, LC).

Prior authorization from the labour authority and notice to the employee is required for dismissal due to economic, technological or structural reasons. This includes situations where the enterprise is closed down partially and where there is a reduction in the volume of work (*secs. 328 and 333*, LC). The notice period in this instance is 30 days. In addition, where it is stipulated under the applicable collective agreement, the employer may only dismiss an employee on the grounds of staff or workload reduction with the prior consent of the respective trade union body (*sec. 333(3)*, LC). *Sec. 329* of the LC reserves for employers a right of selection, in order that they may retain employees who have higher qualifications and superior performance records.

## Severance pay

The LC makes provision for severance pay under *sec. 222(1)*. When the relationship has been terminated without notice in case of delay of payment of remuneration, change of character of work or amount of remuneration, the employer shall pay compensation to the extent of the gross remuneration for the notice period, if it is an indefinite period contract, and to the amount of actual damages in the case of a fixed-term contract. Upon dismissal due to closing down of the enterprise or part of it, staff reduction, reduction of volume of work, or work stoppage for more than 30 days, the compensation due is the amount of the employee's gross remuneration but not more than one month's wages. Greater compensation can be stipulated by Act of Council of Ministers, collective agreement or labour contract. Where the employee is dismissed due to illness as under *secs. 325 and 327* of the LC, he or she is also entitled to severance pay. This amounts to the sum of his or her gross salary for a two-month period, if he or she has been employed for at least five years.

When the employee has worked for ten years or more or where he or she has acquired the right to a pension for length of service and old age, he or she is entitled to compensation in the amount of his or her gross remuneration for a period of six months (for employees with more than ten years' service) or two months (for employees eligible for a pension). If the employee is discharged as a result of a reduction in the workforce or partial or total liquidation of the enterprise for economic reasons, he or she has the right to receive compensation in the form of redundancy pay. Such compensation is equal to one month's salary. Where the employee has found alternative employment with lesser pay, he or she is entitled to the difference in rates between the two levels of pay.

### **Avenues for redress**

Under *sec. 344* of the LC, the employee has the right to contest the legality of the dismissal before the employer or the court and to claim:

- C a declaration recognizing the illegality of the dismissal;
- C reinstatement;
- C compensation in the form of damages; and
- C correction of the grounds of dismissal, entered in his or her service record or other document (*sec. 345, LC*).

Where reinstatement is granted, the employee must report for work within two weeks. On the other hand, where the employee is lawfully dismissed on the grounds that he or she commits a crime which is also a violation of labour discipline, he or she is obliged to pay to the employer compensation in the form of damages. The amount of compensation is calculated in accordance with the loss of labour which the employer suffers as a result of the dismissal, but may not be greater than the amount of remuneration due for the remaining period under the contract.

Disputes relating to dismissal may be tried by the Courts of Justice. Trade unions have the right to act as agents before the court at the request of workers. The burden of proof to establish that the dismissal was lawful lies with the employer.

## ***Cambodia***

### **Source of regulation**

The Labour Code (LC) promulgated on 10 January 1997 contains the legislative provisions on termination of employment in Cambodia.

### **Scope of legislation**

The LC covers all enterprises and establishments whether public, semi-public or private. It also applies to professional offices and associations or groups of any nature. Nevertheless, some categories of workers are excluded from its scope (except for trade union rights). These are (*sec. 1, LC*):

- C magistrates of the judicial branch;
- C permanent workers in government services;
- C personnel of the police, the army and the national police;
- C personnel in air and sea transportation industries; and
- C domestic or household servants.

### **Contracts of employment**

The distinction between contracts of specific duration and contracts of unspecified duration is a useful one as far as the law of termination of employment in Cambodia is concerned. A contract of specific duration is characterized by a fixed term, whether it is a specific period of time or a specified task. It cannot last for more than two years or it will automatically be characterized as a contract of unspecified duration.

The LC also contains specific provisions for apprenticeship contracts (*secs. 63-64, LC*).

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C expiry of a contract concluded for a fixed term;
- C *force majeure*; and
- C the completion of the specific task for which the contract was concluded.

### **Termination of employment at the initiative of the employer**

The employer cannot terminate a contract of specific duration before the expiry of the term, except in cases of serious misconduct.

An employer cannot dismiss an employee without a valid cause. Incapacity, misconduct and operational requirements of the enterprise are considered as valid causes for dismissal (*sec. 74, LC*). Before dismissing an employee, notice of termination must be given in writing.

In cases of serious misconduct on the part of the employee, the employer is discharged from the obligation to give notice of termination. The following are listed as serious misconduct under *sec. 83B*:

- C theft, embezzlement and breach of professional confidence;
- C all fraudulent acts such as the presentation of false identification at the hiring stage or disclosure of professional secrets;
- C serious infractions of disciplinary, safety and health regulations;
- C threats, abusive language or assault against the employer or other workers;
- C encouraging other workers to commit serious offences; and
- C propaganda, political activities and demonstrations within the establishment.

An employer cannot terminate a contract while it is suspended. A contract shall be suspended in the following situations (*sec. 71, LC*):

- C the closing of the establishment following the departure of the employer for military obligations;
- C the absence of the worker for military obligations;
- C the absence of the worker for illness verified by a doctor and for a maximum of six months;
- C the disability of the worker resulting from a work-related accident or illness;
- C maternity leave;
- C leave authorized by the employer and based on regulations or agreements;
- C temporary suspension resulting from disciplinary sanction;
- C absence for paid vacations;
- C incarceration of the worker without a subsequent conviction;
- C *force majeure* preventing one party from fulfilling his or her obligation, up to a maximum of three months; and
- C serious economic difficulties preventing the economic or material operation of the enterprise.

Finally, the employer cannot take into account, in justifying a termination of employment, the race, the colour, the belief or religion, or the political conviction of the worker (*sec. 12*). Such a prohibition also applies to trade union membership and activities (*sec. 279*) and participation in a strike (*sec. 333*).

Special provisions govern collective dismissals. Collective dismissals are defined as those resulting from the reduction of the establishment's activity or from internal reorganization (*sec. 95, LC*).

### **Notice and prior procedural safeguards**

If the duration of the contract is more than six or ten months, the worker should be informed of the expiry, or non-renewal of the contract, respectively ten and 15 days in advance. If this obligation is not respected, the contract will be automatically extended for the period for which it has been originally



been concluded, or characterized as a contract of unspecified duration if, with the extension, the total duration of the contract is longer than two years (*sec. 73, LC*).

Notice in writing should be given for the termination of all contracts of unspecified duration (*sec. 74, LC*). Nevertheless, for probationary contracts and internships, and in cases of serious misconduct and *force majeure*, employers are exempted from the obligation to give notice (*sec. 82, LC*). Situations of *force majeure* that exempt the employer from notice obligations are: closure of the establishment ordered by the public authority, catastrophe leading to material destruction and death of the employer (*sec. 85, LC*).

The minimum notice period depends on the length of continuous service of the employee. It is:

- C seven days when the length of service is less than or equal to six months;
- C 15 days when the length of service is between six months and two years;
- C one month when the length of service is between two and five years;
- C two months for a length of service between five and ten years; and
- C three months for a length of service greater than ten years (*sec. 75, LC*).

This notice period can be extended by agreement, but cannot be reduced (*sec. 76, LC*). Pay in lieu of notice can be given for all or part of the notice period. The amount of the payment should be equal to the remuneration that the employee would have received if the notice period had been respected (*sec. 77, LC*). During the notice period the employee is entitled to two days paid leave to look for a new job (*sec. 79, LC*).

Collective dismissals should be reported to the employees=representatives with a view to averting dismissals and to mitigating their consequences. The Labour Inspector should be informed of this procedure. In exceptional cases, the Minister of Labour can suspend the operation of the dismissals to allow the parties to negotiate an agreement.

Finally, provisions specify the criteria for the selection of the employees to be dismissed. Regard is first to be had to professional qualifications and then to seniority which can be increased in cases where an employee has family obligations. Provisions also govern the priority for rehiring within two years from termination.

## **Severance pay**

At the termination of the contract (expiry of the term period or completion of the task), the employee is entitled to severance pay which is fixed by collective agreement and should not be less than 5 per cent of the total wages paid during the length of the contract (*sec. 73, LC*).

If the worker is dismissed for a reason other than serious misconduct, he or she is entitled to a severance payment. Severance payments should amount to seven days of remuneration if the employee's length of continuous service is between six and 12 months. For a length of service longer than 12 months, severance pay is equal to two weeks of wages for each year of service, up to the maximum of six months= wages (*sec. 89, LC*). This payment is also due when the termination, while formally at the initiative of the worker, is actually the result of unfair treatment or repeated or serious violations of the contract by the employer (*sec. 90, LC*).

## Avenues for redress

If an employer terminates a contract of specific duration before the agreed term, without serious misconduct from the worker or *force majeure*, the employee can make a claim for damages. Damages should at least be equal to the remuneration that the worker would have received until the normal termination of the contract (*sec. 73, LC*).

A worker who considers that he or she has been unjustifiably dismissed is entitled to make a claim to the Labour Tribunal. Nevertheless, before going to the Tribunal, the dispute can be submitted to the conciliation procedure (pursuant to *secs. 300 and 301, LC*). The conciliation procedure is not compulsory, and should be initiated by one of the parties by reporting the dispute to the Labour Inspector. Once notified of the dispute, the Inspector shall solicit the views of the parties and set hearings to conciliate the dispute. The result of the conciliation, whether there is an agreement or not, should be contained in a written statement approved by the Labour Inspector. An agreement has the authority of a final judgement.

If no agreement is reached, the employee may make a claim to the Labour Tribunal or the court of general jurisdiction until the dispute is settled.

If the employee is found to have been dismissed without a valid cause, he or she is entitled to damages. To fix the amount of damages, the relevant court should take into consideration the local custom, the type and importance of the service rendered, seniority and age, deductions and payments made to a retirement plan, and all circumstances establishing the existence and the extent of the harm incurred (*sec. 94, LC*). Instead of damages, the worker can ask for a lump sum equal to a severance payment, in which case the worker does not have to provide proof of damages incurred (*sec. 91, LC*).

## **Cameroon**

### **Sources of regulation**

Termination of employment is regulated by the 1992 Labour Code (LC)<sup>185</sup> and the following regulations:

- C** Order No. 015/MTPS/SG/CJ of 26 May 1993 stating the conditions and duration of the notice period;
- C** Order No. 016/MTPS/SG/CJ of 26 May 1993 setting the terms for compensation and calculation of severance pay; and
- C** Decree No. 21/MTPS/SG/CJ of 26 May 1993 setting the terms for termination of employment for economic reasons.

### **Scope of legislation**

All workers are governed by the LC, except for employees in the public service, members of the judicial and legal service, members of the armed forces and national security personnel, prison personnel and auxiliary administrative employees.<sup>186</sup>

### **Contracts of employment**

Contracts of specified duration are concluded for a maximum duration of two years and may not be renewed more than once (*sec. 25(1)(a)*, LC). If the employment relationship continues after the second period of renewal, the contract becomes one of unspecified duration (*sec. 25(3)*, LC).

These restrictions on contracts of specified duration do not apply to temporary employment to replace a worker, employment to complete a task within a specified period which requires additional manpower, occasional or exceptional work, seasonal work or urgent tasks for reasons of public security.

The LC defines engagement for a trial period as a period of assessing the quality of the work and output of the employee and gives the worker the opportunity to assess the working conditions, lifestyle, remuneration, occupational safety and health and the atmosphere at the workplace (*sec. 28(1)*, LC).

This type of contract may not exceed six months, including renewal. For managerial personnel, this period may be extended up to eight months. The extension of a contract beyond this period without the conclusion of a new contract transforms it into a contract of indeterminate duration (*sec. 28(5)*, LC).

A contract of unspecified duration is one whose term is not fixed in advance and which may be terminated at any time by either of the parties, with notice (*sec. 25(1)(b)*, LC).

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<sup>185</sup> Act No. 92/007 of 14 Aug. 1992 to promulgate the Labour Code.

<sup>186</sup> Unlike the former Code, 1992 Labour Code applies to workers governed by certain rules of custom and who perform their services within the traditional family framework.

## Termination of employment

A contract of employment may be terminated, other than at the initiative of the employer, in many ways:

- C by mutual agreement;
- C because of protracted illness;
- C upon the death of the employee; or
- C by *force majeure*.

## Termination of employment at the initiative of the employer

A contract of specified duration may be terminated before its expiry only on the grounds of serious misconduct, *force majeure* or by written agreement of the parties (*sec. 38, LC*). A contract of unspecified duration may be validly terminated for reasons relating to the conduct of the worker or for reasons relating to requirements of the undertaking. Professional inaptitude may justify termination and may manifest itself in various ways including through the worker's incompetence, poor service, inadequate output, or slowness in the performance of the worker's tasks.

Under *secs. 36(2) and 37(1)* of the LC, serious misconduct justifies the termination of a contract of unspecified duration. The courts consider several attitudes as misconduct which justifies dismissal: acts of subordination or insolence, unjustified absences, acts of negligence and carelessness, the contravention of professional obligations, and fraudulent or illicit acts causing harm to the employer.

Dismissal which is ordered following a substantial modification to the contract of employment is not wrongful if it is done in the interests of the undertaking (*sec. 42, LC*).

Misunderstanding or the impossibility of collaboration between a worker and employer or a person in the management of the undertaking is also grounds for dismissal, provided that these accusations are substantiated by objective elements.

Dismissal effected without a valid reason, and dismissal because of the opinions of the worker, his or her membership or non-membership of a trade union (*sec. 39(1), LC*) or by an employer seeking to avoid legal or contractual obligations (for example, dismissal following a claim for overtime pay),<sup>3</sup> is considered wrongful. Moreover, certain categories of workers enjoy special protection.

The dismissal of a worker's representative is subject to prior authorization of the labour inspector (*sec. 130, LC*). The aim of such authorization is to ensure that the dismissal is not motivated by the activities of the worker's representative in the exercise of his or her functions. The absence or refusal of such authorization results in the reinstatement of the worker (*sec. 130, LC*).

A pregnant woman may not be dismissed because of her pregnancy. Similarly, during maternity leave, the employer may not terminate her contract of employment (*sec. 84(1), LC*).

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<sup>3</sup> P.-G. Pougoue.: *Droit du travail et de la prevoyance sociale au Cameroun* (Paris, Rescue Afrique, 1988), p. 161.

The job of a worker suffering from a non-occupational disease is protected. The employer may not replace him or her before six months have passed.

Workers suffering from an occupational disease or accident are not covered by the six-month limit mentioned above. Their employment is protected during the entire duration of their illness or period during which they are indisposed. The employer may not terminate their contracts or permanently replace them.

The LC provides for the termination of employment for a substantial modification of the contract (Aconstructive dismissal@, *sec. 42(2)*, LC). This rule applies only if the employer proposes a substantial modification of the contract and the worker refuses. If termination follows, it is to be attributable to the employer and therefore the worker is entitled to notice and severance pay. Furthermore, if such modification is not justified by the interests of the undertaking, the termination of the contract will be considered wrongful and the worker will be entitled to damages. This new rule covers cases wherein the employer forces his or her employee to resign by setting less favourable working conditions for the worker, in order to avoid notice requirements.

The amendment to the conditions for termination of employment for economic reasons is one of the most important amendments made to the LC, which now adopts a broader definition for termination of economic reasons.

Pursuant to *sec. 40(2)* of the LC, termination of employment for economic reasons means any dismissal effected by an employer for one or several reasons which are unrelated to the worker, such as the abolition of posts or conversion of jobs, or a modification of a contract resulting from economic difficulties, technological changes or internal restructuring.

### **Notice and prior procedural safeguards**

The termination of a contract of unspecified duration is subject to written notice given in advance by the party taking the initiative (except in the case of serious misconduct). The notice period starts to run from the date of notification. It is not subject to any condition precedent or condition subsequent. Under no circumstances may it be set against the leave period of the worker.

The rules on the duration of the notice period are prescribed in Order No. 015 of 26 May 1993, which was issued by the Minister for Employment.<sup>4</sup> These rules have regard to the worker's length of service and the occupational group to which he or she belongs. They provide for periods of notice as follows:

- C 15 days or a month (according to the professional group of the worker) for between one month and one year of service;
- C one, two or three months for between one and five years of service; and
- C two, three or four months for over five years of service.

For the purpose of seeking other employment during the period of notice, the worker must be allowed one day off each week (with full wages), which he or she may take all at once or one hour at a time as he or she prefers (*sec. 35(2)*, LC).

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<sup>4</sup> *Sec. 1* of Order No. 015/MTPS/SG/CJ of 26 May 1993 establishing the conditions and duration of the notice period.

If the employer fails to give notice, the employer is obliged to pay the worker compensation corresponding to the remuneration and any other advantages to which he or she would have been entitled during the notice period (*sec. 36, LC*).

The termination of a contract of employment of unspecified duration must be notified in writing to the other party giving reasons for the termination (*sec. 34(1), LC*).

In the case of serious misconduct, the employer may suspend the worker without settlement, in the event that the labour inspector authorizes the dismissal, and with a settlement if such authorization is not granted. The period in which the decision of the inspector is due is one month.

Workers=representatives enjoy this protection for up to six months after the expiry of their terms in office, and candidates up to six months after the date of the notification of their candidature (*sec. 130, LC*).

Even if the inspector gives his or her authorization for dismissal, the worker and the workers=representative may in any event bring an appeal before the competent court in order to ascertain the validity of the reason given for dismissal.

*Sec. 40(3)* of the LC lays down mandatory and prior conditions for a termination of employment for economic reasons to be valid. These prior conditions constitute a real obligation to enter into negotiations.

The LC requires an employer who is contemplating termination of employment for economic reasons to meet with the workers=representatives and to discuss with them, in the presence of the labour inspector, all measures to avert termination. These include the reduction of hours of work, working on a shift system, part-time work, lay-offs, readjustment of allowances, compensation and benefits of all kinds, and even the reduction of wages, if unavoidable. The duration of such negotiations should not exceed 30 days.

If a worker refuses to comply with the measures negotiated, he or she may be dismissed with payment for the notice period and, if he or she qualifies for it, a severance allowance (*sec. 40(5), LC*). The statute authorizes termination based on refusal.<sup>5</sup>

If the above-mentioned negotiations or measures adopted do not produce the expected results, the employer is authorized to proceed with the dismissals following a well-established procedure. He or she must decide on the order of dismissals taking into account the skills of the workers, their length of service in the undertaking and family responsibilities, and these criteria should be considered cumulatively and not alternatively.<sup>6</sup>

If no agreement is reached, the employer must inform the staff delegates in writing of the steps taken for dismissal. The staff delegates should respond to the written notice in eight days. The employers= communication and the workers=representative=s response should then be submitted without delay to the local labour inspector for arbitration (*sec. 40(6)(d), LC*).

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<sup>5</sup> P.-G. Pougoue.: *Le petit séisme du 14 août 1992*, in *Le nouveau Code du travail du 14 août 1992* (Yaoundé Puc., 1994), p. 17.

<sup>6</sup> J. Mbendang Ebongue: *Libres propos sur la loi n° 92/007 du 14 août 1992 portant Code du travail au Cameroun*, in *Recueil Penant. Revue de droit des pays d'Afrique* (EDIENA), Jan.-Apr. 1996, No. 820, p. 46.

A worker who has been dismissed for economic reasons, will continue to enjoy priority for two years if workers are recruited for the same type of job in his or her former undertaking. A worker who refuses a job loses this right.<sup>7</sup>

## Severance pay

Apart from instances of serious misconduct, any worker who is dismissed after working for at least two years in the same undertaking is entitled to severance pay which takes into account his or her length of service (*sec. 37(1)*, LC). The terms and conditions for the award of such an allowance and the calculation of severance pay are laid down in Order No. 016 of 26 May 1993 issued by the Minister for Employment. For the purpose of calculating length of service, the following periods are taken into account: paid leave, exceptional permission for paid or unpaid leave, periods during which the contract has been suspended, and legal periods of internship and professional training.

Unless there are more favourable provisions in an applicable collective agreement, individual contract of employment or specific text, severance pay is equivalent to a percentage of the average monthly wages during the last 12 months preceding the dismissal for each year of service in the undertaking. The rates applicable are fixed as follows:

- C from the first to the fifth year: 20 per cent;
- C from the sixth to the tenth year: 25 per cent;
- C from the 11th to the 15th year: 30 per cent;
- C from the 16th to the 20th year: 35 per cent;
- C from the 21st year: 40 per cent.

For the purpose of the calculation, partially completed years are also taken into account on a proportionate basis.

## Avenues for redress

A dismissed employee may seek relief from a judge (*sec. 39*, LC). The judge who is called upon to decide on the dismissal must examine the facts of the case and the validity of the reasons given for the dismissal. The judge must also ascertain whether the various procedures prescribed by law have been observed.

A wrongful termination of a contract may give rise to damages (*sec. 39*, LC). The LC amends the factors which the court must take into account in order to set the amount of damages. If the responsibility rests with the employer, the LC repeals the element of ~~A~~common practice~~@~~ and considers only the nature of the employment, length of service, the age of the worker and any accrued rights (*sec. 39(4)(b)*, LC).

Damages are not to exceed a maximum of one month's wages for each year of service with the undertaking, and the total awarded should not be less than three months' wages. The wage to be taken

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<sup>7</sup> *Sec. 4* of Decree No. 21/MTPS/SG/CJ of 26 May 1993 setting the terms and conditions of termination for economic reasons.

into account is the average monthly gross wages in the last 12 months of service of the worker. This minimum and maximum limit of damages prevents there from being too great a discrepancy between the amounts allocated by the various courts of law. In the event of a lawful dismissal which has not been ordered according to the prescribed procedures, the maximum level of damages is one month's wages (*sec. 39(5), LC*).



## ***Canada (Federal)***

### **Sources of regulation**

The Canada Labour Code (CLC), amended in 1992, and the Canada Labour Standards Act are the sources of labour legislation in relation to termination of employment for employees falling within their scope. In addition, legislation at the provincial level may afford protection in relation to dismissal (see, for instance, the separate entry for Quebec).

### **Scope of legislation**

The CLC applies to employees and employers in federal undertakings and is divided into three parts. Part I (*secs. 3 to 121*) deals with industrial relations; Part II (*secs. 122 to 165*) relates to occupational safety and health; and Part III (*secs. 166 to 264*) concerns standards.

Part I does not apply in respect of employment by the Crown (*sec. 6*). Part II excludes employment in the sectors of the Canadian civil service specified in Schedule I of the Public Service Staff Relations Act (*sec. 123(2)*).<sup>187</sup> Part III does not apply to managers or superintendents or employees who exercise management functions, or to members of such professions designated by regulation as those to which Division I of the LC does not apply (*sec. 167*).<sup>188</sup>

### **Contracts of employment**

The concept of an employment contract can include a contract for an indefinite period, and a contract for a specific project.

### **Termination of employment**

Depending on the nature of the employment relationship, the contract of employment can terminate, not at the initiative of the employer, in various circumstances, including by:

- C the expiry of a fixed-term individual contract; and
- C the completion of the project for which a contract was concluded.

### **Termination of employment at the initiative of the employer**

An employer is free to terminate employment. However, such dismissal must be linked to good and sufficient cause. The following situations constitute invalid grounds for the dismissal of an employee:

- C the employee's trade union activities or participation in a general strike action (*sec. 94, CLC*);
- C if the employee has given evidence in proceedings or an inquiry held under Part II of the CLC (*sec. 147, CLC*);
- C if the employee has provided information regarding the conditions of work affecting his or her safety or health or that of any fellow employee (*sec. 147, CLC*);

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<sup>187</sup> Departments such as Canada Statistics, Civil Service Commission, Royal Canadian Mounted Police, Privy Council, among others.

<sup>188</sup> *Sec. 3* of the Canada Labour Standards Act excludes persons employed in the areas of architecture, dentistry, engineering, law and medicine.

- C if the employee has acted in accordance with the provisions of Part II of the CLC or has sought their enforcement (*sec. 147, CLC*);
- C if the employee is pregnant or has requested maternity or parental leave (*sec. 239(3), CLC*);
- C if garnishment proceedings are to be taken against the employee (*sec. 238, CLC*); and
- C if the employee has been absent due to illness or injury, provided that he or she had worked for the employer for at least three months, and that his or her period of absence was not over 12 weeks. Nevertheless, the employee must submit a medical certificate to the employer within 15 days after returning to work (*sec. 239, CLC*).

*Sec. 212(1)* establishes that a collective dismissal must affect at least 50 workers in the same establishment and must be carried out within a period not exceeding four weeks.

### **Notice and prior procedural safeguards**

An employer who dismisses a worker who has worked continuously for at least three consecutive months is obliged to give the worker notice of termination in writing at least two weeks in advance, or to pay compensation in lieu of notice of an amount equivalent to two weeks' wages at the regular rate of wages for his or her regular hours of work (*sec. 230, CLC*). However, *sec. 232* states that where an employee continues to be employed for more than two weeks after the date specified in the notice, the employer, in conformity with *sec. 230* of the CLC, may terminate employment only with the written consent of the employee, or if the dismissal is based on just cause.

In the case of a collective dismissal, the employer must give the Minister of Human Resources Development written notification at least 16 weeks before the date of the first dismissal. A copy of this notice should also be submitted to the Minister of Employment and Immigration, the Canada Employment and Immigration Commission and to any trade union representing the redundant employees concerned. Such notice shall set out the date or timetable for the proposed dismissals, the estimated number of employees in each occupational classification and such other information prescribed by the regulations (*sec. 212(1), (2) and (3), CLC*).<sup>3</sup>

As soon as notice has been submitted to the Minister, the employer must set up a joint planning committee consisting of at least four members, half of whom should be representatives of the redundant employees and the others, representatives of the employer (*sec. 214(1), (2) and (3), CLC*).

The objective of the joint planning committee is to develop an adjustment programme to eliminate the need for the termination of employment, to minimize the impact of the termination on the redundant employees and to assist them in obtaining other employment (*sec. 221(1), CLC*).

*Sec. 222(2)* of the CLC sets out provisions for an inspector to monitor the work of the committee and to attend any of its sittings.

### **Severance pay**

Subject to *sec. 235* of the CLC, an employer who terminates the employment of an employee who has completed 12 months of continuous employment shall pay to the employee a severance allowance equivalent to two days' wages for each year of service, or five days' wages for each year of service.

### **Avenues for redress**

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<sup>3</sup> For example, the name of the employer, the place where the proposed termination of employment is to take place, the nature of the operations performed by the industry, the name of the trade unions representing the redundant employees and the reason for the dismissal.

Complaints against termination of employment for trade union activities may be made to the Canada Labour Relations Board no later than 90 days after the date of the termination (*sec. 97, CLC*).

An employee who has completed 12 consecutive months of continuous employment with the same employer, and who is not a member of a group of employees subject to a collective agreement, may submit a complaint against unjustified dismissal to an inspector. Such complaints must be made within 90 days from the date of dismissal (*sec. 240, CLC*).

*Sec. 105* of the CLC states that the Minister, on request or at his or her own initiative, may at any time appoint a mediator to confer with the parties to assist them in settling the dispute.

The burden of proof rests with the employer who must prove that the dismissal was justified. Nevertheless, the employee must refer the complaint to the arbitrator in advance (*secs. 98(4) and 133(6), CLC*).

In the case of collective dismissals, the members of the committee may, within six weeks from the date of the submission of notice to the Minister, apply jointly for the appointment of an arbitrator if the committee has not completed the development of the adjustment programme, or if they are not satisfied with the programme (*sec. 223(1), CLC*). If the Minister agrees, he or she will appoint an arbitrator and, if necessary, provide a list setting out any matters in dispute (*sec. 224(1), CLC*). The arbitrator must render a decision within four weeks (*sec. 224(4), CLC*). He or she may not review the employer's decision or delay the termination of employment, and the arbitrator's judgement is final and binding.

In the event of the annulment of a notice of termination or dismissal without notice, the employer may be ordered to pay the equivalent of the wages and benefits to which the employee would have been entitled during the notice period (*sec. 258(1), CLC*).

In the case of unjustified dismissal, the Canada Labour Relations Board is authorized to require the employer to pay the employee a sum not exceeding the remuneration that would, but for the failure, have been paid by the employer (*sec. 99(c)(ii), CLC*).

*Sec. 242(4)(a)* of the CLC states that in cases of unjustified dismissal, an arbitrator may, by order, require the employer:

- C to pay the employee compensation not exceeding an amount equivalent to the remuneration that would have been paid by the employer if the dismissal had not taken place;
- C to reinstate the employee in his or her position; or
- C to take any similar action that is reasonable to require of the employer in order to remedy or counteract any consequences of dismissal.

In addition, *sec. 258(2)(a)* of the LC provides that if an offence for which the employer has been convicted relates to the discharge of an employee, the convicting court may, in addition to any other punishment, order the employer:

- C to pay compensation for loss of employment equivalent to the wages that would have accrued to the employee up to the date of conviction; or
- C reinstate the employee in his or her former position on a date which the court deems reasonable in the circumstances, and in the position that the employee would have held had he or she not been dismissed.

Reinstatement after a dismissal for trade union activities is covered by *sec. 99(1)(c)(i)* of the CLC, and *sec. 242(4)(b)* regulates reinstatement for unjustified dismissal.

## ***Caribbean countries***

### **Sources of regulation**

The Model Harmonisation Act regarding Termination of Employment (The Model Act), drafted with the assistance of the International Labour Office (ILO) for the countries of the Caribbean Community (CARICOM),<sup>189</sup> was adopted by the Standing Committee of Ministers responsible for Labour in April 1995. Since adoption, the Model Act has influenced legislation on the termination of employment in Guyana (Severance Pay Act, 1997), and has been used as a model to a greater or lesser extent for Bills drafted on the termination of employment in Barbados, Bahamas, Grenada and Saint Lucia. In turn, of course, the Model Act was itself influenced by provisions in the CARICOM countries.<sup>190</sup>

At the same time that the Model Act was endorsed, the Standing Committee also adopted the Model Harmonisation Act regarding Equality of Opportunity and Treatment in Employment and Occupation (The Model Equality Act) and the Model Harmonisation Act regarding Registration, Status and Recognition of Trade Unions and Employers=Organisations (The Model Recognition Act). These two Model Acts are commented on below only so far as their provisions affect termination of employment. The legislation governing termination of employment in Jamaica is addressed separately (see summary for Jamaica).

In addition, in all of the CARICOM members, case law (based upon either the common law or civil law systems), individual contracts of employment and, in some cases, collective agreements concluded through collective bargaining are additional sources of regulation on termination of employment.<sup>191</sup>

## Scope of legislation

The Model Act (like the Model Recognition and Equality Acts) defines An employee@ broadly to mean a person who offers his or her services under a A contract of employment@, and to include managerial employees and dependent contractors. A Contract of employment@ is defined to include any contract, express or implied, written or oral, and to include contracts of apprenticeship and probation. Likewise, An employment@ is defined to include part-time employment, contracts for services and commission agents (*sec. 2*, Model Act).

Part IV of the Model Act applies to all employees employed for an unspecified period of time, and to employees employed for specified periods within the specified period. It excludes only fixed-term

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<sup>189</sup> The Caribbean Community (CARICOM), also called the Commonwealth Caribbean, is a geographical and political grouping of 13 countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent, Surinam and the Grenadines and Trinidad and Tobago. Montserrat, a British Dependency, is also a member of CARICOM. The British Virgin Islands is an associate member.

<sup>190</sup> A report on the provisions existing in the CARICOM countries was prepared by R.M. Antoine: *The CARICOM Labour Law Harmonisation Report*, Sep. 1992.

<sup>191</sup> An interesting example of collective agreements as a source of regulation on termination of employment in the CARICOM States is the recent Protocol on Job Security, agreed between the Barbados Employers=Confederation, the Barbados Hotel and Tourism Association and the Barbados Workers=Union. This Protocol, based on the principles enunciated in the Employment Policy Convention, 1964 (No. 122), includes a wage freeze and the concept of gain-sharing remuneration. It also specifies a procedure for employers to follow when considering redundancies, including notice and consultation with trade unions, making all efforts to avoid job losses and the adoption of An last on, first off@ as the (*prima facie*) guiding principle for redundancy selection.

employees upon the expiry of the term of the contract and probationary employees upon the expiry of the probation period (*sec. 14*, Model Act).

The Model Act sets out minimum standards which can be improved upon by collective bargaining (*sec. 3*, Model Act).

### **Contracts of employment**

*Sec. 4(2)* of the Model Act sets out the permissible forms of employment contract. These are:

- C indefinite contracts;
- C contracts for specified periods or tasks; and
- C contracts for probationary periods of no more than three months (unless extended).

Probationary periods may last for up to three months (unless extended, once, for another three months), during which time they can be terminated without reason or notice (*secs. 4(7) and 15*, Model Act), provided the probationer has, during the probationary period, been given a fair appraisal.

### **Termination of employment**

Employment terminates, other than at the initiative of the employer, on the winding up of an employer; however, this is treated as a dismissal for the purpose of redundancy payments (*sec. 24*, Model Act). The transfer of a business will not terminate employment unless employment has been formally terminated and severance pay has been paid (*sec. 13*, Model Act).

Fixed-term or fixed-work contracts terminate on expiry or completion, respectively (*secs. 4(4) and 4(5)*, Model Act). Contracts which purport to be for a fixed period over two years, and which involve a post connected with a normal and permanent activity of the employer, are deemed to be indefinite (*sec. 4(6)*, Model Act).

### **Termination of employment at the initiative of the employer**

*Sec. 14* sets out the basic principle of the Model Act: an employer may not terminate employment unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the enterprise, and unless there is compliance with notice requirements.

The Model Act also sets out a list of invalid reasons for termination (*sec. 16*), including:

- C an employee's race, sex, religion, colour, ethnic origin, national extraction, indigenous status, social origin, political opinion, disability, family responsibilities and marital status (these grounds are also prohibited under the Model Equality Act, subject to specified bona fide occupational qualifications (*secs. 4, 5 and 6*, Model Equality Act));
- C an employee's age (subject to national law and collective agreement provisions on retirement);
- C a female employee's pregnancy or a reason connected to pregnancy;

- C an employee's exercise of his or her union membership or other industrial rights (the Model Recognition Act, *sec. 51*, also prohibits dismissals based on union membership or activity);
- C an employee's temporary absence from work due to illness or injury within leave entitlements;
- C being diagnosed with HIV (unless the employee is a health care worker);
- C absence because of compulsory military service or other civic obligation; and
- C the filing of a complaint, participation in industrial action or removing oneself from a hazardous situation.

Where the employee terminates the contract of employment without notice because the employer's conduct has made it unreasonable for the employee to continue working, this is deemed to be a (constructive) dismissal (*sec. 17*, Model Act).

Employers may terminate employment without notice or payment of any severance payment if an employee is guilty of serious misconduct, based on the operational requirements of the enterprise, of such a nature that it would be unreasonable to require the employer to continue employment (*sec. 18*, Model Act). Employers may also terminate employment based on poor performance or misconduct, after following prescribed procedures (*sec. 19*, Model Act, see below), or on the grounds of redundancy, again after following prescribed procedures (*sec. 20*, Model Act (see below)).

### **Notice and prior procedural safeguards**

Minimum notice periods are set out in *sec. 26* of the Model Act as follows:

- C one working day if the employee has less than one month of service;
- C two weeks for between one month and one year of service;
- C one month for between one and five years of service; and
- C two months for more than five years of service.

These periods of notice may be improved upon by collective agreement or custom (*secs. 26(2) and 26(3)*, Model Act) and may not be waived by the employee, although the employer may make a payment in lieu of notice.

For dismissals on the grounds of misconduct (not justifying summary dismissal) the employer is required to warn the employee, and may only terminate employment if he or she acts within a reasonable period after knowing about the misconduct (*sec. 19(2) and (3)*, Model Act). An employer may only terminate an unsatisfactorily performing employee if that employee has been warned of unsatisfactory performance and has had a reasonable opportunity to improve his or her performance during the three months following the warning (*sec. 19*, Model Act). Employment may only be terminated due to redundancy if the employer has consulted beforehand with the recognized trade union about the proposed redundancies and possible means of averting dismissal (consultation with recognized unions is also required by *sec. 37(1)* of the Model Recognition Act).

### **Severance pay**

Employees who are terminated on the grounds of redundancy and have completed one year's service are entitled to a severance payment of two weeks wages for each of the first ten years service, and three weeks wages for each of the remaining years of service (*sec. 33*, Model Act).

## **Avenues for redress**

Employees have the right, within six months from the date of termination, to complain of unfair dismissal to the appropriate judicial body (*sec. 30, Model Act*). The burden of proving a dismissal was fair rests on the employer (*sec. 31, Model Act*). If a dismissal is found to be unfair, the employee is entitled to one or more of the remedies of reinstatement, re-engagement or compensation, with reinstatement to be the remedy considered first (*sec. 32, Model Act*). Compensation is not to be less than two weeks= wages for every completed year of service.

## *Chile*

### **Sources of regulation**

As is the case in most Latin American countries, the 1925 Constitution of Chile regulates and protects the freedom to work. *Art. 19(16)*<sup>192</sup> of the current version, amended in 1980, alludes to this concept in general terms.

The main legal source of regulation on termination of employment is the Labour Code (LC), which was completely recast in January 1994, setting out systematically, and in a single text, all the laws amending the 1987 Code (Title V of the Act No. 19010 of December 1990 governs termination of employment).

In addition to the LC, the other sources of labour law are collective agreements at the level of the undertaking or above, case law and administrative precedents based on legal opinions. Collective agreements may be formal or informal (*sec. 314*, LC). Legal opinions may be issued by the Labour Secretariat, either *ex officio* or at the request of the parties, in order to identify the content and scope of labour law.<sup>193</sup>

Although *secs. 153-157* of the LC establish the obligation to prepare work rules in the case of undertakings employing 25 or more permanent workers, these rules relate mainly to safety and health standards, which, apart from their contravention and respective sanctions, do not affect termination of employment.

### **Scope of legislation**

Although labour relations between employers and workers are regulated by the LC and its supplementary laws, according to *sec. 1* of the LC, it does not apply to civil servants employed in centralized or decentralized state administration, the National Congress and Judiciary, or to workers in state undertakings or institutions or workers employed in bodies to which they contribute, participate or are represented, provided that such workers are governed by a special law, i.e. the Administrative Statute, Act No. 18834. Thus, the provisions of the LC apply to those aspects not regulated by these special statutes, such as the area of maternity protection.

Independent workers are also excluded (*sec. 8*), except where the LC refers specifically to them.

Services rendered by persons who work either directly with the public, or intermittently or sporadically at home, are not considered as involving employment contracts, and therefore fall outside the LC (*sec. 8*). Graduates of institutions of higher education or professional technical training

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<sup>192</sup> Unlike the texts in other countries of the region, the Constitution does not expressly mention the right to security of employment or protection against unjustified dismissal.

<sup>193</sup> Legal opinions are binding only upon civil servants. Although not binding on the judiciary, they are taken into serious consideration. If there is a discrepancy between an administrative decision and case law of the court, however, the latter prevails.



programmes, for a specified period, are also excluded while they are fulfilling work-experience requirements.

Home work, which is regarded as a dependent or independent relationship determined by the parties themselves, is governed by special legislation (Act No. 19250).

Contracts for apprentices, agricultural workers, stevedores, seafarers and casual port workers, and workers in private homes (domestic workers) are covered as special contracts under Title II of the LC.

### **Contracts of employment**

Pursuant to *sec. 7* of the LC, an individual contract of employment is an agreement by which the employer and the worker enter into a reciprocal obligation, by which the latter agrees to render services under the supervision and immediate direction of the former, who agrees to pay an agreed remuneration for those services.

The LC makes no provision for a probationary period but nothing prevents such provisions from being established through an individual or collective agreement.

Within the scope of the general regulation, temporary, part-time, replacement and other forms of work may be performed, although there is no special regulation promoting such forms of work.

The LC makes no presumption that the contract of employment is indefinite when the corresponding period of service is not expressly specified. In fact, in the absence of a written contract, such stipulations will be made by the worker (*sec. 9*).

Fixed-term contracts may be made for a maximum duration of one year. The continued performance of services after this period transforms the contract into one of indeterminate duration (*sec. 159*).

### **Termination of employment**

Termination of contracts of employment, not at the initiative of the employer, may be effected:

- C by the mutual agreement of the parties;
- C through the resignation of the worker (with at least 30 days= notice);
- C through the death of the worker;
- C upon expiry of the agreed term of the contract or completion of the service for which the contract was made;
- C by unforeseen events; and
- C by *force majeure*.

### **Termination of employment at the initiative of the employer**

Chile abolished the concept of *desahucio* (that is, dismissal without cause) in 1990 and replaced it by requirements of the undertaking, establishment or service, resulting from streamlining or modernization

activities, reduced productivity, changes in market or economic conditions which impose the need to lay off one or more workers, and the workers's lack of technical or job skills (*sec. 161(1)*). Nevertheless, *desahucio* has been retained as grounds for the dismissal of domestic staff; persons occupying positions of trust; and persons representing the employer, such as managers, assistant managers, agents or other types of representatives, provided that they have general administrative competence.

The employer may dismiss a worker for misconduct (*sec. 160, LC*) or on the grounds of failure to meet the requirements of the undertaking (*sec. 161, LC*). The contract of employment may be terminated without entitlement to compensation in the following instances:

- C dishonesty, acts of violence, insult or serious immoral behaviour duly proven;
- C negotiations conducted by the worker within the normal functions of the enterprise and which might have been expressly forbidden, in writing, within the terms of the contract made with the employer;
- C unjustified absence from work for two consecutive working days, two Mondays within a period of one month or a total of three days within the same period; similarly, absence which is unjustified or without advance notice by a worker responsible for a process, task or machine when such absence entails disruption in the rest of the service or production process;
- C abandonment of work by the worker, which is defined as: leaving the workplace without proper notice or valid reason during working hours, and without authorization from the employer or his or her representative; and unjustified refusal to perform the assigned task under the agreed terms of the contract of employment;
- C acts, forgetfulness or carelessness seriously affecting the safety or operation of the establishment, safety or activity of the workers, or their health;
- C deliberate material damage to the plant, machinery, tools, work implements, goods or merchandise; or
- C serious breach of the obligations under the contract of employment.

The LC prohibits dismissal without just cause and subjects the dismissal of women on the grounds of maternity to prior authorization of a judge. This protection covers the period from conception up to one year after post-natal leave, and renders dismissal of a female worker during this period null and void.

### **Notice and prior procedural safeguards**

Dismissal without cause (*desahucio*) of persons in positions of trust, representatives or domestic staff must be carried out in writing, 30 days in advance, and copied to the relevant labour inspectorate. Advance notice is not required if the employer pays the worker cash compensation equivalent to the last monthly remuneration earned.

Written notice of justified dismissal should be delivered to the worker, personally or by registered letter, to the domicile stated in the contract. Such notice should state the reasons for dismissal, the facts on which dismissal is based and the status of social security contributions (*sec. 162, LC*), and should be copied to the labour inspectorate. The letter must be sent within three working days following the removal of the worker.

If the reason is, as stated in *sec. 161* of the LC, based on the requirements of the undertaking, the worker must be given notice, copied to the relevant inspectorate, at least 30 days in advance, except if compensation is paid corresponding to the last monthly pay earned. Furthermore, the notice must precisely indicate the total amount to be paid in accordance with the provisions of *sec. 163*.

Failure to comply with the abovementioned requirements (*sec. 162, LC*) will nullify the dismissal, without prejudice to the prescribed administrative sanctions.

Judicial authorization is required for the dismissal of persons entitled to trade union immunity or women entitled to maternity protection.

In the case of dismissals made on the grounds of the requirements of the undertaking, there is no requirement for prior consultation with trade unions or for administrative intervention.

### **Severance pay**

In the case of the requirements of the undertaking (*sec. 161, LC*), compensation is payable (unless an individual or collective agreement is made with more favourable terms) equivalent to 30 days of the last monthly remuneration earned, for each year of service worked and fraction greater than six months. The upper limit is 330 days for workers with a contract in force for one year or more (*sec. 163, LC*).

If a dismissal for misconduct or for the requirements of the undertaking is declared unjustified, unfair or unlawful, the abovementioned compensation is increased by 20 per cent (which may be further increased by up to 50 per cent in specific cases if there is deemed to be no plausible reason for dismissal).

There is the possibility for an agreement to be made on a compensatory indemnity, from the beginning of the seventh year of employment up to the end of the 11th year of the employment relationship. (For persons hired after 14 August 1981 the limit of 11 years is set; there is no limit for persons hired before this date. Under these agreements, a contribution of 4.11 per cent to 8.33 per cent of the remuneration is deposited in an insured pension fund (*sec. 164, LC*).

Regardless of the cause of the termination of employment, workers in private homes are entitled to compensation paid by the employer in an amount equivalent to that which has been previously described (see above).

### **Avenues for redress**

A worker who feels his or her dismissal is unjustified or improper may bring a claim before the Labour Court within 60 working days (*secs. 170-171, LC*).

## ***China (Hong Kong Special Administrative Region)***

### **Sources of regulation**

On 1 July 1997, China became a dual legal system, as the Governments of the United Kingdom and the People's Republic of China had agreed in 1984 to maintain the application of the basic law in application after the return of Hong Kong to China. The term 'basic law' includes the common law, rules of equity, ordinances, subordinate legislation and customary law. The law may be amended in the new Hong Kong Special Administrative Region (HKSAR), but only in accordance with the existing social and economic policies that are to be maintained for 50 years.

The main legislation regulating termination of employment in HKSAR is the Employment Ordinance (Chapter 57) of 1968 (EO). The EO has been amended a number of times, the last one being on the eve of the changeover, on 26 June 1997, reversing the principle of employment at will by introducing the requirement of a valid cause for termination of employment (*Part VIA*, EO).<sup>194</sup> Other relevant legislation includes the Factories and Industrial Undertakings Ordinance 1968 (Chapter 59) (FIUO), as amended, the Employees' Compensation Ordinance (Chapter 282) (ECO), the Labour Tribunal Ordinance (Chapter 25) (LTO) and the Jury Ordinance (JO). The common law is another important source of regulation.

### **Scope of legislation**

The EO is applicable to all employees engaged under a contract of employment except (*sec. 4*, EO):

- C employees who are members of the employer's family and live with the employer;
- C persons who are serving under an agreement according to the Merchant Shipping Ordinance;
- C apprentices (Apprenticeship Ordinance (Chapter 47)); and
- C persons covered under the Contracts for Employment Outside Hong Kong Ordinance, (Chapter 78).

### **Contracts of employment**

The most important distinction, as far as contracts of employment are concerned, is the one between continuous and non-continuous contracts. This distinction is relevant in the EO in order to determine entitlements to rest days, statutory paid holidays, severance pay, long-service payments and so on. A person is considered to work under a continuous contract where he or she has worked for the same employer for four weeks or more and for at least 18 hours in each of the four weeks (*First Schedule*, EO).

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<sup>194</sup> While other amendments in the field of labour law enacted just before the changeover have subsequently been suspended by the Legislative Provisions (Suspension of Operation) Ordinance, 1997, these amendments to the EO were not suspended and remain in effect.

## **Termination of employment**

Under common law, an employment contract terminates, not at the initiative of the employer:

- C at the end of a fixed-term contract;
- C at the completion of the work for which the contract was entered into;
- C where advance notice is given by the employee;
- C by mutual consent;
- C by death of the employee or death of the employer (provided the ownership of the business does not vest in a personal representative of the deceased employer who then re-engages the employee);
- C by *force majeure*; or
- C upon changes of circumstances rendering the performance of the contract unlawful or physically impossible.

## **Termination of employment at the initiative of the employer**

Reversing the common law principle of employment at will, the EO Amendment of June 1997 contains the requirement of a valid cause for dismissal. It is for the employer to prove that it had a valid reason for dismissing the employee (*sec. 32A(4)(b)*, EO). In a number of specified situations, a dismissal will be automatically unfair.

It is valid for an employer to dismiss an employee for:

- C reasons of conduct, capability or qualifications;
- C redundancy; and
- C the fact that the employer or the employee may be in contravention of some legislation by maintaining the employment relationship (*sec. 32K*, EO).

The law gives the courts wide discretion in deciding on the validity of the reason for termination by inserting a last clause referring to any other reason of substance, which in the opinion of the court or the labour tribunal, was sufficient cause to warrant the dismissal of the employee@ (*ibid.*).

In case of wilful disobedience, serious misconduct, fraud or dishonesty, or habitual negligence by the employee, the employer is entitled to dismiss the employee without notice or payment in lieu thereof. This statutory list of grounds for summary dismissal can be added to by the common law grounds for summary dismissal (*sec. 9*, EO).

The following do not constitute valid reasons for dismissal:

- C dismissal for incapacity arising from work-related injuries and illnesses before the injury or illness has been certified as preventing the employee from working, or before compensation for incapacity has become payable to the employee (*sec. 48*, ECO);
- C dismissal by reason of the fact that the employee has given evidence in proceedings under the EO or FIUO (*sec. 72B*, EO, and *sec. 6*, FIUO);
- C dismissal for trade union membership or activity (*sec. 21B(2)(b)*, EO);

- C dismissal due to maternity leave (*sec. 15(1)*, EO); and
- C dismissal due to the taking of sick leave where sick leave allowance is payable (*sec. 33(4B)*, EO).

While a valid cause is required only for workers employed under a continuous contract, these grounds of unlawful dismissal may be invoked by a worker who may not qualify as working under continuous employment (*sec. 32A(c)*, EO).

In addition, in December 1996, the Sex Discrimination, Disability Discrimination and Family Status Discrimination Ordinances were introduced, making it unlawful, *inter alia*, to dismiss on the basis of gender, marital status, pregnancy or disability (unless the employer can justify dismissal on the basis of a genuine occupational qualification) or family status (defined as having responsibility for the care of an immediately family member). These Ordinances also incorporate concepts of indirect discrimination (i.e. requirements or conditions which are neutral on their face but in fact disadvantage one group and cannot be objectively justified). (The new laws also rendered sexual harassment unlawful.)

### **Notice and prior procedural safeguards**

In accordance with the EO, an employer is required to give notice of termination of contract or payment in lieu of such notice (*secs. 6 and 7*, EO). The length of the notice period depends on whether the contract of employment is continuous or a monthly renewable contract (all employment contracts are presumed to be monthly renewable unless agreed differently), and whether or not the parties have agreed on the notice period. For a continuous contract where there has been an agreement, the notice is as agreed unless the agreed period is less than seven days. If the agreed notice is for less than seven days, the agreement is void and the employee must receive no less than one month's notice.

For non-continuous contracts, the notice is as agreed, or, in the absence of an agreement, a reasonable notice according to common law principles. Special provisions deal with notice for probationers.

As far as collective dismissals are concerned, there are no legislative requirements for notice, consultation, prior authorisation from a judicial or administrative body or any other restrictions in relation to proposed redundancies.

### **Severance pay**

The EO was amended in 1974 to introduce statutory provisions for severance pay in case of prolonged lay-off or redundancy (*sec. 31C*, EO). To be eligible for severance pay, the worker has to have been employed under a continuous contract for at least 24 months.

Additionally, long-service payments were introduced in 1986 for workers dismissed for reasons other than redundancy, lay off or serious misconduct justifying summary dismissal (*sec. 31R*, EO).

Workers are not entitled to severance pay and long-service payment if they leave their employment before the expiry of the notice period. For every year of service, a monthly employee may receive a severance or long-service payment equal to two-thirds of the last full month's wage or of HK\$22,500, whichever is the smaller amount. An employee on piece-rate pay or an employee on time-

based pay which is other than monthly, is entitled to 18 days= wages or to two-thirds of HK\$15,000, whichever is the smaller amount.

### **Avenues for redress**

An employee who is aggrieved about his or her termination of employment may file a claim with the Registrar of the Labour Tribunal within nine months of the date of dismissal. However, under *Part VIA* of the EO, an employee will generally be eligible for remedies only if he or she has served a qualifying period of 24 months=continuous employment. This qualifying period is reduced to 12 months=continuous employment for dismissals effected for trade union membership or activity or because the employee has given evidence in proceedings under the Ordinances (*sec. 72B(1)*, EO, and *sec. 6*, FIUO). Moreover, there is no qualifying period for other automatically unlawful dismissals.

If a dismissal is found to be for no valid reason, several remedies are available (*sec. 32M, N, O and P*, EO). A Labour Tribunal may make an order for reinstatement or re-engagement, or award a terminal payment. If no order for reinstatement or re-engagement is made, and the dismissal is held to be for automatically unfair reasons the Tribunal may award compensation at a level that it considers just and appropriate in the circumstances. These new remedies, under *Part VIA* of the EO do not prevent an employee from continuing to make claims to the Labour Tribunal for severance pay, long service pay or damages for wrongful dismissal.

## *China*

### **Sources of regulation**

The relevant law on termination of employment in China is contained primarily in the Labour Law of the People's Republic of China, 1994 (the *Labour Law*), which came into effect in January 1995, and 17 regulations pertaining to Labour Law promulgated in 1994. The most important of these regulations as regards termination of employment are the Circular of the Ministry of Labour on the Provisions on Personnel Reduction due to Economic Reasons in Enterprises (No. 447) and the Circular of the Ministry of Labour on the Measures of Economic Compensation for the Violation and Revocation of Labour Contracts (No. 481). In addition, provisions applicable to employment termination are found in the Provisional Rules on Dismissal of Workers Violating Labour Discipline in State-Owned Enterprises, 1986 (the *Rules*).

The enactment of the Labour Law heralded a new dawn for industrial relations in China and must be viewed within the context of increasing economic and political change. Since the 1970s, new policies have been introduced promoting economic reform and efficiency, which in general means relinquishing governmental control and increasing privatization of industry and foreign investment. The impetus away from communist-type state control of employment has brought with it significant and new problems for industrial relations<sup>195</sup> and security of employment as private employers gain increased autonomy in the workplace. The new initiative is a radical change from the previous traditional framework which was based on the premise that the economic system was run as a single, large state enterprise.

### **Scope of legislation**

The Labour Law applies to all categories of employees and enterprises while the Rules apply only to employees of the State and acts as a supplement to the Labour Law. Although this study focuses on the examination of principles of dismissal in relation to the private sector, consideration of employment in the state sector is relevant in the case of China because of the tradition of all employment being considered as state employment.

### **Contracts of employment**

There are three types of firms in the traditional industrial structure,<sup>196</sup> the largest group being state-owned enterprises. Under the traditional industrial scheme there are two categories of employment: permanent (or lifelong) employment and temporary employment, with the former comprising the overwhelming majority of employment relationships. Clearly, therefore, security of employment is less of

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<sup>195</sup> For further discussion of some of the problems of industrial relations generally, see Y. Zhu: *Major changes under way in China's industrial relations*, in *International Labour Review* (1995), Vol. 134, p. 39.

<sup>196</sup> State-owned enterprises (SOEs), which belong to the State; collective ownership enterprises (COEs), which belong to the responsible collective; and domestic private enterprises (DPEs), which belong to the individual.



an issue under the traditional structure. Termination of lifelong employment was subject to the official approval of the State (the Airon rice bowl).

The new policies have placed severe constraints on the ability of the traditional labour system to protect workers' rights and have created the need for new labour legislation to cope with these changes, particularly in relation to the power to dismiss workers. A central feature of this radical change has been the creation of a contract system whereby workers are engaged for an indeterminate period of at least one year under written contracts. In some instances, however, the concept of permanent employment still applies, even in firms where some workers are employed under written contracts. Probationary periods are permitted up to six months (*sec. 21, Labour Law*).

### **Termination of employment**

The 1986 regulations constrain contract workers from terminating their contracts, in practice, by requiring each worker to have a labour dossier, which is held by the employer. The employer may therefore effectively prevent the worker taking another position by refusing to release the dossier.

Employees must also give 30 days' notice before leaving (*sec. 31, Labour Law*).

### **Termination of employment at the initiative of the employer**

Although there is no broad principle requiring that all dismissals be effected for a valid or just reason, and the term 'unfair dismissal' is not specifically mentioned, the employer does not have the freedom to terminate employment at will in all circumstances. The law has created specific categories of dismissals which will be considered to be invalid. Thus, under *sec. 29* of the Labour Law, a claim of unfair or illegal dismissal would be successful where the worker is dismissed:

- C for reasons of incapacity to work due to disease or injury suffered at work;
- C where the worker is in receipt of medical treatment; or,
- C in the case of a woman worker, during pregnancy or the puerperal or breast-feeding period.

In addition, it should be pointed out that the Labour Law is open-ended because under *sec. 29* it envisages 'other circumstances stipulated by laws, administrative rules and regulations'. As this is very recent legislation, it is reasonable to assume that other categories of 'unfair dismissals' will be created in the future in accordance with this section and in light of the declaratory principles of the law, which state that the aim is 'to protect the legitimate rights and interests of labourers, ... and promote economic development and social progress' (*sec. 1, Labour Law*). The concept of the right to work is also specifically mentioned under *sec. 4* of the Labour Law, but this appears to be merely declaratory.

The list of automatically illegal reasons for dismissal under *sec. 29* is very brief and excludes reasons such as trade union membership and subject-matters in respect of which it would be discriminatory to dismiss. Nevertheless, in relation to the latter, the broad principle enshrined under *sec. 12*, which prohibits discriminatory practices in employment on the basis of ethnicity, race, sex or religious belief, can, in accordance with the fundamental principles of the law, be read as prohibiting dismissals which are discriminatory.

Certain categories of dismissal are explicitly stated to be fair under Chinese law. Such dismissals may be effected without notice in some instances.

Dismissal without notice, akin to the concept of *summary dismissal* under the common law, is provided for under *sec. 25* of the Labour Law. This is restricted to serious violations of *labour discipline*, or the rules and regulations of the employing unit, or causing *great losses* to the employing unit due to serious dereliction of duty or engagement in *malpractice for selfish ends*. Where the worker is being investigated in connection with a crime, he or she may also be dismissed without notice. After consultation with trade unions, state employees may also be dismissed for the above and, additionally, for:

- C having bad attitudes in serving customers, and having frequent quarrels with customers;
- C disobeying orders of transfers to another post;
- C serious misdeeds not amounting to a crime;
- C wilfully making trouble or seriously disrupting the social order; or
- C committing other serious mistakes (*sec. 2, Rules*).

Probationary employment may be terminated where the employee fails to fulfil the required standards for work.

*Sec. 27* of the Labour Law also makes provision for collective dismissals in redundancy situations. The grounds for such dismissals are narrowly defined. The employer may make a reduction in the workforce where the employing unit *comes to the brink of bankruptcy* or runs into difficulties in production and management, and if reduction of its personnel becomes really necessary.

A limited attempt is made to alleviate the negative consequences of dismissal from employment. In the case of redundancy situations, priority for re-employment must be given to redundant employees where the employing unit recruits personnel up to six months after the redundancy. Further, employees who have been dismissed or disabled due to work-related injury or disease are entitled to social insurance benefits.

### **Notice and prior procedural safeguards**

It is compulsory that notice be given for certain categories of dismissals. This is merely a procedural safeguard and does not affect the employer's right to dismiss the employee in such circumstances. Notice is required where the worker is:

- C unable to continue his or her original work after illness or injury not suffered at work;
- C not qualified for the required work; or
- C unable to reach agreement with his or her employer on the modification of the labour contract when its objective conditions have changed.

The notice period for such categories of dismissal is 30 days (*sec. 26, Labour Law*).

Also important, in practice, are the serious social restraints on dismissal. For workers in state enterprises, their work unit provides a variety of services, and dismissal involves much more than the loss of a job.

There is a requirement that the appropriate trade union and workers be consulted and their opinions sought on proposed collective dismissals. Further, the labour administrative department must be

informed although there is no need for prior authorization. A notice period of 30 days is required for consultation in relation to redundancy.

Several provisions provide regulations on: payment of compensation where the worker is unqualified for the position or where the employing unit breaks a labour contract;<sup>3</sup> in the event of personnel reduction<sup>4</sup> and dismissal of the worker if he or she has engaged in certain acts and has shown no sign of repentance following education or administrative sanction.<sup>5</sup>

The 1994 Circular on Personnel Reduction reinforces the provisions of the Labour Law and reiterates that reduction of personnel is only permissible when the employer is on the brink of bankruptcy or deep into difficulties in production and management. This Circular also requires employers to explain the situation to the trade union and workers 30 days in advance, and consult on a plan of personnel reduction. Certain employees may not be retrenched, including victims of occupational accidents, pregnant employees or workers on sick leave.

### **Severance pay**

Where the employee has been dismissed for economic reasons or in accordance with the provisions of *sec. 26* (see above), the employer is required to provide economic compensation. This is also the case where the employee's contract is terminated by agreement under *sec. 24*. No compensation is granted where the employee is dismissed for violation of labour disciplines or where he or she neglects his or her duty or engages in malpractice.

Remedies for individual dismissal must be in the form of damages as there is no provision for reinstatement. In the case of collective dismissals, a redundancy payment is paid. Since the law allows compensation for dismissals due to agreement and for frustration of the contract, it may be more accurate to describe this type of compensation as a severance payment. The basic rate of economic compensation is one month for each year of service.

### **Avenues for redress**

Under *sec. 30* of the Labour Law, a worker has the right to appeal his or her dismissal to arbitration, or take legal proceedings where arbitration is unsuccessful. Similar provisions are also found under *sec. 5* of the Rules in relation to state employees. Arbitration is effected by means of labour dispute arbitration committees, comprised of representatives from the labour administrative department, the trade union and the employing unit, which have the power to make arbitration awards or binding decisions. The committee is obliged to follow the principles of legality, fairness and promptness. However, the employee retains the right to bring a case to the People's Court at any stage of the

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<sup>3</sup> Circular of the Ministry of Labour on Printing and Distributing the Measures of Economic Compensations for the Violation and Revocation of Labour Contract (Dec. 1994).

<sup>4</sup> Circular of the Ministry of Labour on Printing and Distributing the Provision on Personnel Reduction due to Economic Reasons in Enterprises (14 Nov. 1994).

<sup>5</sup> Provisional regulations on the dismissal of workers and employees who have violated rules of labour discipline in state-run enterprises.

proceeding. Where the employee wishes to appeal to the People's Court against a decision from the arbitration committee, he or she must do so within 15 days.

## **Colombia**

### **Sources of regulation**

The main source of labour law in Colombia is the Labour Code (LC), which entered into force on 1 January 1951. Act No. 50 of 28 December 1990 amends some provisions of this Code. *Art. 25* of the Constitution of Colombia establishes the right to work. *Art. 55* guarantees the right to collective bargaining for the regulation of labour relations.

### **Scope of legislation**

The LC regulates the relations concerning the right of individuals to work and the collective right to work, in both the official and private spheres. Public employees, workers in the railway services and other public servants are excluded from its scope of application.

### **Contracts of employment**

The contract of employment is one in which a person undertakes to hire his or her services to some other physical or juridical person, under the continuous authority of, or subordinate to, such a person, for remuneration (*sec. 22, LC*). The contract of employment may be oral or in writing (*sec. 37, LC*).

Contracts of employment may be made for a fixed period, for the time required for the completion of a certain piece of work, for an indefinite period or for periodical, casual or temporary work (*sec. 45, LC*).

Contracts for a fixed period must state that fact in writing. The duration of such contracts must not exceed three years, but they may be renewed indefinitely (*sec. 46, LC*; replaced by *sec. 3, Act 50/90*).

The probationary period is the initial period of the contract of employment for the purpose of enabling the employer to estimate the employee's aptitude and enabling the employee to decide whether the conditions of work are satisfactory (*sec. 76, LC*). The maximum duration of the probationary period is two months, at any point during which the contract may be terminated unilaterally without prior notice (*sec. 80, LC*).

### **Termination of employment**

The contract of employment may be terminated, other than at the initiative of the employer, in the following instances (*sec. 61, LC*; replaced by *sec. 6, Legislative Decree (LD) 2351/65*):

- C on the death of the employee;
- C by mutual consent;
- C on the expiry of the duration agreed upon or presumed;

- C on completion of the work or service agreed upon;
- C by the liquidation or permanent closing of the undertaking or establishment;
- C where work is suspended by the employer for more than 120 days;
- C by decision of the competent authority;
- C by unilateral decision; and
- C when the worker does not return to work, even when a suspension of work has been lifted.

### **Termination of employment at the initiative of the employer**

The following are considered valid reasons for termination (*sec. 62, LC*; replaced by *sec. 7, LD 2351/65*):

- C the employer has been deceived by the employee by the production of false certificates for the purpose of obtaining employment;
- C the employee is guilty in the course of his or her work of any act of violence, insult, assault, or serious act of indiscipline against the employer or any member of his or her family, the managerial or supervisory staff or fellow workers;
- C the employee is guilty, outside his or her work, of any grave act of violence, insult, or assault against the employer, or any member of his or her family, or any of his or her agents or partners, supervisory staff or watchkeepers;
- C the employee has wilfully caused material damage to the buildings, works, machinery, raw materials, tools or other objects used in the work, or is guilty of serious negligence endangering the safety of persons or property;
- C the employee commits any immoral or unlawful act in any workshop, establishment or workplace in the course of his or her work;
- C the employee is guilty of any serious breach of the special obligations or prohibitions concerning employees;
- C the employee is placed in custody awaiting trial for more than 30 days, unless he or she is subsequently acquitted, or if the employee is sentenced to a term of imprisonment of more than eight days, or less if the reason for such term of imprisonment is in itself sufficient cause for the termination of the contract;
- C the worker reveals any technical or trade secrets, or discloses facts of a confidential nature, thereby causing prejudice to the undertaking;
- C low output by the worker;
- C systematic non-compliance with legal obligations or obligations incurred under agreements;
- C vices of the worker which disrupt discipline in the workplace;
- C refusal to accept preventive, protective or remedial measures;
- C inaptitude of the worker to carry out the work entrusted to him or her;
- C collection of retirement pension or disability benefit while in the service of the undertaking; or

- C contagious or chronic disease not caused by the nature of the job, or any disease or injury which incapacitates the worker, preventing him or her from working, and for which a cure could not be found for 180 days.

In the abovementioned cases the employer must give notice of not less than 15 calendar days, and the contract may be terminated without compensation.

Trade union immunity describes the protection enjoyed by some workers against dismissal without a valid reason that has been previously substantiated by the labour magistrate. The following employees are protected by this form of immunity:

- C founders and workers who join the union before it has been put on the trade union register, from the day of the formation of the union and up to two months after placement on the register, up to a maximum period of six months;
- C the members of the governing board, and their deputies, of all trade unions, federations or confederations of unions, comprised of five principals and five alternates, during their terms in office and six months following the expiry of their mandates; and
- C the members of the statutory grievance committee, during their terms in office and six months following the expiry of their mandates (there can be no more than one such committee in any one undertaking).

The employer may dismiss a worker without a valid reason provided that he or she pays compensation for damages. He or she should give the same period of notice prescribed for the termination of the employment relationship without a valid reason, which is set at a minimum of 30 days (*secs. 47 and 64, LC*).

Collective dismissal is regarded as termination of employment when, within a period of six months, certain proportions of an enterprise's employees are dismissed, as follows (*sec. 67(4), Act 50/90*):

- C 30 per cent of the total number of workers in undertakings employing between ten and 50 workers;
- C 20 per cent of workers in undertakings employing between 50 and 100 workers;
- C 15 per cent of workers in undertakings employing between 100 and 200 workers;
- C 9 per cent of workers in undertakings employing between 200 and 500 workers;
- C 7 per cent of workers employed in undertakings employing between 500 and 1,000 workers; and
- C 5 per cent of workers in undertakings employing more than 1,000 workers.

### **Notice and prior procedural safeguards**

The letter of dismissal must state exact and firm reasons for the termination of the contract. No prior hearing is required.<sup>197</sup>

In order to be able to dismiss a female worker during pregnancy or for three months after confinement, authorization is necessary from the labour inspectorate, or in his or her absence, the mayor of the municipality (*sec. 240, LC*).

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<sup>197</sup> Ruling of 12 Nov. 1996 of the Labour Division, Court of Cassation.

In the case of collective dismissals, the employer should request prior authorization from the Ministry of Labour and Social Security, and he or she should also inform the workers concerned in writing. The Ministry of Labour should decide on the matter within two months (*sec. 66, Act 50/90*).

### **Severance pay**

In the event of unilateral termination of the contract of employment in which the employer fails to provide a valid reason, he or she is required to pay the worker compensation (*sec. 64, LC; replaced by sec. 6, Act 50/90*).

In contracts of specified duration the compensation is equivalent to the amount of wages corresponding to the time left for the completion of the period prescribed by the contract. When the time is determined by the duration of the task or work for which services had been engaged, the compensation should correspond to no less than 15 days= wages.

In contracts of indeterminate duration, compensation should be paid as follows:

- C if the worker has been employed for no more than one year, 45 days= wages;
- C for between one and five years of service, 15 days= wages should be added to the 45 basic days for each year of service following the first year;
- C for between five and ten years of service, 20 days= wages should be added to the 45 basic days for each year of service following the first year; and
- C if the worker has been employed for ten or more years, 40 days= wages should be added to the 45 basic days for each year of service following the first year.

When an employment contract is terminated, the employer is obliged to pay the worker one month's wages for each year of service and proportionally for parts thereof, unless the contract was terminated for any of the following reasons (*secs. 249 and 250, LC*):

- C an unlawful act against the employer or any member of his or her family, or the management staff of the undertaking;
- C any material damage wilfully caused to the buildings, works, machinery, raw materials, tools or other objects used in the work; or
- C if the worker reveals any technical or trade secrets or discloses facts of a confidential nature, thereby causing prejudice to the undertaking.

In cases of collective dismissal the employer must pay the workers concerned the legally prescribed compensation which would be due to them if the dismissal had been carried out without a valid reason. If the undertaking has taxable liquid assets of less than 1,000 minimum monthly wages, the amount of compensation is equivalent to 50 per cent of that sum (*sec. 67, Act 50/90*).

### **Avenues for redress**

In the event of a dispute between the parties, a judicial appeal may be brought before the labour courts. The employer bears the burden of proof.



If it is proved that a worker had been dismissed without the observance of the regulations on trade union immunity, the decision on dismissal must be reversed and the employer will be instructed to pay the worker, by way of compensation, the wages due because of dismissal and to reinstate him or her to his or her post of employment (*secs. 405, 406 and 408, LC*).

Any female worker who is dismissed on account of pregnancy or childbirth without the permission of the authorities is entitled to receive compensation amounting to 60 days= wages, apart from the benefits to which she would already have been entitled under the contract of employment, and also to the payment of 12 weeks= wages during confinement (*secs. 239, 240 and 241, LC*).

Moreover, in the event of dismissal of a worker because of maternity protection, reinstatement will be ordered if it is shown in the proceedings that the dismissal is not based on a valid reason.<sup>2</sup>

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<sup>2</sup> Ruling of 26 Oct. 1982 of the Labour Division, Court of Cassation.

## *Côte d'Ivoire*

### **Sources of regulation**

In Côte d'Ivoire the sources of law on termination of employment consist of the Labour Code (LC),<sup>198</sup> the Interoccupational Collective Agreement of 20 July 1977, Act No. 92-573 of 11 September 1992,<sup>199</sup> Decree No. 96-287 of 3 April 1996,<sup>200</sup> Decree No. 96-195 of 7 March 1996,<sup>201</sup> Decree No. 96-200 of 7 March 1996<sup>202</sup> and Decree No. 96-201 of 7 March 1996.<sup>203</sup>

### **Scope of legislation**

The LC is applicable throughout the territory of Côte d'Ivoire and governs relations between employers and workers. However, public employees and persons working in public corporations are excluded from its scope (*secs. 1 and 2, LC*).

### **Contracts of employment**

A contract of employment may be concluded for a specified or unspecified period (*sec. 13.2, LC*). The contract of employment may contain a probationary period, the duration of which must be stated in writing. A probationary period may last (*sec. 2, Decree No. 96-195 of 7 Mar. 1996*):

- C eight days for daily or hourly paid workers;
- C one month for monthly paid workers;
- C two months for supervisors, technicians and similar workers; or
- C three months for engineers, managers, high-level technicians and similar workers.

These periods may be renewed once. Any renewal must be made in writing to the worker, and the worker must be informed in advance according to the following schedule (*sec. 4, Decree No. 96-195 of 7 Mar. 1996*):

- C two days before the end of the probation period of eight days;
- C eight days, when the probation period is one month; or
- C 15 days when the probation period is two or three months.

If the worker continues to be employed on the expiry of the engagement for a probation period or its renewal, the parties are bound by a contract of employment of indeterminate duration (*sec. 7, Decree No. 96-195 of 7 Mar. 1996*).

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<sup>198</sup> Act No. 95-15 of 12 Jan. 1995 promulgating the Labour Code.

<sup>199</sup> Act relating to dismissal for economic reasons.

<sup>200</sup> Decree on contracts of employment.

<sup>201</sup> Decree on the engagement for a trial period and duration of trial periods.

<sup>202</sup> Decree on the length of the notice period and termination of a contract of employment.

<sup>203</sup> Decree on severance allowance.

A contract of employment for a specified period must be made in written form or confirmed by a letter of employment and must indicate either the date on which the contract expires, or the precise duration for which it is concluded, except in the case of contracts concluded in order to replace a worker who is temporarily absent, for a season, for a temporary accumulation of work, or for an activity which is not part of the normal operations of the undertaking (*sec. 14.6, LC*).<sup>7</sup>

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of a fixed-term contract;
- C mutual agreement; and
- C *force majeure*.

An open-ended contract for a specified period which is made for the temporary replacement of a worker may be terminated unilaterally by the employee after he or she has served at least six months.

### **Termination of employment at the initiative of the employer**

During the probationary period, the contract may be terminated without notice and without entitlement to compensation by either of the parties (*sec. 16.1, LC*). If the employer has not informed the worker of the renewal of the probationary period within the prescribed time limits, the probationary period ends on the date originally agreed (*sec. 5, Decree No. 96-195 of 7 Mar. 1996*).

A contract of employment for a specified period ends on the expiry of the term, without compensation or notice. It may be terminated before the agreed term only by *force majeure*, mutual agreement or serious misconduct on the part of either of the parties (*sec. 14.8, LC*).

A contract of employment of indeterminate duration may be terminated at any time by the employer if he or she has a valid reason (*secs. 16.3 et seq., LC*).

A dismissal ordered by an employer because of job dislocations and operational changes, due mainly to technological changes and restructuring, or to economic difficulties which are of such a nature as to compromise its operations and the financial equilibrium of the undertaking, will constitute a dismissal for economic reasons (Act No. 92-573 of 11 September 1992).

### **Notice and prior procedural safeguards**

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<sup>7</sup> This is the case for contracts for a specified duration but with unspecified term, which pertain to contracts for daily workers engaged by the hour or by the day for a short-term job and paid at the end of the day, week or fortnight (*sec. 14.7(2), LC*).

An employer who decides to terminate a contract of employment must notify the employee, in writing, of the decision and state his or her reasons for the proposed dismissal (*sec. 16.4, LC*).

The termination of a contract of employment of indeterminate duration is subject to notice, except in the case of gross negligence, and subject to the decision of the competent court on the seriousness of the misconduct (*sec. 16.6, LC*).

For workers in the relevant occupational categories who are paid by the hour, day, week or fortnight, the period of notice is as follows:

- C eight days, for those with up to six months of service in the undertaking;
- C 15 days, for between six months and one year of service;
- C one month, for between one and six years of service;
- C two months, for between six and 11 years of service;
- C three months, for between 11 and 16 years of service; and
- C four months, for over 16 years of service.

For monthly paid workers in the relevant occupational categories, the period of notice is:

- C one month, for up to six years of service in the undertaking;
- C two months, for between six and 11 years of service;
- C three months, for between 11 and 16 years of service;
- C four months, for over 16 years of service.

For workers classified in the sixth group and above, the period of notice is:

- C three months, for up to 16 years of service in the undertaking; and
- C four months, for over 16 years of service.

For workers in all groups who have permanent partial disabilities estimated at 40 per cent or more, the period of notice is:

- C the normal notice period for those with up to six months of service in the undertaking; and
- C double the normal notice period after six months of service.

Collective agreements may contain more favourable notice provisions.

The head of an undertaking who intends to dismiss more than one worker for economic reasons must, before making his or her decision, arrange a meeting to consult with the workers=representatives who may be accompanied by trade union representatives. The competent labour inspector should also participate in this meeting. At least eight days before the meeting, the head of the undertaking should send the workers=representatives and the labour inspector a file giving the reasons for the proposed redundancies, the criteria considered, a list of staff to be made redundant and the proposed date of dismissal. The labour inspector and the other participants should sign the summary record of the meeting (*secs. 2 et seq., Act No. 92-573 and sec. 16.7, LC*).

## **Severance pay**

The termination of a contract of employment of indeterminate duration is subject to notice which takes into account the duration of the contract and the occupational group of the employee (Decree No.

96-200 of 7 Mar. 1996). The termination of a contract of employment by an employer requires the payment of a severance allowance, separate from compensation in lieu of notice, if the worker has been employed continuously for a period equivalent to one year and has not been guilty of gross negligence. The compensation takes into account the length of service and corresponds to a percentage of the monthly overall wages for the 12 months of service preceding the date of dismissal (Act No. 96-201 of 7 March 1996). The percentage is set according to the length of service of the worker as follows:

- C 30 per cent up to and including the fifth year;
- C 35 per cent from the sixth to the tenth year inclusive; and
- C 40 per cent from the tenth year onwards.

### **Avenues for redress**

Any termination ordered in contravention of the above-mentioned rules shall incur the payment of damages corresponding to the wages and advantages of any sort to which the employee would be entitled during the period remaining up to the end of his or her contract (*sec. 14.8, LC*).

The termination of a contract of indeterminate duration with notice or with insufficient notice will oblige the employer to pay to the employee compensation corresponding to the remuneration and advantages of any sort to which the employee would be entitled during the notice period which had not been observed (*sec. 16.6, LC*).

Dismissals ordered without a valid reason or in contravention of the rules of procedure prescribed for dismissals for economic reasons are wrongful. The competent court shall determine the validity of the dismissal through an inquiry into the reasons and circumstances of the termination. In cases of wrongful dismissal, the employer can be ordered to pay the worker damages, which may take into account custom, the nature of the services performed, length of service, the age of the worker and acquired rights, if any. However, the amount of damages may not exceed 18 months= wages (*sec. 16.11, LC*).

## *Cyprus*

### **Sources of regulation**

The legislation covering termination of employment contracts in Cyprus is the Termination of Employment Law, 1967 (TEL),<sup>204</sup> as subsequently amended, most recently in 1994.

Another instrument, the Industrial Relations Code (IRC), was negotiated and signed by the Government, employers and trade unions in 1977. It is a purely voluntary agreement, and any adherence to it is dependent on the goodwill of the parties. Nevertheless, at least its procedural part is of considerable importance in practice.

Finally, collective labour agreements have a certain relevance. They are concluded by sectors of industry and also at company level.

### **Scope of legislation**

The TEL regulates the termination of the employment of every person working for another person either under a contract of service or under such circumstances from which the relationship of employee and employer may be inferred (sec. 2, TEL). The TEL does not distinguish between private and public employment.

### **Contracts of employment**

Contracts of employment can be concluded orally between the employer and the employee. There are no legal requirements for contracts to be evidenced in writing either by contract documents or by statements of terms and conditions. For employees at management level, individual agreements are in practice expressed in writing.

The contract can be concluded for a definite or an indefinite period, and it can provide for full- or part-time work as well as temporary work.

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of a fixed term;
- C the employee reaching the age of retirement; and
- C *force majeure*.

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<sup>204</sup> Long title: A Law to regulate the termination of employment at the initiative of the employer, to provide for minimum periods of notice for employed persons and to establish a fund for the payment of benefits to employees declared redundant. No. 24, dated 27 May 1967.

**Termination** of employment at the initiative of the employer

The TEL makes no distinction between individual and collective termination of contract; both are subject to the same rules. However, it does distinguish between terminations of employment giving right to compensation, termination not giving right to compensation and termination giving right to redundancy payments.

The TEL stipulates that an employee is entitled to compensation if, and only if, the termination is not for one of the reasons stipulated in *sec. 5* (see below) and:

- C he or she has been continuously employed by his or her employer for at least 26 weeks<sup>2</sup> (*sec. 3*, TEL); and
- C he or she has not yet attained the age of 65 years (*sec. 4*, TEL).

In its First Schedule, the TEL adds that the amount of the compensation shall not exceed one year's wages and depends on other income of the employee, the length of his or her service, the loss of career prospects of the employee, his or her age and the actual circumstances of the dismissal.

*Sec. 5* of the TEL stipulates that an employee shall not be entitled to compensation for termination of employment payable by the employer if:

- C the employee fails to carry out his or her work in a reasonably efficient manner (not due to temporary sickness or illness);
- C the employee has become redundant (see *sec. 3*, TEL);
- C the termination of employment is due to *force majeure*;
- C an employee's fixed-term contract has expired;
- C the employee has reached the normal age of retirement; or
- C the employee's conduct is such as to render him or her liable to dismissal without notice (for example, cases of gross industrial misconduct, a criminal offence, immoral behaviour, serious or repeated contravention or disregard of works or other rules in relation to employment).

In *sec. 6*, the TEL stipulates that in any tribunal proceedings, the burden of proof is on the employer to show that the termination of employment has been for one of these above-mentioned reasons.

The same section sets out the grounds that may not, *inter alia*, constitute one of these reasons for termination of employment. Thus, an employer may never terminate employment for:

- C membership in trade unions or a safety committee established under the Safety at Work Law of 1988;
- C activity as a workers' representative;
- C the filing in good faith of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations, both civil or criminal;
- C race, colour, sex, marital status, religion, political opinion, national extraction or social origin; or
- C pregnancy or maternity.

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<sup>2</sup> The employer and the employee may, by agreement in writing made at the time the employee enters into the employment, extend this period of continuous employment to a maximum of two years.

## Notice and prior procedural safeguards

Statutory notice periods are laid down in *secs. 9 and 10* of the TEL. The minimum periods of notice to be given by the employer depend on the length of service in employment and are as follows:<sup>3</sup>

- C one week= notice for six months to one year of service;
- C two weeks= notice for one to two years of service;
- C four weeks= notice for three years of service;
- C five weeks= notice for three to four years of service;
- C six weeks= notice for four to five years of service;
- C seven weeks= notice for five to six years of service; and
- C eight weeks= notice for more than six years of service.

An employee who has been given notice by his or her employer is entitled to time off without loss of pay during normal working hours (not exceeding eight hours per week and 40 hours in total), in order to seek new employment (*sec. 12*, TEL). The employer may give the employee a payment in lieu of notice.

In cases of redundancies, the employer is required to notify the Minister of Labour and Social Insurance of the proposed redundancies at least one month prior to the date they are due to be implemented (*sec. 21*, TEL). The notification must include the number of employees likely to become redundant (and, where possible, their occupation, names and responsibilities), the branch which is affected and the reasons for the redundancies.

The TEL does not require employers who are contemplating redundancies to consult with and provide information to employee representatives.

However, provision for such information and consultation is made in Part II of the IRC. This Code is not legally binding, so no legal sanctions can be imposed on those not complying with its provisions. The IRC stipulates that the employer should notify the trade union at least two months before the date of redundancy. After notification, consultations should be carried out with the unions and the employees in accordance with the provisions of the ILO Termination of Employment Recommendation, 1963 (No. 119).

Any employee whose employment has been terminated for any reason is entitled to receive, on request at the time of termination, a certificate from the employer specifying the dates of his or her employment and the type of work at which he or she was employed. Nothing unfavourable to the employee may be inserted in this certificate (*sec. 8*, TEL).

## Severance pay

Any employee who has been employed by the same employer for at least two years, who has not yet attained the age of 65 years and who is declared redundant within the terms of the statutory definition

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<sup>3</sup>These statutory periods are minima and longer periods may be applied where these are set out by custom, collective agreement or otherwise.



is entitled to a redundancy payment out of the Government's Redundancy Fund. This Fund is exclusively financed by employers' contributions in respect of each employee (*secs. 16-25, TEL*). The TEL sets out in *sec. 18* that an employee is redundant when his or her employment has been terminated:

- C because the employer has ceased or intends to cease carrying on the business (or business in the place) in which the employee has been employed;
- C because of modernization, mechanization or any other change in products or methods of production or of organization which reduces the number of employees necessary;
- C because of changes in the skills needed on the part of employees;
- C because of marketing or credit difficulties;
- C because of lack of orders or raw materials;
- C because of scarce means of production; or
- C because of contraction of the volume of work or business.

The redundancy payments are calculated according to years of employment as follows:

- C two weeks= wages for each year of service up to four years;
- C two and a half weeks= wages for each year of service from five to ten years;
- C three weeks= wages for each year of service from 11 to 15 years;
- C three and a half weeks= wages for each year of service from 16 to 20 years; and
- C four weeks= wages for each year of service beyond 20 years.

Where an employer wishes to expand its workforce with employees of the same type and skill as those made redundant within the previous eight months, the employer must give priority to employees previously made redundant, subject to the operational needs of the enterprise (*sec. 22, TEL*).

### **Avenues for redress**

All disputes and ancillary matters arising out of the operation of the TEL are decided by a special tribunal set up by the Council of Ministers under *sec. 12* of the Annual Holidays with Pay Law 1967.<sup>4</sup> The right of any person to institute proceedings in the civil courts with respect to a termination of employment is not affected, but where any person institutes civil proceedings, he or she is not entitled to apply to the other tribunal. In case of unjustified dismissal, the tribunal may award compensation and/or order reinstatement (*sec. 3, TEL*, as amended in 1994).

Procedures for the settlement of disputes in relation to collective agreements are provided for in the IRC.

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<sup>4</sup> Legislative Series, 1967CCyp. 1.

## *Czech Republic*

### **Sources of regulation**

The most important source of law in relation to termination of employment at the initiative of the employer is the Labour Code, 1965 (LC) (Act 69), as amended.<sup>205</sup> The Employment Law, 1992; the Civil Procedure Act, 1993; the Collective Bargaining Act, 1991; and the Jurisdiction of Government Authorities in Employment Act, 1991, supplement the LC.

### **Scope of legislation**

The laws on termination of employment regulate all workers, including state employees. It should be noted that the economy in the Czech Republic is undergoing a transformation from a communist economy to one based on private enterprise. Approximately 80 per cent of industry is now privatized compared to only a fraction of assets which were private before economic reform.<sup>206</sup> The LC also applies to foreign employers as well as to foreign nationals employed in the Republic, unless private international law or a relevant treaty provides otherwise (*sec. 6*).

### **Contracts of employment**

Contracts of employment may be concluded for an indeterminate or fixed-term duration. Contracts are valid for an unlimited period of time, unless a specific duration is stated (*sec. 30(1)*, LC). However, a specified fixed term does not preclude the possibility of dismissal on notice on identical grounds as exist for contracts of indeterminate duration.

Fixed-term contracts cannot be for longer than three years (*sec. 30(2)*, LC). Repeated fixed-term contracts must comply with any requirements in specific legislation. Regulations are envisaged to govern repeated fixed-term contracts; those situations where fixed-term contracts cannot be used; and fixed-term contracts for longer than three years (*sec. 30(3)*, LC).

Contracts of employment may also contain trial periods, which, unless a shorter period is agreed upon, are to last three months (*sec. 31(1)*, LC). Trial periods cannot be extended, once agreed.

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

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<sup>205</sup> Most of the Czechoslovak (federal) legislative acts and regulations continued to apply after 1 Jan. 1993 in both the Czech Republic and Slovakia, unless specifically repealed. As may be expected, the 1965 Labour Code was substantially revised in 1993, following the 1989 Velvet Revolution in (then) Czechoslovakia.

<sup>206</sup> L. Paukert: *Privatization and employment: Labour transfer policies and practices in the Czech Republic* (Geneva, ILO), Labour Market Papers, No. 4, 1995.

- C the expiry of a fixed-term contract;
- C the mutual agreement of the parties; and
- C employee resignation.

### **Termination of employment at the initiative of the employer**

Employment relations which have been concluded for an unlimited period may be severed by agreement, notice, immediate cancellation or cancellation during the trial period (*sec. 42, LC*).

Termination of employment at the initiative of the employer may only be effected for a valid reason and in accordance with the provisions of the LC as set out under *secs. 46 and 53*. Valid reasons are exclusively those connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.

Certain categories of workers are given special protection against dismissal under the LC. These are employees who are:

- C pregnant women and mothers taking care of children less than three years of age;
- C carrying out compulsory military service;
- C temporarily incapacitated for work due to sickness or injury (except if caused by drunkenness); or
- C performing duties of public office (*secs. 48 and 49, LC*).

Dismissal for reasons relating to trade union membership or participation is automatically invalid.

Interestingly, attainment of the retirement age is not expressed to be a valid reason for termination of employment.

A contract may be lawfully and immediately terminated for repeated misconduct or violations of labour discipline after a warning, or where the employee is convicted of a crime or sentenced to jail for a period exceeding one year (*sec. 53, LC*). The employee may also be dismissed summarily, i.e. without notice, where the employee commits an act which constitutes a gross violation of labour discipline or very serious misconduct.

A contract may also be terminated, on notice, pursuant to *sec. 46* of the LC, where:

- C the organization, or a part of it, shuts down, ceases to exist or relocates;
- C the organization is transferred to another employer, who cannot continue to employ the worker;
- C the employee becomes redundant as the result of organizational or technical changes;
- C the employee's health does not permit the employee to continue working;
- C the employee does not meet the legal requirements or performance requirements for the job, and, in the case of unsatisfactory performance, the employee has been warned within the last year; or
- C the employee has been warned regarding repeated or ongoing breaches of work discipline.

For all of the above reasons, except breaches of work discipline, dismissal can be effected only if it is not possible to employ the employee further, even following retraining, or the employee is unwilling to accept a suitable alternative position or to undergo retraining (*sec. 46(2), LC*).

### **Notice and prior procedural safeguards**

The period of notice for dismissals other than for economic reasons is two months, unless otherwise stipulated. This is irrespective of the duration of employment service (*sec. 45, LC*). Such notice must be in writing and give the reasons for the pending dismissal (*sec. 44, LC*).

In situations where the employee is found to be guilty of misconduct or violations of labour discipline, he or she must, in the first instance, be given a written warning, unless his or her conduct justifies summary dismissal. He or she may only be dismissed after such warning and within the two-month period following the warning (*sec. 46(3), LC*). For misconduct or serious violations of labour discipline which warrant summary dismissal, dismissal must be effected within one month after the employer becomes aware of the reason for termination (*sec. 53(2), LC*).

Where the employee's work is unsatisfactory or he or she does not fulfil the necessary requirements for the job, he or she must be given a written warning and the opportunity to improve his or her performance. A dismissal based on such reasons may not take place later than one year from the date when the valid reason arose (*sec. 46(2), LC*).

Prior approval is required from the relevant trade union supervisory body before dismissal of a trade union representative can be lawful. Where such approval is not given, the notice of termination or any summary dismissal will be null and void.

The contract of employment of employees with disabilities may only be terminated with notice after obtaining prior consent from the government employment service.

There are no provisions requiring the employee faced with dismissal to be given the opportunity to defend himself or herself. Any such defence must be made after dismissal during court proceedings.

Before an employer can dismiss workers for reason of redundancy, he or she is obliged to consult with the relevant trade union. Before consultation takes place, the employer must give notice to the trade union, giving key information concerning the proposed redundancy. The period of notice in relation to dismissal for reason of redundancy or other economic reason is three months (*sec. 45, LC*). The information should contain a statement of reasons for the measure and an indication of numbers and categories of workers to be affected. Consultation takes place with a view to preventing or reducing the proposed redundancies, or mitigating their adverse effects. This may include proposals for re-engagement. The law also provides for special subsidies to be paid to employers who have reduced working time of their employees to less than 90 per cent in order to avoid dismissals. Subsidies are also available for employers who organize retraining of their workers.

Notice and relevant information about the proposed redundancy must also be forwarded to the appropriate governmental authority.

## **Severance pay**

A worker is entitled to severance pay where the dismissal is connected with organizational changes; for example, changes in the production programme, introduction of new technological equipment or reduction of the workforce in order to increase efficiency. Such payment is, however, not granted where organizational changes lead to a simultaneous transfer of the rights and obligations from the existing employment relationship to another (Act on Severance Pay on Termination of Employment No. 195/1991).

## **Avenues for redress**

The appropriate avenue for redress for unlawful dismissal is a court of law under civil proceedings (*sec. 64, LC*). The right to contest a dismissal must be exercised within two months after the allegedly invalid termination of employment (*sec. 64, LC*). In legal proceedings pertaining to dismissal from employment, the burden of proof lies on the person alleging the invalidity of the dismissal, i.e. the employee.

Where dismissal is found to be unlawful, the employee is entitled to compensation in the form of damages. This award is calculated on the basis of the earnings lost by the employee as a result of being notified of the dismissal. Where the sum of compensation amounts to a sum equivalent to more than six months= wages, the court has a discretion to reduce the award, taking into account relevant circumstances, such as whether the employee is employed elsewhere. The employer may also be ordered to reinstate the employee.

## ***Dominican Republic***

### **Sources of regulation**

In accordance with the prevailing trend in the region, *art. 8(11)* of the Dominican Republic's National Constitution establishes the freedom of work, stating that *the law may, as required by the general interest, establish ... all provisions for state protection and assistance for workers that may be considered necessary ...*

The Labour Code promulgated by Act No. 16-92 of 29 May 1992 (LC) and regulations for its application (Decree No. 258-93 of 1 October 1993) (LR) are the primary sources of labour law. Collective agreements, case law and decisions of the Ministry of Labour on the application of the LC supplement these sources and represent a complementary source of undeniable utility. Resolution No. 32/93 on the termination of contracts of employment because of plant closure or staff reduction serves as an example.

### **Scope of legislation**

Pursuant to *sec. 5* of the LC, the following categories of workers are excluded from its scope of application: freelance professionals, persons working on commission and brokers, commercial agents and representatives, tenants and sharecroppers.

According to *sec. 4*, contracts relating to domestic service, agricultural employment, work at home and employment in transport, sales, commercial travelling and similar employment, as well as contracts relating to disabled persons and seafarers' articles of agreement, are special types of contracts.

### **Contracts of employment**

The term *contract of employment* denotes a contract by which a person agrees, in return for remuneration, to undertake personal services for another, under the constant supervision and immediate direction of that person (*sec. 1*, LC).

The existence of a contract of employment is to be presumed in any personal labour relations, except where there is proof to the contrary (*sec. 15*, LC). A contract of employment is presumed to be for an indefinite period (*sec. 34*, LC); contracts entered into for a given time which are concluded for the purpose of evading the provisions of the LC will be deemed to be for an indefinite period (*sec. 35*, LC).

Contracts may be for an indefinite period: where the work is of a permanent character, with the objective of fulfilling the normal, ongoing and regular requirements of the enterprise (*secs. 26 and 27*, LC). Contracts may be for a specific period depending on the nature of the services, the temporary replacement of a worker and/or if such a contract suits the interests of the worker. They may also be for a specific task or service: intended to increase production or to respond to exceptional needs or incidental circumstances in the enterprise (*sec. 32*, LC).

Seasonal contracts for work in the sugar industry (*sec. 30, LC*) are considered contracts for an indefinite period subject to the special rules established for such contracts in the event of rescission. Periods of service corresponding to different harvests or consecutive seasons, for which services are provided, may be cumulative for the purposes of determining the worker's rights.

### **Termination of employment**

Pursuant to *sec. 68* of the LC, the contract ends *without liability* for the parties by mutual consent, upon performance of the task or service, in the event of unforeseen events or *force majeure* (in the case of the latter, if insured, the employer must, upon receipt of compensation through insurance, reconstitute the enterprise in accordance with the amount received or otherwise compensate the workers equitably). Compensation paid to workers may not exceed the amount of severance pay (*sec. 74, LC* and *sec. 9, LR*). In order for such termination to be valid, it must be effected before the Department of Labour or the competent local authority, or before a notary (*sec. 71, LC*).

The contract ends *with liability* for the parties (*sec. 69, LC*) by rescission (one party giving notice has the right to terminate a contract for a definite period without cause) and by the worker's resignation.

*Secs. 96 et seq.* of the LC establish the right of the worker to justifiably terminate employment by resignation in the following circumstances:

- C where the employer misled the worker when the contract was concluded;
- C non-payment of remuneration in full;
- C dishonesty or immorality on the part of the employer;
- C improper use of working tools or implements intended for the use of the worker;
- C the requirement for the worker to carry out work other than that which was agreed to in the contract;
- C requirement to render service in conditions which would oblige the worker to change his or her place of residence;
- C contagious disease contracted by the employer if the worker must remain in immediate contact with him or her;
- C health and safety hazards to the worker;
- C imprudent or negligent acts committed by the employer which compromise the safety of the workshop, office or workplace;
- C the employer's failure to carry out any of his or her legal obligations (*sec. 97, LC*); and
- C resignation without a reason.

### **Termination of employment at the initiative of the employer**

Dismissal of the worker may be without cause (*desahucio*) or it may be justified (*sec. 87, LC*). Under *sec. 88* of the LC, the employer does not incur any liability if he or she dismisses the worker because the worker:

- C has misled the employer by claiming skills or knowledge essential for the work and which he or she does not possess, or providing personal references or testimonials which are subsequently proved false;
- C performs work in a manner showing his or her incapacity or inefficiency (a ground which lapses three months after commencement of employment);
- C is guilty of dishonest and immoral acts during working hours or of acts of attempted violence or abuse or ill-treatment of his or her employer or the employer's dependants;
- C commits any of the acts listed in the preceding clause against any fellow workers in such a way as to cause disorder in the workplace;
- C outside of working hours, commits any of the acts referred to in the third clause above against the employer or his or her dependants, or the managers of the enterprise;
- C wilfully causes material damage, or attempts such damage in the course of his or her work, to the buildings, installations, machinery, tools, raw materials, products or other objects related to the work;
- C unintentionally, through negligence or without due care, causes serious damage as mentioned in the preceding clause;
- C commits immoral acts in the workshop, establishment or workplace;
- C reveals manufacturing secrets or information of a confidential nature to the prejudice of the enterprise;
- C compromises, through imprudence or inexcusable carelessness, the safety of the workplace, office or other place in the enterprise or the persons therein;
- C is absent from work for two consecutive days or two days in the same month without permission, or without submitting a good reason within the prescribed time-limit;
- C is absent, without giving a valid reason, while he or she is responsible for work or machinery which, if inactive or stopped, inevitably jeopardizes the operations of the enterprise;
- C leaves the workplace during working hours without permission of the employer or his or her representative, without having previously given any valid reason for his or her absence;
- C disobeys the employer or his or her representatives in the discharge of duties under the contract;
- C refuses to adopt preventive measures or to follow the procedures required by law, the competent authorities or employer, in order to avoid accidents or illness;
- C violates any of the prohibitions laid down in *sec. 45* of the LC on the duties of the worker;
- C has been sentenced to imprisonment by a decision not subject to appeal; or
- C shows lack of dedication to the work for which he or she has been contracted or any other serious shortcomings in respect of the obligations arising from the employment contract.

Under the LC, the termination of employment of workers protected by trade union immunity has no effect (*sec. 392*, LC).

The following workers enjoy trade union immunity and therefore may not be dismissed (*secs. 390 and 393*, LC):

- C up to a total of 20 workers who are members of trade unions which are in the process of being established (up to three months after registration);



- C up to a total of five workers who are members of the governing body of a trade union, where the enterprise employs not more than 200 workers; up to a total of eight such workers, where the enterprise employs between 200 and 400 workers; and up to a total of ten such workers, where the enterprise employs more than 400 workers (up to eight months after they have ceased their functions);
- C up to a total of three workers=representatives during the negotiation of a collective agreement (up to eight months after they have ceased holding office); and
- C alternates to any of the workers mentioned above. However, it is worth pointing out that, where a worker is replaced by another in the exercise of his or her trade union functions, the original worker will no longer benefit from immunity.

The trade union or its promoters must inform the employer, the Department of Labour or the competent local authority in writing of any proposal to establish a new trade union and of any appointment or election which has taken place. The duration of immunity begins on the date of such notification (*sec. 393(4)*, LC).

According to the provisions of *sec. 394* of the LC, immunity may cease for the worker who participates in the following acts:

- C coercion or physical or moral violence, or any other act which is aimed at promoting disorder or introducing a violent element to a strike;
- C curtailing freedom to work, through means or acts which prevent workers from going about their work or fulfilling their obligations;
- C taking action against material goods situated in the enterprise;
- C inciting or participating in acts which cause destruction to materials, tools or work products;
- C inciting, leading or participating in the deliberate reduction of output of the enterprise;
- C abduction of persons;
- C inciting or participating in the destruction of public or private installations; or
- C committing a crime or offence punishable by law, or an act against state security or in violation of the national Constitution.

The LC establishes some maternity entitlements. It invalidates termination of employment by the employer during the worker's pregnancy and up to three months after giving birth. In such cases the worker must notify the employer of her pregnancy by any reliable means, indicating the expected date of birth (*sec. 232*, LC). A woman may not be dismissed on account of pregnancy, and dismissal for such a reason will be considered null and void. In this regard the dismissal of a pregnant woman, during the term of pregnancy or within six months following the birth, must be brought before the Department of Labour or the competent local authority acting on its behalf, in order to determine whether the dismissal was as a result of pregnancy or confinement (*sec. 233*, LC).

### **Notice and prior procedural safeguards**

An employer seeking to dismiss workers for a valid reason must do so within 15 days of the occurrence of the reason for dismissal (*sec. 90*, LC).

Within 48 hours following dismissal, the employer must notify the worker, the Department of Labour or the competent local authority of the reasons for it, and there may not be any subsequent modification of the reasons given in the communication (*secs. 91 and 92, LC*). Dismissal which is not communicated to the labour authority is considered unjustified (*sec. 93, LC*).

Dismissal or resignation must be communicated personally or by letter deposited with the labour authority, which is to keep a register of these communications (*sec. 13, LR*). The party who initiates termination should give notice to the other party, at least seven days in advance, if the length of service is between three and six months; at least 14 days in advance, if the length of service is between six months and a year; and at least 25 days=notice after a year of continuous service (*sec. 76, LC*). Failure to give notice or insufficient notice will require the payment of compensation equivalent to the remuneration which would be owing to the worker for the corresponding period of time (*sec. 79, LC*).

Dismissal initiated by the employer must be communicated in writing to the worker. In cases of dismissal on notice, the worker will have the right during the notice period to leave of two half days each week with full pay (*sec. 78, LC*).

### **Severance pay**

In the event of termination the employer must pay a severance allowance (*sec. 80, LC*) amounting to:

- C six days=regular wages if the length of service was between three and six continuous months;
- C thirteen days=regular wages if the length of service was between six months and one year;
- C twenty-one days= regular wages per year of service if the length of service was continuous between one and five years; and
- C twenty-three days=regular wages per year of service if the length of service was over five years.

Any fraction of a year of over three months must be paid in accordance with the first two rules above.

The calculation of the severance allowance corresponding to the number of years during which the worker=s contract has been in force prior to the promulgation of LC must be made on the basis of a fortnight=s regular wages for each year of service (*sec. 80, LC*). *Sec. 14* of the LR sets out formulas to determine wages for liquidation and severance allowance.

There also exists economic assistance, varying between five and 15 days of regular wages, if the contract of employment is terminated as a result of:

- C death or physical or mental incapacity of the employer or worker;
- C physical incapacitation of the worker preventing performance of the work for which the worker was engaged;
- C illness or justified absence on the part of the worker which might impede job performance for a total period of a year;
- C depletion of raw material extracted in a mining industry; or
- C bankruptcy of the enterprise, in the event that the enterprise ceases all operation (*sec. 83, LC*).

Retired workers are entitled to compensation equivalent to the benefits granted upon termination, if the pension is granted by the Dominican Social Insurance Institution (*sec. 83, LC*),

## **Avenues for redress**

If, as a result of dismissal, a dispute arises and the employer gives proof of the alleged ground, the court must declare the dismissal to be justified (*sec. 94, LC*). If the alleged ground for dismissal is not proven, the court must declare it unjustified and the contract as having been broken through the fault of the employer. The employer should pay, if the contract is for an indefinite period, the amounts corresponding to the period of notice and severance allowance. If it is a contract for a specific task or service, the amount owed is the greater of the total remuneration which would be due up to the expiry of the agreed term or up to the conclusion of the services or work agreed upon, and the amount which the worker would have received in the event of termination, unless the parties have established a higher amount. To this must be added an amount equal to the wages which the worker would have received between the date of the claim and the date of the final decision; this may not exceed six months' wages (*sec. 95, LC*).

## *Egypt*

### **Sources of regulation**

Labour relations in the private sector in Egypt are regulated by the Labour Code created by Act 137 of 1981 (LC), while those in the public sector are regulated by Act 48 of 1978. (The following deals only with termination of employment in the private sector.)

Provisions stipulated in individual or collective contracts of employment or in the by-laws or work rules of an undertaking or those established by custom are valid if they are more favourable to the worker than the provisions of the LC (*sec. 4, LC*).

### **Scope of legislation**

The termination of employment provisions of the LC do not apply to:

- C workers employed by the Government or local authorities;
- C domestic workers and the like; or
- C any member of an employer's family or any of his or her dependent relatives (*sec. 3, LC*).

### **Contracts of employment**

Both fixed-term contracts and contracts of indefinite duration are regulated by the LC. Contracts for casual, temporary and seasonal work are also provided for. Casual work is defined as work not lasting more than six months which is not a usual part of the employer's activities. Temporary work is work which by nature is of limited duration or which involves executing a specific task. Seasonal work is work which is regularly pursued at certain times of the year (*sec. 1, Act 137*). All employment contracts must be in writing with a copy provided to the Government (*sec. 30, LC*).

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of a fixed-term contract; and
- C the completion of the task for which the contract was concluded.

A fixed-term contract is deemed to be renewed if both parties continue to abide by it after its date of expiry (*sec. 72, LC*)

### **Termination of employment at the initiative of the employer**

An employee may be dismissed only if he or she has committed a serious offence (*sec. 61, LC*). An employee shall be deemed to have committed a serious offence if he or she has:

- C assumed a false identity or has forged certificates or references;
- C acted negligently, causing the employer considerable loss, provided the employer informs the competent authorities of the incident within 24 hours of his or her becoming aware of it;
- C despite having received a previous written warning failed to observe written instructions displayed in a prominent place, the compliance with which is necessary to ensure the safety of the workers and of the establishment;
- C been absent without a valid reason for more than 20 days a year, or for more than ten consecutive days, provided that he or she shall first be warned in writing by the employer after ten days= absence in the former case and after five days in the latter;
- C not discharged essential obligations, as specified in his or her contract;
- C divulged secrets concerning the establishment employing him or her;
- C been finally sentenced for a crime or for a misdemeanour involving dishonour, dishonesty or immorality;
- C been found in a state of obvious drunkenness or under the influence of drugs within work-hours; or
- C assaulted the employer or the employer's representative, or has committed a serious act of violence against any of his or her superiors during or in connection with his or her work.

There appears to be no legislative authorization of summary dismissals in Egypt.

The LC itself does not contain invalid reasons for dismissal. However, the Trade Union Act (No. 35 of 1976, as amended by No. 1 of 1981) protects members of boards of trade unions from suspension or dismissal except pursuant to court decision (*sec. 48, Trade Union Act*). Workers may also be reinstated if their dismissal was a result of trade union activities (*sec. 66, LC*).

No special reference is made to collective dismissals in the LC. However, according to *sec. 107*, the Prime Minister must form a committee to determine whether a firm can stop or suspend operations or alter the size or activity of the firm in a way that would affect the size of its workforce. This suggests that it would be difficult to dismiss workers due to operational requirements of the business. The LC does not state what the contents of notice for collective dismissals should contain.

With regards to compensation, it can be presumed that those dismissed will be entitled to severance payments as explained below.

### **Notice and prior procedural safeguards**

Where a worker is accused of an offence for which the appropriate disciplinary penalty is dismissal, the employer shall, before deciding to dismiss him or her, submit a request to do so to a tripartite committee consisting of the following (*sec. 62, LC*):

- C the head of the Directorate of Manpower or his or her representative, who shall act as chairperson;
- C a workers= representative, to be nominated by the competent trade union organization; and
- C the employer or his or her representative.

Apprentices (*sec. 14, Act 137*) and probationary employees, workers on fixed-term contracts, casual and temporary workers (*sec. 71, Act 137*) are excluded from this requirement. Save for these exceptions, no employer shall dismiss a worker before submitting a request to that effect to the tripartite committee. Failure to do so shall render the employer's decision null and void and he or she shall also be required to pay the worker's wages (*sec. 65, Act 137*).

The tripartite committee shall inform the workers about the hearing concerning dismissal (*sec. 63, Act 137*). In addition, for all firms employing more than five workers, disciplinary action may only be taken pursuant to an organization's work rules, which must be drafted in consultation with the relevant union, and with prior government approval (*sec. 59, LC*).

However, workers accused of committing crimes including dishonesty, dishonour or immorality may be placed in preventive detention pending the decision of the tripartite committee (*sec. 67, LC*).

In the case of an apprentice, an employer may terminate the employment relationship if he or she considers that the apprentice lacks either the ability or the necessary inclination to learn the trade or occupation properly. Three days' notice is required (*sec. 14, Act 137*). Except for apprentices, the LC does not contain any other specific notice provisions, except for the requirement to obtain approval from the tripartite committee.

### **Severance pay**

In the case of termination of the employment relationship, the employer shall pay the competent social insurance authority (in respect of any period beginning on or after 7 April 1959) compensation based on half the monthly wage for each of the first five years of employment and on one month's wage for each subsequent year, without any maximum limit (Introduction to LC).

Employees retiring at the age of 60 are entitled to severance pay. According to *sec. 74*, a worker shall, at the age of 60, be entitled to (in respect of the period of employment that he or she has completed) a payment calculated on the basis of half his or her monthly wage for each of the first five years of employment, and on the basis of one month's wages for each subsequent year, unless he or she is entitled to benefits under the old-age, disability and survivors' insurance scheme provided for by the Social Insurance Code of 1975.<sup>207</sup>

### **Avenues for redress**

A worker who is dismissed without valid reason may request a stay of execution by submitting a request by registered letter, to the competent administrative local authority within one week from the date that notice was sent by the employer. The administrative authority is required to take the necessary measures to settle the dispute amicably (*sec. 66, LC*).

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<sup>207</sup> From the wording of the article it would seem that in the case of early retirement, that is before the age of 60, employees would not be entitled to this form of compensation in spite of the fact that they had worked at a certain undertaking for many years. The wording also seems to imply that workers who retire at the age of 60, but who had not worked at the undertaking for at least five years, would also not be entitled to severance pay.

If attempts at settlement fail, the administrative authority shall refer the request within one week of its submission to the judge responsible for summary proceedings on behalf of the local court or the judge of the competent court for the examination of labour questions, acting in his or her capacity as the judge responsible for summary proceedings (*sec. 66, LC*).

The judge shall give a ruling on the request for a stay of execution within two weeks of the first hearing. The judge's ruling is final. Should the judge order a stay of execution, the employer shall be bound to pay the worker's wages after the date appointed for the latter's dismissal (*sec. 66, LC*).

The judge shall then refer the case to the competent court for the examination of labour questions. The court shall then make a decision on the substance of the case as a matter of urgency, granting compensation for damages, where appropriate, within one month of the first hearing (*sec. 66, LC*).

Reinstatement can be ordered where dismissal results from trade union activities (*sec. 66, LC*). The court can also order compensation in the case of an unfair dismissal. The Act does not stipulate how such compensation is to be determined.

## ***Ethiopia***

### **Sources of regulation**

The central statute regulating termination of employment in Ethiopia is the Labour Proclamation No. 42 (LP No. 42) of 1993. Collective agreements may also define procedures, or rights, in relation to dismissal; however, any provision in a collective agreement which provides less favourable protection to an employee than Proclamation No. 42 or other laws is null and void (*sec. 133(1)*, LP No. 42).

### **Scope of legislation**

LP No. 42 is applicable to employment relations based on a contract of employment between a worker and an employer in the private sector. It does not apply to the following employment relations arising out of contracts of employment:

- C** contracts for the purpose of upbringing, treatment, care or rehabilitation;
- C** contracts for the purpose of educating or training, other than as an apprentice;
- C** contracts relating to persons holding managerial posts who are directly engaged in major managerial functions of an undertaking and give decisions within the power delegated to them by law or the employer, depending on the type of activities of the undertaking;
- C** contracts of personal service for non-profit-making purposes;
- C** contracts relating to persons such as members of the armed forces, members of the police force, employees of state administration, judges of courts of law, prosecutors and others whose employment relationship is governed by special laws;
- C** contracts relating to a person who performs an act, in consideration of payment, at his or her own business or trade risk or professional responsibility under a contract of service; or
- C** employment relations between Ethiopian citizens and foreign diplomatic missions or international organizations operating within the territory of Ethiopia, unless the Council of Ministers by regulation decides otherwise, by an international agreement to which Ethiopia is a signatory (*sec. 2*, LP No. 42).

### **Contracts of employment**

A contract of employment is deemed to be formed where a person agrees directly or indirectly to perform work, or a piece of work, for and under the authority of an employer, for a definite or indefinite period in return for remuneration. Unless otherwise provided by law, a contract of employment is not required to be in any special form (*secs. 4 and 5*, LP No. 42).

### **Termination of employment**



The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of a fixed-term contract; and
- C the completion of the task for which the contract was concluded.

### **Termination of employment at the initiative of the employer**

A contract of employment may only be terminated where there are grounds connected with the worker's conduct or with objective circumstances arising out of his or her ability to do the work or where there are grounds related to the organizational or operational requirements of the undertaking (*sec. 26, LP No. 42*).

Ordinary dismissal with notice is usually connected to incapacity, whereas summary dismissal is usually connected to misconduct. The following grounds relating to the loss of capacity of the worker shall constitute good cause for terminating a contract of employment with notice (*sec. 28, LP No. 42*):

- C the worker's manifest loss of capacity to perform the work to which he or she has been assigned, lack of skill as a result of refusal to take the opportunity of training prepared by the employer to upgrade skills, or, after having been trained, the inability to acquire the necessary skills;
- C reasons of health or disability, the worker's permanent inability to carry out his or her obligations under the contract of employment;
- C the worker's unwillingness to move to a locality to which the undertaking moves; and
- C cancellation of the worker's post for a good reason when the worker cannot be transferred to another post.<sup>208</sup>

The following grounds relating to the organization or operational requirements of the undertaking constitute good cause for ordinary dismissal with notice (*sec. 28(2), LP No. 42*):

- C any event which entails direct and permanent cessation of the worker's activities, in part or in whole, making a reduction of the workforce necessary;
- C a fall in demand for the products or services of the employer resulting in work volume reduction and profit reduction, making a reduction of the workforce necessary; and
- C a decision to alter work methods or introduce new technology with a view to raising productivity resulting in the reduction of the workforce.

Unless otherwise determined by a collective agreement, a summary dismissal will only be justified on the following grounds (*sec. 27, LP No. 42*):

- C repeated and unjustified tardiness despite warnings to that effect;
- C absence from work without good cause for a period of five consecutive working days or ten working days in any period of one month or 30 working days in a year;
- C deceitful or fraudulent conduct in carrying out duties (having regard to the gravity of the conduct);
- C misappropriation of the property or funds of the employer;

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<sup>208</sup> This is a form of *A*reduction of the workforce<sup>@</sup> and is not connected to the incapacity of the worker. However, since it only affects individual members of the workforce and not more of the workforce, it is not functionally a collective dismissal.

- C producing output which, despite the potential of the worker, is persistently below the qualities and quantities stipulated in the applicable collective agreement or determined by the agreement of the two parties;
- C responsibility for brawls or quarrels at the workplace (again, having regard to the gravity of the conduct);
- C conviction for an offence where such conviction renders the employee unsuitable for the post which he or she holds;
- C responsibility for causing damage intentionally, or through gross negligence, to any property of the employer or to another property which is directly connected with the work of the employer;
- C commission of any of the unlawful activities referred to in *sec. 14(2)* (i.e. intentionally committing in the place of work any act which endangers life and property; taking away property from the workplace without the express authorization of the employer; reporting for work in a state of intoxication; refusing to be medically examined whenever the law or the employer for good cause so requires; or refusing to observe safety rules or refusing to take necessary safety precautions);
- C absence from work due to a sentence of imprisonment passed against him or her for more than 30 days; or
- C commission of other offences stipulated in a collective agreement as grounds for terminating a contract of employment without notice.

The following shall *not* constitute legitimate grounds for the termination of a contract of employment (*sec. 26, LP No. 42*):

- C membership in a trade union or participation in its lawful activities;
- C seeking or holding office as a workers= representative;
- C submission of a grievance or participation in judicial or other proceedings against the employer; or
- C nationality, sex, religion, political outlook, marital status, race, colour, family responsibility, pregnancy, lineage or social status.

Dismissals for reasons relating to the organizational or operational requirements of the undertaking (as detailed above) are considered a collective dismissal where it affects either:

- C at least 10 per cent of the number of workers employed; or
- C at least five employees, over a continuous period of no less than ten days, where the total number of workers employed is between 20 and 50 (*sec. 29, LP No. 42*).

### **Notice and prior procedural safeguards**

Notice of termination shall be in writing and shall specify the reasons for the termination of the contract and the date on which the termination shall take effect (*sec. 34, LP No. 42*).

Notice of termination by the employer shall be handed to the worker in person. When this is not possible, it shall be fixed to the notice board in the workplace for ten consecutive days (*sec. 34(2), LP No. 42*).

Unless otherwise provided for, the period of notice for the termination of a contract of employment shall be as follows (*sec. 35, LP No. 42*):

- C one month in the case of a worker who has completed probation and has either a period of service not exceeding one year<sup>2</sup> or has had his or her contract terminated due to workforce reduction; or
- C two months in the case of a worker who has a period of service of more than one year.

Non-compliance with notice requirements shall result in the payment of wages in lieu of the notice period, in addition to any other severance payments due (*sec. 44*, LP No. 42).

Outside of complying with the procedures for giving notice (see below), there is no mention in the LP of any need for the employer to consult with trade unions or other worker or trade union representatives. Nor does the LP demand a hearing for the employee in cases where notice is given by the employer.

In instances of collective dismissal the employer shall give written notice, specifying the reason for and the dates of dismissal (*sec. 27(2)*, LP No. 42). The LP does not refer to an obligation to inform the workers about the number of employees to be dismissed or efforts to re-employ them elsewhere.

There is no direct reference to consultation with unions for collective dismissals. However, a consultation procedure for such dismissals is laid out in *sec. 29(3)*. Whenever a collective dismissal takes place, workers having skills and higher rates of productivity shall have priority for being retained in their posts and, in the case of equal skill and rate of productivity, the workers to be affected first by the reduction shall be in the following order:

- C those having the shortest length of service in the undertaking; or
- C if service is equal, those who have few dependants.

In addition, preference against retrenchment is given to:

- C those who are disabled by an employment injury in the undertaking;
- C workers= representatives; and
- C expectant mothers.

This procedure does not apply to the reduction of workers due to a normal decrease in the volume of construction work as a result of the completion of a project, unless the reduction affects workers employed for work that is still to be completed (*sec. 30*, LP No. 42).

## Severance pay

A worker who has completed his or her probation (which can last up to a maximum of 45 days (*sec. 11*, LP No. 42)) and whose contract of employment is terminated under the provisions of the LP (also in the case of a fixed-term contract) shall be entitled to receive severance pay from the employer.<sup>3</sup> The severance pay shall be 30 times the average daily wage of the last week of service for the first year of service. For service of less than one year, severance pay shall be calculated in proportion to the period of service. In the case of a worker who has served more than one year, payment shall be increased by one-third of the said sum referred to above for every additional year of service, provided the total amount shall not exceed 12 months= wages.

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<sup>2</sup> It is not clear whether the employer has to give notice in cases of termination during the probationary period.

<sup>3</sup> However, when the worker proves to be unfit for the job during his or her probation, the employer can terminate the contract of employment without being obliged to pay severance pay or compensation (*sec. 11(5)*).

## Avenues for redress

Cases of unlawful dismissal for both summary and ordinary dismissal are dealt with by the Labour Division of the First Instance Court. A decision has to be taken within 60 days from the date on which the claim is lodged (*sec. 138*, LP No. 42). An appeal to the Labour Division of the Regional Appellate Court is possible within 30 days from the date on which the decision is delivered. The decision of the latter court is final (*sec. 139(1)*, LP No. 42).

Any claim to be reinstated by a worker shall be barred after three months from the date of the termination of his or her contract of employment (*sec. 162(2)*, LP No. 42). Any claims by a worker (or employer) for any kind of payment shall be barred by limitation unless an action is brought within six months from the date of termination of the contract of employment (*sec. 162(4)*, LP No. 42). However, any party may waive his or her right to raise as a defence a period of limitation after its expiry (*sec. 165*, LP No. 42).

Where a contract of employment is terminated unlawfully, the employer shall generally be obliged to reinstate the worker, provided that the worker shall have the right to payment of compensation if he or she wishes to leave the employment (*sec. 43(1)*, LP No. 42). The labour dispute settlement tribunal may, however, order the dismissal of the worker upon payment of compensation even if the worker demands reinstatement, if the tribunal believes that the continuation of the particular worker-employer relationship will give rise to serious difficulty (*sec. 42(3)*, LP No. 42).

Similarly, where a worker who, after obtaining judgement of reinstatement in his or her favour, declines to be reinstated, the labour settlement tribunal may order the dismissal of the worker upon payment of full or fair compensation for the inconvenience he or she incurred having regard to the circumstances of the case (*ibid.*). The compensation to be paid under these circumstances shall be in addition to severance pay, and shall be calculated as follows (*sec. 43(3)*, LP No. 42):

- C 180 times the average daily wage, and a sum equal to the remuneration for the appropriate notice period in the case of unlawful termination of a contract of employment, for an indefinite period; or
- C for the unlawful termination of fixed-term contracts or piece-work contracts, a sum equal to the wages which the worker would have obtained if the contract of employment had lasted up to its date of expiry or completion, provided that such compensation does not exceed 180 times the average daily wage.

## **France**

### **Sources of regulation**

The French Labour Code, which was completely recast in 1973 and has been amended since, and *art. 34* of the Constitution, which establishes the rules and fundamental principles of labour law, are the main sources of legislation on employment.

The Labour Code (LC) is divided into nine Books, each of which is comprised of three Parts: laws (L), regulations (issued by the Council of State) (R) and decrees (D).

### **Scope of legislation**

Book I, Title 2; and Book 3, Title 2, Chapter I, of the LC deal with contracts of employment and dismissal for economic reasons, respectively, and apply to termination of contracts of employment by the employer.

### **Contracts of employment**

A contract of employment is made in writing and must be drawn up in French. It may be concluded without specifying a definite duration (contract for an unspecified period). However, it may include a precise duration fixed at the time the contract is made (*sec. L.121-5, LC*).

A fixed-term contract may be made only for the performance of a specified and temporary job. The instances for which it may be concluded are listed in *secs. L.122-1-1 and L.122-2* of the LC. The total duration of this type of contract may not exceed 18 months generally, and nine months while waiting for an employee recruited on a contract for an unspecified period to take up his or her post. The minimum period may be extended to 24 months if the job is performed by a foreigner (*sec. L.122-1-2 II, LC*). This type of contract may be renewed only once, and its maximum duration may not exceed 24 months. If the contractual relationship continues after the expiry of the contract, the contract becomes a contract for an unspecified period (*sec. L.122-3-10, LC*).

A fixed-term contract of employment may contain a probationary period the duration of which is calculated on the basis of one day for each week that the fixed-term contract will exist.

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of a fixed-term contract (*sec. L.122-3-5, LC*);
- C *force majeure*; and
- C the completion of the specific job for which the employee was employed.

## **Termination of employment at the initiative of the employer**

The LC states that all dismissals should be based on well-founded and valid grounds (*sec. L.122-14-3*). In the absence of agreement between the parties, a contract of employment may be terminated by the employer only on account of serious misconduct or in the case of *force majeure* (*sec. L.122-3-8, LC*).

A contract of employment for an unspecified period may be terminated by either of the parties. The termination by an employer should be justified by a genuine and serious reason.

Any termination carried out by an employer for one or more reasons not inherent in the personality of the employee resulting from the elimination or transformation of the job or a substantial modification of the contract of employment, especially after economic hardships or technological changes, constitutes a dismissal for economic reasons (*sec. L.321-1, LC*<sup>209</sup>).

No employer may terminate the contract of a woman who has been medically certified as pregnant; nor may her employment be terminated during a period of leave to which she is entitled (whether or not she takes it), or within four weeks of the expiration of the leave period.

In addition, an employer may not terminate the employment of a worker whose contract has been suspended because of an employment injury or occupational disease, unless the employer can show that the employee has engaged in serious misconduct or that it is impossible, for reasons unrelated to the injury or illness, for the contract to continue in force.

Termination of the employment of a trade union delegate, an employee representative and persons of similar status can only occur after authorization by the labour inspectorate.

*Sec. L.122-45* of the LC states that no dismissal may be founded on discrimination based upon origin, sex, family status, race, nationality, political opinion, trade union activities, religion, disability, or exercise of the right to strike or health. Any such dismissal is considered null and void.

## **Notice and prior procedural safeguards**

An employer who proposes to dismiss an employee must, before making a decision, summon the person concerned, stating the purpose of the summons. Employees may be accompanied at the interview by an advisor of their choice. During the interview, the employer must give the reasons for the proposed decision and hear the employee's explanations (*sec. L.122-14, LC*<sup>210</sup>).

The decision to carry out the dismissal must be transmitted by registered letter (*sec. L.122-14-1, LC*<sup>211</sup>) and the employer must specify therein the reason or reasons for the dismissal (*sec. L.122-14-2, LC*).

The termination of a contract for an unspecified period is subject to a notice period except in the case of serious fault (*sec. L.122-6, LC*). The notice period is:

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<sup>209</sup> Amended by Act No. 92-722 of 29 July 1992.

<sup>210</sup> Amended by Act No. 91-72 of 18 Jan. 1991.

<sup>211</sup> Amended by Act No. 95-116 of 4 Feb. 1995.

- C one month, if the employee has worked for between six months and two years; and
- C two months after two years= service.

If the length of service is less than six months, the notice period applied will be governed by local custom and the practice in the occupation. Collective agreements may contain provisions more favourable to workers in this regard.

An employer who proposes to dismiss workers on economic grounds must summon and consult the works committee or staff delegates and inform the competent authority of the proposed dismissals (*sec. L.321-2, LC*). The employer should indicate to the staff representatives the economic, financial or technical reasons for the dismissals, the number of workers concerned, the categories of workers affected, the proposed criteria for the order of dismissals, the number of workers employed in the establishment and the provisional timetable for the dismissals (*sec. L.321-4, LC*). The works committee or, in its absence, the staff delegates must be summoned for consultation twice. The interval at which these two meetings are held varies depending on the number of employees affected (*sec. L.321-3, LC*).

After consultation with the works committee or staff delegates, the employer defines the criteria for setting the order of dismissals. These criteria must take into account family responsibilities, particularly in the case of single parents; length of service in the establishment; the situation of employees whose re-entry into the labour market is difficult (disabled persons or elderly employees) as well as skills (*sec. L.321-1-1, LC*).

After notifying the competent administrative authority of the proposed dismissals, the notice period for sending the letters of dismissal is as follows (*sec. L.321-6, LC*):

- C at least 30 days if the number of dismissals is less than 100;
- C 45 days if the number of dismissals is equal to 100 and less than 250; and
- C 60 days if the number of dismissals is at least 250.

## **Severance pay**

When an employment relationship does not continue at the end of a fixed-term contract, the employee is entitled to a severance allowance (*sec. L.122-3-4, LC*). This allowance is calculated according to the remuneration of the employee and the duration of the contract, but it may not be lower than a minimum fixed by decree. It is not payable in the event of premature termination at the initiative of the employee, serious misconduct on the part of the employee or in cases of *force majeure*.

An employee who is bound by a contract of employment for an unspecified period and is dismissed after two years=continuous service with the same employer is entitled, except where he or she is guilty of serious misconduct, to minimum severance pay (*sec. L.122-9, LC*). The amount and the methods of calculating such pay are to be fixed in the corresponding regulations. The statutory minima are often improved by collective or individual agreement. The formula for calculating statutory severance pay is based on 20 hours of pay for wage-earners or 10 per cent of monthly wages for salaried staff, multiplied by the years of service accrued up to a maximum of ten. For each year of service beyond ten, one-fifteenth of a month's pay is added.

There is some evidence that negotiated terminations accompanied by agreed severance pay are becoming more common in France, although such agreements are subject to review by the courts, if challenged.

### **Avenues for redress**

Where legal action is taken, it is up to the judge to decide whether the correct procedure has been observed and whether the reasons given by the employer are well-founded and valid (*sec. L.122-14-3, LC*).

In the event of the termination of a fixed-term contract before the expiry of the term for reasons other than serious misconduct or *force majeure*, the employee is entitled to damages corresponding to the remuneration which the employee would have received up to the end of the agreed term of the contract (*sec. L.122-3-8, LC*).

If the employer fails to observe the notice period, the employee is entitled to compensation in lieu of notice, except in the case of serious fault on the part of the employee (*sec. L.122-8, LC*).

Where an employee is dismissed without the correct procedure being observed, but on well-founded and valid grounds, the court will order the employer to comply with the prescribed procedures and award the employee compensation which must not exceed one month's wages. If the grounds for the dismissal are not well-founded and valid, the court may propose the reinstatement of the employee in the undertaking. If either of the parties rejects such a proposal, the court will award compensation to the employee not less than the remuneration that the employee received during the six months immediately preceding his or her dismissal (*sec. L.122-14-4, LC*<sup>4</sup>).

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<sup>4</sup> Amended by Act No. 92-1446 of 31 Dec. 1992.



## ***Gambia***

### **Sources of regulation**

The Labour Act, 1990 (LA), is the major source of law in Gambia in relation to termination of employment at the initiative of the employer.

### **Scope of legislation**

The following categories of workers are excluded from all of the provisions of the LA: civil servants, members of the naval, military, prison and security services, police officers and domestic workers (*sec. 2(2)*, LA).

The following workers are excluded from the provision of the LA dealing with termination of employment: any employee over 55 who has reached a contractual retirement age; any employee over 65; a probationary employee; and any employee whose dismissal is certified as being in accordance with the national interest by the Secretary of the Cabinet.

### **Contracts of employment**

Contracts of employment may be for a fixed term or for an indefinite period. A fixed-term contract will expire on the specific date indicated in the contract or when the specific task, piece of work or journey to which the contract relates has been finished (*sec. 83*, LA). However, if the specific period, task, piece of work or journey expires or is performed, but the employment continues without protest for four weeks thereafter, the contract is deemed to have been immediately renewed for an indefinite period (*sec. 83(4)*, LA). Probationary periods are permissible, but may not exceed six months.

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C employee retirement;
- C the expiry of a fixed-term contract; and
- C the completion of the task for which the contract was concluded.

Moreover, unless the contract expressly provides to the contrary, the death of the employer will cause the contract of employment to terminate after one month from the date of such death, unless the contract has been lawfully terminated sooner. The personal representative of the deceased shall be deemed to be the employer during such time as the contract continues (*sec. 80*, LA).<sup>212</sup>

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<sup>212</sup> Such termination of employment would only apply in cases where employment is of a personal nature and not in cases where someone is employed by a company.

According to *sec. 80(2)* of the LA, the compulsory winding up of any company or organization shall operate to terminate any contract of employment with that company or organization, but shall not prevent renewal of that contract by the receiver or other person carrying on the business of the company or organization. If such contract is renewed within two months of such termination, it shall be deemed not to have been terminated.

Where a trade or business is transferred in whole or in part, save by a receiver upon the insolvency of the business,<sup>2</sup> the contracts of employment of all employees at the date of transfer shall automatically be transferred to the transferee and all rights and obligations between the employer and the transferor shall continue to apply as if they had been rights and obligations between the employee and the transferee (*sec. 74(2)*, LA).

### **Termination of employment at the initiative of the employer**

An employer is required to justify a dismissal of his or her employee. Dismissal will be justified in cases of incapacity or misconduct, such as:

- C wilful misconduct;
- C omission or disobedience by the worker which, by its nature and the circumstances in which it occurs, is such that no reasonable employer would expect the employment to continue;
- C serious or persistent insubordination;
- C fraud or other serious dishonesty causing the employer substantial loss;
- C incompetence;
- C a single long period of absence without substantial reason;
- C unreasonable refusal to accept other suitable employment in cases where the enterprise needs such redeployment; or
- C wilful destruction or obstruction of safety equipment available for use (*sec. 116*, LA).

Summary dismissal is allowed in the following circumstances:

- C when the employee is guilty of serious misconduct;
- C where, within three months of engagement, the employer has reasonable grounds to believe that the employee lacks the skill or ability which he or she has represented himself or herself to possess and which the law requires should be possessed by an employee for performing the specified work; or
- C where the contract of employment is void for misrepresentation (*sec. 112*, LA).

Where the employer does not provide reasons for dismissal when requested by the employee, such dismissal is deemed unfair (*sec. 114(1)*, LA) Where such a dismissal takes place before completion of any period wherein wages become due, the employee shall be paid a proportionate part of the wages then due (*sec. 112(2)*, LA).

Under *sec. 117* of the LA, the following constitute invalid reasons for dismissal:

- C pregnancy;

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<sup>2</sup> The transferee will, in these circumstances, not be liable for the debts of the insolvent undertaking.

- C the fact that the employee has taken maternity leave;
- C participation in trade union activities, including the organization of lawful industrial action outside working hours or, with the express consent of the employer, within working hours;
- C membership of a trade union;
- C refusal or indication of an intention to refuse to join any organization of workers;
- C a period of absence by reason of illness or injury of less than two weeks unless the employee, on the reasonable request of the employer, fails to supply reasonable independent evidence that he or she was incapacitated for the whole period;
- C instigation by the police of investigations involving the employee concerning a matter not connected with suitability of the employee for a particular employment;
- C a single instance of absenteeism, not being a long unexplained absence so as to justify summary dismissal;
- C taking of steps by the employee to enforce any right granted or any obligation imposed upon the employer;
- C refusal by the employee in any circumstances, save those of grave national emergency or of grave emergency applicable to the employer, to work for more than the number of hours permitted by any rule of law or international convention;
- C any political activity engaged in or political opinion expressed by the employee; and
- C the dismissal of an apprentice, unless the dismissal is necessitated by personal injury or wilful act by the apprentice, or the employer is going out of business.

When collective dismissal is being considered, the employer has to provide the relevant trade unions with written information concerning the circumstances giving rise to the need for dismissal, possible alternative options and whether they are feasible, whether redeployment or retraining has been considered, whether it is reasonably possible that a certain number of employees might be re-employed during the next year, and the principles which will be taken into account when deciding on whom to dismiss (such as last-in-first-out). The employer must then consult with relevant trade unions (*sec. 119, LA*).

The provisions governing collective dismissal shall not apply to employers with five or less employees in all his or her establishments, or where a collective agreement governs the conditions of collective dismissal (*sec. 119(3), LA*).

### **Notice and prior procedural safeguards**

Notice is mandatory for all cases of dismissal except summary dismissal. In cases where it is customary to employ individuals on a day-to-day basis, notice shall be given at the end of the day (*sec. 111(1)(a), LA*). This notice shall be deemed to have been given by specifying that the contract will last for one (additional) day only. For all others, notice periods are as follows:

- C in the case of an employee not employed on a day-to-day basis, but who has been employed for less than one week=s continuous employment with the same employer, 24 hours= notice (*sec. 111(1)(b), LA*).

- C in the case of an employee with one week or more of continuous employment but less than six months=continuous employment with the same employer; one week=s notice (*sec. 111(1)(d)*, LA).
- C in the case of an employee with six months or more but less than six years of continuous employment with the same employer; one month=s notice (*sec. 111(1)(c) and (e)*, LA); and
- C in the case of an employee with six years or more of continuous employment with the same employer, two months= notice (*sec. 111(1)(f)*, LA).

Under *sec. 109*, requirements for notice are excluded in the cases of:

- C any employee who has attained the age fixed for retirement in accordance with *sec. 90*<sup>3</sup> or the age of 65 years, whichever is earlier;
- C termination of the employment relationship during the probation period;
- C any employee whose dismissal is certified by the Secretary of the Cabinet as being in the national interest;
- C a summary dismissal;
- C the payment of wages in lieu of notice (that is, a sum equivalent to the basic wage payable for the period of notice (*sec. 111*, LA); and
- C for fixed-term employees, provided that the contract has not been renewed immediately after expiration.<sup>4</sup>

Before dismissal takes place, the employee has to be informed about the reasons for dismissal and has to be given a reasonable chance to respond (*sec. 113*, LA). The dismissed employee has the right to approach the Industrial Tribunal (*sec. 121*, LA). Such an employee also has the right to be represented by a trade union representative (*sec. 113*, LA). Where the employer does not comply with these conditions, it will constitute an unfair dismissal, unless the employer can prove that the employee was aware of these rights (*sec. 113(3) and (4)*, LA). The Industrial Tribunal has jurisdiction over dismissal disputes (*sec. 21(2)*, LA). Any party who is aggrieved by a decision may appeal to the Supreme Court whose decision is final (*sec. 43(1)*, LA).

### Severance pay

In the case of summary dismissal, the employee must be paid any remuneration or benefits accruing to him or her up until the date of the dismissal (*sec. 112(2)*, LA).

### Avenues for redress

The Industrial Labour Tribunal has jurisdiction over all types of dismissal claims (*sec. 112*, LA). Claims can be filed with the Industrial Tribunal within six months from the date of dismissal. The burden of proof rests with the employer (*sec. 115*, LA). Where the employer cannot prove the reasons for

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<sup>3</sup> *Sec. 90* stipulates that a term in a contract of employment, fixing a retirement age for an employee at any age after reaching his or her 55th birthday, shall be valid and enforceable, and termination in accordance with such provision and shall not amount to a dismissal.

<sup>4</sup> It thus seems that the premature termination of a fixed-term contract would also not require notice.

dismissal, such dismissal will be deemed unfair. In cases where no settlement is reached by the parties, the Industrial Tribunal has jurisdiction to order reinstatement or compensation or both. The Industrial Tribunal has the power to award such compensation as it considers just and equitable, although this amount can be reduced by reason of the conduct of the employee in contributing to his or her dismissal or in failing to mitigate the loss he or she has suffered (*sec. 123, LA*). According to *sec. 123(3)*, the court will also consider, *inter alia*, other job opportunities available, the value of contractual benefits to which the employee might reasonably have expected to become entitled to had he or she not been dismissed; and the value of statutory rights such as pensions or other accrued benefits.

## **Germany**

### **Sources of regulation**

The general rules governing statutory protection against dismissal in Germany are to be found in the Civil Code (*Bürgerliches Gesetzbuch*) (CC) and the Protection Against Dismissal Act (*Kündigungsschutzgesetz*) (PADA).<sup>213</sup> In establishments where there is a works or staff council, the PADA is supplemented by collective law provisions under *sec. 102*, Works Constitution Act and *sec. 79*, Federal Staff Representation Act. Collective agreements may also provide special protection for employees; however, the provisions of these agreements are only valid where they are more favourable to the employee than the provisions of the CC and PADA.

Other sources of legislation relevant to the termination of employment include the Maternity Protection Act; the Disabled Persons Act; the Vocational Training Relationship Act; the Federal Child Care Payment and Child Care Leave Act; and the Job Protection During Compulsory Military or Community Service Act. (There is no consolidated Labour Code.)

Labour Courts also play a very important part in the development of protection against dismissal through interpretation of abstract rules and their direct application to specific cases. Results may differ from one Federal Labour Court to another.

The Act of 27 July 1995 has amended several laws to adapt labour legislation to European Union law.

### **Scope of legislation**

German labour law makes a distinction between ordinary termination with notice, by which the employment relationship is ended when the period of notice expires (*sec. 622*, CC), and summary termination, which brings about an immediate cancellation of the employment relationship (*sec. 626*, CC).

General rules of protection for every contract of employment, in both cases of summary and ordinary dismissal, are contained in the CC. However, in situations of ordinary dismissal, the minimum protections under the CC may also be supplemented by those in the PADA. To qualify for protection under the PADA, an employee must be employed in an establishment regularly employing more than ten full-time equivalent employees (not counting vocational trainees and marginal, part-time workers)<sup>214</sup> and have worked there without interruption for longer than six months (*secs. 1 and 23*, PADA).

If the employee works in an establishment which has a works or staff council, the PADA is also supplemented by collective labour law provisions (*sec. 102*, Works Constitution Act and *sec. 79*, Federal Staff Representation Act). All of these Acts do not apply to special categories of civil servants or members of the armed forces.

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<sup>213</sup> As subsequently amended, the most recent occasion being in Sep. 1996.

<sup>214</sup> Increased from five full-time equivalent workers by the amendment to the PADA of 1996.

## Contracts of employment

Labour law in Germany applies only to employment relationships based on a private contract. This covers blue-collar and white-collar workers as well as civil servants in the public service and private sector who are employed under normal contractual employment relationships.

There is provision for labour contracts of indefinite periods, definite periods, full-time and part-time work and also temporary work. It is presumed that working anything less than the weekly hours worked by full-time workers is therefore part-time work (*sec. 2, Employment Promotion Act, 1985 (Beschäftigungsförderungsgesetz)*).

The same Act relaxed the traditional insistence on a justifying reason for fixed-term contracts (e.g. replacements for pregnant or ill workers) for contracts of less than two years. For these contracts, and for contracts of any duration involving workers over 60, no justifying reasons are needed (*sec. 1, Employment Promotion Act*).

Under fixed-term contracts, early termination is only possible in the form of a summary dismissal for an important reason, or if contractually provided for (*sec. 626, CC*).

Contracts of apprenticeship are technically speaking not considered contracts of employment. However, *sec. 3* of the Vocational Training Act, states that the rules and principles governing the contract of employment are to be applied, except where the Act expressly states an exception, or when the application of labour law would not be compatible with the nature and aim of the apprenticeship. There are also special rules for home workers.

For civil servants not employed under a private contractual relationship, the employment relationship is defined by, and based on, a special section of public law. In addition, there are also special acts which seek to regulate the duties and rights of civil servants.

The Employer Contracting Act (which came into effect on 1 March 1996) requires foreign-based employers in the construction industry to comply with applicable collective agreements, if such an agreement is declared generally binding by the Minister of Labour.

## Termination of employment

The contract of employment can terminate in Germany, not at the initiative of the employer, by:

- C employee resignation;
- C expiry of a fixed-term contract;
- C contractual retirement age being reached;
- C termination by mutual consent;<sup>3</sup> and
- C the contract being declared null and void because it is illegal.

## Termination of employment at the initiative of the employer

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<sup>3</sup> Although this does not constitute dismissal, in practice employers often seek to have an employee voluntarily agree to termination as an alternative to dismissal. Termination by mutual consent relieves the employer from further obligations under the contract of employment. It means that the employee does not have recourse under the PADA. Employees may prefer an immediate payment upon termination by mutual consent to pursuing court procedures.

Pursuant to *sec. 626* of the CC, the reasons for summary dismissal must be based on grave misconduct or incompetence of the employee, or severe economic circumstances unrelated to the behaviour of the employee. However, the dismissal is only lawful if in view of all circumstances of the case, and in evaluating the interest of both parties, it is intolerable for either of the parties to fulfil the contract until the period of notice. Examples of serious breaches of contract include a criminal offence, persistent refusal to fulfil the contract of employment in spite of warnings, and deceiving the employer about skills or qualifications essential for the job.

*Sec. 27*, White Collar Employees Act, also lists additional grounds for summary dismissal. Summary dismissal must be carried out within two weeks of the occurrence on which it is based (*sec. 626*, CC).

The PADA's prima facie position on dismissal is that it is assumed to be socially unjustifiable and therefore unlawful. The first and foremost aim of the PADA is to protect the employee's contract of employment. However, the Act identifies three reasons which render dismissals lawful. These reasons relate to:

- C the employee's person, e.g. personal capability or ill health;
- C the employee's conduct, e.g. breach of obligations, violation of plant regulations or collateral contractual obligations, breach of confidence;
- C redundancy, i.e. due to urgent operational reasons, meaning it must be economically necessary and warranted by factors such as rationalization, reorganization, reduction of work volumes and so on (*sec. 1*, PADA).

Even if the cause for dismissal is one of the reasons listed above, the dismissal is still considered to be socially unjustifiable and therefore unlawful if the worker can be transferred to a comparable job immediately or after reasonable training.

Dismissal is also unlawful in situations where the reasons for dismissal involve:

- C participation in (legal) trade union activities or a (legal) strike;
- C discrimination on grounds of sex, origin, race, language, national origin, creed, religious and political beliefs (*sec. 611*, CC; *art. 3(3)* of the Constitution);
- C pregnancy and maternity: dismissal is banned where the employer knows of the pregnancy at the time of dismissal, or is informed of the pregnancy within two weeks of pronouncing dismissal. Dismissal is only possible where continuation of employment is deemed absolutely intolerable. The ban on dismissal ends four months after giving birth (*sec. 9*, Maternity Protection Act (*Mutterschutzgesetz*));
- C child-care leave: dismissal is banned during the period of leave and is only permissible where continuation of employment is absolutely intolerable. This protection ends the month in which the child becomes 2 years old. However in cases of a contract for a definite period, the contract ends even though dismissal is ordinarily forbidden (*sec. 18*, Federal Child Care Payment and Child Care Leave Act (*Bundeserziehungsgeldgesetz*));
- C compulsory military/community service: dismissal is banned for the period between employees receiving their call-up papers and completing their compulsory service (*secs. 2, 7(1), 8(4)* and



9(5), Job Protection During Compulsory Military or Community Service Act (*Arbeitsplatzschutzgesetz*); (secs. 2 and 5(2), Military Aptitude Act (*Eignungsübungs-gesetz*));

- C members of workers= representative bodies: they can only be dismissed by summary dismissal during their term of office and within a period of one year thereafter (*sec. 14, PADA*). In addition, the consent of the works council must be obtained before dismissal of a works council member, although if such consent is not forthcoming, the employer may seek authorization for such a dismissal from the Labour Court;
- C apprentices: after completion of the probationary period, they can only be dismissed by summary termination (*sec. 15, Vocational Training Act*); or
- C special worker groups: some groups are protected from ordinary dismissal under collective agreements, e.g. white-collar workers employed for at least 15 years in the public service.

The PADA defines **collective redundancy** as a situation where, within a given period of 30 days, the employment relationship of a relatively large number of employees is actually terminated by the employer by way of ordinary dismissal with notice (*sec. 17(1), PADA*).

### **Notice and prior procedural safeguards**

The statutory period of notice for both blue-collar and white-collar workers is four weeks before the 15th, or before the end, of the calendar month (*sec. 622(1), CC*).

Contractual regulations providing shorter periods of notice are only lawful for casual employment relationships lasting less than three months. Also, a shorter contractual period can be provided if the employer regularly employs no more than 20 workers (not counting vocational trainees) and does not exceed the notice period of four weeks (*sec. 622(5), CC*). However, collective agreements may provide for shorter periods of notice than the statute.

In addition, longer periods of notice are provided according to the employee=s continuous length of service in the same establishment, and after the worker=s 25th birthday (e.g., one month after two years= service, two months after five years= service; four months after ten years= service and seven months after 20 years= service). Dismissals based on these periods have to be pronounced before the end of the calendar month.

For a probationary employment relationship, the period of notice is only two weeks (*sec. 622(3), CC*).

For summary dismissals based on repeated employee misconduct, it is necessary, in principle at least, for the employee to be previously notified that continued misconduct will result in dismissal. It is also required by law that the notice of dismissal be given within two weeks of the time that the reason for dismissal became known.

Where there is a works or staff council, the employer is obliged to consult the council before every case of summary or ordinary dismissal, even though the council=s response has no impact on the lawfulness of the dismissal. The council must be notified of: the employees to be dismissed; the type, date and reasons for dismissal; criteria applied for selection; and an examination of possibilities for transfer. For summary dismissals the works council has a period of three days to agree or declare

reservations in writing, otherwise agreement is assumed by law. In cases of ordinary dismissal the response period extends to one week.

If the works council declares objection in due time the employer must hand over the written declaration of objection to the dismissed employee simultaneously with the declaration of dismissal. The employee therefore effectively receives a strategic concept of how to fight the dismissal in court.

For handicapped persons the employer must first receive prior consent from the Central Agency for the Disabled (*sec. 12, Disabled Persons Act*) before issuing a notice of dismissal.

Termination of vocational training relationships requires the employer to issue a written rather than oral declaration of dismissal.

Establishments normally employing more than 20 employees must follow a special procedure which promotes protection against dismissal, and which is regulated by the PADA (*secs. 17 and 18*). An employer who is planning collective dismissals must:

- C inform the works council in writing of the reasons for the planned redundancy, the total number of redundancies envisaged and the time-scale for their implementation. The works council should also be given any additional information it asks for;
- C consult with the council on whether the measures envisaged can be avoided or mitigated and in what manner (*sec. 17(2), PADA*);
- C inform the head of the relevant employment office in writing and without delay if discernible changes suggest collective dismissals are likely within the next 12 months. The employer must forward information of the proposed redundancies and may, if the works council agrees, provide personal details of the employees concerned to help the employment service place them in other jobs. Failure to inform the head of the relevant employment office in writing renders the employer liable for all expenses involving retraining or transposition of employees for a period of six months (*sec. 8(3), Promotion of Employment Act*);
- C prove that the works council has been notified and consulted on the matter (*sec. 8, Promotion of Employment Act (Arbeitsförderungsgesetz)*);
- C draw up a Reconciliation of interests plan (*Interessenausgleich*) if the establishment regularly employs 20 or more employees and is undergoing substantial alteration and composition. The plan's aim is reconciliation of the employer and workforce's viewpoints (*secs. 111 ff., Works Constitution Act*).

As a general rule, the employer must then wait for one month before proceeding with the redundancies, although the employment office itself may extend this period to two months or reduce it under certain circumstances (*sec. 18, PADA*). The periods of notice set out in *sec. 7* also apply in the case of collective redundancy; that is, no employee affected by a collective redundancy may be given a period of notice shorter than what he or she would have received in individual redundancy.

The PADA details criteria for selecting employees to be made redundant based on social criteria of the employee's age, length of service and financial obligations to dependents. However, employees of vital interest to the employer have priority against selection for redundancy, without regard to these social criteria.

## Severance pay

Severance pay is governed by the provisions of the *Asocial plan* (discussed below) for collective dismissals.

## Avenues for redress

Jurisdiction on the subject matter of disputes concerning unfair or unjustified dismissal lies with the system of Labour Courts (*sec. 2(1)(3b)*, Labour Courts Act (*Arbeitsgerichtsgesetz*)). Employees contesting the termination of their employment must bring legal action against the employer by applying for a judgement declaring that the employment relationship is not cancelled by the dismissal (*sec. 4*, PADA). This application must be made to the court within three weeks of receiving notification of dismissal (unless the Court grants leave for an application made out of time). Otherwise, the dismissal has valid legal effect, irrespective of its lawfulness (*secs. 4, 7 and 13*, PADA), and application for protection against dismissal can only be based on other grounds, such as failure to consult the works council or contravention of special protective legislation (*sec. 13(3)*, PADA). The employee may have a right to continued employment during the legal proceedings, if the notice of termination appears invalid and there are no prevailing employer's interests.

A compulsory first step of the procedure in the Labour Courts is a preliminary conciliation hearing, chaired by the President of the Chamber, and involving both parties, in an effort to bring about a compromise. In practice, an amicable settlement is often reached, with an employee receiving some compensation (*sec. 54*, Labour Courts Act). Many disputes brought before the Labour Courts are settled during a conciliation hearing of this manner. In such cases, each party pays for its own litigation expenses and shares the court costs (*sec. 12(a)*, Labour Courts Act).

If the Labour Court rules the employer's termination of an employment relationship invalid, it may then (upon the employee's or employer's application) dissolve the employment relationship and order the employer to pay appropriate compensation for job loss (*secs. 9 and 10*, PADA). The amount of such compensation is decided at the discretion of the court (a sum not exceeding 12 months' pay, or 18 months' pay in the case of employees aged over 55). The main criteria applied in fixing the amount are the employee's social circumstances (e.g. marital status, dependants, state of health) and prospects in the labour market, the extent to which the dismissal is deemed to be unfair or unjustified, and the employee's economic situation.

Where the employee enters new employment while the legal action is in process, and receives a successful court ruling, he or she may choose between carrying on the new employment relationship or return to the old employment relationship. If the employee opts for the new one, the previous employer must be informed of the fact within one week (*sec. 12*, PADA). However, directors and managers and similar employees do not have any right to continued employment if unjustifiably dismissed, and are simply entitled to compensation.

If the decision is to return to the old employment relationship, the employee is entitled to remuneration over the period concerned, as if no new employment relationship had been entered into even if the employee had not worked after the dismissal.

Individual employees may appeal against termination of their contract on the grounds of collective redundancy, claiming unfair dismissal (*sec. 4, PADA*).

Where the employer makes no attempt to arrive at an agreed reconciliation of interests or without compelling reason fails to abide by one, dismissed employees or those suffering a resulting economic disadvantage may claim the corresponding compensation for job loss (*sec. 113, Works Constitution*).

In addition, individuals may appeal through a social plan (*Sozialplan*) for compensation of financial disadvantages resulting from changes in the company. The social plan is a special kind of works agreement on compensation for prejudice suffered by employees. It only becomes effective if it is in writing and is adopted by the works council by formal resolution. It may be concluded for establishments regularly employing more than 20 employees.

## ***Ghana***

### **Sources of regulation**

Enforceable collective agreements, legislation and case law comprise the law on termination of employment in Ghana. Relevant legislation is the Industrial Relations Act, 1965 (IRA), the Civil Service Act and the Civil Service Disciplinary Code Regulations, 1971 (which regulate only state employees), the Labour Decree, 1967 (LD), the Labour (Amendment) Decree Act, 1969 (LAD), and the Labour Regulations, 1969 (LR). However, for workers in the private sector, a voluntary scheme is in effect. Since legislative provisions on protection of employment are minimal, regulation is left primarily to collective agreements. This may result in an absence of protection for non-unionized workers, those not covered by a collective agreement, and even those under collective agreements which do not adequately protect employment terms on their behalf. Common law is also a source of regulation, particularly relevant to wrongful dismissal.

### **Scope of legislation**

The LD and LAD apply to all workers under a contract of employment for an indeterminate period. This includes weekly employees and those employed under an oral agreement to work. Workers under foreign contracts, that is, those employed in foreign countries, are governed by *sec. 22* of the LD. No categories of employees are specifically excluded from the various legislative provisions.

### **Contracts of employment**

Employees may be employed under fixed-term contracts. As well as provision for permanent and temporary workers, the law also makes provision for those in **local contracts** and **foreign contracts**, with different rules on termination for each category.

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by the expiry of a contract concluded for a fixed-term period.

### **Termination of employment at the initiative of the employer**

Apart from provisions laid down under the CSA (applying only to public servants), there is no general legal requirement that dismissal or termination of employment must be for a valid reason. Such limitations, where they exist, are found only in collective agreements. The primary method of lawful termination of employment is by the giving of notice.

Despite the lack of general requirements that termination be fair, certain reasons will be considered as unlawful and are specifically addressed under general anti-discriminatory provisions in the relevant legislation. Thus, under *reg. 30* of the LR, termination of employment on grounds of disability will be unlawful if the employee could be found some like or ~~A~~corresponding@job in the establishment which he or she is capable of performing. Similarly, *sec. 42* of the LD requires the employer to give a pregnant worker a certain period of paid pregnancy and maternity leave, the implication being that it would be unlawful to dismiss a pregnant worker during this leave. Further, where the employee under maternity or pregnancy leave exceeds the period of statutory leave, she may not be dismissed unless the Chief Labour Officer so directs (*sec. 43*).

There is a specific prohibition against termination on the grounds of trade union membership or activity in *sec. 26* of the IRA. Such a termination is viewed as an ~~A~~unfair labour practice@.

### **Notice and prior procedural safeguards**

Apart from those which may be enumerated under collective agreements, no prior procedural safeguards are required by law in relation to termination of employment in the private sector in Ghana. A contract is terminable at any time with the giving of notice or payment in lieu of notice. Where the contract of employment is on a monthly paid basis, the requisite notice is two weeks. For weekly paid employees, the lawful period of notice is seven days. However, where an employee has been employed continuously for a period of more than three years, one month's notice or pay in lieu of such notice is the mandatory period (*sec. 33*, LD). Such notice may be either written or oral. The employer is also required to give notice of termination to the Chief Labour Officer. The employer is required to give notice, but not obtain prior authorization, for terminations due to redundancy, technological or economic change, or restructuring of the establishment. The LD specifies that contracts of employment where the agreement is ~~A~~to pay remuneration at any rate other than monthly or weekly, shall be deemed to be a contract at will determinable at the close of any day without notice@( *sec. 33(3)*). Persons who become disabled and for whom the employer is unable to find a suitable alternative job are entitled to one month's notice.

### **Severance pay**

An employee may be entitled to redundancy or severance pay where his or her employment is terminated due to redundancy, technological or economic change, or restructuring of the establishment, but the amount of such payment, as well as the terms under which payment is to be made, are matters for negotiation between the employer or his or her representative and the employee or his or her representative (*sec. 35*, LAD).

### **Avenues for redress**

Grievances related to termination of employment may be brought before the Chief Labour Officer, who may attempt to conciliate. Under *sec. 31* of the IRA, specific redress is available for persons who have been dismissed on account of trade union membership or activity. The employee, in this instance, can bring the matter, through his or her union, to the attention of the Labour Tribunal, which has the power to order compensation in the form of damages for the loss suffered, or to order reinstatement of the employee. A final appeal from an order of the Tribunal lies with the High Court of Ghana, within 21 days of the making of the order.

## ***Guinea***

### **Sources of regulation**

The sources of law on termination of employment in Guinea are to be found in Ordinance No. 003/PRG/SGG/88 of 28 January 1988, promulgating the Labour Code (LC), as well as in Ordinance No. 91/002/PRG/SGG of 8 February 1991, which amends a number of sections of Ordinance No. 003/PRG/SGG/88.

### **Scope of legislation**

The labour law applies to workers and employers engaged in work throughout the length and breadth of the Republic of Guinea. Civil servants are, however, excluded from the scope of these provisions.

### **Contracts of employment**

An individual who signs an employment contract thereby undertakes to work for another and agrees to do so under the authority of that person in exchange for remuneration. An employment contract may not be concluded with any person who is not at least 16 years of age.

An employment contract may be for a specified period of time or of indeterminate duration. A contract that is concluded without specification of a period of time shall be deemed to be an employment contract of indeterminate duration (*sec. 4, LC*).

An employment contract for a specified period of time is one concluded for a period not exceeding two years. Beyond this period of time, the contract shall be deemed to be of indeterminate duration. A contract for a period of less than two years may be renewed, provided that the duration of the renewed contract does not exceed that of the initial contract and that the duration of both contracts does not exceed two years (*sec. 13, LC*).

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C** the expiry of a fixed-term contract. If the contract is for a period of more than two months, the employer must notify the employee ten days before expiry. If it is for more than six months, this notification period is to be extended to 20 days. If the employer fails to serve advance notice within this period of time, the contract shall thereafter be considered to be of indeterminate duration and subject to the relevant regulations governing termination of contracts of this nature;



- C the mutual agreement of the parties. If the contract is for a specified period of time, early termination by mutual agreement of the parties is permissible, provided that such agreement is put in writing, drawn up in the presence of a labour inspector and signed by both parties; and
- C *force majeure*.

### **Termination of employment at the initiative of the employer**

In the absence of agreement between the parties, employment contracts for a specified period of time may be terminated by the employer only if there is serious misconduct (*secs. 70 et seq.*, LC).

If an employment contract of indefinite duration is terminated at the initiative of the employer, this shall be deemed to be a dismissal. An employee may not be dismissed unless there is an objectively verifiable reason rendering it impossible to maintain the employment relationship (*secs. 74 et seq.*, LC).

The reason for dismissal may be ascribable to the worker himself or herself, due either to ill health, inaptitude, unsatisfactory performance, or misconduct. In such cases, the termination of employment is deemed to be for ~~A~~personal reasons@ (*sec. 79*, LC).

If the dismissal is connected to the organization, restructuring, or closure of the undertaking, it is considered termination of employment for ~~A~~economic reasons@ (*sec. 80*, LC).

Where the death of the employer leads to the closure of the undertaking, workers are entitled to compensation in lieu of notice, severance pay and compensation in lieu of leave not taken (*sec. 116*, LC).

### **Notice and prior procedural safeguards**

An employer who proposes to dismiss a worker must first summon the worker by registered letter to an interview. The letter of summons must reach the worker not later than five days before the interview. The summons must include a statement of the reasons for which dismissal is being contemplated. The worker may be assisted or represented by a person of his or her choice, who may be a member of staff or of the trade union to which he or she is affiliated. The employer must observe a two-day period of reflection following the interview before making the decision of whether or not to dismiss the worker (*secs. 83 et seq.*, LC).

An employer who decides to dismiss a worker must serve notice of such dismissal by letter, hand-delivered to the employee, within three days after the interview.

The termination of an employment contract of indeterminate duration is subject to a period of advance notice, depending on the occupational category of the worker, as follows.:

- C three months for middle managers and similar categories;
- C one month for supervisors and foremen; and
- C a fortnight for operational staff.

If a worker is dismissed because of serious misconduct, he or she is not entitled to a period of advance notice (*sec. 99, LC*).

Any proposals for dismissal for economic reasons must be submitted to the trade union delegates of the undertaking or the establishment concerned for assessment. Seven days before the first meeting, the employer must provide the union delegate with a statement of the reasons for the dismissals contemplated, the number and grades of the workers likely to be dismissed, the period over which notice of termination is likely to be served, as well as the steps taken to minimize the number of dismissals and to assist the workers in finding alternative employment. The statement should also be sent to the labour inspector. Within seven days following the initial meeting, a second meeting should be held with union representatives during which the employer must present the final draft list of dismissals contemplated and if any proposals made by the union delegates have been rejected, set forth the reasons for that rejection. After the meeting, the employer must notify the labour inspector of his or her definitive list of dismissals contemplated and state therein the names and grades of the persons to be affected, the dates of notification of termination and the steps taken to assist in reassigning the persons affected (*secs. 83 et seq., LC*).

Where the terminations being contemplated are to affect fewer than ten workers, the statement must be submitted to the labour inspectorate for the sake of form. If ten or more workers are to be affected, the labour inspectorate may enter its opposition to the implementation of the plan for dismissal within a fortnight after submission of the statement.

### **Severance pay**

Upon expiry of an employment contract for a specified period of time, the employer shall pay the worker a severance allowance equivalent to 5 per cent of the total wages and allowances accrued to the worker during performance of the contract (*sec. 71, LC*).

Employees having worked for at least 12 months are entitled to severance pay<sup>215</sup> (*sec. 100, LC*). The minimum compensation should not be lower than an amount calculated, per year of service to the undertaking, on the basis of 50 hours= wages for hourly paid workers and 25 per cent of a month's wages for monthly paid workers. The wages on which the calculation of the compensation is based shall be those paid over the last three months prior to dismissal. For periods longer than a full year, all months worked must be taken into account in the calculation of the amount of annual compensation on a pro rata basis using the number of months worked divided by the 12 months of the year.

### **Avenues for redress**

Disputes must be referred to the Labour Court and the burden of proof shall be on the employer (*sec. 81, LC*).

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<sup>215</sup> The methods of calculation of the compensation are set forth in Decision No. 1377 of 15 May 1990.

If there is premature termination of the contract by the employer, without any prior serious misconduct on the part of the worker, the worker shall be entitled to damages commensurate with the remuneration that he or she would have received up until the expiry of the contract (*sec. 73, LC*).

If an employer does not fulfil his or her obligation to serve advance notice, he or she shall be ordered to pay the worker a sum in compensation for damages resulting from loss of wages, as well as those allowances and other benefits that would have accrued to the worker had he or she been able to work during the entire period of notice (*sec. 98, LC*).

If an employer does not observe the rules of procedure, he or she shall be ordered to pay the dismissed worker compensation equivalent to three months= wages (*sec. 86, LC*).

Any violation of the rules of procedure renders the dismissal null and void and it shall be so certified by the Labour Court, which must order that the workers be reinstated and that the employer pay each worker compensation corresponding to the total damages suffered by the worker in the time elapsed between dismissal and reinstatement (*sec. 93, LC*).

## *Hungary*

### **Sources of regulation**

The sources regulating labour law in Hungary are Order No. 1387 of 15 May 1990<sup>216</sup> and Act No. 22 of 4 May 1992 on the Labour Code<sup>217</sup> (as amended). In addition, *art. 70(B)* of the Hungarian Constitution guarantees the right to work and free choice of work and occupation.

### **Scope of legislation**

Act No. 22 applies to all employment relationships under which work is performed in the territory of the Republic of Hungary, as well as those under which employees of Hungarian employers work abroad on missions. The employment relationships of employees working on vessels or aircraft are also governed by the provisions of the Act, provided that the vessel or aircraft bears the Hungarian flag or marking (*sec. 1(1-2)*, Act No. 22). Employees in the public service and those in publicly financed institutions are governed by special provisions (*sec. 2(1-2)*, Act No. 22).

### **Contracts of employment**

Contracts of employment must be concluded in writing, except if the period of employment is less than five days, and may not be incompatible with collective agreements, unless they stipulate more favourable conditions for workers.

The probationary period established under the contract shall be 30 days. The collective agreement for the parties may specify a shorter or a longer probation period, but in any event, that period should not exceed three months. The probation period may not be extended and there shall be no valid means of deviating from this provision (*sec. 81(1-3)*, Act No. 22).

In principle, the employment contract is established for an unlimited period of time (*sec. 79(1)*, Act No. 22).

The length of employment limited to a definite period of time shall not exceed five years, including the establishment of any new employment relationship. There is no valid means of deviating from this provision (*sec. 79(2)*, Act No. 22). If the employee works for at least one working day after the contractual period expires, the employment contract limited to a definite period of time shall become unlimited in duration (*sec. 79(3)*, Act No. 22).

### **Termination of employment**

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<sup>216</sup> Order concerning severance pay.

<sup>217</sup> In force since 1 July 1992.

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the death of the employee;
- C the employer becoming insolvent without a legal successor;
- C the expiry of a fixed term; and
- C mutual consent of the parties.

### **Termination of employment at the initiative of the employer**

During the probationary period, either of the parties may terminate the employment with immediate effect (*secs. 81(3) and 88(1)*, Act No. 22).

A contract for a definite period of time may be terminated by mutual consent or by extraordinary notice. The employer may also terminate the employment by paying the average wage due to the employee for the outstanding notice period in advance (*sec. 88(1-2)*, Act No. 22).

A contract established for an indefinite period of time may be terminated by the giving of normal notice.

### **Notice and prior procedural safeguards**

As previously mentioned, normal notice applies to contracts for an indefinite period of time (*secs. 89 et seq.*, Act No. 22). Reasons for giving notice may be related only to the professional skills of the employee, the employee's behaviour in relation to the employment or the operations of the employer. The period of notice is 30 days, but may be extended by:

- C five days after three years of employment with the employer;
- C 15 days after five years of employment with the employer;
- C 20 days after eight years of employment with the employer;
- C 25 days after ten years of employment with the employer;
- C 30 days after 15 years of employment with the employer;
- C 40 days after 18 years of employment with the employer; and
- C 60 days after 20 years of employment with the employer.

Under no circumstances can the notice period exceed one year, however.

The employer may terminate through normal notice an employee's employment within five years prior to entitlement to an old-age pension, but only in particularly justifiable cases (*sec. 90(2)*, Act No. 22).

The employer shall not terminate employment through normal notice during the following periods of time or within 30 days thereafter (*sec. 90(1)*, Act No. 22):

- C incapacity, because of illness, for a maximum of one year after the end of sick leave, or after two years in the case of tuberculosis, and the entire period of entitlement to sick pay as a result of a work accident or occupational illness;

- C sick leave granted to nurse a sick child, or leave of absence without pay for the same purpose, or for the nursing or care of a close relative at home;
- C pregnancy, the postnatal period until six months after delivery, and leave of absence without pay granted for caring for a child; and
- C the period of regular or reserve military or civilian service, from the date of receipt of the enlistment order or notice pertaining to the fulfilment of civilian service.

When an employer gives notice, he or she must provide a clearly comprehensible explanation for doing so. In the event of disagreement, the validity and rationality of the reason for giving notice must be proven by the employer. Prior to notice of termination, the employee must be given an opportunity to defend him or herself against criticism. Legal proceedings may be initiated concerning decisions made by an employer, but the parties shall attempt to reconcile their views prior to going to court. Conciliation procedures shall be initiated in writing within 15 days from the date that the measure is disclosed. If conciliation fails to result in an agreement within eight days from its commencement, court proceedings can be initiated within 15 days from the date that the conciliation procedure has failed (*secs. 89(2) and (4);199(3); 200(1); 201 and 202(1)*, of Act No. 22).

The employer may terminate employment with extraordinary notice if the employee (*sec. 96 of Act No. 22*):

- C wilfully or through gross negligence substantially violates the essential obligations arising from employment; or
- C behaves in such a manner that makes the continuation of his or her employment impossible.

The right to extraordinary notice can be exercised within three days from the date upon which the underlying cause becomes known, or a maximum of six months from the occurrence of the cause; or within a maximum of one year if there are relevant provisions in the collective agreement, or within the statutory limitation period if a crime was committed. A legal challenge may be initiated against a decision made by the employer, but the parties shall attempt to reconcile their views prior to going to court. Conciliation procedures shall be initiated in writing within 15 days from the date the measure is disclosed. If conciliation fails to result in an agreement within eight days from its commencement, court proceedings can be initiated within 15 days from the date that the conciliation procedure has failed (*secs. 96(3);199(3);200(1);201 and 202(1)*, of Act No. 22).

### **Severance pay**

The employee shall be entitled to severance pay if employment is terminated through normal notice by the employer or because of the liquidation of the employer without a legal successor. An employee shall not be eligible for severance pay if he or she is entitled to a retirement pension (*sec. 95(1-5)*, Act No. 22).

Severance pay shall equal the amount of:

- C one month's wage for a minimum of three years of employment with the employer;
- C two month's wages for a minimum of five years of employment with the employer;
- C three month's wages for a minimum of ten years of employment with the employer;

- C four months= wages for a minimum of 15 years of employment with the employer;
- C five months= wages for a minimum of 20 years of employment with the employer; and
- C six months= wages for a minimum of 25 years of employment with the employer.

### **Avenues for redress**

If a court of law declares that the employment was illegally terminated, the employee shall be reinstated to the original position if he or she so requests (*sec. 101(1)*, Act No. 22). At the employer's request, the court may refrain from reinstating the employee to the original position, provided that the employer pays compensation. Such compensation shall be twice the amount of the severance pay due for a normal notice of termination (*sec. 100(2)* of Act No. 22).

## ***India***

### **Sources of regulation**

The main statutes which regulate termination of employment are the Industrial Employment (Standing Orders) Act (IESA), 1946, and the Industrial Disputes Act (IDA), 1947, as amended.

Some States have also passed legislation dealing with dismissal. Regulations concerning termination of employment are also found in standing orders made pursuant to the IESA. Standing orders are written documents dealing with terms and conditions of employment. Drafted by employers in all establishments, standing orders are documents on which trade unions or workers are given an opportunity to object. They are certified by the government Certifying Officer who adjudicates upon the fairness and reasonableness of the provisions of any standing order and upon its conformity to the model standing order (MSO).

Another source of regulation is the case law of the courts. Any questions arising from the application or the interpretation of a standing order can be raised before the Labour Court and its decision will be final and binding.

### **Scope of legislation**

The IESA applies to all industrial establishments employing 100 workers or more (*sec. 1(3)*). The IESA and IDA both exclude managerial and administrative employees and those in supervisory positions earning more than a specified statutory amount (*sec. 2(i)*, IESA). The IDA applies to those employed in industry, and contains a similar exclusion (*sec. 2(s)*, IDA). The scope of the relevant legislation is further restricted by the narrow interpretation given by the courts to the terms industry and industrial, which have been held to not include all economic activities and may, for example, exclude those workers employed in clerical activities.

### **Contracts of employment**

Workers are classified as permanent, probationers, *baldis* (that is, workers filling in for permanent or temporary workers on a temporary basis), temporary, casual and apprentices (*sec. 2*, MSO).

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C employee retirement; and
- C the expiry of a fixed-term contract.



## Termination of employment at the initiative of the employer

The law relating to termination of employment in India distinguishes broadly between three different situations: dismissal for misconduct, discharge and retrenchment. Indian law starts from the common law premise that an employer has a right to terminate the services of an employee without giving a reason.<sup>218</sup> However, for dismissals for misconduct this position has been affected by legislative intervention and by the development by the courts of natural justice requirements. Some instances of conduct which may justify dismissal are listed in the MSO and include (*sec. 14(1)(iii)*, MSO):

- C wilful insubordination or disobedience;
- C theft or dishonesty;
- C wilful damage or loss of employer's property;
- C bribery;
- C habitual lateness or absence; and
- C striking unlawfully.

Likewise, for retrenchment (i.e. termination of employment other than for disciplinary reasons, with certain exceptions (*sec. 2 (oo)*, IDA)) the IDA sets out detailed procedural requirements. Thus, the concept of discharge at will can be said to apply only to employees not covered by the IDA, and not dismissed for misconduct. Retrenchment corresponds broadly to terminations based on economic grounds or related to the employee's capacity (except retirements, dismissals for ill-health and the expiry of fixed-term contracts).

Termination of employment is unlawful if it is for reasons related to trade union membership or activity; filing complaints concerning the employer; race, colour, sex, marital status, pregnancy, religion, political opinion or social origin. In addition, termination of employment in violation of fair labour practices as defined by legislation or case law will not be valid. The IDA (*Fifth Schedule*) lists some practices which will be considered to be Unfair Labour Practices. These include dismissal on account of trade union activity or membership; dismissal by way of victimization; dismissal not in good faith but in the colourable exercise of the employer's rights; dismissal by falsely implicating a worker in a criminal case or on false or trumped up allegations of absence without leave, dismissal without due regard to natural justice or for minor misconduct leading to disproportionate punishment. The list is not exhaustive.

The Maternity Benefit Act, 1961, provides that absence from work during maternity leave, as allowed under the statute, should not be considered as a valid reason for termination of service. Similarly, employees may not be dismissed or discharged while they are in receipt of a sickness benefit or disablement benefit for temporary disablement or are receiving medical treatment for sickness or are absent from work as a result of certified illness arising out of pregnancy (*sec. 73*, Employees' State Insurance Acts).

Termination of employment for reason of redundancy, or for any economic, technological, structural or other similar reasons, is governed by the IDA.

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<sup>218</sup> See, for example, C.K. Johri: India, in R. Blanpain (ed.): *International encyclopaedia for labour law and industrial relations* (The Hague, Kluwer Law International, 1999), Vol. 7, p. 102.

Retrenchment in this context is defined as termination of service by the employer for any reason where there is surplus labour, including the cessation of business for any reason, but does not include disciplinary punishment, retirement or termination for ill-health (*sec. 25F*, IDA). However, a distinction is made for cessation of business for reasons beyond the control of the employer. This might include *force majeure*, frustration of contract, etc., but does not include financial difficulties or loss of stock. In such circumstances the employee is still entitled to a redundancy payment, but the amount is less than that given for termination of employment due to other reasons, being a sum equivalent to no more than the average of three months' pay.

Where retrenchment is challenged, the matter may be brought to the Labour Court, which has jurisdiction to inquire into the merits of the case. An appeal against the justifiability of the employer's action is provided under *arts. 226 and 136* of the Constitution of India.

### Notice and prior procedural safeguards

Under the IESA, employers are required to give one month's notice or payment in lieu of such notice in order to lawfully terminate the employment of permanent workers. Notice is not required for workers found guilty of serious misconduct such as would constitute summary dismissal. Notice is not required either for probationers, *baldi* or temporary workers (*sec. 13*, MSO).

Despite the fact that an employer is entitled to dismiss an employee for serious misconduct or inadequate performance of work, the rules of natural justice have now influenced labour law jurisprudence in India to the extent that the employer will be required to give the employee a hearing to answer the charges before the dismissal is effected. This may take the form of a written complaint to initiate departmental proceedings with a view to disciplinary proceedings, and the hearing may be a mere explanation from the employee or may be a full departmental inquiry into the matter with the necessary documentary evidence. Questions into the legality of dismissal due to misconduct often hinge on the nature of this internal inquiry and the Indian courts, in the interest of good industrial relations, have consistently affirmed the need for the usual rules of natural justice to apply. Central to these rules are the requirements that the employee has a fair hearing, including the right to adduce evidence on his or her behalf and to cross-examine witnesses, and that the hearing be free from bias. An employee who faces a charge of misconduct may also generally expect only a warning if it is a first offence or is not habitual conduct. Where a matter relating to termination is pending before a conciliatory or adjudicatory body, the conditions applicable to the worker may not be altered (*sec. 33*, IDA).

Under *sec. 9* of the IDA, an employer proposing to retrench workers must give one month's notice or pay in lieu of such notice to the worker, and must also notify the Labour Commissioner, giving the reasons for the proposed retrenchment.

Special provisions under the IDA are applicable in relation to industrial establishments employing 100 workers or more. In this case, workers may not be retrenched unless three months' written notice, giving reasons for the retrenchment, or pay in lieu of notice, is given to the worker. In addition, the employer must seek prior authorization from the relevant governmental authority before the retrenchment can be carried out.

The concept of *Aprior authorization* in this context perhaps needs some elaboration here. The Supreme Court of India has recognized the right of management to run its own business as it pleases without any interference by the courts. The decision to retrench is thus left solely up to the discretion of management. The court will inquire only into the closure to verify that it is bona fide and for economic reasons and will not question the motive behind it. The concept of a bona fide redundancy does not, for example, include a situation where retrenchment is carried out in accordance with unfair labour practices or to victimize workers. Consequently, the proper government authority is required to examine the reasons given in the notice for the proposed retrenchment to ascertain whether they are in accordance with good labour practice and are for bona fide reasons of redundancy. If this is not found to be so, the government authority may refuse permission for the retrenchment, giving its reasons in writing.

### **Severance pay**

Under the Payment of Gratuity Act, 1972, a worker continuously employed for five years or more is entitled to a gratuity payment upon termination of service, except where such termination has been as a result of his or her wilful omission or negligence resulting in damage or loss of the employer's property, in which case the gratuity shall be forfeited to the extent of the damage caused. Where the employee has been dismissed on account of his or her riotous, violent or disorderly conduct or for an offence involving moral turpitude committed in the course of employment, the gratuity shall be wholly or partly forfeited. The sum is calculated at 15 days' average pay for every completed year of service.

For retrenchments, employees with more than one year's service, other than temporary or casual employees, are entitled to compensation equivalent to 15 days' pay for each completed year of service (*sec. 25F(b)*, IDA). In case of redundancy, compensation is calculated in the same way as for retrenchment of permanent employees.

### **Avenues for redress**

Under *sec. 2(a)* of the IESA, a worker dissatisfied with his or her termination of employment is entitled, in the first instance, to raise the matter as a labour dispute with an officer from the conciliation department of the Ministry of Labour. The officer will attempt to conciliate the matter and must submit a report to the Government if conciliation fails, pending a decision from the governmental authority on whether the matter merits adjudication before the Labour Court or Tribunal. Challenges to dismissal are able to be made to the Labour Court under *sec. 11A* of the Industrial Relations (Amendment) Disputes Act, 1971. The Labour Court may review a termination of employment and set aside a dismissal if it decides that the dismissal was not justified. Since the 1965 amendments to the IDA (*sec. 2A*), the dismissal or retrenchment of an individual is deemed to be an industrial dispute, hence the ability of a worker to take his or her claim to the Labour Courts.

No time limit is prescribed within which an aggrieved worker may raise a labour dispute. However, excessive delay may prejudice a worker's case. The burden of proving that dismissal was for a valid reason rests with the employer.

The Labour Court, Industrial Tribunal and National Tribunal have wide discretion to review disputes relating to termination of employment, including the examination of the evidence, and to award

relief as they see fit including compensation in the form of damages and reinstatement. Before reinstating an employee, the judicial body will inquire into the feasibility of reinstatement; for example, whether the employee has lost confidence in the employer and whether industrial peace and harmony will be threatened.





## ***Indonesia***

### **Sources of regulation**

Several pieces of legislation and regulations comprise the law on termination of employment in Indonesia. These include the Decree of the Minister of Manpower No. KEP.15A/Men 1994 (the ADecree@), the Termination of Employment in Private Undertakings Act, 1964 (TEPU), the Instruction on the Prohibition of the Massive Manpower Dismissal of the State-Owned Enterprises without Consultation with the Department of Manpower (PMMD), the Manpower Minister=s Regulation on the Settlement of Working Relationships, Severance and a Stipulation on Severance Monies, Service Monies and Compensation in Private Companies 1996 (the A1996 regulations@). The Manpower Act of 1998 was suspended before coming into force; however, its provisions on termination of employment may affect future legislation.

### **Scope of legislation**

The parent legislation, the TEPU, covers the termination of employment in private undertakings in respect of all workers, provided that they have fulfilled any applicable probationary period (of no more than three months) (*sec. 4*, TEPU). The 1996 regulations apply to any form of private undertaking, whether profit seeking or not (*sec. 1(a)*).

### **Contracts of employment**

The relevant legislation on termination of employment does not distinguish between the various types of employment contract, except in relation to fixed-term and probationary contracts.

### **Termination of employment**

Contracts of employment can terminate, not at the initiative of the employer, by:

- C retirement;
- C the expiry of a fixed-term contract; and
- C the worker=s termination of the contract at his or her own initiative.

### **Termination of employment at the initiative of the employer**

Under Indonesian law, there is a general policy against termination of employment at the initiative of the employer. This policy is embodied in the TEPU, which states that: AThe employer shall do his best to prevent termination of employment@(sec. 7(1)). This policy is reinforced by *sec. 6* of the 1996

regulations, which requires employers to make every effort to avoid severances. This general prohibition is given legal force in the procedures set up under legislation to regulate dismissal, which mandate prior authorization from government for termination of employment (see below).

Termination of employment is specifically prohibited while the worker is unable to work due to certified sickness over a period not exceeding 12 consecutive months or where the employee is prevented from performing work due to fulfilling his or her legal duties towards the State or as commanded by his or her religion and approved by government (*sec. 1(2)*, TEPU).

Dismissal permits will not be issued by the Government (see below) for:

- C matters related to union membership or activity;
- C the lodging of a proven complaint; or
- C ideology, religion, political opinion, social group or gender (*sec. 2(3)*, 1996 regulations).

In addition, permits will not be issued for dismissals based on illnesses of less than 12 months, fulfilling of approved religious duties, or reasons of marriage, pregnancy or childbirth (*sec. 2(4)*, 1996 regulations).

Permission from a governmental authority is not required for terminating the employment of probationers, whose period of probation may not exceed three months (*sec. 4*, TEPU). Permits are also not required for written resignations, retirements according to company regulations or collective agreements, or expiry of fixed-term contracts (*sec. 2(2)*, 1996 regulations).

Dismissal permits may be issued for grave mistakes including (*sec. 18*, 1996 regulations):

- C theft;
- C fraud;
- C intoxication;
- C indecency or gambling at work;
- C criminal acts;
- C abuse of the employer or his or her family;
- C reckless or deliberate damage to life or property;
- C divulging trade secrets;
- C gross negligence, after a warning; and
- C other conduct as specified in company regulations or collective agreements.

Collective dismissals or mass dismissals are regulated by law. These are defined as dismissals in an undertaking where the employer has terminated the employment of ten or more workers within a period of one month, or has affected a series of terminations indicative of an intention to achieve mass dismissal (*sec. 3*, TEPU). Under the *Elucidation to TEPU*, it is explained that the numerical figure of ten given here is only notional and that the important consideration is the intention of the employer to carry out mass dismissal.

The Manpower Act, which contains a number of provisions on termination of employment, was passed in September 1998, to come into force in October 1998. Its operation was, however, suspended before it came into force. It now appears that the Act is to be re-worked to create separate laws on various topics. The provisions on termination of employment have been noted for possible inclusion in new legislation on dispute settlement laws. However, subject to ongoing developments, these



reforms are likely to have a relatively limited impact on termination of employment, as the Act specifically retains the TEPU and its implementing regulations (*secs. 88 and 197* of the Act, read together with the corresponding Explanation). However, the Act envisages a series of future implementing regulations, which may affect the provisions of the TEPU and its implementing regulations.

The Act also specifically retains the TEPU's basic principle that employers, workers and trade unions should endeavour to avoid terminations of employment (*sec. 85*, the Act). It retains the existing prohibitions on terminations:

- C if the worker is ill for less than 12 months;
- C if the worker is performing religious duties or duties for the State; and
- C on grounds of trade union activity or membership.

The Act also lists marriage, pregnancy, confinement, miscarriage and having a relative or spouse at the same establishment as additional prohibited grounds of dismissal. However, dismissal on the grounds of having a relative or spouse at the same establishment is allowed if it is provided for in a collective agreement or company regulations (*sec. 86*, the Act).

The Act provides that where termination could not be avoided the employer is to discuss its intention to terminate with the relevant trade union, or worker (*sec. 87*). It seems that, given the retention of the TEPU and its implementing regulations, this provision is in addition to, not in substitution for, the necessity to obtain government consent for such terminations.

The Act also regulates atypical contracts of employment. Fixed-term contracts are to be in writing (*sec. 17*) and may not contain a probationary period (*sec. 18*). In addition, the Act envisages further implementing regulations regulating fixed-term contracts (*sec. 19*). Damages are payable by either party for the unexpired portion of fixed-term contracts terminated early (*sec. 22*). Probationary periods are permitted for up to three months, subject to the payment of a minimum wage for probationers to be set by the Minister (*sec. 20*).

The Act also provides for the termination of employment contracts:

- C when the worker dies;
- C on the expiry of any fixed term;
- C in case of emergency;
- C by court order; or
- C according to the terms of the contract.

Neither the transfer of the business or death of the employer will terminate employment (*sec. 21*).

### **Notice and prior procedural safeguards**

The rather unusual system of termination of employment under Indonesian law means that the employer may not terminate employment merely by giving notice. Consequently, there are no notice provisions in the relevant legislation.

Notwithstanding the general prohibition against dismissal on the grounds of sickness or duty toward the State, and attempts by the law to prevent termination of employment (discussed above), the

law provides for some discretion to terminate on the part of the employer. Where the employer believes that termination of employment cannot be avoided, the employer may discuss his or her intention to terminate with the workers' organization concerned, or with the worker directly (*sec. 2*, TEPU), with a view to reaching agreement. If no consensus is reached, the employer may make a request for cessation (termination) of employment to the Regional Committee for the Settlement of Labour Disputes, giving written reasons for the request (*sec. 5*, TEPU). Thereafter, the employer may only dismiss the worker after having obtained a permit from the Regional Committee. A permit may be granted if it is clear that the discussion required by the law has taken place and failed to produce agreement. Further elucidation on the nature of the discussion expected between employer and employee is given in *sec. 3* of the Decree, which states that an attempt should be made to reach a settlement in a spirit of deliberation and consensus. In determining whether termination should be permitted, the Regional Committee shall take into account the condition and development of the labour market and the interests of both the worker and the undertaking (*sec. 7*). Workers, unions and employers are also required to, in the first instance, attempt to negotiate the terms of any severance (*sec. 10*, 1996 regulations).

Parties to a deliberation concerning proposed termination of employment may also apply to the Ministry of Manpower for mediation. The Ministry must deal with the matter within 30 days. Where mediation fails, the matter is then forwarded to the regional or central committee. Moreover, an employee may not be suspended or his or her employment affected in any way while the outcome of a request for a permit for termination of employment is pending (*sec. 11*, TEPU).

As part of the obligation to avoid dismissals, a system of (generally) three warnings applies before a dismissal for misconduct or poor performance will be permitted (*secs. 2 and 9*, 1996 regulations).

Except where such dismissals are effected with consent, an employer wishing to terminate employment in such a manner must obtain prior authorization in the form of a permit from the National Committee for the Settlement of Labour Disputes, a governmental body. This committee will consider the condition and development of the labour market and the interest of both workers and the undertaking, including the outcome of consultation with workers.

In the case of mass dismissals arising from redundancy or any government measure, the Government will endeavour to alleviate the consequences to workers by attempting to transfer them to undertakings or projects, as outlined under the *Elucidation to Act No. 12 of 1964 on Termination of Employment in Private Undertakings*.

## **Severance pay**

Regional and national committees have discretion to award severance pay, service pay and other compensation to a worker after granting an employer's request for termination of employment (*sec. 7(2)*, TEPU). In addition, the fixing of the amount of severance pay, service pay and other compensation may be laid down by ministerial regulation. Severance pay is paid at a base rate of one month's pay for each year of service, up to a maximum of five months pay (*sec. 21*, 1996 regulations). Service monies are also payable for service periods of over five years. Severance pay is payable at the base rate for company closures and change of company location, and twice the base rate for redundancies for efficiency reasons and other dismissals not being for 'grave mistakes' by the employee (*secs. 25 and 26*, 1996 regulations).

## **Avenues for redress**

An employee may appeal against a national or regional committee's decision to permit termination of employment within 14 days of the permission being granted by bringing the appeal to the Central Committee for Settling Labour Disputes. There is no further provision for appeals to any higher authority.

## ***Iraq***

### **Sources of regulation**

Act No. 71 promulgating the Labour Code of 27 July 1987 (LC) is the primary source of labour legislation in Iraq.

### **Scope of legislation**

The provisions of the LC apply to all workers employed in the private, mixed and cooperative sectors, and to undertakings and other workplaces which employ one or more workers. *Sec. 8* of the LC defines the terms **Aworker@** and **Aemployer@**.

### **Contracts of employment**

A contract of employment is an agreement concluded by a worker and an employer under which the worker undertakes to perform specified work for the employer, subject to the employer's direction and supervision, in return for the employer's payment of an agreed wage (*sec. 29*, LC).

A contract of employment shall be drawn up in written form and shall stipulate the type of work to be performed and the amount of wages to be paid (*sec. 30*, LC).

As long as the contract of employment so specifies, a worker may be subject to a probation period of a maximum of three months (*sec. 31*, LC). The time period should be included in a written contract of employment.

The contract of employment may be of specified or indeterminate duration. A contract involving work which is temporary or seasonal in nature is a fixed-term contract (*sec. 32(2)*, LC). For activities which are permanent in nature, no time limit may be fixed for the contract, unless the requirements of the task imply calling upon additional workers for a fixed period, for the performance of specific work (*sec. 32(1)*, LC).

### **Termination of employment**

A contract of employment may be terminated, other than at the initiative of the employer, in the following instances (*sec. 36(1) and (2)*, LC):

- C** by mutual agreement of the parties, as stated in writing; and
- C** on the expiry of a fixed-term contract.

A contract of employment shall not be terminated upon the death of the employer unless the provision of care or personal services for the employer was the main purpose of the contract (*sec. 38*, LC).

## **Termination of employment at the initiative of the employer**

Dismissal may be carried out only in cases when the worker (*sec. 127, LC*):

- C guilty of serious misconduct leading to material damage (in such a case, the employer must have notified the labour office in the governorate within 24 hours of the occurrence of the incident);
- C has disclosed a professional secret and such disclosure has prejudiced the employer;
- C has failed on more than one occasion to follow instructions regarding occupational safety, provided these instructions have been drawn up in writing and have been prominently posted or on condition that an illiterate worker has been orally notified of them;
- C has on more than one occasion been at the workplace in a state of obvious drunkenness or under the influence of drugs;
- C has on more than one occasion engaged in conduct which is incompatible with respect for work;
- C has inflicted physical harm on the employer, or on the employer's representative or supervisors, whether or not the act was committed at the workplace, provided the employer has advised the labour office in the governorate of the incident within 24 hours of its occurrence;
- C commits a misdemeanour or a crime at work involving one of his or her co-workers and has been found guilty by a court in a final judgement;
- C has been sentenced by the final judgement of a court to imprisonment for a period of more than one year; or
- C has been absent from work without justification for ten consecutive days, or for 20 non-consecutive days in a given year, provided the employer has, in the first case, posted a warning at the workplace during the first five days of the absence and sent the competent trade union organization a copy on the same day and, in the second case, given written notice to the worker at the workplace once he or she has been absent for 15 non-consecutive days during the work-year.

## **Notice and prior procedural safeguards**

A worker may be penalized only after he or she has been heard in the presence of a representative of the competent trade union organization (*sec. 128(2), LC*). A decision to impose a penalty shall be set forth in writing and the worker shall be notified thereof.

## **Avenues for redress**

The worker may appeal the decision to the competent labour tribunal within 15 days of having received the notification; a decision of dismissal may be taken to the court of appeal (*sec. 129(1), LC*). When the penalty of dismissal has been imposed and the tribunal has decided to revoke it or to replace it by another penalty, the worker shall be reinstated to his or her job. The employer shall be required to pay the worker's entire wages for the period of suspension from work and to make the contributions for that period to the Workers' Social Security Service (*sec. 129(2), LC*).

## ***Islamic Republic of Iran***

### **Sources of regulation**

The Labour Code of 20 November 1990 (LC) is the main source of labour legislation in the Islamic Republic of Iran. In addition, the Constitution states that all persons have the right to freely choose an occupation provided that it is not incompatible with the principles of Islam or the public interests and does not violate the rights of other persons.

### **Scope of legislation**

The LC applies to all employers and workers as well as workplaces and production units, industrial establishments and agricultural services. *Secs. 2, 3 and 4* of the LC define the terms **Aemployer@**, **Aworker@** and **Aworkplace@**.

### **Contracts of employment**

The expression **Aemployment contract@** means a written or an oral agreement whereby a worker undertakes, in return for remuneration, to perform work for an employer. The contract may be concluded for a definite or indefinite period (permanent contract).

The maximum duration of a definite period shall be determined by the Ministry of Labour and Social Affairs and approved by the Council of Ministers (*sec. 7, note 1, LC*).

Where no period is specified in a contract for work which is permanent by nature, the contract shall be deemed to be permanent (*sec. 7, note 2, LC*).

The validity of an employment contract shall be subject to fulfilment of the following conditions:

- C** the subject matter of the contract must be lawful;
- C** the subject matter of the contract must be specified clearly and accurately; and
- C** the parties should not be barred because of religion or law from taking possession of property or from performing work as specified in the contract.

An employment contract shall also specify the following information:

- C** the type of work or occupation in which the worker will be engaged or the duties that he or she must discharge;
- C** the basic salary or wage and any supplements thereto;
- C** working hours, holidays and leave;
- C** the workplace;
- C** the date of signing the contract;
- C** the duration of the contract, if it is for a fixed term; and
- C** any other matters required by custom and common practice in relation to the job and the locality concerned.

When a contract of employment is concluded in writing, it shall be drawn up in four copies: the first copy should be deposited with the Labour Office, the second is retained by the worker, the third by the employer and the fourth by the Islamic Labour Council.

The parties may agree on a probation period by mutual consent and such agreement must be specified in the employment contract. The maximum duration shall be one month for unskilled and semi-skilled workers and three months for skilled and specialized workers.

### **Termination of employment**

An employment contract may be terminated, other than at the initiative of the employer, by any of the following events (*sec. 21, LC*):

- C the worker's death;
- C the worker's retirement;
- C the worker's total disability;
- C the expiry of the period specified in an employment contract concluded for a fixed term;
- C the completion of the work under a contract concluded for a specified assignment; and
- C the worker's resignation.

### **Termination of employment at the initiative of the employer**

During the probation period, either party shall be entitled to terminate the employment relationship without prior notice and without being obliged to pay compensation. Should the employment relationship be terminated by the employer, he or she shall be required to pay remuneration for the whole probation period (*sec. 11, LC*).

Where an employment contract is concluded for a fixed term or for piecework, neither party may unilaterally terminate the contract (*sec. 25, LC*).

Where a worker is negligent in discharging his or her duties or if, after written warnings, he or she continues to violate the disciplinary rules of the workplace, the employer shall, provided that the Islamic Council is in agreement, be entitled to pay to the worker a sum equal to his or her last monthly wage for each year of service, and to terminate his or her employment contract (*sec. 27, LC*).

If the employer refuses to reinstate the worker after a period of suspension, such refusal shall constitute unlawful dismissal (*sec. 20, LC*).

### **Notice and prior procedural safeguards**

Termination of employment for continued violations of disciplinary rules requires previous written warnings. Moreover, termination on this ground or for negligent performance requires the agreement of the Islamic Labour Council. In units where there is no Islamic Labour Council, the employer must secure the agreement of the Guild Society.

## **Severance pay**

Upon expiry of an employment contract for a specified period of time or for piecework, the employer shall pay to each worker an amount equal to his or her last monthly wage for each year of service (*sec. 24* of the LC).

In the event of termination of employment as the result of *force majeure* or an unforeseen event, the employer shall be obliged to reinstate workers in the same reconstituted units in which they worked before the operations of the workplace were interrupted (*sec. 30*, LC).

## **Avenues for redress**

In the event of a dispute between an employer and a worker, a settlement shall, in the first instance, be sought by direct compromise between the parties. Where no compromise can be reached, the dispute may be referred to, examined and settled by the Board of Inquiry (*sec. 157*, LC).

In the case of unlawful dismissal, the worker shall be entitled to apply to the Board of Inquiry within 30 days. If the employer is unable to prove that the dismissal is based on a valid reason, the employer shall be obliged to reinstate the worker in his or her job (*sec. 20*, LC).

A worker who is to be dismissed in accordance with the decision of a Board of Inquiry shall be entitled to appeal the decision to the Disputes Board (*sec. 158*, LC).

Where there is unlawful dismissal, the worker shall be reinstated and the employer shall be ordered to pay his or her remuneration as of the date of his or her dismissal (*secs. 20 and 165*, LC).



## *Israel*

### **Sources of regulation**

A major source of regulation in relation to termination at the initiative of the employer in Israel is the collective agreement which is legally binding and enforceable. A majority of workers are covered by such collective agreements.<sup>219</sup> There is no general or comprehensive statute requiring that dismissals be fair or mandating specific procedures to ensure fairness where dismissal is contemplated. Employment security is thus inextricably linked to the strength of unionization and the collective agreement. In the absence of such collective agreements, the employee will be subject to dismissal at will, except where the employee can establish a claim of breach of contract or a lack of good faith. However, certain statutes provide for some basic provisions on certain aspects of employment security. These include: the Employment Service Law, 1953; the Employment of Women Law, 1954; the Severance Pay Law, 1963; the Labour Inspection (Organisation) Law, 1954; the Employment (Equal Opportunities) Law, 1988; and the Apprenticeship Law, 1953.

The decisions of the Labour Court also form an important basis for the formation of labour law norms.

### **Scope of legislation**

Under the Severance Pay Law only employees with one year or more of continuous service are covered by the legislative provisions (*sec. 1*).

### **Contracts of employment**

A variety of contracts are possible in Israel. These include contracts of indeterminate duration, fixed-term contracts and temporary contracts. There are no statutory provisions preventing or regulating the use of temporary or fixed-term contracts.

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of a fixed-term contract; and
- C the completion of the task for which the contract was concluded.

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<sup>219</sup> The President of the National Labour Court of Israel, Menachem Goldberg, has stated that: "The overwhelming majority of employees in Israel are employed according to provisions in general or special collective agreements, the majority of which include dismissal procedures, for each type of dismissal" (Quoted in W. Black (ed.): *European labour courts: Current issues* (Geneva, ILO, 1989), p. 62.

## Termination of employment at the initiative of the employer

Despite the paucity of legislative intervention in relation to termination of employment, job security is protected under collective agreements. A generally accepted concept in collective agreements is that of tenure whereby a worker who successfully completes his or her probation period cannot be dismissed without a valid reason and in accordance with the specified procedure.

Collective agreements usually contain provisions which require employers to have a good reason for dismissing employees. Such justifiable reasons would relate to the worker's incapacity for the job or any serious misconduct.

Where the employee is not covered by a collective agreement requiring justification for dismissal, he or she may base a claim of wrongful dismissal on the general principles of the law of contract; for example, the requirement that there be bona fide execution of contractual obligations if a notice requirement is not complied with. Where the employment contract makes no provision for dismissal, it may be terminated in good faith at any time, for any reason. Thus, the concept of dismissal at will is recognized.<sup>2</sup>

Certain types of discriminatory treatment leading to dismissal are prohibited by statute. Under *sec. 9* of the Employment of Women Law, 1954, women may not be dismissed for reasons connected to their gender, such as maternity or pregnancy. Similarly, the Employment (Equal Opportunities) Law proclaims the broad principle of non-discrimination in employment. This means that employees may not lawfully be dismissed on discriminatory grounds such as sex, gender, race, religion, nationality and other similar categories. Further, *sec. 30* of the Contracts Law (General Part), 1974, has been interpreted to mean that the reason given for dismissal must not violate public policy.<sup>3</sup> More recently, the Protection of Employees (Exposure of Offences, of Unethical Conduct and of Improper Administration) Law, 1997, provides protection from dismissal for employees who file a complaint against their employer regarding a violation of the law, unethical conduct or administration. Regional labour courts have jurisdiction under this Act, and may award compensation to dismissed employees, or, for public bodies or enterprises with over 25 employees, may issue an injunction against dismissal.

Moreover, the Labour Inspection (Organisation) Law, 1954, grants special protection from arbitrary and discriminatory dismissal to union officials, where the dismissal is based on reasons connected to union membership and activity (*secs. 17(a)(2) and 24*).

## Notice and prior procedural safeguards

The Employment Service Law, *sec. 37*, makes provision for the employee to receive notice of contemplated termination of employment by the employer. Where the employer intends to dismiss ten or more workers he or she must also give prior notice to the Employment Service Bureau.

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<sup>2</sup> *Zori v. the National Labour Court and others*, 25 (Part 1) PD (Supreme Court Decisions), p. 372 (High Court of Justice Petition No. 73/254).

<sup>3</sup> For example, in *Case No. 1973/25-3, Workers' Committee of EL-AL Stewards v. Chazin*, 4 PDA (Labour Court Decisions), a provision in a collective agreement which permitted the dismissal of stewardesses who were married was held to be unlawful as a violation of public policy.

The requirement for prior notice or payment in lieu of such notice is also established by custom and practice, and may in some cases have solidified into an implied term of the employment contract.

Except where negotiated under collective agreements, there are no mandatory procedural requirements, such as natural justice requirements, governing terminations. In practice, however, collective agreements will contain mechanisms ensuring that workers are informed of the reasons for pending dismissal and are given the opportunity to defend any allegations made against them by the employer.

Several collective agreements contain provisions which require the employer to consult with the employees' representative when contemplating redundancy.

### **Severance pay**

Under the Severance Pay Law, 1963, all workers with at least one year of service, and seasonal workers who have worked for two or more seasons, are entitled to severance pay, regardless of the reason for the cessation of employment. This is viewed as an award for service.

Collective agreements may increase, but not decrease, the amount payable when the employment relationship ceases. The severance pay sum is dependent upon the employee's length of service.

### **Avenues for redress**

In practice, many employment undertakings have their own internal arbitration bodies which seek to reconcile employer/employee interests in dismissal disputes. These are internal mechanisms set up pursuant to collective agreements, which are independent of the national courts. Typically, representatives of both the workers and the employer will be part of such arbitration committees. Where the dismissal is taken up as an industrial dispute, the Labour Court has jurisdiction to hear the matter and pronounce judgement.

Where the employee pursues an independent claim based on breach of contract, he or she has recourse to the ordinary courts of law.

Where an employee is successful in claiming wrongful dismissal, he or she is entitled to compensation in the form of damages. These damages are for breach of contractual obligations, not for any concept of the unfairness of the dismissal.

As the law of termination of employment is still founded upon the law of contract and the concept of dismissal at will, the Labour Court has no jurisdiction to order reinstatement, except for dismissals which breach anti-discrimination legislation. In all other cases, the appropriate remedy, as in other cases of breach of contract, is damages.

## *Italy*

### **Sources of regulation**

Within the broad principle of protecting freedom of enterprise, as protected by the Italian Constitution, a body of protective legislation and legally enforceable collective agreements has evolved which gives considerable protection against dismissal to employees.

Contracts of employment for manual and white-collar workers are regulated mainly by the Italian Civil Code (CC) as amended by several pieces of legislation relevant to employment affairs. The most important on dismissal are: Act 604 (15 July 1966) on Individual Dismissals as amended by Act 108 (11 September 1990) and Act 300 (20 May 1970) on Workers= Protection (often referred to as the Workers=Statute) as amended by Act 108. For collective dismissals, Act 223 (23 July 1991) is also an important statute. For managerial employees the most important provisions are laid down in their national collective agreements.

Collective agreements are of considerable importance in Italy and almost all employees except for those employed in very small businesses are covered by collective agreements. Industry-wide agreements concluded between the main trade union confederations and the relevant employers= associations for a particular sector are binding on all employers and all manual and white-collar employees in that sector irrespective of whether they have been directly or indirectly involved in the drawing up and ratification of that agreement. The onus is on the employer to comply with the terms and conditions of the agreement and with any procedures and provisions relating to termination of the contract of employment which may improve upon basic statutory minima.

Even inter-union agreements drawn up in the form of recommendations or codes of practice without the ratification of the employers may have relevance in practice and in law. For example, the inter-union agreement of 5 May 1966 on collective dismissal, until recent changes in the law, was seen by the courts as a standard of practice for employers.

### **Scope of legislation**

The CC and Acts 300/1970 and 604/66 cover manual and white-collar workers. Labour law is concerned only with the private sector, and is traditionally clearly distinguished from the law on public employment.

Act 108/1990 providing mandatory protection against dismissal does not cover domestic workers, executives and employees aged over 60 years who are entitled to an old-age pension but who have opted to work until age 65.

Concerning remedies, the employee is entitled to payment of damages but also reinstatement in his or her job. Act 108 also extends these remedies to workers in non-commercial organizations employing more than 15 people (or more than five if operating in the agricultural sector) in the same production unit or same locality, and provides arbitration for workers in establishments of fewer than 15 employees. Finally, the remedies were extended by Act 108 to those employees in any enterprise (commercial or not) with 60 or more employees.

## **Contracts of employment**

The basic definition of employment contracts, laid down in the CC (*sec. 2094*), refers to a subordinate employee as being a worker who has engaged himself or herself to cooperate for remuneration in an enterprise by working manually or intellectually under the direction of the entrepreneur.

By law, any contract of employment which is not permanent and full-time is considered to be special. Special employment contracts are regulated by appropriate legislation and are permissible either as part of a job-creation scheme or because they are inherent in the nature of the work involved. Other special employment contracts apply to domestic work and work undertaken by building caretakers. The main types of special contracts of employment are as follows: apprenticeships, part-time, solidarity contracts (these are intended to assist in maintaining employment during periods of business difficulties), work-training contracts, fixed-term contracts and contracts for managers (*dirigenti*).

Fixed-term contracts are considered an exception to indefinite employment and the contract of employment is considered indefinite except in cases specified by legislation (Act 230 of 1962). The permitted cases of fixed-term work include seasonal work, replacement of ill employees or employees on maternity leave, and extraordinary or occasional work. In addition, following recent legislation, collective agreements may provide for further permitted cases (Act 56 of 1987). However, legislation still provides for maximum durations of fixed-term contracts, and limits the situations in which they can be used. Until recently, a breach of legislative requirements on fixed-term contracts led to employers typically being required to employ the employee indefinitely. Recently, however, Act 196 of 1997 has limited this sanction to ongoing violations. If employment continues for ten days beyond the expiry date, the employer is liable to pay 20 per cent extra remuneration; for 20 days beyond the expiry date, 40 per cent extra; and only then is the contract required to be converted into an indefinite one. A fixed-term contract will also be deemed to be indefinite if the employee is rehired after less than either ten or 20 days from its expiry (ten days for contracts of less than six months=duration; 20 days for contracts of six months=duration or more).

Act 196 of 1997 also deals with the restriction on temporary work and regulates temporary work agencies. The use of temporary work is permitted, but only in limited instances, such as the replacement of absent workers and where permitted by collective agreements. The Act also identifies a number of cases in which temporary work is prohibited, including in dangerous work, to replace strikers, and in firms shedding labour where the employees hold the same qualifications as those to be recruited on a temporary basis.

Work-training contracts are also permitted for young workers who also receive training, for a duration of up to two years.

Probationary periods must be specified in writing. Service under probation is added to the employee's length of service once the contract is made permanent. Probationary periods can last between 12 days and six months, depending on job grade.

## **Termination of employment**

The different ways in which a labour contract can come to an end are enumerated and regulated in part by the general law of contract and in part by specific provisions of labour law. The application of the general principles of the civil law to the labour contract has been progressively reduced as a consequence of the emergence of more detailed special provisions. The basic trend of these provisions is to promote the stability of employment in favour of the employee, restricting in various ways the possible grounds for dismissal.

An individual fixed-term contract may be terminated when the contract expires or when the tasks for which the contract was drawn up are completed. An indefinite contract may also be terminated if the company ceases doing business completely (not where the employer merely changes activity), by mutual consent, because of *force majeure* or the total incapacity of the employee, the withdrawal of one party without the consent of the other, or one party failing to fulfil the contract.

If withdrawal from the contract is due to the employee's resignation, then there are no legal restrictions, although most collective agreements stipulate periods of notice and that notice must be given in writing. However, any employee may resign with immediate effect in the circumstances specified in *sec. 2110* of the CC (such as non-payment of wages or social security contributions, closure of the enterprise, failure to be included within the category or grade corresponding to the work effectively being undertaken, refusal to grant holidays, the unilateral changing of the employee's duties with a corresponding reduction in wages, offences by the employer against the duty to safeguard the physical and psychological well-being of the employee under *sec. 2087* of the CC).

### **Termination of employment at the initiative of the employer**

Limitations on the employer's freedom to dismiss were introduced by Act 604 (1966) for companies employing more than 35 people and extended to all organizations by Act 108 in 1990.

As far as fixed-term contracts are concerned, termination is automatic at the end of the specified duration or at the completion of the specified task (*sec. 2*, Act 230). Nevertheless, the employer may terminate the contract earlier for a just cause (*sec. 2119*, CC).

Termination of a contract of indefinite duration by the employer (*sec. 1*, Act 604), on the other hand, is only possible for a justified reason and provided that the notice period is respected (*sec. 2118*, CC); or without notice for a just cause (*sec. 2119*, CC). Collective agreements frequently list the grounds for dismissal. Termination without grounds is limited to trial periods, domestic workers, employees who have reached retirement age and directors. For all dismissals an employer must make a severance payment (*trattaneceto di fine rapporto*).

Neither Act 604 nor Act 108 contain very precise definitions of just cause or justified motive. However, there is a body of case-law which helps to clarify these concepts. A just cause, in broad terms, requires very grave conduct which, when evaluated both subjectively and objectively, constitute a serious and irremediable breach of the contract of employment (*sec. 2119*, CC). Whether such a breach has occurred would normally have to be determined ultimately by a court, taking all relevant factors into account.

Justified reason is defined as the obvious failure of the employee to fulfil contractual obligations; or reasons inherent in the production process, the organization of work or the smooth running of the undertaking (*sec. 3, Act 604*).

Any dismissal will be deemed automatically unfair unless it is for just cause or justified motive, and the correct procedures have been followed. The burden of proof lies with the employer.

There are a number of provisions protecting individual categories of employees, which will render their dismissal automatically unfair; for example, dismissal on the grounds of political opinion, trade union membership, sex, race, language or religious affiliation will automatically be unfair, and members of workers' committees may not be dismissed or transferred for one year following the cessation of their duties on the committee without the authorization of the relevant regional trade union organization. Discriminatory dismissals (*sec. 3, Act 108*) are considered null and void. Reinstatement of these workers is mandated by law. This law also applies to directors and domestic workers. Dismissal on the grounds of pregnancy, if the dismissal takes place between the conception and the end of the female employee's statutory period of absence on confinement leave or unpaid leave, until the child reaches one year of age, is specifically prohibited. Dismissal on the grounds of marriage is also prohibited. Protection against unfair dismissal of managerial employees is regulated by collective agreements.

Act 223/1991 on collective dismissals applies to all employees except managers in firms employing more than 15 people (five employees in the agricultural sector). All dismissals in firms of fewer than 15 employees are regulated by the law on individual dismissals even if they take place together. A collective dismissal is defined as a change in employment levels caused by a reduction in, or change of, activity involving five or more employees in a single unit of production over a period of 120 days or five employees in several units belonging to a single employer within a province. The law also covers job losses in firms which cease doing business entirely.

### **Notice and prior procedural safeguards**

There are no specific procedures for termination on the grounds of just cause, and notice is not required. Dismissal for justified motive, however, must be in writing. The employer must wait for five days, during which the employee has the right to be heard, before dismissal. The employee is entitled to ask the reason for dismissal within 15 days and the employer must reply within seven days. In cases of disciplinary dismissal, the conciliation procedures laid down in *sec. 7* of the Workers' Statute must be followed. The section states that an employee can request, via his or her trade union, that his or her case be heard by a conciliation and arbitration tribunal. Failure to observe the correct procedures renders the termination null and void.

According to *sec. 2118* of the CC, either party may terminate a contract of unspecified duration by giving the required notice as specified by existing regulations or customs and practice or according to the principles of equity (although see the reference to the need for a justified reason above). Either party failing to give the required notice becomes liable for a payment equal to the remuneration which would have been paid during the period of notice. The employer must also make such a payment in lieu of notice in cases where the employee dies in service. The length of periods of notice is governed largely

by collective agreements at the national industry level and varies according to the sector, category of employee and length of service.

The notice period runs from the first day of the month following that in which the notice is received by the employee.

To initiate redundancy procedures, companies must inform employee representatives and the appropriate industry union in writing of their intention. Where there are no local representatives, the company must notify full-time officials in the relevant union(s). The company must also notify the labour authorities. Within seven days of union representatives being informed, the parties must conduct a joint examination on the reason for the surplus labour and proposed dismissal, and the possibility of redeployment, use of solidarity contracts or the introduction of flexible working time to forestall dismissals.

These discussions may last for up to 45 days from the receipt of the initial communication by the employee representatives. The period may be halved if fewer than ten jobs are at risk. If no agreement can be reached, the labour authorities will attempt conciliation. Following the attempts to mitigate dismissals, the company and the employee representatives will move to conclude an agreement on measures for those faced with redundancy. This procedure has two elements: (a) an order of priority in the choice of workers; and (b) an obligation to rehire the discharged workers if the employer intends to fill the same job within one year. Dismissal may only occur as a last resort. However, the employer's economic grounds, if genuine and objective, may not be reviewed.

### **Severance pay**

The use of the indemnity has been made flexible to some extent. Act 233 provides that a maximum of 70 per cent of the indemnity acquired can be requested in advance given certain conditions (e.g. minimum eight years of seniority, no prior requests) for certain expenditures and purchase of initial residence.

Since 1977, a scheme of severance pay has existed by law. It is partially protected against inflation. Employees are entitled to a severance payment for any termination of contract based on the formula of a year's salary divided by 13.5, plus 1.5 per cent for each year's service plus compensation for inflation. It is payable whenever an Italian employee leaves his or her job for whatever reason, and is based on length of service with the company. Instead of assessing it on the basis of the last wage multiplied by the years of service, Act 233 provides that every year a certain amount of wages is set aside to be paid upon termination.

At the termination of employment, whatever the method used to effect it, the worker is entitled to receive from the employer, in addition to any other sum of money, a special allowance called seniority indemnity. This indemnity is peculiar to Italian law and has undergone long evolution.

### **Avenues for redress**



An employee wishing to contest a dismissal must do so in writing within 60 days of receiving notice of dismissal (Act 604). Act 108/1990 empowers the judge to order reinstatement in cases of unjustified, discriminatory or formally vitiated dismissal. Discriminatory dismissals because of union activity or affiliation can also be attacked through the special procedure of *sec. 28* of Act 300 of 1970.

Employers employing more than 15 employees (or five in the agricultural sector) in each establishment, branch, office or autonomous department, and employers employing more than 60 workers, wherever located, are liable for reinstatement of the employees and payment of damages equal to a minimum of five months= pay. Alternatively, the employee can refuse reinstatement and request payment of damages equal to 15 months= pay. If the employer invites the employee to return to work and the employee does not take up the offer within 30 days, the contract is automatically terminated.

Where there are fewer than 15 employees in each unit or fewer than 60 employees in total, the case cannot come before a magistrate unless conciliation has been requested beforehand according to the procedures laid down in collective agreements or in *secs. 410 and 411* of the Code of Civil Procedure.

Should attempts at conciliation fail, either party can request within 20 days that the matter be referred to arbitration. If the matter is still unresolved and the court finds the dismissal unlawful, the employer must reinstate the employee within three days or pay damages: a minimum of two-and-a-half months= pay up to a maximum of 14 months= pay. In these cases, the employer can elect between reinstatement or compensation.

Under the Workers= Statute any employer who refuses to comply with a magistrate=s reinstatement order must continue to pay the employee his or her full remuneration until the employer complies. If the unfair dismissal is in connection with the employee=s trade union duties, the employer is liable to pay an additional day=s pay for every day of non-compliance. The employer may immediately lodge an appeal against the decision to reinstate.

## ***Jamaica***

### **Sources of regulation**

The Jamaican law on termination of employment is based on, and governed by, the English common law, except to the extent the common law has been modified by statute. There are two central statutes dealing with termination of employment: the Employment (Termination and Redundancy Payments) Act, 1974 (as amended) (ETRPA), and the Labour Relations and Industrial Disputes Act, 1975 (as amended) (LRIDA).

In addition, the Labour Relations Code, 1976 (promulgated pursuant to the LRIDA), while not having the force of law, is a supplementary source of regulation to the extent its provisions influence the decisions of the courts or are embodied in contracts of employment. Collective agreements, while taken into account, play only a minor role as a source of regulation on termination of employment in Jamaica.

### **Scope of legislation**

The LRIDA applies to **Aworkers@**, who are defined as all individuals who work or normally work under a **Acontract of employment@**, which in turn is defined as including express, implied oral and written contracts, and apprenticeships (*sec. 2, LRIDA*).

The ETRPA definition of an **Aemployee@** largely mirrors the LRIDA definition of worker, except that public servants are expressly excluded and apprentices are not expressly included (*sec. 2, ETRPA*). Under the ETRPA, if the contract of employment specifies a probationary period, either party to the contract may terminate the contract without notice during the probation period, or during the first 90 days of the probation period, whichever is the lesser.

### **Contracts of employment**

The ETRPA excludes fixed-term employees, on contracts for more than two years, from those eligible for redundancy payments (*sec. 8(2)*). However, an employee on a fixed-term contract which continues for four weeks after the stated expiry date is deemed to be employed indefinitely (*sec. 3(5)(b), ETRPA*).

Jamaican legislation does not expressly distinguish between casual or part-time employees and other employees. Seasonal workers are defined as working a minimum of 90 days per year. All other employees must be working at least 18 hours per week.

### **Termination of employment**

Termination of employment, other than at the initiative of the employer, is largely governed by common law. Accordingly, employment will terminate when:

- C the employee dies;
- C there agreement between the employee and employer;
- C the employment contract is frustrated (i.e. becomes impossible to perform due to an event external to the parties);
- C the employer, if a natural person, dies (however, *sec. 11* of the ETRPA deems the death of an employer to be a dismissal for the purposes of redundancy benefits, unless the employer's personal representative offers the employee continued employment);
- C the employer, if a company, is wound up; and
- C the employer, if a natural person, is declared bankrupt.<sup>220</sup>

### **Termination of employment at the initiative of the employer**

Jamaican legislation does not contain an express statement that all dismissals must be justified by the employer, but, as the LRIDA enables a dismissed employee to seek reinstatement if the dismissal was unjustifiable (*sec. 12(5)(c)*), the courts have used this standard, as developed by case law, to protect employees from arbitrary dismissals.

In addition, dismissals on the grounds of race, place of origin, political opinion, colour or creed (*art. 24*, Jamaican (Constitution) Order in Council, 1962); pregnancy or taking maternity leave (Maternity Leave Act, 1979); or trade union membership or activity (*sec. 4*, LRIDA) are prohibited.

*Sec. 5(5)(c)* of the ETRPA codifies the common law rule on constructive dismissal and provides that when an employee is compelled, by reason of the employer's conduct, to terminate the contract without notice, this is deemed to be a dismissal.

The common law rule on summary dismissal is also retained. Thus an employer is entitled to terminate the contract without notice, in the case of serious misconduct, and an employee so dismissed is not entitled to a redundancy payment or to a period of notice (*sections 5(5) and 6(2)*, ETRPA). However, an employer is not entitled to terminate employment without notice after four weeks from when he or she became aware of the employee's conduct justifying dismissal (*sec. 3(5)(a)*, ETRPA).

A dismissal is also justifiable, under common law, if it is on the grounds of poor performance or misconduct not justifying summary dismissal, and notice is given, or a payment in lieu of notice is made.

Moreover, a dismissal is justifiable if the employee is dismissed by reason of redundancy (using the common law definition of redundancy; that is, the dismissal is attributable, wholly or partly to the employer having ceased to carry out that business, or the requirements for the employee's work having ceased or diminished). However, dismissals on the grounds of redundancy, unless excluded (see below) mandate a redundancy payment.

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<sup>220</sup> There is some controversy whether, at common law, an employer's bankruptcy terminates the employment contract: in any event, it operates as a statutory suspension of the employer's liability to pay wages to the employee.

The ETRPA also contains an extended definition of **Dismissal**, which deems a dismissal due to the employee having suffered an accident or developed a disease in the course of his or her employment to be a redundancy, so as to allow such employees to obtain redundancy payments (*sec. 5(2)(c)*, ETRPA).

### **Notice and prior procedural safeguards**

The ETRPA contains statutory minimum notice periods which apply in the absence of an agreement more favourable to the employee (*sec. 3*). These are as follows:

- C two weeks= notice for employees with less than five years of continuous employment;
- C four weeks for between five and ten years of continuous employment;
- C six weeks for between ten and 15 years of continuous employment;
- C eight weeks for 15 to 20 years of continuous employment; and
- C 12 weeks for 20 or more years of continuous employment.

As under the common law, notice periods may be waived, or payments in lieu of notice may be made (*sec. 3(3)(a)*, ETRPA). Greater notice periods will apply if the contract of employment so provides, or if custom requires a longer notice period (*sec. 3(3)(c)*, ETRPA).

As discussed above, dismissal on the grounds of misconduct must be within four weeks of the act by the employee entitling the employer to dismiss him or her.

The Labour Relations Code sets out a model disciplinary procedure for employers and recommends that employers institute disciplinary rules. The provisions of the Code, or other provisions governing the procedure for termination of employment, may be included in collective agreements. However, in practice, collective agreements are less important than statute as a source of dismissal regulation.

The Jamaican courts have also taken cognisance of the development of the common law requirements of procedural fairness and natural justice for dismissals.

### **Severance pay**

Subject to the exclusions discussed below, employees with not less than two years continuous employment, who are dismissed on the grounds of **Redundancy** (see above) are entitled to a redundancy payment. **Dismissal** is also defined, for this purpose, to include the expiry of a fixed-term contract of less than two years and constructive dismissals (*sec. 5(5)*, ETRPA). An employee employed on a fixed-term contract for more than two years will not be entitled to a redundancy payment if he or she has agreed in writing not to receive a redundancy payment (*sec. 8(2)*, ETRPA).

Other exclusions from the right to receive a redundancy payment include cases in which the employee:

- C resigns;
- C is retired and is eligible for a pension;
- C is justifiably summarily dismissed;

- C receives an offer of employment before his or her employment is terminated (*sec. 6, ETRPA*).  
After meeting two years= qualifying period, the rates of redundancy payments are as follows:
- C for one to ten years service, two weeks pay per year;
- C for service beyond ten years, two weeks pay per year for years one to ten, then three weeks=pay per year for each year of service beyond ten years of service (*ETRPA regulations*).

### **Avenues for redress**

There are two central avenues for redress in Jamaica in cases involving termination of employment. First, to the Industrial Disputes Tribunals set up under the LRIDA, and, second, to the civil courts for claims of wrongful dismissal or breach of contract.

Both reinstatement and compensation are available from the Industrial Disputes Tribunal, if a dismissal is found to be unjustifiable. In contrast, reinstatement is not generally available for wrongful dismissal and the claim is limited to compensation for the notice period the employee would have received.

## *Japan*

### **Sources of regulation**

The main provisions governing dismissal in Japan are to be found in the Civil Code (CC) of 1899 (as amended) and in the Labour Standards Act, 1947 (as amended).

### **Scope of legislation**

The CC applies to all contracts of private law; the application of the Working Conditions Act, 1989, is therefore restricted to undertakings listed in *sec. 8* of that statute. Moreover, seafarers and public employees are governed by other legislation.

### **Contracts of employment**

Contracts of employment can be either indefinite or for a defined period. Generally a contract is considered to be indefinite if no mention is made of a specific period. Following recent amendments to the Labour Standards Act in 1998, fixed-term contracts can, in certain circumstances, be concluded for a period of up to three years. A fixed-term contract ends automatically on the expiry of its term. Probation periods are also permissible.

### **Termination of employment**

Contracts of employment may terminate, other than at the initiative of the employer, in various ways, including by:

- C mutual agreement;
- C resignation of the employee;
- C the death of the employee or, where the employer is an individual, the death of the employer; and
- C termination for cause by the employee.

### **Termination of employment at the initiative of the employer**

The CC provisions on termination are based on the principle of freedom of termination through notice. Under the law, the existence of a valid reason is not necessary for a dismissal to be justified. The employer may exercise his or her discretion in dismissing workers at any time. Nevertheless, collective agreements often list reasons which may provide grounds for dismissal.

Moreover, it should be noted that collective dismissals are not expressly regulated by statute. After the first oil crisis in 1973, the courts were faced with this problem and developed a number of principles and rules to serve as guidelines.

The following are deemed valid reasons for dismissal:

- C professional incompetence on the part of the employee, even if such incompetence results from an occupational disease;
- C violation of a disciplinary rule; and
- C dismissal of a non-unionized employee as a result of an agreement for a post-entry closed shop<sup>1</sup>. In this case, the collective labour agreements allow the hiring of persons who are not members of unions, but the employer is thereafter obliged to dismiss each employee who does not join the union.

If dismissal is contemplated on the grounds of professional incompetence, the courts place an obligation on the employer to ascertain the possibility of transferring the employee to another post before proceeding to dismissal.

Dismissal on the following grounds will be regarded as unjustified:

- C marriage, pregnancy or childbirth (*sec. 11(3)*, Act on equal opportunity in employment);
- C requesting maternity leave (*sec. 7*, Maternity Leave Act);
- C trade union activities guaranteed by *art. 28* of the Constitution (*sec. 7*, Trade Unions Act); and
- C the sex of the worker (*art. 8*, Constitution).

Under *sec. 19* of the Working Conditions Act, dismissal is prohibited during the following periods:

- C during the absence of an employee because of work-related illness and 30 days thereafter; and
- C during an employee's maternity leave and 30 days thereafter.

### Notice and prior procedural safeguards

The law does not lay down a notice procedure to be followed, nor does it provide for mandatory prior consultation. Nevertheless, most collective agreements do state such requirements.

Pursuant to *sec. 20* of the Working Conditions Act, a normal period of notice is 30 days. However, in accordance with *sec. 21*, this rule does not apply to the following workers:

- C workers employed on a daily basis if they have worked for less than one month without interruption;
- C seasonal workers employed for a specific period not exceeding four months; and
- C workers during a trial period if they have worked for less than 14 days without interruption.

In addition, according to *sec. 20(1)* of the above-mentioned Act, an employer is exempt from obligations pursuant to this subsection if the continued operation of the undertaking becomes impossible because of a natural disaster or some other unforeseen event or in the event of summary dismissal. In such cases, an employer is obliged to obtain administrative authorization (*sec. 20(3)*, Working Conditions Act).

*Sec. 42* of the Seafarers Act states that notice for the dismissal of seafarers must be given in writing 24 hours in advance.

The obligation of the employer to abide by the notice period is waived in the case of summary dismissals (*sec. 20*, Working Conditions Act).

In the event of collective dismissal, an employer who intends to dismiss a large number of workers must inform the employment service<sup>221</sup> (*sec. 21(1)*, Employment Measures Law (No. 132 of 1966, as amended)).

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<sup>1</sup> The number and special conditions are prescribed by ministerial ordinance.

If the undertaking belongs to a sector which is recognized as threatened, the employer may set up a plan aimed at protecting jobs and assisting the persons who will inevitably be dismissed to find alternative employment. This plan must be presented to the trade union and to the employment service for approval.

### **Avenues for redress**

A worker who has been dismissed may raise a complaint in the competent court of general jurisdiction. (There are no special labour courts in Japan.) He or she may also go before the Labour Relations Commission if, and only if, the complaint is of an unfair labour practice under the Trade Union Act.

If the employer fails to observe the requirement to give notice, *sec. 114* of the Working Conditions Act offers the employee concerned the option of requesting compensation through the courts. If the employer fails to respect the rules of procedure prescribed by a collective agreement, the courts will usually declare such dismissal null and void, except if there is a valid reason for this infraction.

The courts consider all unjustified dismissals as being null and void. In such cases, the employer must continue to employ the worker concerned. If the court nullifies the dismissal, the employee is entitled to receive his or her normal wages for the period between the date on which the dismissal took effect and the date of reinstatement.



## ***Kenya***

### **Sources of regulation**

Legislation giving specific protection in relation to termination of employment in Kenya has been enacted in the form of the Employment Act, Cap. 226 (EA), the Trade Disputes Act, Cap. 234 (TDA), and the Regulation of Wages and Conditions of Employment Act, Cap. 229. Pursuant to the Regulations of Wages and Condition of Employment Act, Regulations of Wages Orders are adopted which also contain provisions on termination of employment, either by branch or generally, including the Regulation of Wages General Order (RWGO). In addition, collective agreements, common law principles and case law are important sources of regulation.

### **Scope of legislation**

The EA excludes from its purview the armed forces, the police, members of the prisons services, the National Youth Service, and any class of persons or public body as the Minister may, by order, exempt (*sec. 1*, EA).

### **Contracts of employment**

In general, Kenyan labour legislation does not distinguish between the various types of contract of employment in relation to termination of employment.

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of a fixed-term contract; and
- C the completion of the task for which a contract was concluded.

### **Termination of employment at the initiative of the employer**

There is no statutory requirement for a valid cause or justifiable reason of dismissal in Kenya. The employer is only required to respect a specific notice period, or to give the employee pay in lieu of notice. In case of gross misconduct, the employer may summarily dismiss an employee (i.e. without notice). *Sec. 17* of the EA lists the matters amounting to serious misconduct as follows:

- C absence from work without leave or lawful cause;
- C intoxication during working hours that prevents proper performance of work;

- C wilful negligence or carelessness;
- C insulting the employer or other authority;
- C knowingly failing or refusing to comply with a lawful and proper order from a person in authority;
- C imprisonment for an offence lasting more than four days; and
- C commission of, or reasonable suspicion of commission of, a criminal offence against the employer or his or her property.

This list is not exhaustive. In addition, *sec. 16* of the RWGO provides that misconduct which does not by itself warrant summary dismissal can become a valid cause for summary dismissal if it is repeated three times in spite of written warnings.

In spite of the absence of a statutory requirement of valid cause, the case law of the Industrial Court has established the necessity of a justifiable cause for dismissal via the emphasis on the principles of good industrial relations and fairness of labour practices. (These include notions of incapacity, gross negligence, redundancy and serious misconduct.) In fact the Court grants remedies to employees for wrongful dismissal if in terminating the services of an employee, the management's action was wanting in the following instances:

- C want of good faith (e.g. camouflaging the real reason for dismissal);
- C victimization or unfair labour practices such as dismissal of an employee for trade union activities, racism, tribalism, personal grudges;
- C commission of a basic error or violation of the principles of natural justice such as denying an employee a chance to defend himself [sic] before dismissing him;
- C when on the materials the finding is completely baseless or perverse; and
- C where the employer has been unduly harsh, e.g. terminating the services of an employee where perhaps a warning letter would have been sufficient.<sup>222</sup>

Redundancy is defined in *sec. 2* of the TDA as follows:

- C the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of the employee are superfluous; or
- C the practice commonly known as abolition of office, job, occupation and loss of employment due to the Kenyanization of a business. Redundancy does not include loss of employment by a domestic servant.

### Notice and prior procedural safeguards

Notice is required for terminating all contracts except those for a fixed-term period or for specific tasks (*sec. 14*, EA), and except when the employee is summarily dismissed (*sec. 17*, EA). The relevant notice periods are as follows:

- C for workers paid daily, one day's notice;
- C for contracts where wages are paid periodically at an interval shorter than a month, notice equivalent to this interval; and

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<sup>222</sup> S.R. Cockar: *The Kenya industrial court: Origins, development and practice* (Longman, 1981), p. 105.

C for contracts where wages are paid at intervals longer than a month, 28 days= notice.

Employees declared redundant are entitled to one month's notice or wages in lieu. When a greater notice period has been agreed to by the parties, this notice period prevails. The employer can give the employee payment in lieu of notice (*sec. 16, EA*).

The trade union of which a redundant employee is a member and the local Labour Office shall be informed of the reasons and the extent of the redundancy (*sec. 16A, EA* and *sec. 15, RWGO*). In addition, employers are required to have due regard to seniority, skill, ability and reliability in selecting employees for redundancy and no employee is to be placed at a disadvantage for being or not being a trade union member (*sec. 16A, EA*).

If redundancies are effected according to an agreement as to the terms of the redundancy, termination may be effected after compensation is paid. If there is no agreement, the standard settlement procedure applies. Termination for redundancy cannot be effected until any union of which the employee is a member, and the area Labour Officer, have been notified of the reasons for, and extent of, any redundancies. A trade dispute is specifically defined to include redundancy terminations, enabling an employee to challenge a redundancy dismissal in the Industrial Court.

An employee cannot be summarily dismissed for conduct which does not by itself warrant summary dismissal, unless he or she has received two written warnings for misconduct, the second being no more than a year old (*sec. 16, RWGO*).

### **Severance pay**

According to *sec. 16A* of the EA, an employee declared redundant should be entitled to severance pay at the rate of not less than 15 days' pay for each completed year of service. There are no provisions in the legislation mentioned above for severance pay in case of termination for reasons other than redundancy.

### **Avenues for redress**

Any dispute involving dismissal or termination of employment (and not being a termination as a result of redundancy) shall be reported to the Minister by or on behalf of any party to the dispute within 28 days of the dismissal or termination (*sec. 4, TDA*).

The Minister shall consider the dispute and consult a tripartite committee to take one of the following steps: refuse the report, make proposals for settlement, initiate the conciliation procedure under *sec. 6* of the TDA, commence an investigation of the dispute, or recommend that the case be referred to the Industrial Court. Under *sec. 6* of the TDA, the Minister may make use of machinery or arrangements for the settlement of disputes which exist by agreement at the enterprise or branch level. He or she may also appoint a conciliator or a tripartite conciliation panel.

The Industrial Court is not to take cognisance of any trade dispute concerning dismissal unless it has received a certificate of exhaustion of the conciliation machinery for the voluntary settlement of the dispute, and the written authorization of the Minister stating that the dispute should be referred to the

court (*sec. 14(9)*, TDA). The Industrial Court does not have jurisdiction over disputes in the public sector.

If the dismissal is held to be wrongful, the court may order reinstatement and/or award compensation equal to the actual loss of the reinstated employee or, when no reinstatement is ordered, equal to 12 months= monetary wages (*sec. 15*, TDA).

## ***Lesotho***

### **Sources of regulation**

The major source of labour law in Lesotho is the Labour Code of 1992 (LC). Collective agreements may also provide protection against dismissal.

### **Scope of legislation**

The provisions for protection under the LC apply to all contracts of employment with the exception of apprentices and trainees, who are subject to the Technical Vocational Training Act, 1984. An apprentice is defined as a person who has entered into an apprenticeship contract with another person for the purpose of acquiring a skill or learning a trade. A trainee is a person who is being trained by or for an employer, or for employment under a training scheme in any trade or occupation (*secs. 3 and 61(2)*, LC).

### **Contracts of employment**

The LC allows and regulates contracts of indefinite duration, contracts of fixed duration, and contracts to perform specific work or to undertake a specified journey (*sec. 62(1)*). The non-renewal of a fixed-term contract, or contract for a specific task or journey, will result in dismissal only if the contract provides for the possibility of renewal (*sec. 68(6)*, LC).

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of a fixed-term contract;
- C the completion of the task for which the contract was concluded; and
- C employee retirement.

### **Termination of employment at the initiative of the employer**

An employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination of employment (*sec. 66(1)*, LC). Termination of employment is only valid where it concerns:

- C the capacity of the employee to do the work he or she was employed to do (including, but not limited to, an employee's fraudulent misrepresentation of having specific skills required for a skilled post);
- C the conduct of the employee at the workplace; or
- C the operational requirements of the undertaking, establishment or service (*sec. 66(1)(2)*, LC).

Any other dismissal will be unfair unless, having regard to all the circumstances, the employer can sustain the burden of proof to show that he or she acted reasonably in treating the reason for dismissal as sufficient grounds for terminating employment (*sec. 66(2)*, LC).

The following do not constitute valid reasons for dismissal (*sec. 66(3)*, LC):

- C trade union membership or participation in trade union activities outside working hours or, with the consent of the employer, within working hours;
- C seeking office as, or acting or having acted in the capacity of, a workers' representative;
- C non-trade union membership (*sec. 196(2)*, LC);
- C filing in good faith a complaint or grievance, or the participation in a proceeding against an employer involving the alleged violation of the LC, other laws or regulations, or terms of a collective agreement or award;
- C race, colour, sex, marital status, pregnancy, family responsibilities, religion, political opinion, national extraction or social origin; and
- C absence from work in accordance with provisions of the LC (e.g. educational leave, sick leave, holiday) or as authorized by the employer.

Also, any dismissal that takes effect during the statutory maternity leave of an employee shall automatically be an unfair dismissal (*sec. 136(1)*, LC).

*Sec. 66* of the LC allows for dismissal based on the operational requirements of the undertaking. However, no mention is made of any special procedure that has to be followed, such as informing the Labour Commissioner/trade union, or when a dismissal could be described as a collective dismissal. Where the employment relationship is terminated by the employer due to the operational requirements of the undertaking, the employee is entitled to severance payments (see below) and holiday pay.

### **Notice and prior procedural safeguards**

A dismissed employee is entitled to have an opportunity at the time of dismissal to defend himself or herself against the allegations made, unless the circumstances are such that the employer cannot reasonably be expected to provide this opportunity (*sec. 66(4)*, LC). No reference is made in the LC concerning the need for consultation with relevant union representatives in the case of individual dismissals.

For contracts without reference to limit of time, the employer may terminate the contract upon giving the following notice periods (*sec. 63(1)*, LC):

- C one month's notice, where the employee has been working continuously for one year or more;

- C two weeks=notice, where the employee has been continuously employed for more than six months but less than one year; and
- C one week= notice, where the employee has been continuously employed for less than six months.

According to *sec. 63(2)*, parties can agree on a longer period of notice of termination than that which is provided in the LC. Also, notice to terminate a contract may be either oral or written (*sec. 65(1)*, LC). The day on which the notice is given shall not be included in the period of notice. If the employment continues after the day on which the contract is to terminate, the termination shall be deemed cancelled and the employment relationship shall continue as before, unless the employer and employee agree otherwise. The abovementioned notice periods do not apply to probationary employees. An employee may initially be employed for a probationary period not exceeding four months. At any time during the probationary period or immediately at its end, the employee may be dismissed with one week= notice (*sec. 75*, LC).

Notice does not have to be given in cases involving:

- C summary dismissal (i.e. cases where serious misconduct by the employee make it unreasonable for the employer to continue the employment relationship through the notice period) (*sec. 63(2)*, LC);
- C payment in lieu of notice (where the employer pays in lieu of notice a sum equal to all wages and other remuneration that would have been owing to the employee up to the expiration of any notice of termination); and
- C fixed-term employees (the employer shall pay all wages and other remuneration owing to the employee had he or she continued work until the completion of the contract).

The employer is to provide a written statement of the reason for any dismissal (as defined in *sec. 68(a)(b)*, LC) to any employee who is dismissed. If the employer fails to fulfil this requirement, without reasonable excuse, a fine is imposed which may not exceed 300 maloti (*sec. 69(1)*, LC).

As the LC does not entail special requirements concerning the procedure to be followed during a collective dismissal, the same notice requirements (*sec. 63(1)*, LC), conditions concerning a hearing and the provision of reasons for the dismissal (*secs. 66(4) and 69(1)*, LC) prima facie apply.

## Severance pay

*Sec. 79(2)* of the LC explicitly states that an employee who has been fairly dismissed for misconduct (which includes summary dismissal) is not entitled to severance payments. This applies only to dismissal on the grounds of misconduct; it is thus unclear from the LC if a severance payment would apply where the employment relationship is terminated due to incapacity of the worker.

Except for dismissals for misconduct, employees who have had their employment terminated are entitled to the following severance payments:

- C for an employee with more than one year of continuous service with the same employer, severance payment is to be equivalent to two weeks= wages for each completed year of continuous service upon termination of the employment. if employment were to terminate upon the death of such an employee, severance pay would still have to be paid (*sec. 79(1)*, LC); and

- C for an employee with at least three months= of continuous service with the same employer, an additional one days= full pay in respect to each completed month of employment for which the employee has earned, but not taken a holiday with full pay, would have to be paid (*sec. 120(5), LC*).

Regardless of an employee's length of service, the amount of severance pay for an employee may not exceed a sum which may be prescribed by the Minister from time to time after consultation with the Wages Advisory Board (*sec. 79(3)*).

An employer who fails to make a severance payment in accordance with *sec. 79* of the LC shall be guilty of an offence and shall be liable on conviction to a fine (600 maloti) or imprisonment (six months) (*sec. 80*).

### Avenues for redress

Unless they are alleging the dismissal was unfair due to invalid reasons under *sec. 66(3)*, or are alleging constructive dismissal, the following employees have no right to bring a claim for unfair dismissal (*sec. 71, LC*):

- C employees employed for a probationary period, as provided under *sec. 75*; and
- C employees over the normal age of retirement for the type of employment involved.

Any claim against summary dismissal or unfair dismissal must be filed with the Labour Court within six months of the termination of the employment relationship (*sec. 70, LC*). However, the Labour Court may allow claims outside this period if it is satisfied that the interests of justice so demand (*sec. 70(1)(2), LC*).

The employer has to bear the burden of proof and show that the termination of the employment relationship was reasonable (*sec. 66(2), LC*). The decision of the Labour Court is final and no appeal is possible (*sec. 38, LC*).

If the Labour Court holds a dismissal to be unfair, it shall order the reinstatement of the employee in his or her job without loss of remuneration, seniority, and other entitlements or benefits which the employee would have received had there been no dismissal, unless it considers reinstatement of the employee to be impracticable in light of the circumstances (*sec. 73(1), LC*).

If the court decides that it is impracticable in light of the circumstances for the employer to reinstate the employee in employment, or if the employee does not wish to be reinstated, the court shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement (*sec. 73(2), LC*).

The amount of compensation awarded by the Labour Court is to be such amount as the court considers just and equitable in all circumstances of the case. In assessing the amount of compensation to be paid, account is to be taken of whether there has been any breach of contract and whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses (*ibid.*).

In cases where no written reasons for dismissal were provided, the court may also award an additional two weeks= wages to the employee as compensation (*sec. 69(5), LC*). The LC does not explicitly cap compensation and it seems that if it were just and equitable to do so, full damages could be awarded.



## Malaysia

### Sources of regulation

The central pieces of legislation governing the termination of employment in Malaysia are the Employment Ordinance, 1955 (as amended) (EA), the Industrial Relations Act, 1967 (as amended) (IRA), and the Employment (Termination and Lay-Off Benefits) Regulations, 1980 (as amended). In addition, the common law, as developed by Industrial and Appeal Courts, is an important source of law. Collective agreements and individual contracts of service may also be additional sources of regulation.

### Scope of legislation

The EA applies to all labourers as defined in the First Schedule. The term labourer is misleading as the EA actually applies to all employees, irrespective of their occupation, who are paid less than a specified rate, as well as to all labourers and manual workers, at any rate of pay (First Schedule, EA, as amended by the EA Amendment Act, 1980). The IRA applies to all workmen and defines workman widely, to include any person employed by an employer under a contract of employment, including employees. The Employment (Termination and Lay-off Benefits) Regulations apply to all employees except outworkers (*secs. 3 and 7* of the Regulations). Domestic workers are governed by separate provisions of the EA (*sec. 56*, EA): domestic workers can be dismissed on 14 days' notice, or payment in lieu of notice, or without notice in the event of conduct inconsistent with the terms and conditions of their employment contract.

### Contracts of employment

Fixed-term contracts are permitted in Malaysia, but must be in writing,<sup>223</sup> and for less than six months.<sup>224</sup> In addition, the courts have been prepared to examine the non-renewal of contracts to ascertain if the reasons for non-renewal are genuine, and to prevent employers circumventing the applicable statutory protections.<sup>225</sup>

In relation to probationary employees, case law has established that an employee continues as a probationer even after the expiry of the probation period, until the appointment is confirmed.<sup>226</sup> A termination within the probation period will not be set aside unless the probationer can show the employer acted with malice.<sup>227</sup>

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<sup>1</sup> For fixed-term contracts for a period exceeding one month (*sec. 10*, EA).

<sup>2</sup> *ibid.*

<sup>3</sup> For example, *Taylor's College v. Yang Show Fooi and others*, Award 20/87, and *Han Chiang High School v. National Union of Teachers in Independent Schools*, Award 306/88.

<sup>4</sup> *K.C. Matthews v. Guthries* (1981) 2 MLJ 320; *Express Newspaper Ltd. v. Labour Court & Anor* (1964) AIR SC 806.

<sup>5</sup> *Hotel Continental v. National Union of Hotel, Bar & Restaurant Workers*, Award 23/76.

## Termination of employment

Subject to the limitations discussed above, fixed-term contracts will terminate on the expiry of the term (*sec. 11*, EA).

Contracts of employment may also terminate through the employee giving notice (*sec. 12*, EA). Employees may terminate the contract without notice if they are ill-treated or exposed to a risk of disease or injury that they did not contract to undertake (*sec. 14(2)*, EA). The Malaysian courts also recognize the concept of constructive dismissal and will treat a resignation as a dismissal if the resignation is involuntary or under threat of dismissal.<sup>6</sup>

Retirements are not considered dismissals for the purposes of statutory redundancy benefits (*sec. 4(1)(a)*, Employment Termination and Lay-Off Regulations, 1980).

### Termination of employment at the initiative of the employer

While the relevant statutes do not set out a detailed prohibition against unfair dismissal, the courts have used the existence of the statutory remedy of reinstatement to develop a principle against dismissals unless they are based on a just cause. The courts have also refused to distinguish between terminations and dismissals for the purposes of dismissal protection. Dismissals are possible for operational reasons, provided the requisite notice periods are complied with (*sec. 12(3)*, EA, as amended). The courts have refused to interfere with the employer's prerogative to retrench workers provided the retrenchment decision is bona fide and not taken to victimize the employee.<sup>7</sup> Moreover, if an employee covered by the EA is continuously absent for more than two days, without leave or reasonable excuse, then his or her employment may be terminated (*sec. 15*, EA, as amended).

However, the courts have required employers to operate the last on, first off principle when retrenching employees, unless there are sound and valid reasons for departing from this principle.<sup>8</sup> In addition, for retrenchments, there is statutory severance pay which must be paid (see below). Dismissals, without notice, on the grounds of misconduct, are also possible, but only after a due inquiry (*sec. 14*, EA).

Pursuant to the IRA, it is unlawful to dismiss an employee for union membership or activities (*sec. 5(1)(d)*, IRA).

### Notice and prior procedural safeguards

Statutory notice periods, applicable to all dismissals (including those for operational reasons), except dismissals for misconduct, are as follows (*sec. 12(2)*, EA, as amended):

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<sup>6</sup> *Stanley Ng Peng Hon v. AAF Pte. Ltd.* (1979) 1 MLJ 57.

<sup>7</sup> See, for example, *Trebor v. Tamil Selvam Gopal*, Award 36/87.

<sup>8</sup> *East Asiatic v. Ong Wai Beng*, Award 24/87.

- C four weeks for employees with less than two year of service;
- C six weeks for employees with two to five years of service; and
- C eight weeks for employees with greater than five years of service.

These provisions are merely statutory minima, and it is open to employers and employees to agree on greater periods of notice, which must then be observed. Either employers or employees may make a payment in lieu of notice (*sec. 13, EA, as amended*).

Employees who may be dismissed for misconduct are entitled to receive due inquiry before being dismissed. However, the courts have held that any defect in an internal inquiry held by the employer can be cured by the court, provided there is a substantial reason for the dismissal.<sup>9</sup>

### Severance pay

The Employment (Termination and Lay-Off Benefits) Regulations, 1980, provide for statutory severance pay in the event of terminations for operational reasons or performance, on the following scale (*sec. 6(1)*):

- C ten days= wages for one completed year= service, but less than two years= service;
- C 15 days= wages for two to five years= service; and
- C 20 days= wages for greater than five years= service.

These Regulations apply to employees with more than one year= service (*sec. 3(1)*) and, again, set out statutory minima only, which the parties are free to agree to increase. They do not apply to:

- C dismissals for misconduct, after due inquiry;
- C terminations upon the employee attaining retirement age; or
- C voluntary terminations by the employee (*sec. 4*).

### Avenues for redress

An employee covered by the IRA may complain to the Industrial Relations Department and seek reinstatement if his or her dismissal is not for a just cause (*sec. 20(1), IRA, as amended*). The Industrial Relations Department then may attempt to settle the dispute, including by conciliation. If no settlement is possible, the Department will report the matter to the Minister, who may refer the matter to the Industrial Court. The Industrial Court may award either reinstatement or compensation (including one month= wages for every year of service). In practice, the Court has not often awarded reinstatement and has stated it will not order reinstatement if this would not be in the interests of industrial peace in the establishment. There is a limited right of reference to the High Court for questions of law which arise during proceedings in the Industrial Court, if the Industrial Court elects to refer the question. The decision of the High Court on any question of law so referred is final and binding.

Alternatively, an employee can proceed in the civil courts in an action for wrongful dismissal.

Employees may also seek unpaid wages or notice payments in the Labour Court, and retain the right to bring proceedings, such as for breach of contract or wrongful dismissal, in the civil courts.

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<sup>9</sup> *Dreamland Corporation v. Choong Chin Sooi & Another*, Supreme Court Civil Appeal No. 385 of 1987.



## *Mauritius*

### **Sources of regulation**

The main sources of regulation in relation to termination of employment are the Labour Act, 1975 (LA), the Industrial Relations Act, 1973 (IRA),<sup>228</sup> and the Industrial Expansion Act, 1993 (IEA). The Code of Practice (Industrial Relations Act) is also of high persuasive authority. In the absence of specific legislative provisions, common law rules on termination of employment are deemed to apply. Collective agreements can also be supplementary sources for regulation of termination of employment.<sup>229</sup>

### **Scope of legislation**

No specific categories of workers are expressly excluded under the LA. In addition, the meaning of the term *worker* is defined broadly to include apprentices, share-workers<sup>230</sup> and casual workers. Nevertheless, the termination of contracts of employment of public sector workers is not regulated under the LA, but under special regulations for the Public Service and the Constitution which are enforced by special bodies such as the Civil Service Industrial Relations Commission and the Civil Service Arbitration Board. The IRA, however, applies both to the public and private sectors.

Since 1970, employees in the export processing sector have been covered under special legislation, namely, the Export Processing Zone Act, which was replaced in 1993 by the Industrial Expansion Act. The IEA improved provisions for a severance payment of one week's wages for each year of service when an employee has service of less than three years. Consequently, only the provisions under the LA which relate to unjustified dismissal, for example, on the grounds of serious misconduct, apply to workers in this sector. Employees in export processing zones cannot, therefore, be viewed as having protection in relation to termination of employment on such wide terms as elsewhere in the private sector.<sup>231</sup>

Special regulations exist concerning the termination of workers in the sugar industry (agricultural sector), road haulage industry, construction industry and export processing zones. These are mainly confined to notice requirements.

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<sup>228</sup> Note that consideration is being given to amendment of this legislation.

<sup>229</sup> Although collective agreements are not given force of law under statute, the Industrial Relations Court has ruled that they are legally binding as it was the intention of the legislature to make such agreements binding in order to promote good industrial relations (Bolaky, Roy, Cunniah and Mauritian tripartite delegation: *The promotion of collective bargaining and the protection of security of employment in Mauritius*, in *Collective bargaining and security of employment in Africa: English-speaking countries*, Labour-Management Series, (Geneva, ILO, 1988), pp. 175 and 182). The court here was strongly influenced by French jurisprudence on the issue.

<sup>230</sup> Under *sec. 2* of the LA, a *share-worker* means a person who (a) is remunerated wholly or partly by a share in the profits or gross earnings of the work done by him; and (b) is not an owner of the main equipment used in the work he does.

<sup>231</sup> Note that statistics show that the majority of work stoppages due to trade disputes occur in the export processing sector, and that more than half of these disputes relate to termination or redundancy matters (Bolaky et al., *op. cit.*, p. 183).

## **Contracts of employment**

Contracts of employment can be either for a fixed term or task or for an indefinite period.

## **Termination of employment**

Where an employee is engaged on a fixed-term basis or where he or she is engaged to perform a specific task, his or her contract of employment will be deemed to have terminated automatically upon expiry of the agreed fixed term or task (*sec. 30, LA*). However, for contracts of a fixed term, the employer is required to give notice of termination to avoid the continuation of the contract on the same terms and conditions as before.

### **Termination of employment at the initiative of the employer**

There is no express prohibition against unjustified dismissal under the law of Mauritius, although the requirements of *secs. 32 and 39* of the LA appear to amount to a requirement of justification for dismissal. The existence of an Industrial Court with jurisdiction over all labour law matters means, in effect, that the reasons for termination of employment may be inquired into on a case-by-case basis in accordance with the concept of good industrial relations practice. In this regard, the provisions of the Code of Practice (Industrial Relations) Act should be noted, particularly the proposition that A good human relations between employers and employees are essential to good industrial relations@. Further, *sec. 52* of the IRA specifically states that the Industrial Court, the Industrial Relations Commission and the Permanent Arbitration Tribunal shall take into consideration any provision of the Code of Practice which they consider to be relevant.

Workers may be lawfully dismissed where they are absent from work without good and sufficient cause for more than two consecutive days, on the grounds of breach of contract, or where they are found guilty of serious misconduct and the employer cannot in A good faith@ take any other course (*sec. 32, LA*). Incapacity of the worker for the required job is also considered to be a valid ground for dismissal.

Female workers may not be dismissed for reasons of pregnancy or maternity leave (*sec. 19, LA*).

Dismissal on the grounds of ill health or injury in a situation in which the employee is entitled to statutory sick leave constitutes unlawful dismissal under *sec. 20* of the LA. In this case, the employer is liable to a fine under *sec. 3A* of the Workmen's Compensation Act in addition to being liable under the LA.

Employees may not be dismissed for filing a complaint or participating in a proceeding against an employer involving alleged violation of a law (*sec. 32, LA*). In addition, employees may not be dismissed for trade union membership or activity.

Specific protection against dismissal on discriminatory grounds such as race, colour, religion and political opinion is guaranteed only under the Constitution. However, as Constitutions in general regulate only actions emanating from the State, this is merely of persuasive significance in private employment law. Nevertheless, such reasons will almost certainly be considered to be unlawful by any adjudicating body considering a termination matter, as they do not fall among the reasons deemed to be valid.

The burden of proving the existence of a valid reason for termination rests on the employer.

Where the worker is ill-treated by his employer, this will be treated as dismissal (*sec. 30(a)(4)*, LA). The statute does not define the concept of ill-treatment, but in practice its meaning is similar, but not identical, to the concept of constructive dismissal under common law, whereby an employee can claim unlawful dismissal and any benefits accruing in a situation where the employer breaches any fundamental term, express or implied, of the contract, such as the non-payment of wages. In Mauritius, the concept of ill treatment, while having a similar effect of constructive dismissal, emphasizes the attitude of the employer to his or her employee, concerned, for example, with actions which affront his or her dignity or person. The other aspect to constructive dismissal, that is, the non-payment of wages, is embodied under *sec. 30(b)* of the LA, which allows the employee to claim unlawful dismissal for such reason. However, the non-payment of wages should be of such a nature as to make the continuation of the employment relationship not possible. One isolated case would be insufficient.

*Sec. 39* of the LA regulates collective reductions in the workforce which occur for whatever reason. This section only applies to employers who employ more than ten workers.

### **Notice and prior procedural safeguards**

Where an employee is accused of misconduct, he or she may not be dismissed unless the employer cannot, in good faith, take any other course. The implication here is that the employer is obliged, in the first instance to consider other avenues; that is, to warn the employee about the potential consequences of the misconduct, or to suspend the employee instead of dismissing him or her where it is feasible to do so.

In cases of alleged misconduct, the employee is entitled to a fair hearing in which the employee is afforded the opportunity to defend himself or herself against the charges made. He or she is also entitled to have the assistance of a representative of his or her trade union or a legal representative or a labour officer in defending the charge. In addition, the dismissal may only be carried out within seven days after the completion of such a hearing. Where the misconduct is the subject of criminal proceedings, the time limit of seven days starts running from the day on which the employer becomes aware of the final judgement of conviction (*sec. 32(b)*, LA).

*Sec. 31* of the LA lays down mandatory notice periods for termination of the contract in the absence of any notice periods which may be agreed to between the parties to the contract of employment. Such notice periods must be:

- C three months for periods of continuous employment of three years or more;
- C 14 days where the worker is remunerated at intervals of not less than 14 days and he or she has been employed less than three years; and,
- C where the worker is remunerated at intervals of less than 14 days, at least equal to the interval.

Under special regulations of the LA categorizing certain sectors of employment, statutory notice periods may vary. Consequently, with respect to sugar and agricultural workers, a daily paid worker is entitled to one week's notice of dismissal after two weeks' continuous employment. For workers in the road haulage industry, where employment is not monthly paid and a worker has remained in continuous employment for six months, he or she is entitled to 14 days' notice. In the construction industry, daily paid workers in continuous employment for at least six months but less than three years are entitled to seven days' notice.

Where an employer covered by *sec. 39* of the LA intends to reduce the workforce, he or she is required to give written notice to the Minister of Labour, together with a statement of the reasons for the reduction. The Minister must refer the matter to the Termination of Contracts of Service Board (the Board), a tripartite body established under *sec. 38* of the Labour Act, for consideration. The employer may not reduce his or her workforce pending a decision of the board or before the lapse of 120 days from the date of redundancy notice, whichever is later. Where the employer reduces the workforce in breach of notice requirement or in breach of the waiting period laid down for determination by the Board, he or she must pay to the workers a sum equal to 120 days' remuneration together with a sum equal to six times the amount of statutory severance allowance. A defence of good cause lies in relation to the latter breach.

The operational requirements of an undertaking will be taken into account in assessing whether redundancy is justified and may constitute a valid reason for dismissal. Where the Board finds that reduction of the workforce is justified, it will give its approval to the terminations, but the employer is required to pay severance allowance to workers made redundant. Where the Board finds that the reduction in workforce is not justified, it will order the employer to pay the workers intended to be made redundant an amount equal to six times the severance allowance unless they have been reinstated (*sec. 39(4)*, LA).

Reductions in the workforce in the export processing zone are not referred to the Termination of Contracts of Service Board. Consequently, the employer in this sector has more freedom in relation to redundancies.

The Code of Practice (IRA) also urges employers to consult with employees and trade unions and to seek to avoid redundancies by such means as restrictions on recruitment, early retirement, reductions in overtime, short-time work and retraining. Where redundancy is unavoidable, employers should consider schemes for voluntary redundancy, transfer to another establishment within the undertaking, a phased rundown of employment and offer to help employees in finding other work in cooperation with the Ministry. However, this rarely takes place.

### **Severance pay**

Where a worker has been in continuous employment for a period of one year or more and his or her employment is terminated, or he or she retires on or after the age of 60, or retires voluntarily before the age of 60 in accordance with special regulations under the IRA (*sec. 96*), he or she is entitled to a severance allowance. Payment of severance is excluded under *sec. 35* of the LA where:

**C** a worker is dismissed for reasons of misconduct;



- C the employer dies and the worker is employed or offered employment by the personal representative or heir of the deceased employer;
- C the worker is employed under a partnership, the partnership is dissolved and he or she is re-employed by a member of the dissolved partnership or a new partnership;
- C the worker's employment by a corporate body ceases on the dissolution of that body and he or she is employed by another corporate body in accordance with an enactment or a scheme of reconstruction after the dissolution; or
- C the worker's employment ceases on the disposal by his or her employer of the goodwill, or of the whole or a substantial part of the business.

The sum of severance payment varies according to the following:

- C for one year's employment, 15 days' remuneration; and
- C for workers employed for more than one year, the sum above multiplied by the number of years of continuous employment (*sec. 36, LA*).

Where, contributions are payable in respect of a worker under the National Pensions Act, the amount of severance allowance is reduced to eight days per year of service. The severance payment sum may also be reduced to take into account any pension, gratuity or provident fund initiated by the employer.

Where the worker is employed on a specific task basis or his or her work included any sum paid by way of commission, the amount of severance pay should be computed in the manner best calculated to give the rate at which the worker was being remunerated over a 12-month period.

Workers in the construction industry who have worked for the same employer for at least six months and whose attendance has averaged not less than 20 days per month during the first six months of employment are entitled to compensation in the form of one day's wage for each completed month of service where employment is terminated for reasons other than misconduct.

For workers in export processing zones, the IEA stipulates that severance payment is payable to the amount of one week's wages for each year of service where there has been continuous service of more than 12 months but less than three years. Where an employee has been employed continuously for more than three years, he or she is entitled to not less than two weeks' wages for each year of service. Where such a worker has been dismissed for serious misconduct in a situation where the employer could not in good faith be expected to adopt any other course, no severance sum is payable.

### **Avenues for redress**

A worker who believes that his or her employment has been unjustifiably terminated may refer the matter to a labour officer of the Government within seven days of being notified of his or her dismissal. He or she is allowed the assistance of the trade union, if any, to present his or her case to such an officer. An appeal from any decision of the labour officer lies with the Industrial Court.

Where dismissal forms the basis of a collective dispute, the proper avenue for redress is as provided under the IRA. The procedure in this case is that the dispute must first be reported to the Minister of Labour who will make proposals for settlement, or refer the parties to the Industrial Relations Commission for investigation and conciliation, or advise the parties to refer the dispute to the Permanent

Arbitration Tribunal for arbitration. The Minister may also, without consulting the parties, forward the dispute to the Permanent Arbitration Tribunal for compulsory arbitration (*sec. 82, IRA*).

Where the Industrial Court finds that dismissal was unjustified, it orders that the worker be paid an amount equal to six times the amount of severance allowance normally payable upon termination of employment. The court also has discretion to order the employer to pay interest on the severance payment sum (*sec. 36(3), LA*).<sup>5</sup> The Permanent Arbitration Tribunal also has jurisdiction to make an award with respect to collective disputes arising from termination matters but can, and often does, decline to exercise that jurisdiction.

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<sup>5</sup> Originally the law provided for both reinstatement and compensation in the form of discretionary damages, but these were found to be unworkable, hence the current formula.

## *Mexico*

### **Sources of regulation**

As in other parts of the region, the Constitution<sup>232</sup> is the primary source of labour law in Mexico. *Art. 123* lists comprehensive labour and social rights. In this regard, *art.123(B), clause IX*, grants powers to the union, the Government of the federal district and their workers stating that:

Workers shall be suspended or dismissed for sufficiently grave reasons and subject to the periods of notice fixed by law. In the case of unjustifiable dismissal, the worker concerned shall be entitled to claim, through normal legal channels, reinstatement in his or her post or payment of suitable compensation. In case of elimination of the post, the worker concerned shall be entitled to transfer to a similar post or to the compensation prescribed by law.

The Federal Labour Act (FLA) of 2 December 1969 (published 1 April 1970) constitutes the main source on the right to work and is supported by regulations, ratified treaties and international Conventions made in accordance with the provisions of *art. 133* of the Constitution and supplemented by the case law of the Supreme Court, collective agreements and work rules (*secs. 422-425, FLA*).

### **Scope of legislation**

Pursuant to *art. 123(A)* of the Constitution, *sec. 1* of the FLA governs the employment relationship of workers, employees, domestic workers, craftspersons and in general to all contracts of employment@.

In accordance with *art. 123(B)* of the Constitution, public employees are excluded from the Labour Code and are subject to separate regulations (which were adopted by Federal Act of 27 December 1963).

Workers in positions of trust, seafarers, flight crews, railway workers, road transport workers, the labour force in zones under federal jurisdiction, rural workers, commercial travellers, sports professionals, actors, musicians, home workers, domestic employees, workers in hotels, restaurants, bars and similar establishments, family undertakings, resident medical doctors during specialist training and employees of universities and autonomous institutions of higher learning are subject to special legislation.

### **Contracts of employment**

Under the FLA, the term *employment relationship@* means, irrespective of the act from which it originates, the personal performance of work under the authority of another person in return for payment of remuneration.

*Individual contract of employment@* means, irrespective of its form or title, a contract by which a person binds himself or herself to perform a personal service for another under his or her management and supervision in return for payment of remuneration (*sec. 20, FLA*). The existence of a contract of employment and an

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<sup>232</sup> Dating back to 1917. However, more than 350 amendments have been made to the original text.

employment relationship is presumed between the person performing a personal service and the person who receives such services (*sec. 21, FLA*).

The employment relationship may be for a specified piece of work or of specified duration or of unspecified duration. In the absence of any express stipulation the relationship is to be deemed to be of unspecified duration.

A contract for a specified piece of work may be made only when such contract is required by the nature of the work (*sec. 36, FLA*). A contract of a specified duration may be made only in the following cases (*sec. 37, FLA*):

- C where the nature of the work to be done so requires;
- C when the contract is to provide a temporary substitute for another employee; and
- C in the other cases provided for in this Act.

A worker must in no case be obliged to accept employment for more than one year (*sec. 40, FLA*). There are no provisions in the FLA for the setting of probationary periods.

Employment relationships for work in mines lacking in minerals capable of paying the cost of the operation or for the reopening of abandoned or unworked mines may be for a specified period, for a specified piece of work or for the investment of a fixed capital sum (*sec. 38, FLA*).

If on the expiry of the specified period the material to be worked still subsists the employment relationship continues for as long as this circumstance continues (*sec. 39, FLA*).

## **Termination of employment**

Under *sec. 46* of the FLA, the employment relationship may be cancelled at any time by a worker or an employer having sufficient justification without thereby incurring liability.

The following constitute sufficient grounds for terminating the employment relationship without liability for the worker (*sec. 51, FLA*):

- C if the employer or, as the case may be, the employers' association proposing the workers' employment deceives the worker with respect to the conditions of such employment. This reason for termination ceases to be operative after the worker has been in employment for 30 days;
- C if the employer, the members of the employer's family or his or her executive or administrative staff are guilty in the course of the employment of a dishonest or dishonourable action, violence, threats, insolence, ill-treatment or the like towards the worker, his or her spouse, parents, children or siblings;
- C if the employer, the members of his or her family or his or her employees are guilty outside the employment of the acts mentioned in the preceding clause and the said acts are of such a serious nature as to render continuation of the employment relationship impossible;
- C if the employer reduces the workers' wages;
- C if the worker does not receive the wages due to him or her at the time or in the place agreed upon or fixed according to custom;
- C if the employer wilfully damages his or her implements or tools;

C if the worker's safety or welfare or that of his or her family is seriously endangered either on account of the unsatisfactory hygienic conditions in the establishment or failure to comply with the preventive and safety measures prescribed by law;

C if the employer by his or her inexcusable imprudence or carelessness compromises the safety of the establishment or of the persons therein; and

C for reasons similar to those laid down in the preceding items if they are of equal gravity and entail similar consequences as far as the work is concerned.

The worker may leave his or her employment within the 30 days following the date on which any of the facts mentioned above occur and is entitled to compensation from the employer in the manner prescribed (*secs. 50 and 52, FLA*).

The following constitute grounds for terminating the employment relationship under *sec. 53*:

C by mutual consent of the parties;

C the death of the worker;

C termination of the work or expiry of the period or exhausting of the capital invested in accordance with the provisions of *secs. 36, 37 and 38*; and

C the worker's physical or mental incapacity or obvious disability making it impossible for him or her to perform the work (if the incapacity is a result of an accident or disease other than an employment injury, the employee is entitled to payment of one month's wages plus an extra 12 days' wages for each year of service in accordance with the provisions of *sec. 162* or to be given at his or her choice some other work compatible with his or her aptitude in addition to such compensation to which he or she may be entitled by law).

The following are grounds for terminating the employment relationship under *sec. 434*:

C *force majeure* or unforeseen event not attributable to the employer or the employer's physical or mental incapacity or death entails the suspension of work as an inevitable, immediate and direct consequence;

C the known and obvious inability of the undertaking to pay its way;

C the exhaustion of the substance being extracted by a mining undertaking;

C the cases referred to in *sec. 38*; and

C statutory declaration of insolvency proceedings or bankruptcy if the competent authority or the creditors decide on the definitive closure of the undertaking or the definitive retrenchment of production.

### **Termination of employment at the initiative of the employer**

The following constitute sufficient justification for the employer to terminate the employment relationship without incurring liability (*sec. 47*):

C if the worker or the trade union which proposed or recommended him or her deceives the employer by means of false certificates or references attributing to the worker's abilities, skills or

qualities which he or she does not possess. These grounds for termination cease to be operative after the worker has completed 30 days= employment;

C if the worker in the course of his or her employment commits a dishonest or dishonourable act, violence, threats or ill-treatment towards the employer or any member of the employer=s family or the top management or managerial personnel of the undertaking or establishment, except in the case of provocation or self-defence;

C if the worker is guilty of any of the acts mentioned in the preceding clauses towards any fellow workers and workplace discipline is affected as a consequence of such acts;

C if the worker is guilty outside his or her employment of any of the acts mentioned in the second ground above and these acts are of such a serious nature as to render the fulfilment of the contract of employment impossible;

C if the worker in the performance of his or her work or in connection therewith wilfully causes material damage to the buildings, works, machinery, tools, raw materials or other objects connected with the work;

C if the worker causes damage as in the preceding clause of a serious character acting without malicious intent but with negligence which is the sole cause of the damage;

C if the worker by his or her inexcusable imprudence or carelessness endangers the safety of the establishment or the persons therein;

C if the worker is guilty of immoral conduct in the establishment or workplace;

C if the worker reveals manufacturing secrets or communicates matters of a private character to the detriment of the undertaking;

C if the worker is absent from work more than three times in a period of 30 days without the employer=s permission or without sufficient reason;

C if the worker refuses to obey the employer or his or her representative without sufficient reason in matters connected with the work under the contract;

C if the worker refuses to adopt preventive measures or follow the procedure laid down for the prevention of accidents or disease;

C if the worker attends work in a state of intoxication or under the influence of a narcotic or harmful drug unless, in the latter case, he or she has a medical prescription. Before commencing service, the worker should inform the employer of the facts and submit a certificate signed by a medical practitioner;

C if the worker receives an executory judgement sentencing him or her to a term of imprisonment preventing him or her from fulfilling the obligations under the employment relationship; and

C on grounds similar to those laid down in the preceding clauses if they are of equal gravity and entail similar consequences as far as the work is concerned.

Although there is no specific rule on trade union immunity, *art. 123(XXII)* of the Mexican Constitution provides that if an employer dismisses a worker without justifiable cause or because he or she joined an association or union or took part in a lawful strike, the employer is required at the election of the worker either to fulfill the contract or to indemnify the worker to the amount of three months= wages.

In regard to the right of the working mother to maternity protection, *sec. 170* of the FLA establishes reinstatement in the post she previously occupied on condition that she returns to work within the year following her confinement (*sec. 170(VI)*).

### **Notice and prior procedural safeguards**

Pursuant to the provisions of *sec. 47* of the FLA, the employer must serve written notice on the employee indicating the date of termination of his or her contract and the reason or reasons therefor. Notice should be given to the worker and, in the event that he or she refuses to accept it, the employer should, within the five days following the dismissal, inform the respective Board, furnish the official address of the worker and request the Board to notify the worker.

Failure to notify the worker or the Board may be considered grounds on which to declare dismissal unjustified.

*Sec. 435* provides that in case of *force majeure*, declared insolvency, bankruptcy or exhausted mines, notice of termination should be communicated to the Conciliation and Arbitration Board for its approval or disapproval.

Where the reason for termination of employment is the inability of the employer to pay, the employer must, prior to termination, obtain the authorization of the Conciliation and Arbitration Board in accordance with the provisions concerning collective disputes concerning wages and money claims. In such cases of termination, the workers are entitled to three months=wages by way of compensation, plus the length-of-service bonus referred to in *sec. 162 (sec. 436)*. Any proposal to reduce the hours of work in an undertaking or establishment must take into account the staff lists according to posts and seniority, the workers having least seniority being first affected by such reductions (*sec. 437*).

Where the installation of machinery or new methods of work results in reduction of personnel, the employer must, if there is no agreement covering the case, obtain the authorization of the Conciliation and Arbitration Board. The workers laid off are entitled to four months=wages by way of compensation plus an additional 20 days= wages for each year of service or an amount stipulated in the contract of employment if this is greater, as well as the length-of-service bonus referred to in *sec. 162 (sec. 439)*.

### **Severance pay**

Under *sec. 49* of the FLA, the employer may, in the following cases, be released from the obligation to reinstate the worker by paying the compensation referred to in *sec. 50*:

- C in the case of workers who have been employed for less than one year in the undertaking;
- C if sufficient evidence is furnished to the satisfaction of the Conciliation and Arbitration Board that the worker on account of the work performed or the nature of the work is in direct and permanent contact with the employer and the Board is of the opinion, taking into consideration all the circumstances of the case, that continuation of the work is impossible;
- C in the case of employees in a position of trust;
- C in domestic service; and
- C in the case of casual workers.

Compensation referred to in the preceding section consists of the following:

- C if the employment relationship is for a specified period of less than one year, an amount equal to the total amount of remuneration payable for one-half of the entire period of employment; if the employment relationship lasted for more than one year, six months= wages for the first year of service plus 20 days= wages for each additional year of service;
- C if the employment relationship is for an unspecified period the compensation consists of 20 days= wages for each year of service;
- C in addition to the compensation referred to in the preceding clause, three months= wages plus the entire remuneration payable in respect of the period from the date of dismissal to the date on which the compensation is paid.

### **Avenues for redress**

The worker may apply to a Conciliation and Arbitration Board for reinstatement in the post occupied or for compensation in the form of three months= wages, at his or her choice.

If the employer fails to furnish proof of cause for dismissal at the hearing, the worker is furthermore entitled, irrespective of the type of action instituted, to payment of wages in arrears from the day of dismissal until the day the award is carried out (*sec. 48*).

Moreover, if the employer is unable to furnish conclusive evidence of the reasons for terminating the contract in the course of the legal proceedings, the employee enjoys the rights referred to in *sec. 48 (sec. 55)*.



## *Namibia*

### **Sources of regulation**

The Labour Act of 1992 (LA) is the main source of labour law.<sup>233</sup> Other relevant labour legislation is the Apprenticeship Ordinance of 1938, the Merchant Shipping Act of 1951, and the Public Service Act of 1980.

### **Scope of legislation**

The LA applies to every employer (including the State) and employee, with the exception of members of the Namibia Defence Force and Police Force (*sec. 2*). It overrides inferior terms contained in other legislation or collective agreements, but a provision in the LA will not apply to employees covered by a provision in legislation or a collective agreement which is more favourable to the employee.

### **Contracts of employment**

According to the LA, an employee is a natural person who is either working for an employer, receiving or entitled to receive remuneration, or is assisting in any manner in the carrying on or conducting of an employer's business (*sec. 1(a)*). There is no specific reference in the LA to particular types of employment contracts. The provisions would therefore seem to cover contracts of a fixed-term, short-term or indefinite duration, as well as casual and seasonal employment.

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of a fixed-term contract;
- C the employee's retirement; and
- C the death of the employer.

### **Termination of employment at the initiative of the employer**

All dismissals must be both for a valid reason (which are undefined) and implemented through a fair procedure. Summary dismissal is only justified where the employee is guilty of serious misconduct,

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<sup>233</sup> A draft Labour Bill is currently under consideration in Namibia. This draft does not, however, appear to substantively change the law on termination of employment.

that is, misconduct of such a nature that it would be unreasonable to require the continuation of employment during the notice period.

Under the LA, the following reasons do not constitute fair reasons for dismissal (*sec. 45*):

- C an employee's race, colour, national extraction, social origin, religion, creed or political opinion, sex, marital status, family responsibilities, sexual orientation or disability;
- C a female employee's pregnancy or a reason connected with her pregnancy (*sec. 41*);
- C an employee's trade union activities or membership;
- C providing information or giving evidence, or complying with a lawful requirement, or presenting a complaint or initiating or enforcing any other proceedings under the law;
- C any act performed or omission committed by an employee which is authorized by the LA, collective agreement or contract of employment, such as an employee's temporary absence from work due to illness or injury, or because he or she has taken, or proposes to take, any leave to which he or she is entitled under the law;
- C an employee's exercise of the right in the LA to remove himself or herself from a work situation which he or she has reasonable justification to believe presents an imminent or serious danger to his or her life or health; and
- C an employee's participation in a legal strike or lockout, or an employee's refusal to do any work normally done by an employee who is on a legal strike.

The LA does not define what number of dismissals will constitute a collective rather than individual dismissal. It does, however, stipulate procedures to be followed for collective dismissals (see below).

### Notice and prior procedural safeguards

Where ordinary dismissal is planned for contracts of indefinite employment, the employer must give due notice as follows, according to the employee's length of service:

Length of continuous employment	Notice period ( <i>sec. 47, LA</i> )
4 weeks or less	1 working day's notice, given on any working day
Over 4 weeks but less than 1 year	1 week's notice, given on or before the usual pay day
Over 1 year	1 month's notice, given before the first or 15th of the month
Probationary period of 3 months or less	Not less than 1 week's notice

A period of notice shall not be given during, or run concurrently with, an employee's period of leave, including sick leave or maternity leave (*sec. 47(1), LA*).

Parties can also agree to a longer period of notice than is provided for in the LA (*sec. 47(6)*). Moreover, payment in lieu of notice is possible, in which case the employee shall be paid a sum equal to the wages he or she would have received, had employment been terminated by the giving of notice (*sec. 47(5), LA*).

Where there is a contravention of, or failure to comply with, the requirements concerning the period of notice (*sec. 47(5)*), the district labour court may order the employer to:

- C restore the employee concerned in the position in which he or she would have been, had such employer complied with the requirements; or
- C pay such an employee any remuneration that would have been paid, had the contract not been terminated.<sup>2</sup>

Although there is no explicit reference in the statute to trade union consultations or hearings for employees, the employer must observe any terms of an applicable collective agreement regarding consultations. In addition, *sec. 45(1)(b)* of the LA states that the absence of a fair procedure<sup>@</sup> constitutes an unfair dismissal. In other words, the courts will decide if a fair procedure had been followed. One factor that may be taken into account is whether consultation had taken place.

In the case of collective dismissals, no permission is needed from authorities but the authorities do have to be informed. However, when an employer contemplates dismissals of any employees on account of the reorganization of the business due to economic or technological reasons, he or she shall, in accordance with *sec. 50* of the LA:

- C notify the Labour Commissioner of such a dismissal; and
- C notify the registered unions or workplace representatives in the enterprise.

The Labour Commissioner and unions have to be informed about the reasons for the terminations, the number and categories of workers likely to be affected, and the period over which the dismissals are intended to be carried out. The information should be provided at least four weeks before the first dismissals are to take effect, except where the employer can show it is not reasonably practicable to comply with such a limit (*sec. 50(1)*, LA).

Before any dismissals are undertaken, the employer has to consult with the union representatives on measures to be taken in order to avert or minimize the dismissals and in order to take measures to mitigate the adverse effects of such dismissals (*sec. 50(1)*, LA).

Any employer who contravenes or fails to comply with these provisions is guilty of an offence and, on conviction, is liable to a maximum fine of 4,000 rand or maximum imprisonment of 12 months, or both (*sec. 50(2)*, LA).

In the case of collective dismissals, an employee who has completed one year or more of continuous employment with his or her employer shall be entitled to severance pay at the termination of employment (see below).

### **Severance payments**

An employee who has completed one year or more of continuous employment with his or her employer is entitled to severance pay where:

- C he or she has reached the retirement age of 65;<sup>3</sup>

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<sup>2</sup> These remedies only concern the period of notice (and instances where the employer does not pay the required severance payment) and not the procedural fairness of the dismissal as a whole. The remedies applicable to procedural and substantive fairness are regulated by *sec. 46* of the LA.

<sup>3</sup> It seems that this form of severance pay will not be applicable to employees who retire before the age of 65,

- C the death of an employer terminates the employment relationship;<sup>4</sup>
- C the insolvency of an employer who is a natural person terminates the employment relationship;<sup>1</sup> or
- C the employee has been collectively dismissed.

The severance payment shall be equivalent to one week's wages for each completed year of continuous employment with that employer unless a pension or annuity provided by the employer will provide a larger amount.

Severance pay will not be granted if the employee unreasonably refuses to be reinstated under such terms and conditions which are not less favourable than the terms and conditions which were applicable to such employee immediately before the termination (*sec. 52(2)*, LA).

### Avenues for redress

In cases where dismissals are disputed, the parties can approach the district labour court (*sec. 46(1)*, LA). The court shall not consider a claim or appeal unless it is presented within 12 months of the moment when the act complained of occurred, unless in all circumstances of the case it is just to do so (*sec. 24*, LA). The Labour Court hears appeals from the district labour court. The Labour Court's decisions are final (*sec. 18(1)*, LA).

In cases of unfair dismissals, the district labour court will either order reinstatement or compensation. Reinstatement is an available remedy and all factors must be taken into account, such as the wishes of the employee, the circumstances under which the dismissal took place (including negative behaviour on the part of the employee) and the practicality of the order (*sec. 46*, LA). With regard to reinstatement, the court could either demand that:

- C the employee be reinstated as if the dismissal had never taken place;
- C the employee be re-engaged in work comparable to that in which the employee was engaged prior to dismissal; or
- C where the district labour court finds that the employee caused or contributed to the dismissal to any extent, it may include a disciplinary penalty as a term of the order for re-engagement (*sec. 46(1)*, LA).

An award of compensation is to be equal to the losses suffered by an employee in consequence of such dismissal or an award of an amount which would have been paid to him or her had the employee not been dismissed (*sec. 46(1)*).

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since this is the age specified in the LA and no reference is made to severance payments in the case of early retirement.

<sup>4</sup> If the employee enters the employment of the employer's widow or widower or the employer's dependant or successor within one month after the death of the employer on the same (or better terms) than those applicable before, severance pay need not be paid (*sec. 52(2)*, LA).

<sup>1</sup> Where the employee is employed by a partnership which was dissolved and the employee enters the employment of one or more of the former partners within one month after dissolution on the same terms as before, or on more favourable ones C or unreasonably refuses such employment C the severance payment need not be paid (*sec. 52(2) and (3)*, LA).

In considering the nature of the compensation to be awarded, the court shall have regard to the circumstances in which the employee has been dismissed, including the extent to which the employee has contributed to or caused his or her dismissal (*sec. 46(4), LA*).

## *Nepal*

### **Sources of regulation**

In Nepal, termination of employment is governed by the Labour Act, 2048 (1991) (LA). Exercising powers conferred by the LA, the Government has issued the Labour Regulation, 2050 (1993) (LR), and, with a more limited scope, the Labour Rule Relating to Tea Estates, 2050 (1994) (LTE), both expanding upon the LA in minor respects.

### **Scope of legislation**

The LA's Preamble indicates that the Act applies to workers and employees in establishments of various sectors, including tea estates. The LA applies only to establishments where at least ten workers or employees are employed, unless the establishment is situated in industrial districts established by the Government (*sec. 2(b)*, LA). *Employees* are defined as persons engaged in the administrative functions of the establishment. *Workers* are defined as persons employed, in return for the payment of salary or wages, in production, in providing services, or in any work related or incidental thereto, including work on a piece-rate contract or agreement basis (*sec. 2(d)*, LA). Apprentices are covered by the Industrial Apprenticeship Training Act, 1982, and as such are not considered to be workers or employees.

### **Contracts of employment**

Prior to recruitment, the general manager of an establishment must classify the posts of the workers and employees according to the nature of the production process, service or work of the establishment. The labour office to which the classification must be notified may direct the general manager to amend the classification of posts (*sec. 3*, LA). Workers and employees are appointed to a classified post by the general manager, rather than hired on the basis of a contract of employment. The general manager is the person who takes the final decision on matters concerning the activities of the establishment (*sec. 2(f)*, LA). Workers and employees, including those engaged in any piece-rate or contract work, must be granted a permanent appointment after they complete one year of uninterrupted service if their performance, honesty, discipline, dedication to work, attendance and so on are satisfactory. The mandatory appointment letter issued by the general manager must explicitly mention the post, remuneration, and conditions of service for the worker or employee concerned. The employer has to inform the competent labour office of the appointment (*sec. 4*, LA).

In the event that any establishment is required to increase production or services for a short period of time, it may appoint workers or employees according to need on a fixed-term basis. If it becomes necessary to appoint any person for a certain period of time or for any specified work in view of the nature of the work for the establishment, such person may be appointed on a contract basis if his or her remuneration, service period and conditions of service are explicitly mentioned in the contract (*sec. 7*,

LA). There is no obligation to conclude the contract in writing unless the appointment, however temporary, is to a permanent post.

It follows from the foregoing that the probationary period is a maximum of one year, irrespective of the type of employment relationship established.

### **Termination of employment**

Any worker or employee who illegally engages in rioting, or directly or indirectly instigates others to do so, in an establishment other than the one in which he or she is working, or in any government office, may be dismissed from service by the Department of Labour. Both the establishment and the Department of Labour<sup>234</sup> have to follow the procedure set out in *sec. 53* of the LA (see below) before dismissing a worker or an employee.

The general manager of an establishment may compel any worker or employee who has attained the age of 55 years to retire. However, the service of any worker or employee who is indispensable to the operation of the establishment may be extended for an additional five years (*sec. 15*, LA).

### **Termination of employment at the initiative of the employer**

It is unlawful to terminate the service of a permanent worker or employee of any establishment unless the procedures and rules prescribed under the LA or regulations issued under it are followed (*sec. 10*, LA). As a result, an employer can only give notice of termination to a permanent worker or employee in accordance with the procedure set out in cases of redundancy and misconduct.

If the production or services of an establishment need to be curtailed, or if the entire establishment needs to be closed down due to *Aspecial circumstances@* for a period of up to three months, all permanent workers and employees, and all workers working in shifts or on a wage basis, must be maintained *Aon call@* with half the salary they normally receive and with all appropriate benefits which they have been receiving. *Aspecial circumstances@* relate to production stoppages due to damage to machinery, shortage of energy or raw materials, natural disaster or lack of customers. Permission must be obtained from the labour office if the period of curtailment is 15 days or less, and from the Department of Labour if the period exceeds 15 days (*sec. 11*, LA).

A different regime applies to workers or employees of a seasonal establishment when it closes during the off-season period notified to the labour office. Permanent workers or employees of such establishments receive an allowance amounting to at least 25 per cent of the remuneration to which they are normally entitled.

If the need for curtailment or closure exceeds three months, the general manager may lay off all or part of the enterprise's employees after obtaining permission from the Department of Labour. If it

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<sup>234</sup> One labour officer is appointed per region. Prominent among his or her functions are conducting inspections in establishments, providing advice with a view to improving labour relations and solving disputes between the workers or employees and the general manager (*sec. 65*, LA). Whereas the Ministry of Labour devises labour policy, the Department of Labour coordinates the implementation of policy. Regional labour offices are the first-level contact institutions for employers and employees/workers.

becomes necessary to subsequently fill the posts vacated by retrenched workers and employees, priority must be given to the retrenched workers or employees as far as possible.

It is lawful to terminate the employment of any worker or employee who has not recovered from an occupational accident within a year, or who has been found to be permanently disabled by a certified physician (*sec. 21, LR*).

Any worker or employee committing any of the following forms of misconduct may ultimately be dismissed from service:

- C causing physical injury or harm, tying up or detaining the general manager, or engaging in destructive activities within the establishment in respect of any labour dispute or any other issue;
- C any criminal offence involving moral turpitude for which the worker or employee is convicted or imprisoned;
- C taking or instigating others to take action in such a way as to adversely affect the production of or the provision of services by the establishment, or preventing the supply of food and water, or cutting telephone or electricity service, or obstructing movement within the establishment;
- C stealing any property of the establishment, or showing dishonesty in the business of the establishment;
- C offering or accepting bribes;
- C participating or forcing others to participate in a strike which has been declared irregular or illegal;
- C participating in a strike without fulfilling the legal requirements, or wilfully slowing down work so that the interests of the establishment are harmed;
- C wilfully destroying or damaging any asset of the establishment, or carrying outside the premises of the establishment and using or allowing unauthorized persons to use such assets without obtaining permission from the authorized person;
- C frequently and intentionally violating any order or directive issued under the LA or the rules established under the LA, or any work rules made by the establishment, or misbehaving in relation to the clients of the establishment;
- C absence from work or frequent late arrivals for work without having obtained permission;
- C consuming alcohol during office hours, or reporting to work after consuming alcohol;
- C committing any action which violates the secrecy of the establishment relating to any special technology, with the objective of causing losses to the establishment where the worker or employee is employed; and
- C wilfully misusing or damaging any object or facility kept to ensure the welfare, health and safety of workers or employees.

Any worker or employee who behaves in a manner mentioned under the first two grounds mentioned above may be dismissed from service at once. Any worker or employee who commits a type of misconduct listed under the third through thirteenth grounds may be dismissed after being punished twice. The initial punishment for the types of misconduct listed under the third through fifth grounds is a suspension of three months; for those listed under the sixth through ninth grounds, the withholding of the annual salary increment, and for those listed under the tenth through thirteenth grounds, a warning (*secs. 51 and 52, LA*).



If an employee remains absent from work for more than 30 days without informing his or her employer about the extension of the leave or without obtaining leave, he or she can be dismissed from service with a reduction of salary commensurate with the number of days of absence (*sec. 37, LR*).

During the probationary period, the contract of employment may be terminated by either party without notice.

### **Notice and prior procedural safeguards**

In the event of retrenchment, the workers or employees performing similar work who were appointed last must be laid off first (*sec. 12(1), LA*). The LR lays down the following particulars (*sec. 8, LR*):

- C non-Nepali nationals must be retrenched first, even if they have not been employed last;
- C workers and employees who are absent for a long period due to poor health must be retrenched first; and
- C other reasons can be given for the need to deviate from the last-in-first-out order.

Pursuant to the LTE, the same selection criteria for retrenchment apply to tea estate labourers.

Retrenched permanent workers or employees, or workers or employees who have completed one year of uninterrupted service, are entitled to one month's advance notice indicating the reasons for lay-off (*sec. 11(3)(a), LA*). This rule does not apply to workers or employees appointed under fixed-term contracts (*sec. 11(4), LA*). A notice can be personally given in the presence of three witnesses or sent by registered mail to the last recorded address of the other party.

A notice of imminent termination on disciplinary grounds, explicitly referring to the alleged misconduct and the punishment that might be imposed, must grant a reply period of seven days within which the employment relationship cannot be terminated. This reply period is reduced to five days if the imminent termination is notified after the worker or the employee has received two warnings. If the worker or the employee concerned does not submit an explanation within the time-limit prescribed, or if the explanation submitted by him or her is not found to be satisfactory, the worker or employee may be punished for misconduct. If the worker or the employee concerned does not accept notification of the time-limit, or remains absent, he or she is deemed to have been notified about the time-limit after it is sent to his or her address by registered post and the copy is posted on the public notice board of the establishment, subject to a statement that the copy was posted, prepared and witnessed by at least three persons and subject to the sending of another copy to the labour office (*sec. 53, LA*).

### **Severance pay**

The one month's advance notice mentioned above may be substituted by one month's remuneration. In addition, permanent workers or employees, or workers or employees who have completed one year of uninterrupted service, are entitled to lump-sum compensation at the rate of 30 days' salary for every year of service completed in the establishment. In this regard, a service period of at least six months constitutes a service period of one year (*sec. 11, LA*).

Permanent workers or employees who have served for at least three years and whose employment is terminated are entitled to a lump-sum gratuity the amount of which increases with seniority (*sec. 23, LR*). Those dismissed from service by the employer or the Department of Labour for any of the above-mentioned forms of misconduct are not entitled to this gratuity (*sec. 23(3), LR*). Retrenched workers or employees can choose between the gratuity and the compensation mentioned in the previous paragraph. Permanently disabled workers can claim separate compensation, in addition to the gratuity (*sec. 21, LR*). The LTE applies these principles to tea estate labourers.

### **Avenues for redress**

Individual claims or complaints regarding employment matters must be submitted to the general manager in writing (*sec. 73, LA*). If the general manager fails to resolve the problem through discussions within 15 days, the claim may be submitted to the competent labour office, which will arrange bilateral negotiations within seven days between the general manager and the workers or employees concerned. If the problem is still not resolved, the chief of the competent labour office must determine the dispute, but this decision is subject to an appeal to the Labour Court within a period of 35 days from the date of receiving notice of the decision.

An employee subject to a disciplinary measure (including dismissal) may file a complaint with the labour office within 35 days from the date of receipt of the dismissal notice. He or she can appeal against the decision of the labour office within 35 days after receiving notice of the decision.

Terminating the employment of a permanent worker or employee without observing the legal prescriptions (Illegal breach) is void and no compensation can substitute for the specific remedy of reinstatement.

Workers and employees can appeal against an order to wind up an establishment to the Supreme Court within 35 days of such an order.

## *Netherlands*

### **Sources of regulation**

The legislation governing termination of employment in the Netherlands is the Civil Code (CC), the Labour Relations (Special Power) Decree (LRD), the Works Council Act (WCA), the Conditions of Work Act (CWA) and the Notification of Collective Dismissals Act (CDA). A statute producing major amendments to the CC entered into effect on 1 April 1997 and further amendment bills (e.g. regarding the approval of termination by the Director of the Regional Employment Office) were pending in Parliament at that time.

In the event the law remains silent, or its application is not mandatory, collective labour agreements may also constitute a source of law. A number of sections of the CC contain a subsection providing that a departure from the principle is permitted only under a collective agreement or an arrangement made by or on behalf of a competent public body.

### **Scope of the legislation**

A contract of employment is defined as an agreement under which one party, the employee, undertakes to perform work for a certain period of time in the service of the other party, the employer, in return for remuneration (*sec. 610, CC*). The CC's provisions on contracts of employment do not apply to persons in the employment of the State, provinces, municipalities, water control boards or other public bodies, unless they are declared applicable either by or on behalf of the parties before, or on the commencement of, an employment relationship, or by law or ordinance (*sec. 615, CC*).

The LRD covers contracts of employment as well as situations in which a worker assisted by a maximum of two other workers personally performs work without having concluded a contract of employment, unless this work is performed only on an occasional basis. On the other hand, the LRD does not apply to (*sec. 2, LRD*):

- C employees of public bodies;
- C the teaching staff of institutes of education managed by a natural person or body corporate;
- C persons who hold ecclesiastical offices;
- C employees who for less than three days a week perform only or principally domestic work or personal services in the household of private individuals;
- C company directors;
- C disabled workers employed in specially protected workplaces; and
- C workers during the probationary period.

The CDA does not apply to the termination of an employment relationship for which the approval of the Director of the Regional Employment Office is not required, or which is effected solely for reasons connected with the employee himself or herself, or at the end of seasonal work for the performance of which the relationship was established (*sec. 1.2, CDA*).

## **Contracts of employment**

The law does not establish a typology of contracts of employment. For the purpose of termination of employment a distinction is maintained, however, between contracts of employment concluded for a definite period and those concluded for an indefinite period. An employee with a fixed-term contract cannot challenge the terminology of that contract at the end of the contract, although earlier termination requires authorization as for a dismissal. For the purpose of terminating fixed-term contracts by giving notice, contracts of employment between the same parties which have run consecutively, with intervals of not more than 31 days between them, are presumed to have been continued, unless they merely concern casual, irregular work and each contract expires within 31 days (*sec. 668(4), CC*). The same presumption applies if, under a contract concluded for an indefinite period, the employee has been consecutively employed by different employers succeeding each other in respect of the work performed, or if the employment relationship is resumed following a court order (see below) (*sec. 673, CC*). However, aside from these presumptions, a fixed-term contract can be concluded for a specific period, a specific piece of work, or a specific situation. Proposed legislation will impose a definable objective time limit on fixed-term contracts. Also under proposed legislation a contract will become indefinite if it is renewed more than twice, or if the total duration is over three years for a series of contracts, subject to collective agreements.

## **Termination of employment**

The CC lists the following grounds for termination of a contract of employment, not at the employer's initiative:

- C** the expiry of a fixed term stipulated by contract, rules, law or custom (*sec. 667(1), CC*). If the contract of employment is continued unchallenged by the parties upon expiry, it is deemed to have again been established for the same period, not exceeding one year in each instance, on the same terms as before (*sec. 668(1), CC*). A continued contract of employment concluded for a definite period can be terminated only by giving notice (*sec. 668(3), CC*);
- C** the death of the employee, but not of the employer (*secs. 674-675, CC*). However, both the employer's heirs and the employee are entitled to give notice of the termination of a contract concluded for a definite period (*sec. 675, CC*); and
- C** mutual consent (implied in *sec. 677(1), CC*).

A contract of employment does not end by virtue of a stipulation terminating the employment relationship because of the employee's marriage, pregnancy or confinement to give birth. Any stipulations to this effect are void (*sec. 667(3) and (4), CC*).

## **Termination of employment at the initiative of the employer**

The following grounds for termination provided by the CC are predominantly used by employers:

- C a contract concluded for an indefinite period can be terminated by either the employee or the employer giving notice (*secs. 669-672, CC*). It is lawful to terminate a contract of employment without giving notice by paying compensation in lieu of notice (*sec. 677, CC*);
- C both employer and employee can terminate the contract by informing the other party of an urgent reason (*sec. 677(1), CC*), meaning such acts, qualities or behaviour of one party as make it unreasonable to expect the other party to allow the employment relationship to continue (*secs. 678 and 679(1), CC*). However, the urgent reasons in respect of the employer and the employee which are listed in the law are non-exhaustive;
- C the cantonal court can, upon application by the employer or the employee rescind the contract for substantial reasons (*sec. 685, CC*). Substantial reasons are circumstances which would have constituted an urgent reason if the employment relationship had been immediately terminated, and changes in circumstances which justify the termination of the employment relationship (*sec. 685(1), CC*).

However, an employer cannot terminate a contract of employment with notice:

- C because of an employee's marriage;
- C while an employee is unfit to perform his or her work because of illness unless his or her incapacity has lasted at least two years;
- C while an employee who is fit to perform the agreed work is pregnant, because of her confinement or during a period of six weeks after the period during which she was entitled to sickness allowance has elapsed;
- C during the period the employee is completing military service or alternative service (*sec. 670(2)-(5), CC*);
- C during the employee's membership of the Workers' Council or any of its committees, unless the undertaking or the part of the undertaking where the employee is employed stops its activities (*sec. 21(2), WCA*); or
- C because the employee has made a claim, whether or not before a court, based on an allegation of unequal treatment of the sexes (*sec. 646, CC*).

In these cases, the employer is also not entitled to terminate the contract by paying compensation in lieu of notice. The employee can claim that the termination is null and void within two months of receiving notice or of the termination of the contract if the employer has terminated the contract otherwise than by giving notice (*sec. 677(5), CC*).

### **Notice and prior procedural safeguards**

If a probationary period has been agreed, either party is entitled to terminate the employment relationship before the probationary period expires without giving notice or without having to pay compensation (*sec. 676, CC*).

Prior notice is required to terminate a contract concluded for a definite period, if such notice is required by written contract, by rules or (if it is not inconsistent with a written contract) by custom (*sec. 667(2), CC*). Prior notice of termination must also be given if a fixed-term contract is continued (*sec. 668(3), CC*).

Notice of the termination of a contract concluded for an indefinite period must be given on the day or one of the days specified in a contract, in rules or by custom, if any such specification exists.

Provisions on the period of notice to be observed by the employer as well as the employee can be summarized in four rules:

- C *Basic period of notice:* The basic period of notice must be equal to the time normally elapsing between two consecutive payments of remuneration, but may not exceed six weeks, unless (1) there is a written contract or a set of rules providing for a longer period; (2) this period is not longer than six months; and (3) the employer is not required to give less notice than the employee.
- C *Period of notice based on seniority:* The employer must give at least as many weeks=notice as the number of full years for which the relationship has continued since the employee reached the age of majority, up to a maximum of 13 weeks. This notice period is extended by one week for each year of employment after the worker has reached the age of 45, with a maximum of a further 13 weeks. Added together the maximum is 26 weeks. On the other hand, the employee must give at least as many weeks=notice as the employment relationship has comprised periods of two full years since he or she reached the age of majority, with a maximum of six weeks. Of the basic period of notice and the period of notice based on seniority, only the longer period applies, and in any event, the notice period is subject to the comments below regarding notice for those who are 65 or more years of age.
- C *Notice if employee is 50 or over:* The employer must give a minimum of three weeks notice to an employee who is 50 years of age or older and has been employed for at least one full year.
- C *Notice if employee is 65 or over:* For employees who are 65 or more years of age, the basic period of notice or the period of notice based on seniority applies, but without the extended notice period applicable to workers who have reached 45 years of age. In this case also, this period of notice can be longer as long as: (1) there is a written contract or a set of rules; (2) the period is not longer than six months; and (3) the employer is not required to give less notice than the employee.

No notice needs to be given of termination of a contract of employment for urgent reasons.

Where a contract of employment has been concluded for more than five years or for the lifetime of the employee, the employee is entitled to give six months=notice of its termination after it has been in existence for five years (*sec. 684, CC*). The employer on the other hand cannot terminate employment by giving notice.

The contract of a former member of the Works Council or any of its committees who has served as such within two years previously, or of a candidate for election to the Works Council, may be terminated on notice only where the cantonal court has approved the termination. The cantonal court will not give its approval unless it is satisfied that the termination is unconnected with the employee's membership of the Works Council (*sec. 21(3), WCA*).

Termination restrictions which are similar to those for Works Council members apply to employees assuming certain safety and health functions in the enterprise, i.e. supervisors, doctors and members of a safety and health committee (*secs. 8, 18 and 19, CA*).

Neither the employer nor the employee can terminate a contract of employment without the consent of the Director of the Regional Employment Office, unless the contract is terminated:

- C for an urgent reason of which the employee or the employer is immediately informed;

- C by mutual agreement; or
- C by expiry of the period for which the contract was concluded (*sec. 6(1) and (2)*, LRD).

There are no statutory provisions which determine when a permit will be issued. The decision is taken after the parties concerned have been heard and the advice of a dismissal committee composed of one representative each of the workers= and employers= organizations has been obtained. In taking a decision the Regional Director follows the guidelines established by the Minister of Social Affairs and Employment. A permit is usually granted when the Regional Director considers that the dismissal is reasonable, i.e. based on incompetence, misconduct or redundancy. A permit may limit the period in which the beneficiary can actually terminate the contract. It can be granted subject to conditions, such as a temporary prohibition to hire a new worker to do the same work. A termination which has not obtained this consent is void and employers as well as employees can apply for nullification within six months after the act of termination (*sec. 9(1) and (2)*, CC). There is no appeal against the decision of the Regional Director.

In case of collective dismissal a number of procedural rules must be observed in order to obtain the necessary prior approval of the Director of the Regional Employment Office. A collective dismissal is the termination by one employer of the contracts of at least 20 employees employed within the region of one employment office within three months (*sec. 3(1)*, CDA). The employer must notify the Director of the Regional Employment Office and any relevant employees= association (for the purposes of consultation) of the planned dates of termination, certain particulars about the employees identified for possible retrenchment and the date on which the Works Council was consulted (*secs. 3 and 4*, CDA). The Director must postpone consideration of the application for approval for one month after the notification has become complete, provided this does not jeopardize the re-employment of the employees threatened with dismissal or the employment of the other employees in the undertaking concerned (*sec. 6(1)*, CDA). In cases where the enterprise is bankrupt, the requirement for the employer to consult the employees= associations or Works Council, or for the Director to postpone his or her consideration, does not apply (*sec. 6(2) and (4)*, CDA).

### **Severance pay**

There are no statutory provisions regarding the calculation of redundancy payments, but in some industrial sectors collective agreements provide guidelines in case of mergers, takeovers, reorganization and so on. Compensation may be awarded, however, as described below.

In the event of the death of the employee the employer must pay his or her surviving relatives a death benefit equal to the remuneration the employee would have received from the day on which he or she died until the last day of the second month after this day. The amount of the entitlement to a death benefit depends upon the entitlement to benefits under statutory health or disablement insurance (*sec. 674*, CC).

### **Avenues for redress**

A court may require the party who has become liable for compensation or who has terminated the contract on evidently unreasonable grounds to resume the employment relationship and make arrangements for the resumption accordingly.

The employer or employee is liable for compensation if he or she terminates the contract without giving notice or without regard for the procedure to be followed (i.e. proper day on which to give notice and proper period of notice). Equally liable is a party who has, by his or her conduct, wilfully or negligently provided an urgent reason for terminating the contract, provided the other party has terminated the contract without giving notice or without regard for the notice rules, or the court has declared the contract rescinded (*sec. 677(3)*, CC). The other party is then entitled to opt for fixed compensation, or to demand full damages (*sec. 677(4)*, CC). Fixed compensation is equivalent to the amount of the pecuniary remuneration for the period during which the employment relationship would have remained in effect if it had been terminated in the prescribed manner, unless a larger amount is set under a written contract or a set of rules, or unless a court deeming the compensation excessive reduces it within certain limits (*sec. 674*, CC). Unlike the party opting for the fixed compensation, the party demanding full damages must prove the damage.

In addition, if the employer or the employee terminates a contract on evidently unreasonable grounds whether or not he or she observes the rules applicable to termination, a court can award the other party damages. The evidently unreasonable grounds in respect of the employer and the employee which are listed in the law are non-exhaustive (*sec. 681*, CC).

Compensation may also be ordered by the cantonal court rescinding the contract because of changes in circumstances, if the court deems it fair to do so in view of the circumstances (*sec. 685(8)*, CC). The calculation of compensation is not governed by statute. In order to cope with uncertainty, the Association of Dutch Cantonal Courts has issued **ARecommendations@** containing motivation requirements for the cantonal court and a formula which cantonal courts can rely on to determine compensation when rescinding a contract of employment. The basis of this formula is the gross monthly salary, to which are added all fixed and agreed salary components and from which are excluded further components, such as pension contributions. Compensation is then determined by multiplying the monthly salary by the number of years of service and an adjustment factor. The years of service of employees of at least age 40 are multiplied by 1.5, and those of employees of at least age 50 by two. The adjustment factor incorporates the special circumstances of the case. For instance, if the termination of employment is **Aneutral@** (e.g. because the job has become redundant) the compensation will be multiplied by a factor of one. The factor will be higher if the reasons for the termination can be attributed to the employer, lower if the reasons can be attributed to the employee, and close to zero if urgent reasons attributable to the employee are involved.

A court may impose a severance payment in lieu of the resumption of an employment relationship. The court may do so at its own discretion or upon a request by one of the parties. The court determines the amount of the severance payment at its discretion, taking into account the circumstances of the case (*sec. 682*, CC).



## *New Zealand*

### **Sources of regulation**

Both statute and the common law comprise the modern law of dismissal at the initiative of the employer in New Zealand. The main legislation is the Employment Contracts Act, 1991 (ECA). Other relevant legislation includes: the Human Rights Act, 1993; the Parental Leave and Employment Protection Act, 1987 (PLEP); and the Social Security Act, 1964.<sup>235</sup> The common law is also an important source of law for termination of employment issues, because employees may also take action for wrongful dismissal under the common law jurisdiction. Redundancy payments are often governed by legally binding collective employment contracts (collective agreements). However, the statutory right to bring an unjustified dismissal claim may not be abrogated by agreement.

### **Scope of legislation**

The ECA requires every contract of employment to contain effective personal grievance procedures to deal with unjustified dismissal claims (*sec. 33*, ECA). As such, it covers all employees regardless of their category or sphere of work. Despite this broad purview, however, it does not have jurisdiction in relation to the armed forces or members of the police force which have separate dismissal mechanisms. The PLEP, however, applies to all employees.

Notably, the definition of *employee* under *sec. 2* of the ECA includes home workers, casual workers and probationers.

### **Contracts of employment**

Persons may be employed under a contract of indefinite duration, under a fixed-term contract or for a specified task. Such employees are also protected under the Human Rights Act, 1993, and the PLEP.

In addition, although the law does not prohibit the entry into fixed-term contracts, the reason for such a contract must be genuine and the contract should not be used as a device by the employer to avoid the obligations of a continuous employment relationship. However, the courts have emphasized that, if the fixed-term contract is genuine, and reflects the real relationship between the parties, its expiry will not be a *dismissal*.<sup>236</sup>

### **Termination of employment**

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<sup>235</sup> Note that the Industrial Relations Act, 1973, was repealed in 1987 and the Labour Relations Act, 1987, in 1991. The provisions of these statutes have been replaced by the Employment Contracts Act, 1991. The Maternity Leave and Employment Protection Act, 1980, was repealed in 1987 and has been replaced by the Parental Leave and Employment Protection Act, 1987.

<sup>236</sup> *Principal of Auckland College of Education v. Hagg* [1997] 1 ERNZ 116.

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of a fixed-term contract;
- C the completion of the specific task for which a contract was concluded;
- C the resignation or retirement of the employee; and
- C *force majeure*.

### **Termination of employment at the initiative of the employer**

The ECA requires that there must be a good reason for an employee to be dismissed at the employer's initiative (i.e. the dismissal must be justifiable, both on substantive grounds and procedurally). The reasons may include dismissal on the grounds of redundancy for genuine commercial reasons, or reasons connected to the employee's lack of capacity for the work or his or her conduct or performance on the job.

Certain categories of dismissal are presumed to be unjustified. These include dismissals:

- C on the grounds of trade union membership or participation in trade union activity (*sec. 28, ECA*);
- C for filing a complaint or participation in proceedings against an employer (*sec. 30, ECA*);
- C on grounds of race, colour, sex, marital status, religious or ethical belief or ethnic or national origins (*sec. 28, ECA*). In addition, the Human Rights Act, 1993, also makes it unlawful to discriminate on the grounds of disability, age, political opinion, employment status, family status or sexual orientation (*sec. 21, Human Rights Act*);
- C on the grounds of pregnancy, maternity or parental leave (*sec. 49, PLEP*);<sup>3</sup> and
- C due to temporary absence from work because of illness or injury (this is governed by the common law). However, there is no requirement on employers to keep positions open indefinitely when an employee is absent due to illness or injury. The question as to what is reasonable in such circumstances will be judged on a case-by-case basis.

Dismissal for reasons of redundancy, meaning dismissal for economic, organizational or technological reasons, is *prima facie* justified under the law, if it is genuine. The employer has the ultimate discretion to determine whether the operational requirements of the undertaking necessitate any redundancy. Nevertheless, certain procedural requirements (implied at common law) must be met. In addition, where an employee challenges a redundancy dismissal, adjudicatory bodies have jurisdiction to examine the dismissal to determine whether genuine commercial reasons in fact existed at the time of the termination.

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<sup>3</sup> Note that this would include male employees. *Sec. 49* of the PLEP gives the right of up to 12 months unpaid leave (to be shared between both parents) to employees who are having a child or who are adopting a child under 5 years of age. Where the employee takes four or more weeks of such leave, employment must be kept open unless the employer proves that the position cannot be kept open because a temporary replacement is not reasonably practicable due to the key nature of the position. The meaning of a key position will be interpreted strictly by the courts. If a position cannot be kept open, the employee is entitled to a preference period of six months after the end of parental leave, in which the employer must offer to the employee any available job substantially similar to the employee's previous position.

## Notice and prior procedural safeguards

Under the ECA, an employer is required to adhere to the requirements of procedural fairness and reasonableness and the principles of natural justice in order for a dismissal to be justified. This means that before the employee is dismissed for misconduct or incompetence, he or she must be given the opportunity to defend himself or herself against any allegations that have been made. The concept of procedural fairness in employment is defined broadly by the New Zealand courts, also incorporating elements which are within the traditional boundaries of natural justice principles, such as the right to a fair hearing and freedom from bias. Consequently, before dismissing for misconduct the employer will generally be required to take the following measures:

- C inform the employee about the complaint against him or her;<sup>4</sup>
- C conduct a fair and reasonable inquiry into the grounds for dismissal;
- C give the employee a genuine opportunity to explain his or her conduct;<sup>5</sup>
- C give credit to the employee's past good behaviour or length of service;
- C ensure that the employee is treated equally to other employees in similar circumstances; and,
- C in the event that the complaint is a breach of a rule, ensure that the rule had been brought to the employee's attention.

Before dismissing an employee on performance grounds, an employer will generally need to give advance warning to the employee that his or her performance could lead to dismissal and present him or her with an opportunity to improve his or her performance.<sup>6</sup> Each case will be adjudicated on its own facts to ascertain whether a valid reason and fair procedure was present in the dismissal.

In certain exceptional cases, such as serious misconduct, summary dismissal (dismissal without notice) may be justified. However, even in this situation, the employee must be given a reasonable opportunity to explain his or her conduct.

No specific period of notice is required by statute. Rather, such notice requirement is a matter for contract. Where notice is specified under the contract of employment or under a collective agreement, failure to provide such notice will be treated as a factor evidencing an unjustified dismissal, actionable under the ECA. Moreover, a failure to give the requisite notice is also a breach of contract which is actionable by a civil claim of wrongful dismissal, or by an arrears of wages claim. Where notice is not specified in the contract, the Employment Tribunal or Court will determine what constitutes reasonable notice in the circumstances.

Where the employer contemplates termination for reasons of an economic, technological, structural or other similar reason, he or she must discuss the proposed redundancy with the affected employees (and any relevant union representative) before the final decision is made.<sup>7</sup> There must be true

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<sup>4</sup> This includes sharing with the employee the results of any investigation (see *Airlines Stewards and Hostesses (NZ) IUW v. Air New Zealand Ltd.* [1990] 3 NZLR 549).

<sup>5</sup> The right to be heard is considered to be a fundamental pillar of just termination procedures. *Irvines Freightlines Ltd. v. Cross* [1993] 1 ERNZ 424.

<sup>6</sup> The opportunity to improve must be a reasonable one. In certain circumstances this may require the provision of additional training (see *Downes v. Northern Distribution Union* [1989] 2 NZLR 842).

<sup>7</sup> This broad interpretation of procedural fairness in redundancy situations was affirmed in *GH Hale & Sons v. Wellington*,

consultation which includes giving the employees and their representatives a real opportunity for making an input and considering any constructive suggestions they may submit. In addition, adequate information about the nature of the proposed redundancy must be afforded to the employees in advance of such consultation.

The employer is also required to consider alternative options to redundancy before such redundancy will be deemed fair. Alternate measures may include retraining, redeployment, transfer relocation, voluntary redundancy and early retirement. If, after considering alternatives, redundancy is to occur, the employer must give the employee notice of termination in accordance with any applicable contract, or if no contractual notice provisions exist, a reasonable period of notice.

### **Severance pay**

Severance pay is not governed by statutory regulation but is a subject for negotiation between the parties. A recent Court of Appeal case has overturned previous precedent and held that redundancy compensation is only payable if it is stipulated for in the contract of employment.

### **Avenues for redress**

As a first recourse, employees must have access to any internal grievance procedures which are designed to encourage discussion between employers and employees, if stipulated in an employment contract. If this fails, the claimant can apply to the Employment Tribunal for a binding mediation settlement or for adjudication. The Employment Tribunal is an impartial quasi-judicial body with jurisdiction over all types of dismissal. Where decisions are adjudicated by the Employment Tribunal, an appeal lies with the Employment Court within 28 days, from which, in turn, there may be an appeal to the Court of Appeal on questions of law only.

The Employment Tribunal also has jurisdiction to assess dismissal claims relating to redundancies. However, although the Tribunal, Employment Court or Court of Appeal may determine whether the redundancy was in fact for a proper reason or was procedurally fair, it does not have jurisdiction to substitute its judgement for that of the employer in deciding whether or not a redundancy was necessary in terms of the business's operational requirements. The Court will, however, in the determination of procedural fairness, examine whether other options were considered by the employer as an alternative to redundancy.

Where the employee pursues a claim under the Human Rights Act, 1993, he or she may elect to have recourse to a special independent body of adjudication, the Complaints Review Tribunal. Although employees are entitled to pursue claims either under the ECA or the Human Rights Act, 1993, they may not pursue both avenues for redress in relation to the same complaint.

The burden of proof to establish that a dismissal was both substantively and procedurally justifiable rests with the employer, once the employee has shown there was a dismissal. Employees are given 60 days in which to request written particulars of the dismissal, to which the employer must respond within

14 days. Moreover, an employee must pursue any claim alleging unjustified dismissal within 90 days of the dismissal.<sup>8</sup>

Finally, employees may seek to challenge a wrongful dismissal under the common law. The time-limit for bringing actions of this type is six years from the alleged breach of the employment contract.

Where the Employment Tribunal or Court determines that a dismissal was unjustified, it may award to the employee any of the following remedies as it sees fit: compensation in the form of damages for lost wages; damages for humiliation; injury to feelings or loss of dignity; damages for the loss of any benefit the employee might reasonably have expected to have obtained had he or she not been dismissed; and reinstatement (*sec. 40, ECA*). Reinstatement is no longer the primary remedy (as it was under the Labour Relations Act, 1987). A civil claim for wrongful dismissal on the basis of the failure to give notice will attract compensation in the form of damages for the amount in lieu of such notice, plus (potentially) damages for emotional distress.

Where a claim is pursued under the Human Rights Act, 1993, for dismissal on the grounds of discrimination, the remedies available are declarations, orders, damages and any other relief in the discretion of the Complaints Review.

Employees whose contracts have been terminated may benefit from the Social Security Act, 1964, under which they may be entitled to unemployment benefits.

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<sup>8</sup> Subject to obtaining leave for claims outside the 90-day limit in exceptional circumstances. *Sec. 33, ECA*.

## *Nigeria*

### **Sources of regulation**

Nigeria's legal system is based on the English common law, which continues to apply except to the extent it has been modified by statute. In relation to the termination of employment, the most important statutes are the Labour Act 1974 (LA) (also known as the Labour Decree 1974), as amended, and the Trade Disputes Act 1976 (TDA).

### **Scope of legislation**

All labour law statutes in Nigeria, including the LA and TDA, apply only to those persons considered 'employees' at common law (i.e. those employed under a 'contract of service' rather than a 'contract for services'). In addition, both Acts apply only to those employees who are 'workers'. The LA defines a worker as any person who has entered into a contract (of service) with an employer, whether the contract is for manual or clerical work, or is express or implied, or oral or written (*sec. 90*, LA). The courts have interpreted this definition to apply only to manual or clerical workers.<sup>237</sup> The LA definition also excludes:

- C any person not employed for the purposes of the employer's business (such as domestic staff);
- C persons exercising administrative, executive, technical or professional functions;
- C members of the employer's family (also excluded by *sec. 21* of the LA);
- C representatives, agents and commercial travellers, to the extent their work is carried out outside the employer's permanent workplace;
- C home workers; and
- C any persons employed at sea or on an aeroplane, who are governed by specific legislation.

In addition, members of the armed forces and police are excluded from the LA (*sec. 88(2)*).

The definition of 'worker' in the TDA mirrors the LA definition, except that it is expressly extended to workers other than manual or clerical workers and to apprentices; furthermore the exceptions listed above do not apply (*sec. 47*). However, again, members of the armed forces and police are excluded from the TDA (*sec. 48*).

### **Contracts of employment**

Contracts of employment may be either contracts for an indefinite period or for a fixed term or fixed amount of work. The common law position that contracts for a fixed term or fixed amount of work expire according to their terms is codified in *sec. 9(7)(a)* of the LA and this rule has not been modified by statute, nor is there any further statutory regulation of fixed-term contracts.

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<sup>237</sup> Following the English decision of *NALGO v. Bolton Corporation* [1943] AC 166.

Probationary periods are possible, although, as the statutes do not exclude probationary employees from their ambit, the statutory notice periods (see below) also apply to probationary employees. The term *Acasual worker* has no legal significance in Nigeria.

## **Termination of employment**

The termination of employment other than at the employer's initiative is largely governed by common law. Contracts of employment may be terminated, other than at the employer's initiative, by:

- C mutual agreement, either by an agreement as to the term of the contract or an agreement that employment should end;
- C frustration by a supervening event;
- C the employee resigning by giving the requisite notice; and
- C the death of the employee (codified in *sec. 9(7)*, LA).

*Sec. 10* of the LA codifies the common law position that an employee's contract of employment may not be transferred from one employer to another without the employee's consent, and, in addition, requires authorisation of any transfer of employment by a government labour officer, who may also require a medical examination.

## **Termination of employment at the initiative of the employer**

There is no general statutory principle against unfair dismissal in Nigeria and the law of dismissal is largely governed by the common law, as affected by the LA. However, a dismissal may constitute a *Atrade dispute* under the TDA, in which case the worker concerned may bring a claim to the National Industrial Court (NIC) under that Act.

Notably, while it is far from clear from the statutory definition of *Atrade dispute* in the TDA (i.e. *Aany dispute between employers and workers ... which is connected with the employment or non-employment of any person*) that claims relating to dismissals are covered by the Act, in practice the NIC has exercised jurisdiction over dismissal claims. There is, however, little statutory guidance involving as to the standard the NIC is to apply in adjudicating trade disputes involving a dismissal; its remedial jurisdiction simply being to *Amake awards to settle trade disputes* (*sec. 15(1)(a)*, TDA).

There are specific statutory prohibitions against dismissal on the grounds of union membership and activity (*sec. 9(6)(b)*, LA) and pregnancy and taking maternity leave (*sec. 53(4)*, LA).

In addition, the common law has developed the concept of a *Aconstructive dismissal* (i.e. behaviour by the employer which is intolerable, and which forces the employee to resign, and which is deemed to be a dismissal) and, as part of the common law, this concept is part of Nigerian law.

The LA (*sec. 11(5)*) expressly retains the common law right of an employer to summarily dismiss an employee for serious misconduct. The LA also retains the employer's ability to dismiss on the grounds of redundancy (*sec. 20*), although this section also introduces certain procedural requirements for redundancies (see below). *ARedundancy* is defined by *sec. 20(2)* of the LA to be *Aan involuntary and permanent loss of employment caused by an excess of manpower*.

## Notice and prior procedural safeguards

*Sec. 11* of the LA sets out statutory minimum notice periods as follows:

- C for less than three months of service, one day;
- C for three months to two years of service, one week;
- C for two to five years of service, two weeks; and
- C for more than five years of service, one month.

The above periods are statutory minima which can be improved upon by collective agreements or contracts of employment. Payments in lieu of notice are permissible, and either party may waive the right to notice (*sec. 11(6)*, LA).

For dismissals for misconduct, the common law rule that employers who, with full knowledge of the employee's conduct, condone such conduct, cannot thereafter rely on the conduct to justify a summary dismissal.<sup>2</sup> However, the common law rule that misconduct discovered after dismissal may justify the dismissal also applies.<sup>3</sup> There are no statutory requirements as to procedure for dismissals for misconduct, although a breach of any contractual procedure may constitute a breach of contract leading to an award of damages. Likewise, there are no statutory procedural requirements for dismissals on the grounds of unsatisfactory performance.

For dismissals on the grounds of redundancy, *sec. 20* sets out the following procedural requirements:

- C the employer is to inform the trade union or worker's representative of the reasons for and anticipated extent of the redundancies;
- C the principle of last in, first out is to be applied, subject to factors of merit, including skill, ability and reliability; and
- C the employer is to use his or her best endeavours to negotiate redundancy payments.

## Severance pay

There is no general statutory severance pay, although there is provision for the Minister of Labour to enact regulations providing for severance pay to redundant workers (pursuant to *sec. 20(2)* of the LA). In addition, the NIC has, on occasion, awarded severance pay, as additional compensation, to unfairly dismissed workers.

## Avenues for redress

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<sup>2</sup> See, for example, *ECN v. Nicol* [1968] All NLR 201.

<sup>3</sup> *Clouston v. Corry* [1906] AC 122.



Claims for wrongful dismissal or breach of contract may be brought in the civil courts, although such claims are limited to damages for the equivalent amount that the employee would have earned during the notice period, and generally exclude reinstatement<sup>4</sup> and damages for injured feelings.<sup>5</sup>

In addition, as discussed above, a dismissed employee may submit a trade dispute to the NIC, and the NIC has a wide discretion as to remedies, including reinstatement. The resolution process for trade disputes can also include conciliation provided by the government.

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<sup>4</sup> Except for office-holders under administrative law. Such persons are unlikely to include private sector employees.

<sup>5</sup> *Addis v. Gramophone Co.* [1908] AC 488.

## ***Pakistan***

### **Sources of regulation**

The law relating to termination of employment in Pakistan does not conform to a uniform standard. In some instances, legislation has been enacted which attempts to intervene in the relationship between the employer and employee on this issue, abolishing or affecting the common law presumptions of employment-at-will and dismissal without the need to prove cause. However, workers falling outside this legislation remain covered by common law legal principles. In addition, different kinds of legislation establish varying degrees of employment protection for the worker.

The main statutes governing termination of employment in Pakistan are the West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 (ICEO), and the Industrial Relations Ordinance, 1969 (IRO). Other relevant legislation which covers a smaller proportion of workers includes the Road Transport Ordinance, 1961 (RTO), the Newspaper Employees (Conditions of Service) Act, 1973 (NEA), the Pakistan Essential Services Maintenance Act, 1952 (ESMA), and the West Pakistan Shops and Establishments Ordinance, 1969 (SEO). The standing orders under the ICEO which relate to termination of employment have been made applicable to the RTO and the NEA.

### **Scope of legislation**

The ICEO is generally applicable to all workers belonging to industrial and commercial establishments of 20 or more workers. However, industrial establishments of less than 50 workers are excluded from the provisions concerning termination of employment. While the ICEO does not exclude specific categories of workers from its purview, it is important to note that it is limited in its scope because of the restrictive interpretation given to the definition of a *workman*, to which the sections on termination of employment refer. Under *sec. 2(I)* of the ICEO, a *workman* is defined as a person who does *manual* or *clerical* work. This definition has been very narrowly construed by the courts to exclude many workers from protection against arbitrary dismissal under this legal instrument. In deciding whether a person may qualify as a *workman* under the provisions, the courts have regard not to the category of the job, but rather to the nature of the work involved.

The other legislation mentioned above applies specifically to special types of employment.

### **Contracts of employment**

Standing Order No. 1 of ICEO distinguishes between four types of worker. *Permanent employees* are defined as workers who are engaged in work likely to last more than nine months and who have satisfactorily completed a probationary period. *Temporary workers* are those who have been engaged for work of an essentially temporary nature that is likely to be finished within a period not exceeding nine months. There is also a concept known as *Abaldi*, which describes a worker who is appointed in the place of a permanent worker or probationer who is temporarily absent. Finally, *probationers* mean workers provisionally employed to fill a permanent vacancy, and who have not completed three months' service.

### **Termination of employment**

While provisions concerning termination of employment for misconduct apply to all *workmen*, protections related to termination for other causes are restricted to *permanent workers* under the ICEO. Under the ICEO's Standing Orders (SO) and the SEO, termination by the employer may be either termination *simpliciter*, which is termination on grounds other than that of misconduct, by notice (*sec. 12, SO*); or for misconduct (*sec. 15, SO*). This dichotomy is reflected both in the procedures and reasons accepted for termination of employment. This distinction also applies for employees covered under the NEA and the RTO.

### **Termination of employment at the initiative of the employer**

For workers falling under the ICEO, a valid and written reason must be given for termination of employment to be upheld. This applies to both termination *simpliciter* (*sec. 12, SO*) and dismissal on the grounds of misconduct (*sec. 15, SO*). The IRO authorizes the Labour Court to inquire into the legitimacy of termination of employment according to the principles of good labour practices and natural justice. This implies that a valid reason must be given for termination, even though there is no other specific legislative requirement in this regard.

The provisions of the SEO do not stipulate that a reason must be given for termination of employment; it is sufficient if written notice is given to employees. For workers falling outside the purview of the above legislation, the common law presumption of employment at will prevails and no reason for termination is required by law. However, common law principles on procedural fairness will be applicable.

While the ICEO obliges the employer to state, in writing, a reason for termination of employment, except in very few instances, it neither prescribes any reasons for which the services of a worker could be lawfully terminated nor specifies limits on the kinds of reasons which will be acceptable. The development of valid reasons for dismissal has therefore been left to case law. In relation to termination unrelated to misconduct, case law establishes that acceptable reasons for dismissal include serious illness, economic needs of the industry or establishment, and inefficiency or incapacity to perform the required job.

Where there is jurisdiction under the IRO, the Labour Court may impose any requirement for reasons which is in keeping with its adjudicating principle of good industrial practices.

Serious misconduct, provided that the procedure of a fair hearing according to the principles of natural justice has been carried out, is a sufficient basis for dismissal under the ICEO and the SEO. Examples of misconduct include prolonged absence without permission, negligence at work, wilful insubordination or disobedience, theft, fraud or dishonesty in connection with the employers' business or property (*sec. 15, SO*).

Under the *sec. 12* of the SO of the ICEO (termination *simpliciter*), any termination effected must be carried out in good faith. Consequently, where discharge of an employee is carried out merely to avoid the obligations of a fair hearing under the SO (*sec. 15*), albeit with the required notice, the Labour Court may inquire into the matter and declare the reason for termination invalid.

Termination of employment on the basis of trade union membership or activity will also be considered invalid reasons for termination, both under the ICEO (*sec. 18, SO*) and under the standard of good labour law practices. Other specific examples of unlawful dismissal are not outlined in legislation but will be determined according to the adjudicatory principles of the Labour Court, the labour authority and case law based on good labour practices.

### **Notice and prior procedural safeguards**

Notice for termination of employment is only mandatory for permanent employees falling under the purview of the ICEO or the SEO (*sec. 12, SO*, and *sec. 19, SEO*, respectively). This notice period is specified as one month's notice or equivalent pay in lieu of such notice.

Under *sec. 15* of the SO of the ICEO, the employer is compelled to grant the worker a fair hearing in cases of dismissal on the grounds of misconduct. The worker must first be informed in writing of the allegations made and the employer is required to institute an independent inquiry into the charges. In addition, where dismissal is on grounds of misconduct, *sec. 19* of the SEO requires that temporary employees (who are not entitled to notice) who are being dismissed as a punishment, be given an opportunity to explain the charges levelled against them.

Termination for economic reasons or retrenchment has not been given special attention as regards procedures and rights. It is included in the provisions concerning termination on grounds other than that of misconduct (*sec. 12, SO, ICEO*). Nevertheless, special provisions have been enacted concerning the choice of the workers to be retrenched first (*sec. 13, SO*) and the priority of re-employment of retrenched workers (*sec. 14, SO*).

In the event of fire, catastrophe, breakdown of machinery or stoppage of power supply, epidemics, civil commotion or other cause beyond the employers' control that frustrate the operation of the work, workers may be

laid off and then receive a payment equal to their daily wage. The stoppage must be notified to the workers. After 14 days of lay-off, the contracts of employment may be terminated with appropriate notice (*sec. 11*, SO, ICEO). Apart from these situations of extreme emergency, the employer must obtain prior authorization from the Labour Court in order to close down an establishment or to terminate the employment of more than 50 per cent of the workmen (*sec. 11A*, SO, ICEO).

### Severance pay

Under the ICEO, workers whose employment has been terminated for any reason other than misconduct are entitled to severance pay or a gratuity equivalent to 20 days' wages for every completed year of service or any part thereof in excess of six months. A pension may be substituted for any gratuity (*sec. 12(5)*, SO).

### Avenues for redress

The jurisdiction under the IRO is dual in nature. It provides mechanisms for adjudicating both individual dismissal grievances (under *sec. 25A*, added in 1972) and collective disputes on dismissal (*secs. 26-31*), where this is a dispute of interest, not a dispute of rights. However, the jurisdiction of a Labour Court under *sec. 25A* may only be invoked if *locus standi* is granted under another law, that is, if another law gives a basis for contesting the dismissal by providing for a specific right and there is no mechanism for settling such a dispute under that law. Laws granting such initial jurisdiction are the ICEO, the RTO and the NEA, which provide for mandatory procedures for termination of employment including a right to a fair hearing where dismissal on grounds of misconduct is alleged.

Where the IRO grants an avenue for redress for individual grievances, the employee may take the case to the Labour Court. The Labour Court is empowered to go into all the facts of the case when adjudicating a grievance under *sec. 25A* of the IRO and pass such orders as the Court deems just and proper in the circumstances of the case. This is a reversal of the previous law whereby the Court only had limited jurisdiction in dismissals on the ground of misconduct, not having the power to review the facts of the case and being able only to ensure that the worker had the opportunity of self-defence. The principles of good labour practices and natural justice are employed in the adjudication of termination disputes.

The jurisdiction under the IRO may be ousted by another statutory grievance procedure for specific workers. This is the case for workers in essential services, such as members of the police, armed and defence forces (ESMA), and workers in business, trade and professional enterprises (SEO).

For those workers who fall under the ESMA and the SEO, means of redress are not via the Labour Court but through a separate authority established under the respective statutes. In the case of the SEO (*sec. 12*) this is by way of a governmental authority, with a final appeal to the civil courts. An appeal must have the approval of this governmental authority, and be filed within a three-month period. Similarly, under *Rule 3(2)(d)* of the ESMA, a specified authority is set up to arbitrate on matters relating to termination of employment.

Where workers are not covered by the IRO or any other specific dismissal legislation, they may, if unionized, take a dismissal dispute to a Labour Court if it qualifies as a collective interest dispute. For the non-unionized employee, the only recourse is to the ordinary courts of law pursuing an action based on breach of contract in relation to the master/servant relationship.

The Labour Court has jurisdiction to make any award it deems fit, including an order of reinstatement, damages or exemplary damages. For actions pursued in the ordinary courts of law, reinstatement is not an option, and only damages or compensation for the loss of notice pay is possible. For awards arising out of the jurisdiction of governmental authorities, compensation for pay in lieu of notice and a fine where the employer violates statutory obligations are the options specified.



## ***Panama***

### **Sources of regulation**

*Art. 70* of the 1972 Constitution of Panama states that no worker can be dismissed without just cause and without the formalities established by law. The law will specify the just reasons for dismissal, special exceptions and corresponding compensation. In accordance with *art. 75* of the Constitution, this is considered as a minimum protection for workers.

The Labour Code (LC), as amended in 1995, is the primary source in the area of labour law, although there are also supplementary laws regulating specific subjects. Collective agreements and internal works rules (which should contain, among other things, disciplinary provisions and the form in which they are to be applied) also supplement the main legal sources (*secs. 181, et seq., LC*).

Rulings made by the labour courts do not establish precedents although their contents are regarded as legal doctrine.

### **Scope of legislation**

Pursuant to *sec. 2* of the LC, its provisions are binding on all physical persons and incorporated bodies, undertakings, farms and establishments existing or to come into existence in the national territory. Civil servants are governed by civil service rules, except in those cases where any provision of the LC is expressly stated to be applicable to them.

Agricultural and agro-industrial cooperatives are governed by the special regulations made on this subject (*sec. 3, LC*).

### **Contracts of employment**

An employment contract is a verbal or written contract whereby a person undertakes to provide services or perform work for another person, under the latter's orders and authority (*sec. 62, LC*). Contracts may be made for an unspecified period, for a specified period (of not more than one year, except in the case of services requiring special technical skills, in which case the duration may be stipulated for a maximum of three years) or for a specified piece of work (*sec. 73, LC*). The duration of a contract for a specified period is valid only (*sec. 75, LC*):

- C where the nature of the work performed so permits;
- C if it is made for the purpose of temporarily replacing a worker who is on leave, on vacation or absent because of any temporary impediment; or
- C in the other cases provided for in the LC.

The employment relationship is deemed to be for an unspecified period (*sec. 77*) if on expiry of the agreed period, the worker nevertheless continues in the employer's service; when the contract is made for the execution of a specified piece of work and the worker continues to do the same kind of work after the specified piece of work has been completed; when successive contracts for a specified period or for a specified piece of work are entered into, or the agreement is not adjusted to the nature of the service, or if it is clear from the quantity and total duration of the contracts that there is the intention to foster an indefinite relationship.

A clause stipulating a probation period will be valid when the work requires certain aptitudes or special skills (*sec. 78, LC*). The maximum duration of the probation period is months, provided that it is expressly contained in the written contract of employment. A probation period may not be required in the event that a worker is hired to work in a post which he or she had previously occupied in the same undertaking.

The LC also provides for temporary contracts (*sec. 79, LC*), which are contracts for work performed at a given time each year, in certain branches of activity forming part of the normal routine of the employer's activities, and which is suitable for the establishment of contracts of unspecified duration. The employment relationship is deemed to be a

regular or stable one, on a seasonal basis, once a worker has been employed for two full consecutive seasons.

Domestic employees, rural workers, teachers and instructors, commercial travellers, sales personnel and similar workers, artists, musicians and announcers, motor transport workers, sea and inland waterway transport workers are covered by special contracts.

### **Termination of employment**

A contract of employment may be terminated other than at the initiative of the employer (*sec. 210, LC*):

- C by mutual consent, on condition that consent is expressed in writing and does not imply a waiver of rights;
- C on the expiry of the stipulated period;
- C on completion of the work which is the subject of the contract;
- C on the death of the worker;
- C on the death of the employer, if this has the inevitable result of terminating the contract;
- C by prolongation, at the worker's request, of any of the reasons for suspension of the contract for a period exceeding the maximum authorized in the LC for the reason concerned; and
- C by the worker's resignation.

The worker may terminate the employment relation (*sec. 222, LC*), without having to give any reasons as justification, by serving 15 days' prior notice in writing on the employer, except in the case of technicians who must give two months' prior notice. A worker who fails to give such notice is obliged to pay the employer an amount equal to one week's wages, which may be deducted from the long-service bonus if the worker is entitled to one. The worker may also end the employment relationship for just cause, and in this case may be entitled to compensation for unjustified dismissal (on the grounds stated in *sec. 223, LC*).

The following workers are exempted from these rules (*sec. 212, LC*):

- C workers who have completed less than two years' uninterrupted service;
- C domestic employees;
- C workers who are permanently with or on the staff of small agricultural, fishing or manufacturing undertakings (if the agricultural or fishing undertaking employs ten or fewer workers, the agro-industrial undertaking employs 20 or fewer and the manufacturing company, 15 or fewer);
- C seafarers serving on board vessels operating on international routes, apprentices;
- C workers in retail sales establishments and in undertakings with five or fewer workers, except in the case of insurance establishments or real estate. In these cases, in addition to paying compensation, the employer must give 30 days' prior notice or pay the corresponding amount. Also, no payment of wages in arrears is due for unjustified dismissal, unless the absence of a valid reason is proved.

### **Termination of employment at the initiative of the employer**

Panamanian law recognizes numerous disciplinary, non-disciplinary and economic reason as valid grounds for the termination of employment at the initiative of the employer.

The following are valid disciplinary reasons for the employer to terminate the contract of employment:

- C if the worker misled the employer by submitting false certificates attesting skills, aptitudes or abilities which the worker does not in fact possess, where the possession of these attributes was a material fact on which the contract was based. The employer's right to terminate the contract on these grounds lapses one month after the date on which he or she becomes aware of the facts, if he or she fails to take action. In cases where no proficiency certificates are involved, the time limit should in no case exceed one year running from the date of entry into employment;
- C if the worker, in the course of the work, behaves in a violent manner or physically attacks or threatens or is guilty of verbal abuse towards the employer or the latter's family or members of the management of the undertaking or business or his or her fellow workers, unless the worker has been severely provoked;

- C if the worker behaves in the above manner outside the workplace towards the employer or members of the management of the undertaking or business or fellow workers involving any of the acts described above, if it is impossible to continue the employment relationship on account of the seriousness of these acts;
  - C if, without the employer's authorization, the worker discloses technical, commercial or manufacturing secrets or confidential management secrets, the disclosure of which may cause prejudice to the employer;
  - C if the worker commits at any time during the validity of his or her contract serious dishonest or immoral acts or acts damaging property, thereby causing direct prejudice to the employer;
  - C if the worker wilfully damages, in the performance of his or her work or in connection therewith, any machinery, tool, raw material, product, building or other object directly connected with the employment;
  - C if the worker causes, through his or her wilful negligence or unlawful act, the material damage referred to in the preceding clause, if the damage is sufficiently serious and the worker's act is the sole cause of the prejudice suffered;
  - C if the worker's inexcusable imprudence or negligence endangers the workplace and the persons on such premises;
  - C if the worker flagrantly and repeatedly refuses to observe the prevention rules and the precautions imposed for the avoidance of employment injury;
  - C if the worker refuses to obey, without justification and thereby causing prejudice to the employer, any order given by the latter or the latter's agents in directing the work, on condition that such orders are given clearly and refer directly to the performance of the work contracted for;
  - C the worker's absenteeism, without the employer's permission or valid excuse, on two Mondays in the course of one month or six Mondays in the course of one year, or three consecutive or alternating days in the course of one month. For the purposes of this clause **Monday** is to be interpreted as meaning also the day following any public holiday or day of national mourning;
  - C if a worker repeatedly leaves his or her post, which means leaving the workplace at prohibited times without justification and without the permission of the employer or the latter's representative, during working hours, or repeated refusal to perform the work which is the subject of the contract, without valid reason;
  - C repeated failure on the part of the worker to observe the prohibitions laid down in *sec. 127(3), (4) and (5)* (prohibitions on workers);
  - C if a worker, being in a position of trust or confidence, is guilty of acts or omissions, in the performance of his or her services or outside his or her employment, which cause the employer to lose confidence in him or her;
  - C sexual harassment, immoral conduct or unlawful acts perpetrated by the worker at work; or and
  - C if the worker's output is obviously below standard according to the systems of and regulations for their appraisal previously approved by the Ministry of Labour and Social Welfare or agreed through collective agreement.
- The following are valid non-disciplinary reasons for the employer to terminate the contract of employment:
- C the pre-existing inability or manifest inefficiency of the worker making the fulfilment of the essential obligations of the contract impossible. These grounds may be alleged by the employer only within the first six months following the date on which the worker commences his or her service;
  - C an executory judgement sentencing the worker to a term of imprisonment or hard labour or the fact that a worker who is in custody or preventive detention does not give the notification referred to in *sec. 199(2)* in due time, or after his or her imprisonment for a period of one year;
  - C the grant to the worker by the social insurance scheme of a retirement or permanent absolute disability pension, after confirmation is received that he or she is due to receive such pension as from the following month;
  - C the worker's mental or physical incapacity, duly certified, making the performance of the contract impossible;
  - C on the expiry of a period of one year from the date of suspension of the contract on account of sickness, other than an occupational disease, contracted by the worker or an accident other than an occupational injury sustained by him or her;
  - C the employer's incapacity, inevitably resulting in termination of the contract; and
  - C *force majeure* or unforeseen event having as its necessary immediate and direct consequence the definitive



cessation of the employers activities.

The following are valid economic reasons for the employer to terminate the contract of employment:

- C the employers bankruptcy or insolvency;
- C the closing down of the undertaking or retrenchment, due to the undertaking obviously not being able to pay its way, or to the exhaustion of raw materials in the case of extractive industries;
- C the final and permanent termination of the activity which is the subject of the contract; and
- C the duly proven reduction of the employers activities due to serious economic crisis or part of the operations not paying their way on account of decline in production or innovations in the production process or manufacturing plant; or the fact that an official tender or concession is called in or lapses; cancellation of sales or purchasing orders, or any similar reason duly proven by the competent authority.

The LC provides the guarantee of trade union immunity to the following workers:

- C the members of trade unions, where the unions are being established;
- C the members of the executive committees of workers= trade unions= federations, confederations or central congresses, up to a maximum of 11 members (*sec. 369, LC*);
- C trade union representatives; and
- C substitute members of the executive committee whether actively serving or not. If the trade union has more than 200 members, it may appoint a number of substitute members equal to or less than the titular members and all such members are to enjoy full trade union rights and privileges. If the membership of the trade union is less than 200, the union may designate one substitute member for every titular member, but only five such members have full trade union rights and privileges; in every case, the substitute members of the executive committees of workers= federations, confederations and central congresses enjoy full trade union rights and privileges (*sec. 382, LC*).

*Sec. 384* of the LC establishes a series of rules applicable to the duration of trade union immunity:

- C for the members of trade unions in the course of formation: for three months following the date on which such association's registration is authorized;
- C for titular and substitute members of executive committees (the latter if they enjoy trade union immunity) and trade union representatives: for one year running from the date on which they cease to hold office;

The protection of trade union immunity commences on the date on which the workers name appears on the list of candidates for election, on condition that such list is communicated to the employer or to the Inspectorate of Labour, and provided that such protection does not cover a period of more than one month before the actual date of the elections. Elected candidates continue to enjoy trade union immunity even before they take office, and unsuccessful candidates are to continue to enjoy such protection for the entire month following the date of the election returns. If the communication referred to above is not made, immunity should be afforded to members of the executive committee and trade union representatives as from the date of their election.

Similarly, in the area of maternity protection, *sec. 106* of the LC provides that an expectant mother may be dismissed only for valid reasons and with prior authorization of the judicial authorities. An expectant mother who receives notice of dismissal or of unilateral termination of her employment which has not been authorized by the competent labour court must submit to the employer or to any labour authority a medical certificate of her pregnancy within the 20 days of receipt of such notice of dismissal. On completion of this formality the employee is entitled to immediate reinstatement in her employment plus payment in full of her remuneration as from the date of the dismissal. If she allows the said 20-day period to expire without taking any action, she may submit the certificate and claim reinstatement at any time during the following three months, but in this case she is entitled only to back payment of her remuneration as from the date on which she submits the certificate. If the employer refuses to reinstate her, she may sue in the ordinary way for a reinstatement order.

### **Notice and prior procedural safeguards**

If an employer contemplates dismissing a worker for any of the reasons stated in *sec. 213, clause C* (valid grounds for dismissal based on economic reasons), the employer must furnish evidence to the labour administration authorities.

In the cases covered by this section, dismissal carried out without the fulfilment of the requirements stated in

the previous paragraph is considered wholly unjustified. However, if after 60 calendar days the labour administration authorities have not issued a decision on the application, the employer may proceed to give notice of dismissal, which will be considered entirely proper but which will require the payment of the compensation prescribed by the LC (*sec. 225, LC*).

The notice is to be in writing, specifying the date and the specific reasons for the dismissal or termination of the employment relationship (*sec. 214, LC*). Any additional reasons subsequently alleged and differing from those set out in the said notice are invalid.

The labour administration authorities called upon to take a decision respecting the granting of prior authorization to terminate a contract or dismiss a worker on the grounds referred to in *sec. 213* of the LC must personally inform the worker or workers concerned of the employers making an application, giving them a time-limit of three days to present their case. The authority must examine the evidence within a reasonable period and issue an immediate decision granting or refusing the authorization applied for (*sec. 216, LC*). After being notified, the parties may appeal against the decision to the next higher competent authority, such appeal acting to suspend the decision.

The employer has the option, before proceeding to give notice of dismissal on any of the grounds set out in *sec. 213, clauses A, B and C(1)*, of applying to the labour courts for prior authorization to dismiss, the application being dealt with in the summary or expedited proceedings (*sec. 217, LC*).

The right to dismiss a worker and the right for the worker to quit his or her job with just cause expires within a time limit of two months. In the case of authorization for dismissal, the period runs from when the respective final judgement is handed down.

The imposition of disciplinary sanction on a worker excludes the possibility of dismissing the same worker or applying for an authorization to dismiss him or her on the same grounds (*sec. 13, LC*).

In the event of dismissal for economic reasons, the following rules are applied (*sec. 213(C)(3), LC*):

- C the first workers to be affected are those having the shortest length of service in the categories concerned;
- C after that, in deciding which workers are to be maintained on the staff, preference should be given to Panamanian workers (over aliens), workers who are members of the trade union (over those who are not) and those who have shown the most efficiency should be given preference over less efficient workers;
- C expectant mothers, even if they are not protected by the preferential treatment referred to in the foregoing provisions, should be laid off last of all and only in cases of absolute necessity, with due observance of all the legal formalities; and
- C all other things being equal, after the above rules have been applied, workers protected by their trade union status or office have preference over the other workers as regards maintenance of their contracts (*sec. 213, in fine, LC*).

### Severance pay

In the case of contracts of unspecified duration, a worker who is given notice of dismissal may apply to the arbitration and conciliation board or the labour courts, in the absence of arbitration boards, for reinstatement to his or her post or payment of the compensation referred to in *sec. 225* of the LC. If, in the course of the subsequent proceedings, the employer is unable to furnish evidence of justification for dismissal or is unable to produce the authorization for such dismissal, the court will issue judgement in the workers favour, confirming the rights claimed by him or her and ordering the back payment of all wages, calculated as follows (*sec. 218, LC*):

- C up to a maximum of three months following the date of dismissal, for those workers who were employed after the LC came into force; and
- C up to a maximum of five months, for those workers who were already employed at the time the LC came into force.

Labour proceedings under way in the courts before the LC entered into force and which imply the payment of employment benefits, wages in arrears or compensation are governed by the rules in force at the time the LC entered into force. Judgement will require the payment of this compensation from the fund established by the employer for this purpose or, in the absence of such a fund, the board or court should order the employer to pay the legal costs, in addition to compensation.

The arbitration and conciliation board must render a decision within a maximum period of three months,

following the submission of the application. The fine for the infringement of the foregoing stipulations is subject to the provisions of the LC.

The Ministry of Labour may establish the arbitration and conciliation boards as needed for the fulfilment of the objectives of this section and, in particular, to prevent the accumulation of wages in arrears (*sec. 218, LC*).

In the event that reinstatement is ordered, the employer may end the employment relationship through the payment of compensation plus a surcharge, calculated as follows (*sec. 219, LC*):

- C 50%, in addition to the corresponding compensation, for those workers employed in the undertaking at the time the LC entered into force; and
- C 25%, in addition to the corresponding compensation, for those workers who begin working after the LC entered into force, provided that the employer has not established a severance fund.

In addition, wages in arrears are to be paid in the form prescribed by the respective judgement, in accordance with *sec. 218* of the LC.

The employer has a time limit of one month to reinstate the worker or pay the compensation with a surcharge and the wages in arrears, up to the date on which reinstatement takes place or compensation is paid; this period will run from the day following the date on which the judgement is handed down.

In the cases considered in *sec. 212(3) and (6)* of the LC, the payment of compensation should be made within a time limit of not more than six months, with proof, duly endorsed in advance by the judge or board, of the poor economic status of the undertaking, and on condition that such payments are not less than the equivalent average monthly wages of the dismissed worker (*sec. 219, LC*).

Upon termination of a contract of employment of unspecified duration (*sec. 224, LC*), irrespective of the cause of termination, the worker is entitled to receive a long-service bonus from his or her employer, at the rate of one week's pay for every year of employment since the commencement of the employment relationship. In the event that any of the years of service has not been completed since the commencement of the employment relationship or in subsequent years, the worker is entitled to the corresponding proportion. In the case of a worker who was already employed at the time the severance fund was established, this right is calculated from that date. The period previously worked should also be paid to him or her upon termination of employment, provided that he or she has rendered continuous services to the employer for ten or more years.

The worker is entitled to receive from his or her employer compensation based on the following scale (*sec. 225, LC*):

For a period of service prior to 2 April 1972, the following scale is to be applied:

- C for less than one year's service, the equivalent of one week's wages for every three months of employment, and with a minimum amount of such compensation equivalent to one week's wages;
- C for a period of service of between one and two years, the equivalent of one week's wages for every two months of employment;
- C for more than two and not more than five years' service, three months' wages;
- C for more than five and not more than ten years' service, four months' wages;
- C for more than ten and not more than 15 years' service, five months' wages;
- C for more than 15 and not more than 20 years' service, six months' wages; and
- C for more than 20 years' service, seven months' wages.

This scale may not be applied on a graduated basis, i.e. the highest applicable level determines the amount to be paid.

For periods of service after 2 April 1972, the following scale is to be applied:

- C for less than one year's service, the equivalent of one week's wages for every three months of employment (the minimum amount of such compensation to be the equivalent of one week's wages);
  - C for a period of service between one and two years, the equivalent of one week's wages for each two months of employment;
  - C for a period of service between two and ten years, the equivalent of wages for three additional weeks for each year of service; and
  - C for more than ten additional years of service, the equivalent of one additional week for each year of service.
- This scale is applied on a graduated basis, the total length of service completed being distributed among the

corresponding steps set out in the previous sub-items. In the case of service rendered in periods before and after 2 April 1972, the abovementioned scales are to be applied separately.

In the case of employment commencing after the LC entered into force, compensation should be equivalent to three to four weeks of wages for each year worked in the ten first years; and each year after ten years should be compensated with the equivalent of one week's wages for each year. Such compensation should not be combined with any other scale. For the two instances cited in this sub-item, where a full year has not been completed, the corresponding proportion is due.

Compensation provided under this section is also due when the employment relationship is terminated for any of the reasons stated in *sec. 213(C)* of the LC.

Payment in kind for the long-service bonus, compensation and surcharge applicable to the compensation is prohibited. For the purposes of determining the amount of the long-service bonus (*sec. 226, LC*), *Average* means, in respect of each year of service completed by the worker, the average of the total remuneration received by him or her during the last five years of employment.

In the case of a contract of employment of specified duration or for the performance of a specified task (*sec. 227, LC*), if the employer terminates such contract without valid reason before the expiry of the fixed term or before the specified task or job is completed, he or she is obliged to pay to the worker compensation equal in amount to the remuneration which the latter should have received during the remainder of the period which the contract had to run.

If the employer terminates the contract without valid reason before the date on which the employment relationship is due to commence, he or she must pay compensation to the worker for loss incurred. Such compensation should not be less than one month's wages, except in the case of contracts made for a shorter period (*sec. 228, LC*).

With regard to contracts of unspecified duration, employers should establish a severance fund to pay the worker, at the end of the employment relationship, the long-service bonus and compensation for unjustified dismissal or resignation with just cause (*sec. 229(A), LC*). In order to establish this fund, the employer is to make quarterly contributions, the assessed share relative to the worker's long-service bonus and 5 per cent of the monthly assessed share of the compensation to which the worker is entitled, in the event that the relationship is terminated through unjustified dismissal or resignation with just cause.

### **Avenues for redress**

The worker's right to sue for unjustified dismissal is barred by the statute of limitations three months after the date of the dismissal. This period of limitation applies to actions for reinstatement or compensation on the grounds of unjustified dismissal, with back pay in both cases. Actions exclusively for compensation on the grounds of unjustified dismissal, plus the other payments connected with or consequent on the termination of the employment relationship, are statute-barred one year after the date of dismissal (*sec. 221, LC*). The labour courts are the competent bodies to resolve such cases.

The amount of the compensation for unjustified dismissal is to be determined in the manner prescribed in *sec. 149* of the LC.

If reinstatement is ordered, the unjustly dismissed worker must be reinstated in his or her work immediately, or at any rate, before the second working day following the date on which the order becomes executory, and his or her reinstatement must restore him or her to his or her employment in exactly the same conditions as existed prior to the dismissal. At the request of the other party, the judge may order the arrest of the employer for contempt of court (*sec. 220, LC*).

## *Peru*

### **Sources of regulation**

*Art. 27* of the 1993 Constitution of Peru states that the law grants to the worker adequate protection against arbitrary dismissal. This represents a change in approach from *art. 48* of the Peruvian Constitution of 1979, which had enshrined a right of security of employment, stressing that the worker could be dismissed only for just cause, as prescribed by statute and duly substantiated.

There are other sources of regulation which elaborate on this new perspective. Termination of employment in the context of individual relations is governed by Law on Labour Competitiveness and Productivity (Decreto Supremo No. 003-97-TR, 21-03-97) (LLCP) and Law on Training and Labour Promotion (Decreto Supremo No. 002-97-TR, 21-03-97) (LTLP) as well as by collective agreements and case law. Work rules are also recognized by law and are therefore regarded as sources of law.

### **Scope of legislation**

*Sec. 4* of the LTLP and *sec. 3* of the LLCP state that the scope of this legislation extends to all enterprises and workers in the private sector. From this perspective, public employees are excluded from the scope of this legislation, as they are governed by the framework law on public service and remuneration of the public sector and other supplementary standards. For the purpose of this legislation, a public servant is a person who renders service in public administration entities upon appointment or through a contract with a competent authority, with regular working hours and corresponding remuneration. A public servant is also a person who is elected or designated by the competent authority to carry out duties at the highest level in the government and in autonomous bodies.

Workers subject to special legal rules and those in management and positions of trust are governed by their own set of rules (*secs. 43-45*, LLCP).

### **Contracts of employment**

Pursuant to *sec. 4* of the LLCP, it is assumed that there is a contract of indefinite duration where remunerated services have been provided in a situation of subordination. However, contracts for a definite period and those subject to special conditions may be freely concluded.

Probationary periods may last three months, at the end of which the worker gains the right of protection against unlawful dismissal. The parties may agree to extend the probationary period where the work to be undertaken requires a period of training and adaptation or where the nature of the work or responsibility entailing such extension may be justified (*sec. 10*, LLCP). Extension of the probationary period must be established in writing and may not exceed six months in total in the case of skilled workers and one year for managerial personnel or persons in positions of trust. The provisions of *sec. 75* of the LLCP govern the probationary period for contracts subject to special conditions.

With regard to workers employed under special conditions, *sec. 76* of the LLCP states that upon expiry of the probationary period, if the employer arbitrarily rescinds the contract, he or she must award the worker compensation equivalent to the average ordinary monthly remuneration for each month of work left until the expiry of the contract, up to a limit of 12 payments.

Contracts subject to special conditions may be concluded to meet market requirements or demand for increased production, or if the temporary or incidental nature of the service or task which is to be carried out deems it necessary. Intermittent or seasonal contracts which by their nature may be permanent are accepted (*sec. 53*, LLCP).

The following are temporary employment contracts (*sec. 54*, LLCP):

- C a contract concluded at the commencement or launching of a new activity (maximum duration three years);
- C a contract based on the requirements of the market to meet increases in market demand which cannot be satisfied by permanent staff (maximum five years); and

C a contract for restructuring of the enterprise, in response to the replacement, modification, extension or, in general, any technological change (maximum two years).

The following are considered incidental employment contracts (*sec. 55, LLCP*):

C a casual contract to meet transitory needs different from the normal activity at the workplace, which may be for a maximum of six months in one year;

C a contract to replace a worker for as long as required, for a maximum of five years; and

C an emergency contract to cover needs arising from an unforeseen event or *force majeure* (for the duration of the emergency and never for more than five years).

The following are considered employment contracts for a specific piece of work or service (*sec. 56, LLCP*):

C contract for the performance of a specific piece of work or service;

C intermittent service contract to cover permanent but discontinuous activities of the enterprise; and

C seasonal contracts.

None of the three abovementioned contracts, according to common provisions, may exceed five years.

Contracts subject to special conditions are considered indefinite in the following cases (*sec. 77, LLCP*):

C where the worker continues to work after the expiry of the term stipulated or after agreed extensions where these exceed the maximum authorized limit;

C where a contract is for a specific piece of work or service and the worker has continued to provide effective services after completing the work for which he or she was contracted, without the contract being renewed;

C where the holder of the post being replaced does not resume his or her post on expiry of the period and the substitute continues working; or

C where the worker can prove deception or fraud in relation to the standards prescribed by the LLCP.

*Sec. 79* of the LLCP expressly mentions the right to security of employment for workers employed under special conditions, stressing that they have the same benefits, once the probation period has ended, as workers employed on contracts for a definite period.

### **Termination of employment**

*Sec. 16* of the LLCP lays down the following as reasons for the termination of a contract of employment other than at the initiative of the employer:

C the death of the worker or employer; in case of the employer's death the worker may, by prior agreement with the employer's heirs, stay on for a brief period of time, not exceeding one year, to wind up the business (*sec. 17, LLCP*);

C voluntary resignation of the worker, with 30 days' notice, enabling the employer to release him or her (*sec. 18, LLCP*);

C the completion of the task or service, the occurrence of a condition leading to the contract's termination and the expiry of the term in contracts legally concluded, subject to specified conditions;

C mutual agreement to terminate;

C permanent total disability;

C the retirement of the worker; and

C the termination of employment on objective grounds, that is, due to an unforeseen event or *force majeure*, liquidation of the enterprise or bankruptcy. Under these circumstances, workers are entitled to compensation for length of service and enjoy the right of preference for reinstatement.

### **Termination of employment at the initiative of the employer**

In order for a worker employed for four or more hours daily for the same employer to be dismissed, there must be a valid reason prescribed by law and duly substantiated (*sec. 23, LLCP*).

- The following are reasons connected with the capacity of the worker (*sec. 24, LLC*) that may justify dismissal:
- C deterioration of the physical or mental faculties or an acquired incapacity having a major effect on his or her performance on the job;
  - C inadequate output in relation to the worker's capacity or in comparison to the average output for similar work under similar conditions; or
  - C unreasonable refusal on the part of the worker to undergo a previously agreed or legally required medical examination in the context of the employment relationship, or to follow medical treatment or preventive measures prescribed by a doctor in order to avoid illness or accident.

The following are valid reasons for dismissal related to the conduct of the worker (*sec. 24, LLC*):

- C serious misconduct, which, in accordance with *sec. 25* of the LLC, makes the continuation of the employment relationship unreasonable, as follows:
  - failure to comply with employment obligations in such a way that the breakdown of good faith in the employment relationship may be presumed; repeated opposition to orders relating to the work; repeated and untimely stoppage of work when this has been found to be the case by the competent authority; or the failure to observe work regulations or occupational safety or health regulations;
  - deliberate and repeated deterioration in output, or in the volume or quality of production;
  - appropriation or attempted appropriation of goods or services belonging to the employer or for which the worker is responsible, or unjustified retention or utilization of the same;
  - the use or transfer to a third party of information reserved for the employer; the unauthorized removal or use of documents belonging to the enterprise; providing false information to the employer with the intention of causing harm or obtaining an advantage; or unfair competition;
  - repeated attendance at work in a state of drunkenness or under the influence of drugs or narcotics, and even if it is not repeated, where because of the nature of the work, such condition is exceptionally serious;
  - acts of violence, serious breaches of discipline, insults and disrespect in oral or written statements addressed to the employer, his or her representatives, senior staff or other workers, whether they take place inside or outside the workplace;
  - deliberate damage to buildings, plant, works, machinery, instruments, documents, raw materials and other goods belonging to the enterprise, or in its possession;
  - failure to appear at the workplace for more than three consecutive days; unjustified absence for more than five days over a period of 30 calendar days, or more than 15 days over a period of 180 days, irrespective of whether any disciplinary action is taken in either case; repeated lateness where attention has been drawn to this by the employer, and where disciplinary sanctions such as written warnings and suspensions have already been applied;
- C conviction for a crime involving fraud (by a decision not subject to appeal); or
- C disqualification of the worker imposed by judicial or administrative authorities to carry out his or her job at the workplace for three months or more.

Dismissal for economic, technological, structural or similar reasons, or because of restructuring of the enterprise are objective grounds for termination of employment (Ch. VII, *sec. 7, LLC*). Workers dismissed for these reasons are entitled to a severance allowance (Legislative Decree No. 650) and have preferential rights to be reinstated if the employer decides to hire, directly or through third persons, new staff to fill similar posts, within a year of the collective dismissal. In the event of non-compliance, the worker is entitled to request, through legal channels, corresponding compensation in accordance with the law.

The termination of employment contracts solely on economic grounds may be carried out in cases where a

minimum of 10 per cent of the total workforce of the enterprise is involved, and should follow a special procedure.

Pursuant to *sec. 29* of the LLCPC, dismissal for the following reasons is considered null and void:

- C membership of a trade union or participation in trade union activities (up to 90 days after having relinquished the post, (*sec. 46b* of the LLCPC regulation));
- C candidature for workers=representative or acting or having acted in this capacity (from 30 days leading up to elections and up to 30 days after, (*sec. 46a* of the LLCPC regulation));
- C submitting a complaint or taking part in an action against the employer before the competent authorities, except in cases of gross misconduct through acts of violence, serious indiscipline, or damage suffered by the employer;
- C discrimination on the grounds of sex, race, religion, political opinion or language; and
- C pregnancy, where dismissal takes place 90 days preceding or following confinement.

Under the provisions of *sec. 30* of the LLCPC, the following acts result in constructive dismissal:

- C the non-payment of remuneration, barring *force majeure*;
- C unfounded reduction of wages;
- C transfer of a worker for the purpose of causing him or her prejudice;
- C the non-observance of safety and health measures which may adversely affect or endanger the life or health of a worker;
- C acts of violence committed against or serious disrespect to the worker or his or her family; and
- C acts of discrimination based on sex, race, religion, political opinion or language, immoral acts, sexual harassment and all other acts which manifest an improper attitude adversely affecting the dignity of the worker. In such instances, before taking legal action, the worker must make a written request to his or her employer to cease the prejudicial act and must accord him or her a reasonable period of not less than six months to rectify the conduct.

### Notice and prior procedural safeguards

The employer must give the worker a reasonable period of written notice, of not less than six calendar days, so that the worker can present a written defence to any charges brought against him or her, or 30 calendar days to prove his or her professional capacities and correct any error. However if the worker is guilty of flagrant serious misconduct where it would be unreasonable to require the employer to continue the employment relationship, no notice is required.

During the prior proceedings when the dismissal is for reasons related to the conduct of the worker, the employer may waive, in writing, the worker's obligation to report to work as long as this does not prejudice his or her right of defence, and guarantees the rights and benefits to which the worker is entitled (*sec. 31*, LLCPC).

Dismissal must be communicated in writing, by letter, stating the reason given for the action. If the worker refuses delivery of the letter, it may be sent through a notary public, justice of the peace, or, in their absence, the police. The employer may not subsequently invoke grounds other than those referred to in the letter of dismissal. Notwithstanding the above, where proceedings are already under way, and a further offence is brought to the employer's notice, the proceedings may be recommenced (*sec. 32*, LLCPC).

At all times, the burden of proof rests with the party seeking termination (*sec. 37*, LLCPC).

The enterprise should furnish the trade union, or if there is none, the workers or their authorized representatives, with the relevant information stating the precise reasons for dismissal. The labour authorities should also be informed of this process and must make a decision based on the outcome of specified procedures (*secs. 48 and 49*, LLCPC).

### Severance pay

Dismissal of a worker due to his or her capacity or conduct does not give rise to compensation (*sec. 34*, LLCPC).



## Avenues for redress

Judicial action in the event of invalid dismissal, unlawful dismissal and constructive dismissal must be brought within 30 calendar days of the act. However, if the worker has left Peru and therefore cannot bring an action, the time limit is suspended for the duration of this impediment (*sec. 36, LLC*). The time limit for an adjudicated decision is six months from the end of the hearing (*sec. 42, LLC*).

If dismissal is unlawful because a valid reason has not been given, or cannot be legally substantiated, the worker is entitled to the payment of compensation equivalent to the average ordinary monthly remuneration for each year of service up to a maximum of 12 months. Fractions of years or months are paid in twelfths and thirtieths, as the case may be (*sec. 38, LLC*). The worker may also claim any other right or social benefit to which he or she is entitled.

In the event that dismissal is declared null and void, where the worker's case is declared justified, he or she must be reinstated in the job, but in complying with the decision he or she may opt for compensation, as provided for in *sec. 38* of the LLC.

In the event of a constructive dismissal, the provisions of *sec. 30* lay down that the worker may choose to bring an injunction against the employer's actions or he or she may choose termination of the contract. In case of such termination, he or she will be entitled to the payment of compensation referred to in *sec. 36*, independently of the fine and social benefits to which he or she is entitled.

Upon determination that the request to invalidate the dismissal is justified, the judge may order the payment of outstanding remuneration, with deductions for any period during which there has been an interruption in the legal proceedings not attributable to either party. Likewise, he or she may order the payment of a bond corresponding to the amount of compensation according to length of service and interest, where applicable (*sec. 40, LLC*).

In the case of an action brought to invalidate a dismissal, the court may, at the request of one of the parties, order provisional payment of an amount which may not exceed the worker's normal monthly remuneration. Partial payments are to be made by the employer until they amount to the full total of the sum payable in compensation for the period of service outstanding. If this turns out to be insufficient, the amount must be covered by the bond until the amount deposited and interest on it have been exhausted. Where a decision is taken to reinstate a worker, the employer is entitled to have the bond plus the corresponding interest returned, after deduction of remuneration due (see above) (*sec. 41, LLC*).

An employer who fails to comply with an order of reinstatement within 24 hours of being instructed to do so may be ordered to do so under penalty of a fine, the amount of which will be increased by increments of 30 per cent of the original sum upon each subsequent order until compliance (*sec. 43, LLC*).



## ***Philippines***

### **Sources of regulation**

There is a hierarchy of sources of law concerning the termination of employment in the Philippines. First, *art. 2(9)* of the Constitution obliges the State to assure workers of the right to *security of tenure*. Pursuant to this general principle, Book Six of the 1974 Labour Code (LC) sets out principles governing the termination of employment (*secs. 278-287*, LC). Finally, there are Rules and Policy Instructions implementing the LC.

### **Scope of legislation**

The provisions of the LC governing termination of employment apply to all private sector employees, whether employed by a profit-making enterprise or not (*sec. 278*, LC).

There are two key distinctions between types of employees in Filipino labour law: the first is between *regular employment* and non-regular employment; the second is between *managerial* and *rank and file* employees. The scope of the protection against dismissal otherwise than for *just cause* applies to all employees in *regular employment* (*sec. 279*, LC). *Regular employment* is defined as employment whereby the employee has been engaged to perform activities which are usually necessary or desirable in the usual course of business or trade of the employer, except where employment has been fixed for a specific project or undertaking, or seasonal employment (*sec. 280*, LC). Employment which falls outside the definition of regular employment is deemed to be casual employment, provided that casual employment which lasts for over a year, continuously or intermittently, is considered regular employment (*ibid.*).

While the prohibition against dismissal except for just cause applies to both managerial and rank and file workers, the requirement to obtain a clearance to terminate (see below) only applies for rank and file workers. A *managerial* worker is one who is vested with powers and prerogatives to lay down and execute management policies and/or to hire and fire employees (*sec. 212(m)*, LC).

### **Contracts of employment**

As stated above, the standard employment relationship in the Philippines is *regular employment*, although casual, seasonal, and fixed project employment (as defined above) is possible without prior government clearance.

Probationary employment is not to exceed six months, unless pursuant to an apprenticeship agreement (*sec. 281*, LC). The termination of probationary employees is also governed by the requirement of just cause, with some modification to reflect the probationary nature of the employment. A probationary employee can be terminated for just cause or when the employee fails to qualify as a regular employee in accordance with reasonable standards made known to the employee at the time of engagement (*ibid.*).

### **Termination of employment**

Employment may terminate, other than at the employers initiative:

- C if the worker abandons his or her contract;
- C if the employee dies;
- C by mutual consent of the parties;
- C if the employee retires; and
- C if the employee resigns by giving written notice at least one month in advance. If the employee does not comply with this notice obligation, he or she will be liable for damages for the notice period not given (*sec.*

285(a), LC).

In addition, in exceptional circumstances, an illegal and coercive strike has been held to terminate the employment relationship.<sup>238</sup>

The concept of constructive dismissal is codified in the Philippines, and the employee may resign without notice if:

- C the employee's honour or person has been seriously insulted;
- C there has been inhuman or unbearable treatment;
- C the employer has committed a crime against the employee or the employee's family; or
- C there is any cause analogous to the above causes (*sec. 285(b)*, LC).

### **Termination of employment at the initiative of the employer**

*Sec. 282* of the LC sets out some of the causes which will be considered just cause for termination by the employer, including:

- C serious misconduct or willful disobedience;
- C gross and habitual neglect by the employee of their duties;
- C fraud or willful breach of trust;
- C commission of a crime against the employer or his or her family; and
- C a cause analogous to the above (which has been interpreted by the courts as including gross inefficiency and incompetence).

Employment may also be terminated by the employer for economic, technological or structural reasons. In this respect, the LC distinguishes, for the purposes of severance pay (discussed below), between retrenchments to prevent losses and the closing of a business and redundancies due to the installation of labour saving devices (*sec. 283*, LC).

Finally, an employer may terminate an employee who is suffering from any disease, if his or her continued employment will be prejudicial to himself or herself, or any co-workers' health, or if the employee's employment is illegal because of the disease (*sec. 284*, LC).

Employment cannot be terminated if an employee is fulfilling a military or civic duty (*sec. 286*, LC), and it is an unfair labour practice and a criminal offence to dismiss employees because of their trade union membership or activities (*sec. 248(b)*, LC).

### **Notice and prior procedural safeguards**

There are stringent procedural requirements which apply to dismissals of rank and file employees. A clearance to terminate must be sought for all dismissals: ten days before dismissal for dismissals based on conduct or capacity, and at least one month before dismissal for dismissals based on economic reasons. Importantly, in addition, when seeking clearance, the employer must be able to show that the employee has had notice of the reason for the dismissal and that a due internal inquiry has followed to allow the employee to answer the allegations of misconduct (or refute the case for redundancy or retrenchment, as the case may be).<sup>2</sup> If clearance is not sought, the termination is deemed to be without cause and the employee is entitled to reinstatement.

While these procedural requirements preclude summary dismissal, a preventative suspension of the employee for up to 30 days pending clearance for the dismissal is possible if the worker's continued employment poses a serious and imminent threat to the life and property of the employer or the worker's co-workers.

Because of the detailed procedural requirements before dismissal, no statutory notice periods are provided.

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<sup>238</sup> *Almeda v CIR & Pepsi Cola*, 97 Phil. 306.

<sup>2</sup> Policy Instructions: Disposition of Termination Cases.

### **Severance pay**

Severance pay is payable at the rate of one month's pay for every year of service (with a minimum of one month's pay) for employees made redundant because of a labour saving device or reorganization (*sec. 283, LC*), and at the rate of one half a month's pay for each year of service (again with a minimum of one month's pay) for employees retrenched due to the closure of a business, or to prevent losses, and for employees dismissed on the grounds of disease (*secs. 283 and 284, LC*).

In addition, minimum retirement benefits are provided of one-half month's pay for every year of service, unless the employee would receive more under a collective agreement or other legislation. However, these provisions only apply if the employee is over 60 and has rendered at least five years' service.<sup>3</sup> Retirement benefits are not available to employees in domestic service or agriculture, or to those exclusively engaged in retail or household and individual services.

### **Avenues for redress**

Termination of employment without just cause, or without the necessary prior clearance, is deemed to be void and ineffective, and the worker is entitled to be reinstated (*sec. 279, LC*), and to full back pay. If the employee cannot be reinstated, because the position no longer exists or the employment relationship has been irreparably damaged, then the employee is entitled to severance pay of one month per year of service, with a minimum of one month's wages.

An employee may file an *Opposition* to a notice of dismissal with the Government; a government agency will then decide on the merits of the dismissal, either summarily or by arbitration. This arbitration decision can be appealed to the National Labour Relations Commission, whose decision is final.

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<sup>3</sup> Republic Act No. 7641 of 1993.

## ***Poland***

### **Sources of regulation**

The Labour Code (LC) of 26 May 1974, as amended on 15 August 1996, is the main source of law regulating termination of employment in Poland. Supplementary legal provisions are found under the Termination of Contracts Act of December 1989 (TCA) the Employment and Unemployment Act, 1991, and the State Labour Inspection Act, 1985. In addition, the Constitution is an important source of law as some of the fundamental precepts of labour protection are enshrined there. The Constitution is therefore the underlying force and legislative basis of Polish labour law.<sup>239</sup> Special regulations provide for severance pay for domestic workers (Council of Ministers (regulation of 20 April 1990)) and for the police (Act of 6 April 1990).

### **Scope of legislation**

The LC regulates conditions of employment of workers in both the state-owned sector and the private sector. It covers all persons employed on the basis of a contract of employment, an appointment, nomination, election or a cooperative contract of employment. These forms of employment are all defined in the LC.

Since 1989, with the enactment of the TCA and then the Employment and Unemployment Act, both statutes designed to address problems stemming from Poland's transition from a centralized economy to a market economy, the scope of protection against employment termination has been somewhat reduced. Specifically, the fundamental concept of a right to work enshrined under the Constitution and previously given effect under the old regime of full employment, has been eroded. This concept is now little more than an ideological concept and is not justiciable. Consequently, the new statutes have limited the procedural and substantive safeguards of the right to work.

### **Contracts of employment**

Contracts of employment may be concluded for an indefinite period, for a fixed period or for the time to complete a specific task (*sec. 25, LC*). *Sec. 25* provides for trial periods of not longer than three months. Entering into a subsequent employment contract for a fixed period has a legal effect identical to entering into an employment contract for an indefinite period, provided that the parties have previously entered into an employment contract for a fixed period (for periods following each other), and the interval between the termination of one employment contract and entering into the subsequent one was not longer than one month (*sec. 25(1), LC*).

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C mutual agreement of the parties;
- C expiry of a fixed-term contract; and
- C completion of the task for which the contract was concluded.

### **Termination of employment at the initiative of the employer**

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<sup>239</sup> For example, the right to work is specifically mentioned. The LC also specifies that Polish citizens shall be assured of work through constant and comprehensive development of the national economy and a rational employment policy (*sec. 19, LC*).

The concept of the right to work is no longer viewed as a right to employment for all under Polish law. Instead, this ideal is translated into the provision of broad protection against unjustified termination of employment by the employer. This protection includes an absolute prohibition against the dismissal of certain groups of workers. In addition, the LC requires all dismissals to be for a valid reason, and the Code itself enumerates several grounds of lawful and unlawful dismissal.

Reasons considered to be valid will generally fall within the categories of serious or repeated misconduct, incapacity or operational requirements of the enterprise (*secs. 52, 53 and 55, LC*). Instances of serious or repeated misconduct entitle the employer to dismiss summarily, without notice, and include where the worker commits a serious violation of his or her basic duties as a worker. Examples of this include where the worker disturbs the order and peace of the workplace, is absent without justification, makes products of poor quality,<sup>2</sup> is drunk at the workplace or commits abuses in connection with social security allowances. The worker may also be summarily dismissed if he or she is convicted of a criminal or civil offence which makes their employment impossible or where they cease, through their own fault, to have the necessary qualifications for the job. A serious violation of basic duties has been judicially defined as an instance of blatant carelessness and not instances of lesser fault, while the term basic duties refers to those obligations outlined under *sec. 100(2)* of the LC.<sup>3</sup>

An employer may also terminate the work relationship where the worker is incapacitated by disease and such incapacity lasts for longer than the permitted period for receiving welfare benefits (*sec. 53, LC*). A worker who has been absent from work (other than for illness) for more than one month may also be lawfully dismissed.

An employee may also be lawfully dismissed for refusing a proposed change in conditions of employment or remuneration (*sec. 42(3), LC*). This is in direct contrast to the rule under common law where the employee is entitled to claim wrongful dismissal if the terms and conditions of his or her contract are substantially and unilaterally changed by the employer. Nevertheless, a proposed change may not be arbitrary but must be justified either by a reason which would be grounds for termination with notice, or by any other adequate reason.<sup>4</sup>

Certain categories of workers are deemed to have special protection from dismissal and such workers may only be dismissed for reasons of serious misconduct or, in some instances, where the employer declares bankruptcy or is placed into liquidation.

Workers may not be dismissed for reasons of trade union membership or participation,<sup>5</sup> or for undergoing obligatory military service. Wives of soldiers in military service are similarly protected, as are women who are on pregnancy or maternity leave, or those on three-year child care leave. Further, employees who are military invalids or those who are less than two years away from pensionable age also enjoy special protection from dismissal (*secs. 39 and 40, LC*).

A worker also may not be dismissed without notice if he or she has been absent to care for a child or has been placed in isolation because of a contagious disease (*sec. 53(2), LC*).

In addition, the Constitution of Poland prohibits discrimination on the grounds of race, creed, religion or gender and this is reflected in the labour laws (*sec. 11, LC*), which also prohibit discrimination on the grounds of age, disability, nationality, political views and trade union membership.

Specific rules relating to dismissal for economic reasons, or because of structural, technological or production changes (i.e. redundancies), were introduced under the Act concerning termination of employment relationships for reasons connected with establishments (1989), and the TCA (*sec. 1*). The latter statute applies to enterprises which contemplate terminating at least 10 per cent of their workforce where the total number employed is less than 1,000 workers, and at least 100 workers where the total number employed is higher than 1,000 (*sec. 1, TCA*).

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<sup>2</sup> *Sec. 6* of the Act of 8 February 1979 on the quality of products, services and construction units, *Journal of Laws*, No. 2/1979, item 7.

<sup>3</sup> These include: (1) observing the appropriate work-hours; (2) endeavouring to achieve the best possible work results, including the display of appropriate initiative; (3) complying with internal employment rules and orders; (4) complying with the rules on occupational safety and health; (5) having regard for the welfare of the establishment, taking good care of its property and using it in accordance with the purposes for which it is intended; (6) keeping state and business secrets; and (7) observing the rules governing life in the community.

<sup>4</sup> Directive of the Full Bench of the Chamber of Labour of the Supreme Court, 1985 (*sec. 43, LC*).

<sup>5</sup> Also protected under *sec. 234* of the Trade Union Act, 1991.

### Notice and prior procedural safeguards

Notice is required for all dismissals except for well defined situations of serious misconduct which entitle the employer to dismiss without notice, that is, summary dismissal. The length of notice for a contract of employment concluded for an indefinite period depends on the length of the period of employment:

C for periods of employment of less than six months, the length of notice is two weeks;

C for periods of employment for at least six months, one month; and

C for periods of employment of at least three years, three months (*sec. 36, LC*).

The notice period of three months may be reduced to one month in cases of redundancy: for the remaining period of notice, an indemnity is to be given in lieu of notice (*sec. 7, TCA*).

Where a contract of employment is for a fixed term, the contract may provide for an early termination notice period of two weeks (*sec. 33, LC*).

The employer is required to give his or her reasons in writing for any proposed termination of employment to the employee (*sec. 38(1), LC*).

Termination with notice is subject to trade union control. The employer must give to the relevant union notice, in writing, concerning the proposed dismissal. The union is then given the opportunity to give an opinion concerning the proposed dismissal within five days (*sec. 38(2), LC*). Although the opinion expressed by the trade union is non-binding, it is of great influence in the final decision on dismissal made by the director of the enterprise. It is also an important factor in any dispute about the justifiability of the dismissal. Failure to inform the union about a proposed dismissal is sufficient grounds for an employee to claim that his or her notice of dismissal is unlawful.

Employers wishing to dismiss those employees who belong to categories granted special protection from dismissal must first obtain authorization from the proper governmental labour authority.

Strict procedural guidelines are laid down for redundancies (*secs. 3, 4 and 5, TCA*). First, management must give notice to trade unions about the proposed termination, and inform them of the number of employees concerned and the reasons for the terminations. Such notice must be given at least 45 days before the proposed redundancies. Trade unions are given an opportunity to contest the redundancies and to submit counter-proposals. They are expected to reach an agreement with management about the procedure for redundancies. If no agreement is reached, management may decide alone.

Secondly, the same information about the number and reasons for the dismissals must be given by the employer to the local employment office.

Finally, in case of redundancies, the three months notice period given to the employee can be reduced to no less than one month and a payment in lieu of notice given for the remaining part of the notice period (*sec. 7, TCA, and sec. 36(1), LC*).

### Severance pay

In case of redundancies, special provisions are made for severance payments or compensatory allowances under the TCA, *sec. 8*.

Severance payments equate to one, two or three months remuneration for workers who have worked for a total of less than ten, less than 20 or more than 20 years, respectively. Severance pay is not due to workers who are entitled to a lump-sum payment in connection with their retirement.

Compensatory allowances are paid for six months when the dismissed worker has been relocated in a job with a lower wage. These allowances are charged to the Government Labour Fund.

For dismissals other than redundancies, Poland has an extensive unemployment benefits scheme regulated under the Employment and Unemployment Act, 1991. A worker who is dismissed for serious misconduct or who resigns is not entitled to unemployment benefits.

### Avenues for redress



Unjustified termination of employment, with or without notice, or violation of any of the procedural rules governing termination with notice, and dismissal of a worker covered by special protection gives the employee the right to institute legal proceedings in a court of law (*sec. 44, LC*). This right includes employees who have been dismissed for reasons of redundancy or other economic reasons, even where part of a collective dismissal. In addition, an employee can apply to the Arbitration Commission for arbitration before undertaking recourse to legal proceedings before the courts.

Where dismissal is effected before the expiration of the period of notice or without notice, the dismissal is declared null and void. The employment relationship continues without interruption and the worker suffers no loss in remuneration. In cases of dismissal on unjustified grounds, the employee is entitled to reinstatement and damages (*secs. 45 and 47, LC*). Except for workers enjoying special protection, such as pregnant women or soldiers, compensation in the form of damages is limited to an amount equivalent to three months=pay but not less than the period of notice (*sec. 47, LC*).

Compensation will be reduced by the amount of any remuneration that the employee may have earned by taking up employment during the period in question in some other establishment.

## ***Republic of Korea***

### **Sources of regulation**

Termination of employment in the Republic of Korea is governed by the Labour Standards Act, 1997 (LSA), the Equal Employment Act, 1989 (as amended in 1995) (EEA), and the Trade Union and Labour Relations Adjustment Act, 1997 (TULRAA).

### **Scope of legislation**

The LSA applies to all businesses and workplaces with five permanent workers or more. It excludes domestic workers, relatives and those in military service (*sec. 10*, LSA).

### **Contracts of employment**

The provisions of the relevant law on termination of employment distinguish between daily-paid workers, workers on short-term contracts, temporary workers (i.e. workers employed for less than six months), seasonal workers, probationary workers and those employed on a permanent basis (*sec. 35*, LSA). There are also restrictions on the employment of job agency workers, who may only be employed for work that requires specialized knowledge, techniques or experience (including temporary vacancies due to maternity, illness or injury, or temporary and irregular needs), for an initial period of one year (extendable for another year), and cannot be employed in direct production process work in manufacturing. An employer is required to consult with trade unions or workers=representatives before employing a job agency worker, and cannot discriminate in relation to terms and conditions between job agency workers and permanent employees.

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of a fixed-term contract; and
- C employee retirement.

### **Termination of employment at the initiative of the employer**

Employers are required to give a justifiable reason for dismissal or termination of employment under the LSA (*sec. 30(1)*). Collective dismissals and dismissals due to redundancy must only be effected because of **urgent managerial needs** after every effort to avoid dismissal has failed (*sec. 31*).

Certain types of dismissals are specifically prohibited by legislation. Under *sec. 30(2)* of the LSA, a worker may not be dismissed during the course of a temporary interruption of work for medical treatment of an occupational injury or disease, or for a 30-day period afterwards. Further, women workers may not be dismissed during a period of lawfully granted maternity leave (*secs. 8 and 11*, EEA). Dismissal on the basis of trade union membership or activity also constitutes unlawful dismissal under *sec. 81* of the TULRAA. All workers are protected from dismissal due to the making of a work complaint or report to the governmental labour authority. The EEA also contains provisions which make it unlawful to dismiss a worker for reasons related to gender (*secs. 8 and 11*, EEA).

When an employer wishes to dismiss employees for managerial reasons, he or she is required to ensure that there are **urgent managerial needs**, such as transfers, mergers and acquisitions of businesses to avoid financial difficulties.

### **Notice and prior procedural safeguards**

A period of 30 days=notice, or payment in lieu of notice, is required for dismissal of permanent workers. The requirement does not apply to temporary workers employed for less than six months, workers employed for a fixed term of less than two months, seasonal workers and probationers (*sec. 35*, LSA).

Where an employer wishes to dismiss for reasons of misconduct, the employee concerned must be given the opportunity to defend himself or herself according to the rules of natural justice and, where applicable, to follow the procedures for dismissal laid down in any collective agreement.

Before deciding to dismiss for managerial reasons, the employer shall make every effort to avert dismissal, shall establish rational and fair standards of dismissal (which cannot discriminate by gender) and shall select workers to be dismissed according to those standards (*secs. 31(2) and 31(3)*, LSA).

In endeavouring to avert dismissals and in establishing standards of dismissal, the employer shall consult in good faith with the trade union at the establishment (provided the trade union has been formed by the consent of the majority of employees), or with those who represent the majority of employees where the trade union does not represent the majority of employees (*sec. 31(3)*, LSA). In this regard, notice is to be given to the union or workers=representative 60 days prior to dismissal day (*sec. 31(3)*, LSA). Employers are also obliged to inform employees at least 30 days prior to dismissal (*sec. 32(1)*, LSA). When an employer dismisses a certain number of workers (to be set by Presidential Decree) the employer must notify the Minister of Labour of those dismissals (*sec. 31(4)*, LSA). Employees made redundant have priority for re-employment for two years, if the employer recruits similar workers.

### **Severance pay**

*Sec. 34* of the LSA requires the establishment of a retirement allowance system for workers employed for more than one year whereby not less than 30 days=wages per year of consecutive service is paid as a retirement allowance.

## **Avenues for redress**

The Labour Relations Commission hears matters relating to dismissals. An application for relief for unlawful dismissal must be made within three months of the dismissal (*sec. 33, LSA, and sec. 82(2), TULRAA*). The Labour Relations Commission is empowered to conduct any investigation it deems necessary and to set up an inquiry into the matter (*sec. 33, LSA, and secs. 82-86, TULRAA*).

Either reinstatement or compensation may be awarded to unfairly dismissed employees.

An employer guilty of violating the law prohibiting trade union discrimination may be liable for a fine or imprisonment for not more than two years (*sec. 90, TULRAA*).

## *Senegal*

### **Sources of regulation**

The sources of labour law in Senegal are found, first and foremost, in the Labour Code (LC) of 1961,<sup>240</sup> regulations and case law. The LC has subsequently been amended on several occasions, the most recent being in 1994, when the sections regulating the conditions of individual and collective dismissal for economic reasons or internal restructuring of the undertaking were modified.<sup>241</sup>

A number of regulations have also been elaborated by the social partners and these consist of collective agreements, the most important of which is the National Interoccupational Collective Agreement of Senegal (CCNI) signed on 27 May 1982.

### **Scope of legislation**

The provisions of the LC apply to the relationship between employers and workers (*sec. 1*, LC), and each of these terms is broadly defined.

According to *sec. 1* of the LC, trainees and persons appointed to permanent posts in the public administrative service are not covered by the provisions relating to dismissal. Moreover, the dismissal of public employees is regulated only through certain provisions of the General Civil Service Statute (particularly with regard to the exercise of due process of law before a disciplinary commission). Termination of a contract of employment in the maritime services is also governed by separate specific rules (Merchant Marine Code, 1962, *secs. 166 to 169*).<sup>242</sup>

### **Contracts of employment**

A contract of specified duration is a contract whose duration is stipulated in advance according to the will of the parties (*sec. 34*, LC). A contract of employment made for the execution of a specified piece of work or the conclusion of an operation whose duration cannot be assessed beforehand is to be treated as a contract of specified duration. A contract whose termination is subject to a future but certain event, the date of which is not exactly known, is also to be treated as a contract of specified duration.

An engagement for a trial period exists where the employer and the worker, with a view to entering into a final contract (either verbally or written), decide to test beforehand the quality of the worker's services and his or her output (from the employer's point of view) and the working and living conditions, remuneration, health and safety conditions and human relations in the workplace (from the worker's point of view) (*sec. 39*, LC). Contracts of engagement for a trial period may not extend beyond a period of six months (*sec. 41*, LC). However, the maximum duration of this period may be

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<sup>240</sup> Act No. 61-34 of 15 June 1961 concerning the Labour Code of Senegal.

<sup>241</sup> Act No. 94-80 of 8 Dec. 1994 concerning the amendment to *sec. 47* of the LC.

<sup>242</sup> Act No. 62-32 of 22 Mar. 1962 concerning the Merchant Marine Code.

one year for a worker who has habitually resided outside the Republic of Senegal and for a worker recruited as a supervisory staff member.

If the worker's employment is continued after expiry of the contract of engagement for a trial period, even if no new contract is made, this will be equivalent to the conclusion of a contract of unspecified duration, taking effect as from the beginning of the trial period (*sec. 42, LC*).

Every contract of employment which does not fall within the definitions of a contract of specified duration or contract of engagement for a trial period is to be considered as a contract of unspecified duration (*sec. 43, LC*).

### **Termination of employment**

The grounds for termination, other than at the initiative of the employer, common to all contracts are (*secs. 45-47, LC*):

- C termination by mutual consent of the parties;
- C *force majeure* (an external and unexpected event whose consequence is to render the performance of duties impossible); and
- C death of the worker.

The expiry of the term designates the end of a contract of specified duration. A contract of this nature may also be terminated before its normal time for lapsing, on the grounds of *force majeure* (Premature termination, see *sec. 45, LC*).

Unless otherwise specified in the contract, a probationary contract can be terminated at any time by either party (*sec. 46, LC*).

The principle governing dismissal in the case of contracts of unspecified duration is unilateral termination. As *sec. 47(1)* of the LC clearly states: A contract of unspecified duration may cease at any time at the will of either party.®

### **Termination of employment at the initiative of the employer**

Every unjustified dismissal shall be considered as a wrongful dismissal (see *sec. 51, LC*). A valid reason® is a concept not defined either by legislation nor by jurisprudence. This concept encompasses a large number of instances. In spite of the diversity of facts and situations which may constitute a valid reason for termination, they may be grouped in two categories depending on whether they relate to the worker or the interests of the enterprise.<sup>4</sup> Most cases fall within the category of reasons relating to the worker, which includes all conduct or inaptitude by the worker incompatible with the continuation of employment. Medically certified physical incapacity of the worker is a valid reason for dismissal, provided that dismissal is not carried out during the period when employment has been suspended because of illness. The same is true for professional inaptitude which may manifest itself in various forms:

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<sup>4</sup> Issa-Sayegh, J: *Droit du travail sénégalais* (Senegalese Labour Law) (Dakar, Nouvelles éditions africaines, 1987), pp. 606 et seq.

poor service, poor management, low output, professional incapacity, non-performance of a job in the agreed period, among others.

In addition, the courts consider the following as misconduct justifying dismissal:

- C acts of indiscipline or insolence;
- C unjustified absence;
- C violation of professional obligations;
- C civil or criminal offences; and
- C negligence or recklessness.

Dismissal may be carried out, independently of misconduct on the part of the worker if, in the interests of the enterprise, it is deemed necessary. Such is the case when enterprises cease operations, regardless of the reason for doing so (e.g. closure of the enterprise or establishment, bankruptcy, and so on). Retrenchment for economic reasons, however, require the application of a specific dismissal procedure for economic reasons.

Misunderstanding and lack of cooperation between the worker and the employer or a supervisor also justifies dismissal, provided that these accusations are supported by objective reasons. Dismissal is also legitimate when the worker refuses to accept a modification to the employment contract which is justified by the interests of the enterprise.

Dismissal without legitimate reasons and dismissal on account of the worker's opinions, trade union activity or membership or non-membership of a particular trade union (*sec. 51, LC*), or on the grounds of sex, race or religion are examples of wrongful dismissal.

Moreover, absence from work for up to six months, which is justified by incapacity due to an illness other than an occupational disease or accident, is not a valid reason for termination. If the worker's illness requires long-term treatment, taking into account the seniority of the worker in the enterprise, the six-month time limit will be extended to eight months for workers with seven to 15 years' seniority, and to ten months for workers with a longer period of service with the enterprise (*sec. 19, CCNI*).

A contract of specified duration may not be terminated before its normal time for lapsing, except in the case of serious misconduct or *force majeure* (*sec. 45, LC*). Premature termination for any other reason is considered wrongful.

In addition, some workers are governed by a particular regime concerning dismissal, which is characterized by protective rules. For example, because of the importance of their mandate, staff representatives may be dismissed only with the authorization of the local inspector of labour and social security (*secs. 188 and 188bis, LC*). The same is true for workers who are members of the National Advisory Council on Labour and Social Security (CCNTSS).<sup>5</sup>

Under *sec. 138* of the LC, an employer may not dismiss a pregnant woman during the period of interruption of work due to pregnancy. Similarly, a worker who has suffered an occupational accident who cannot be reassigned in the enterprise may only be dismissed with the prior agreement of the labour inspector (*sec. 118, Social Security Code*). Without this authorization, such dismissal is wrongful.

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<sup>5</sup> *Sec. 180* of the LC establishes the CCNTSS within the Ministry of Labour and Social Security for the general purpose of studying problems concerning labour and social security.

Any individual or collective dismissal that an employer intends to order on account of economic reasons or an internal reorganization constitutes dismissal for economic reasons (*sec. 47(3)*, LC).

### **Notice and prior procedural safeguards**

The termination of a contract of unspecified duration is subject to the giving of notice (*sec. 47(2)*, LC). The notice period begins to run from the date on which notice is served. During this period, the contract continues in force. The duration of the notice period is fixed by collective agreement or, in absence of such agreement, by decree.<sup>6</sup> For the purpose of seeking other employment, during the period of notice, the worker is to be allowed one day off with full wages each week, which he or she may take all at once or one hour at a time, as he or she prefers (*sec. 48*, LC).

*Sec. 48* of the LC establishes that during the period of notice the employer and the worker are committed to respecting all the obligations they have assumed towards each other. If these obligations are not respected by one of the parties, no period of notice is enforceable on the other party, who is also entitled to file a claim for damages in a competent court.

Whenever a contract of employment of unspecified duration is broken without notice or without full notice, the employer must pay to the worker compensation in lieu of notice. This amount corresponds to the remuneration, together with full bonuses and allowances, which the worker would have enjoyed during the period of notice not observed (*sec. 49*, LC). If the contract is terminated while the worker is on leave, compensation in lieu of notice is to be doubled (*sec. 50*, LC).

However, a contract may be broken without notice in case of serious misconduct, subject to the findings of the competent court of law as regards the gravity of the misconduct (*sec. 49*, LC).

In the case of premature termination of a fixed-term contract of employment exceeding three months (*sec. 37*, LC), the employer must, within 15 days, notify the labour inspector before whom the contract was made (*sec. 53*, LC).

An employer must give written notice of his or her intention to terminate a contract of unspecified duration (*sec. 47(2)*, LC), stating the reasons for doing so.

With the aim of avoiding economic dismissals, the employer must consult the staff representatives to ascertain whether other possibilities, such as a reduction in working hours, work on a rota system, part-time work, training or reassignment of staff may avert the proposed dismissal (*sec. 47(3)(a)*, LC).

A summary of this meeting must be transmitted by the employer within eight days to the labour inspector, who will have 15 days following the submission of the communication from the employer to possibly exercise his or her good offices (*sec. 47(3)(a)*, LC).

If, after the expiry of 15 days, it is necessary to carry out some dismissals, the employer will decide on the order in which to proceed. The first employees to be dismissed will be the workers with the least aptitude for the jobs the employer decides to maintain (*sec. 47(3)(b)*, LC).

In the case of workers with equal aptitude, the workers with the greatest seniority will be kept on staff. Seniority in the enterprise is increased, for the purpose of establishing the order of dismissals, by

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<sup>6</sup> For executives and similar personnel: three months; for monthly paid white-collar workers, blue-collar workers and permanent hourly, daily or weekly paid staff: eight days and one month, depending on the length of service (*sec. 23*, CCND).



one year in the case of married workers and by one year for each dependent child in accordance with legislation on family allowances.

The employer must inform the staff representatives in writing, giving a list of the workers he or she proposes to dismiss with an indication of the criteria adopted. Staff delegates (*sec. 47(3)(c)*, LC) will be required to meet within seven days to discuss their proposals. After the meeting with the staff representatives, the employer may proceed with the dismissals (*sec. 47(3)(e)*, LC).

A worker who has been dismissed for economic reasons will continue to enjoy priority for two years if workers are recruited within the same category in his or her former enterprise (*sec. 47(4)*, LC).

### **Severance pay**

The LC leaves it open for contracts and collective agreements to determine whether provisions for compensation for dismissal are due or not (*sec. 51*, LC). There are, therefore, provisions for compensation in most collective agreements, particularly in the CCNI.<sup>7</sup>

Workers who have completed a period of service at least equal to the period of eligibility for holidays have a right to such compensation. Similarly, workers who have served for the necessary period in several positions in the same enterprise are also entitled to benefit from such compensation upon dismissal, if their termination was due to staff reduction or retrenchment. In such cases, the amount of compensation is calculated, with deductions made for amount deposited for this purpose during previous dismissals.

For each year of service in the enterprise, severance pay is represented by a percentage of the average overall wages for the last 12 months of service prior to the date of dismissal. These overall wages include all payments representing allowances, except for those allowances corresponding to the reimbursement of travel expenses.

This compensation is not payable if the contract has been terminated because of gross misconduct.

A worker who has been made redundant for economic reasons will enjoy, apart from notice and compensation for dismissal, a non-taxable, special indemnity equal to one month's gross wages.

### **Avenues for redress**

The principle of judicial monitoring of termination of contracts appears in *sec. 45* of the LC for employment contracts of specified duration and in *sec. 51* of that Code for all contracts. Under these provisions, the competent court is to examine the causes and circumstances of the breaking of the contract. Such monitoring relates to the legitimacy of the sanction for wrongful termination (damages).

Neither cancellation of the decision to terminate employment nor reinstatement of the worker are avenues of redress for wrongful dismissal, which may give rise only to the payment of damages (*sec. 51*, LC). Under *sec. 51* of the LC, where the responsibility for the termination lies with the employer, damages will be assessed with due regard to custom, the nature of the services contracted for, the worker's length of service, his or her age and any vested rights. Commissions, bonuses or various advantages and allowances, in so far as they do not constitute repayment for expenses, are also taken

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<sup>7</sup> The description of the regime for such compensation here refers mainly to the CCNI (*sec. 30*).

into account for the calculation for damages (*sec. 112*, LC). The judgement must expressly mention the alleged reason given by the employer and substantiate the assessment of damages.

In the event of litigation, individual labour disputes concerning termination of an employment contract for economic reasons must be examined *as a matter of priority* by the labour courts (*sec. 47(5)*, LC).

## *Singapore*

### **Sources of regulation**

The central pieces of legislation in Singapore governing the termination of employment are the Employment Act, 1970, as amended (EA), and the Industrial Relations Act, 1966, as amended (IRA). In addition, collective agreements or individual contracts of employment may contain provisions governing the termination of employment.

### **Scope of legislation**

The EA contains a wide definition of *employee*, which includes all persons who have entered into work under a contract of service with an employer (*sec. 2*, EA), but excludes seafarers, domestic servants, watchkeepers, security guards and any employees in managerial, executive or confidential positions. Foreign workers are also excluded from the EA.<sup>243</sup> The EA does not distinguish between casual, probationary, apprentice and permanent employees. However, the termination requirements for fixed-term employees mean that these employees are effectively excluded from the protections against unfair dismissal (see below).

### **Contracts of employment**

The EA provides that a contract for a specified piece of work or for a specified period of time is to terminate when the work is completed or the period expires (*sec. 9(1)*, EA).

### **Termination of employment**

Indefinite contracts of employment may terminate upon either party giving notice. In addition, an employee may terminate employment immediately if salary is not paid (*sec. 13(1)*, EA), or if the employee or his or her dependants are threatened by violence or disease (*sec. 15*, EA).

### **Termination of employment at the initiative of the employer**

Summary dismissal by the employer is possible when:

- C** the employee willfully breaches a condition of the employment contract (*sec. 11(2)*, EA);
- C** the employee is continuously absent from work, without leave or reasonable excuse, for more than two days (*sec. 13(2)*, EA); or

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<sup>243</sup> *Sec. 9*, Employment of Foreign Workers Act, 1990.

C the employee is found, after due inquiry, to be guilty of misconduct (*sec. 14*, EA).

If an employee is found, after due inquiry, to be guilty of misconduct, the employer may, instead of dismissing the employee, downgrade or suspend him or her for up to a week (*sec. 14(1)*, EA). An employer may also dismiss an employee on notice, and either party may waive the right to notice.

An employer may not dismiss or discipline an employee on the grounds of trade union activities, or for taking maternity leave or being pregnant (*sec. 81*, IRA).

### **Notice and prior procedural safeguards**

Notice periods are governed by the terms of the contract, and it is only in the absence of a stipulation as to notice in the contract that the statutory notice periods apply (*sec. 10*, EA). Either the employer or employee may make a payment in lieu of notice (*sec. 11*, EA). The contractual notice periods for both employer and employee are required to be equal (*sec. 10(2)*, EA). The statutory periods of notice are:

C for service of less than six months= service, one day;

C for service of six months= to two years= service, one week;

C for service of two to five years= service, two weeks; and

C for service of more than five years= service, four weeks (*sec. 10(3)*, EA).

Employers are required to make a due inquiry<sup>2</sup> before dismissing an employee for misconduct, which includes an obligation to comply with the dictates of natural justice (*sec. 14*, EA). However, there is no statutory procedure for collective dismissals, and no requirement to obtain government approval for any kind of dismissal, although consultation and other obligations may be included in applicable collective agreements.

### **Severance pay**

Employees with more than three years= service can claim retrenchment benefits, and employees with more than five years= service may claim retirement benefits. However, the level of these benefits is set by collective agreements (if any).

### **Avenues for redress**

A dismissed employee who considers that he or she has been dismissed without just cause, may seek reinstatement (and/or damages) from the Minister of Labour, who may delegate the investigation of the merits of the dismissal to the Labour Commissioner.<sup>2</sup> A Commissioner appointed by the Minister will establish the facts of the matter and attempt to conciliate the dispute. If no agreement is possible, the Minister may order reinstatement or damages. The decision of the Minister, after receiving any report from the Commissioner, is final (*sec. 14(5)*, EA).

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<sup>2</sup> *Sec. 14(2)*, EA, as amended, and *sec. 35(2)*, IRA (for unionized employees).

For claims not of unfair dismissal but simply breach of contract at common law, the employee retains the right to sue in the civil courts.

## *South Africa*

### **Sources of regulation**

There are four sources of law that regulate the termination of the employment relationship in South Africa.: the Constitution, legislation, the common law and collective agreements.

*Art. 23* of the South African Constitution entrenches several fundamental rights concerning labour relations. These rights apply to legislation and to the common law. They are also capable of being made applicable to employers and employees in the private sector.

The constitutional right to fair labour practices includes the right not to be unfairly dismissed. *Art. 39(1)* of the Constitution requires the courts or arbitration tribunals to consider international law when interpreting the provisions of the Bill of Rights. The courts have had recourse to the ILO Termination of Employment Convention, 1982 (No. 158), and Recommendation, 1982 (No. 166), when interpreting the right not to be unfairly dismissed.

Two pieces of legislation apply to the termination of employment: the Labour Relations Act (LRA) (No. 66 of 1995) and the Basic Conditions of Employment Act (No. 75 of 1997) (BCEA).

The constitutional right not to be unfairly dismissed is given effect to by Chapter VIII of the LRA, which provides a remedy for unfair dismissal. Schedule 8 of the LRA contains a Code of Good Practice: Dismissal. The Labour Courts and the Commission for Conciliation and Arbitration must take this Code into account when determining the fairness of a dismissal.

The BCEA sets minimum terms and conditions of employment including the notice of termination and the payment of a severance allowance. In South African common law a contract of employment is regarded as a species of lease. Accordingly, the common law rules on the cancellation of contracts of lease apply to termination of employment contracts.

Collective agreements are also a source of law regulating the individual employment relationship. The LRA provides a framework within which one or more trade unions and one or more employer or their organizations can collectively bargain to determine terms and conditions of employment. These agreements often include pre-dismissal procedures, periods of notice and post-dismissal procedures. Collective agreements may provide alternative procedures for processing unfair dismissal disputes.

### **Scope of legislation**

The LRA, which deals with the right not to be unfairly dismissed, applies to all employers and employees in both the public and the private sectors, with the exception of members of the defence force and the state intelligence agencies. An employee is defined as any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration (*sec. 213*, LRA).

The scope of the BCEA, which deals with the minimum period of notice and severance pay, is similarly limited except that there is an additional general limitation of scope (regarding unpaid volunteers working for charitable organizations) and several specific limitations in respect of merchant seamen (only

the provisions on severance pay apply). Moreover, the BCEA does not apply to persons undergoing vocational training to the extent their terms and conditions are regulated by other laws and employees who work less than 24 hours a month are not covered by the notice and severance pay provisions (*sec. 36, BCEA*).

The consequence of limiting the scope of the LRA means that there is no statutory remedy for an unfair dismissal of an employee falling within the excluded categories. However, because *art. 23(1)* of the Constitution entrenches the right to fair labour practices for [everyone](#), the unfair dismissal of such an employee may found a constitutional claim.

## **Contracts of employment**

The validity of a contract of employment is governed by common law rules of contract. There must be an intention to contract, i.e. to create obligations. But the fact that parties intend to enter into a contract does not mean that the contract is valid. The parties must have contractual capacity. The performance undertaken must be possible at the time of contracting. The contract itself, its performance and purpose must be lawful. Finally, there must be compliance with any constitutive formalities.

The contractual arrangements between the parties are, to an increasing extent, in the formal sector, being embodied in written documents. In most cases, however, this is not a legal requirement. Thus a contract of employment may be concluded orally or in writing; and expressly or by implication. However, certain limited classes of contracts of employment must be in writing, such as contracts of apprenticeship and articles of clerkship. The BCEA requires employers (except those who employ less than five employees and employees who work for less than 24 hours a month or are domestic workers) to produce written particulars of certain terms and conditions of employment (*sec. 29*). However, an unwritten contract is still valid.

The BCEA lays down a wide range of minimum standards (e.g. dealing with hours of work, overtime, leave, sick leave, work on Sundays and public holidays). However, the parties to a contract of employment have the freedom to agree to terms and conditions of employment which are more favourable than those laid down by legislation. They are also generally free to agree on matters which are not regulated by statute.

A contract of employment may be concluded for a definite or an indefinite period, and it can provide for full or part-time work as well as temporary work. However, under the LRA an employer who fails to renew a fixed-term contract, when a reasonable expectation that it will be renewed is held by the employee, is deemed to have dismissed the employee.

The provisions of the BCEA are deemed to be included in all contracts of employment unless the terms of other laws, or the contract itself are more favourable (*sec. 4*). Moreover, the Minister of Labour may make a [sectoral determination](#) setting different minimum standards for specific sectors (*sec. 55*), and may deem categories of persons to be employees (*sec. 83*).

## **Termination of employment**

The different ways in which a labour contract can come to an end are enumerated and regulated in part by the general law of contract (common law principles) and in part by specific statutory provisions

of labour law. When a contract is entered into for a fixed period of time, it will automatically come to an end when the contract period expires. The parties to the contract can also agree on the automatic termination of the employment contract on the occurrence of a future event; for example, when the task or project for which the employee has been employed is completed. As a general rule, a contract of employment can also be terminated by mutual agreement of the parties. Moreover, the death (but not the illness) of the employee will lead to the end of the contract. However, in terms of common law, the death of an employer will not necessarily lead to the contract's termination. A contract may also terminate by operation of law.

### **Termination of employment at the initiative of the employer**

Every employee has the right not to be unfairly dismissed@ (*sec. 185, LRA*). The LRA distinguishes between **Automatically unfair dismissals@** and **Unfair dismissals@** (*secs. 187 and 188*). According to this legislation, any dismissal is unfair if it is based on an **Automatically unfair reason@**. A dismissal will also be unfair if it is not for a fair reason based on the employee's conduct or capacity, or owing to the employer's operational requirements, or if the correct procedures have not been followed. This is the case even if the dismissal complies with any notice period in a contract of employment or in legislation governing employment (*secs. 188 and 2(1)* of the Code of Good Practice, Schedule 8 of the LRA).

In regard to automatically unfair dismissals, the question of fairness is decided irrespective of whether the employer has lawfully terminated the contract of employment at common law. *Sec. 187* of the LRA lists the automatically unfair reasons as follows:

- C** dismissal based on membership in a union or a workplace forum, or participation in lawful union activities or workplace forum activities;
- C** an employer's request that a person seeking employment shall not be or become a member of any trade union or workplace forum, or would have to give up such membership;
- C** dismissal based on participation in a strike in conformity with the LRA or the intention to participate in such a strike or to support it;
- C** dismissal based on the employee exercising a right under the LRA, or participating in any labour proceedings;
- C** an employer compelling an employee to accept a demand concerning a matter of mutual interest between the employer and employee;
- C** dismissal based on race, colour, ethnic or social origin, gender, marital status, family responsibilities, sexual orientation, religion, conscience, belief, political opinion, or disability, unless the reason for dismissal is based on an inherent requirement of the particular job;
- C** pregnancy or maternity; or
- C** dismissal based on age, unless the employee has reached the normal or agreed retirement age for employees in that capacity.

*Sec. 188* of the LRA stipulates that a dismissal is unfair where the employer fails to prove that the dismissal was effected for a fair reason. Fair reasons may be:



- C connected with the employee's conduct;
- C connected with the employee's capacity; or
- C based on the employer's operational requirements.

Dismissal must be in compliance with a fair procedure, which includes taking account of the Code of Good Practice.<sup>244</sup> Participation in an illegal strike may also constitute a fair reason for dismissal.

*Sec. 189* of the LRA regulates dismissals on the grounds of the operational requirements of a business. Dismissals for economic, technological, structural or similar reasons are commonly collective dismissals.

### **Notice and prior procedural safeguards**

An employer seeking to dismiss an employee must observe the minimum *notice periods* as prescribed, *inter alia*, by *sec. 37* of the BCEA. According to this section, a party wishing to terminate a contract of employment must, during the first four weeks of employment, give the other party one week's notice. For employment of more than four weeks, but less than a year, two weeks' notice is required. For employment of greater than a year (or greater than four weeks for farm or domestic workers), the notice period is four weeks. An employer may make a payment in lieu of notice, but a contractual notice period required of an employee may not be longer than the period to be given to an employee. Collective agreements, but not individual contracts, may provide shorter notice periods than those stipulated by the BCEA.

Notice of termination may not be given while an employee is absent on leave, including sick leave; usually, it must be given in writing, except if an employee is illiterate. On termination of a contract of employment, the employer must furnish the employee with a certificate of service.

The Code of Good Practice appended to the LRA deals with some of the key aspects of individual dismissals for reasons related to *conduct* and *capacity* (*sec. 1* of the Code). Termination of employment due to operational requirements, if they involve collective dismissals, are not regulated by the Code (*sec. 7* of the Code).

Although special reference is made to probationary employees with regard to terminations on the grounds of *capacity*, the Code of Good Practice does not distinguish between temporary, casual or managerial employees.

The new legislation provides consultation rights for trade unions, workplace forums and employee representatives when collective dismissals are contemplated. An employer is obliged to disclose in writing all relevant information for the purpose of consultation (e.g. reasons for dismissal, number of employees affected, period during which the proposed dismissals are to occur, proposed method of selecting employees for dismissal, assistance which may be rendered by the employer to the employees, possibilities of future employment and other alternatives to dismissals). The employer must also allow employees to respond, and in turn reply to the response of the workers' representatives to these issues. If selection criteria for the dismissals have not been agreed to by the parties, the employer must follow

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<sup>244</sup> Schedule 8 of the LRA. This Code is drafted in general terms and is not intended to substitute *codes of discipline* which have been provided for in the applicable collective agreement, contract of employment or workplace forums. In assessing whether the employer has given effect to the underlying principles of the Code, the courts take into account the size and nature of the undertaking.

fair and objective criteria. The employer's failure to comply with these procedural requirements renders any dismissal unfair.

As far as misconduct is concerned, the Code of Good Practice demands that disciplinary rules should be adopted according to the size and nature of the employer's business and should promote certainty and consistency. These rules should be clearly formulated and made available to all employees (*sec. 3(1)* of the Code).

In deciding on the imposition of a disciplinary penalty, all relevant facts should be taken into account, including the employee's disciplinary record, length of service and personal circumstances. However, the procedure does not necessarily have to take on a formal nature (*sec. 4(1)* of the Code). In any case, the employee has to be informed of the allegations against him or her and has to be given a chance to respond (where necessary, with the assistance of trade union or employees' representatives) (*sec. 4* of the Code).

*Sec. 3(4)* of the Code states that generally it is not appropriate to dismiss an employee for a first offence. For a first infringement, the employee should receive a written warning (for more serious infringements, a final warning). Dismissal should be saved for cases of serious misconduct or repeated infringements of disciplinary rules which make a continued employment relationship intolerable. Gross dishonesty or wilful damage of property; wilful endangering of other persons; physical assault; and gross insubordination are examples of serious misconduct.

Disciplinary proceedings against a trade union representative should not be instituted without first informing and consulting the union (*sec. 4(2)* of the Code).

As far as incapacity is concerned, the legislation distinguishes between poor work performance, on the one hand, and ill health and injury, on the other.

With regard to poor work performance, the legislation further distinguishes between probationary employees and employees not on probation. A probationer should be given the proper instruction, training or counselling that he or she requires in order to render satisfactory service (*sec. 8(1)* of the Code). Dismissal during the probationary period should be preceded by an opportunity for the employee to state a case in response and to be assisted by a trade union representative or fellow employee (*sec. 8(1)* of the Code). After probation, an employee should not be dismissed for incapacity unless the employer has given the employee appropriate instruction, training or counselling, and, after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily (*sec. 8(2)* of the Code). The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider any available alternatives to dismissal (*sec. 8(3)* of the Code).

With regard to incapacity due to ill health or injury, the investigation conducted by the employer should establish the extent of the incapacity and the prognosis, and consider counselling or rehabilitation. The employer should also consider any available alternatives to dismissal (*sec. 11* of the Code).

## **Severance pay**

The LRA requires severance pay in the case of dismissal for economic reasons (*sec. 196*), unless the employer is exempted from this obligation by the Minister. A basic rate of at least one week's wages per year of service is required by both the LRA and BCEA (*sec. 41*) but only for dismissals for

operational requirements. This rate, which accords with current industry norms, may be adjusted by the Minister from time to time. It may also be improved on by collective agreement. Where a dispute over severance pay forms part of a dispute over unfair dismissal for economic operational reasons, it is determined as part of the latter dispute by the Labour Court (*sec. 196, LRA*).

### **Avenues for redress**

The LRA establishes an independent, tripartite Commission for Conciliation, Mediation and Arbitration and a Labour Court (Chapter VII of the LRA). *Sec. 191* of the LRA states that if there is a dispute about the fairness of a dismissal, the employee may refer the dispute in writing within 30 days of the date of the dismissal to a special bargaining council or to the Commission, if no council has jurisdiction. If the council or the Commission does not succeed in resolving the dispute through conciliation, it is referred to arbitration. No appeal is available against an arbitration award (*sec. 143, LRA*).

Automatically unfair dismissals should be referred to the Labour Court. The Director of the Commission may also refer other dismissals to the Labour Court where:

- C the dismissal is for discriminatory reasons;
- C it is a very complex case;
- C there are conflicting arbitration awards that have to be resolved;
- C it is in the public interest; or
- C a question of law is involved.

The Labour Court also has jurisdiction with regard to disputes concerning dismissal as a consequence of operational requirements.

In the case of dismissals adjudicated by the Labour Court, an appeal against the decision of the Court is possible. Appeals from the Labour Court will be heard by the Labour Appeal Court. However, no appeal to the Appellate Division of the Supreme Court of South Africa is possible.

Common law claims for breach of contract in the ordinary civil courts are also still possible.

The primary remedy envisaged by *sec. 193* of the LRA in cases of unfair dismissal is reinstatement or re-employment. Urgent interim relief (including temporary reinstatement) may also be available.

Alternatively, the Labour Court or the arbitrator may order the employer to pay compensation to the employee (*sec. 194* of the LRA deals with the limits on compensation for dismissals that are not automatically unfair, or not for operational requirements; the maximum amount is the equivalent of 12 months= pay). *Sec. 195* states that such an order or award of compensation is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.

## *Spain*

### **Sources of regulation**

The main sources of law for termination of employment in Spain are the Workers= Charter,<sup>245</sup> Royal Decree 2546/1994 of 29 December on recruitment, and Royal Legislative Decree 2/1995, which adopts the text which is recast in the Labour Procedure Act (LPA). In addition, *art. 35* of the Spanish Constitution states that All Spaniards have the duty to work and the right to work, to the free selection of their profession or office career, to advancement through work and to sufficient remuneration to satisfy their needs and those of their family, while in no case can there be discrimination for reasons of sex. Some collective agreements also deal with this subject.

### **Scope of legislation**

Labour legislation is to be applied to work done by Spanish workers hired in Spain and in Spanish undertakings in a foreign country.

The Workers= Charter is applied to workers who voluntarily provide remunerated services for another person and within the scope of organization and management of the other physical or legal person called the employer or entrepreneur. The following categories of workers and work are excluded from the scope of the law: civil servants;

- C staff in the service of the State, local government and autonomous public entities governed by other legislation;
- C mandatory civil or community service;
- C activity limited to the mere discharge of the duty of an adviser or member of the governing bodies of corporations where this activity entails the execution of tasks inherent in such duties;
- C work carried out in the name of friendship, benevolence or good neighbourliness;
- C family work, except if it is demonstrated that the persons doing the work have the status of wage-earners; and
- C the persons who are involved in trading operations on behalf of one or more employers, if they are personally responsible for the successful completion of the transaction and assume the risk of profit and loss.

### **Contracts of employment**

A contract of employment is one in which a person provides service on behalf of and within the context of the organization and direction of another in exchange for pay. The employment contract may be concluded in writing or orally (*sec. 8*, Workers= Charter). Contracts for a specified period over four weeks must be made in writing (*sec. 8(2)*, Workers= Charter).

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<sup>245</sup> Royal Legislative Decree 1/1995 of 24 March.

The employment contract may be concluded for an indeterminate or specific period (*sec. 15(1)*, Workers= Charter).

Under *sec. 1* of the Royal Decree 2546/1994, contracts of specified duration may be concluded in the following cases:

- C for the completion of specified tasks or services;
- C in order to meet market circumstances, work backlog or excessive demand;
- C in order to replace workers with the right to reserve the post; and
- C for the launching of a new activity.

*Sec. 14* of the Workers=Charter provides for the possibility of written agreement on a probation period, the duration of which may not exceed six months for skilled technicians, or two months for other workers. In enterprises employing fewer than 25 workers the probation period may not exceed three months for workers who are not skilled technicians.

### **Termination of employment**

Pursuant to *sec. 49* of the Workers=Charter, the employment contract may terminate, not at the employer's initiative, for the following reasons:

- C by mutual agreement of the parties;
- C *force majeure* which puts a definitive end to the provision of the service;
- C the expiration of the agreed term of the contract or the completion of the task or service for which the contract was concluded;
- C for the resignation of the worker, upon the submission of notice provided for in the applicable collective agreements or by local practice;
- C because of the death or serious or permanent total or absolute disability of the worker;
- C retirement of the worker;
- C death, retirement or incapacity of the employer, or the extinction of the legal personality of the contracting party; or
- C by the worker, because of contractual non-performance by the employer.

In accordance with *sec. 14(2)* of the Workers=Charter, during the probation period either party may end the employment relationship.

### **Termination of employment at the initiative of the employer**

The employment contract may be terminated because of the following valid reasons (*sec. 52*, Workers= Charter):

- C the inaptitude of the worker which is known or later demonstrated, after his or her actual placement in the enterprise. Existing inaptitude observed before the completion of a probation period may not be alleged after such completion;

- C the worker's failure to adapt to the technical modification of his or her job, if such changes are reasonable and have occurred after a minimum of two months from the introduction of the modification;
- C the existence of an objectively substantiated need to fill posts for any of the reasons specified in *sec. 51* (discussed below); and
- C absence from work, even justified but intermittent, which amounts to 20 per cent of the working days in two consecutive months, or 25 per cent in four discontinuous months within a period of 12 months, if the rate of absenteeism of the total workforce exceeds 5 per cent during the same periods.

The employment contract may be terminated by the employer through dismissal based on serious and culpable non-performance on the part of the worker. The following are considered non-performance of contractual obligations (*sec. 54, Workers= Charter*):

- C repeated and unjustified absence or lateness in the workplace;
- C indiscipline or disobedience at work;
- C verbal or physical offences against the employer or persons employed in the enterprise or the family living with them;
- C violation of contractual goodwill, and abuse of confidence in the discharge of duties;
- C continued and voluntary reduction of normal or agreed output; and
- C habitual drunkenness or drug addiction if it adversely affects the worker's work.

Collective dismissal is classified as the termination of employment contracts based on economic, technical, organizational or productive reasons within a period of 90 days, which affects at least (*sec. 51, Workers= Charter*):

- C ten workers, in enterprises which employ fewer than 100 workers;
- C 10 per cent of the number of workers in enterprises which employ between 100 and 300 workers; or
- C 30 workers in enterprises which employ more than 300 workers.

The termination of employment contracts of the undertaking's entire workforce of five or more workers is also considered a collective dismissal.

In Spain, the anti-discrimination provisions of the Workers= Charter prohibit termination of employment on the basis of sex, ethnic origin, marital status, race, social status, religious or political beliefs, membership or non-membership in a trade union, or language (*secs. 4(2) and 17(1), Workers= Charter*). To this is added protection contained in the Act on Social Integration of the Disabled (No. 12/1982 of 31 March 1982), which extends this protection to disability status. Any termination of employment based on the above-mentioned grounds is considered to be null and void. The worker may be reinstated or paid his or her wages indefinitely, including continued coverage by the social security system (*sec. 12, LPA*), without prejudice to other possible civil liability to which the employer may be subject.

## Notice and prior procedural safeguards

Termination of the employment contract for objective reasons requires the observance of the following criteria (*sec. 53(1)*, Workers= Charter):

- C written communication to be given to the worker explaining the reason;
- C payment to be made to the worker, at the same time at which the written communication is handed over, of compensation corresponding to 20 days for each year of service (periods of time which are under a year to be prorated by months), up to a maximum sum of 12 months= pay; and
- C granting to the worker a 30-day notice period.

In the case of termination of employment for misconduct, the dismissal must be notified in writing to the worker, stating the facts justifying the dismissal and indicating the date on which the employment relationship will end (*sec. 55(1)*, Workers= Charter).

If the worker is a workers= legal representative or a trade union representative, there will be formal adversarial procedures, during which the worker concerned, and other members of the union to which he or she belongs may be heard. If the worker happens to be a member of a trade union and the employer is aware of this fact, representatives of the corresponding trade union must be heard in advance.

An employer who intends to carry out collective dismissals must request permission from the competent labour authority and at the same time must consult the legal representative of the workers. The communication to the labour authority and to the legal representatives should be accompanied by all the necessary documentation justifying the reasons for the dismissal and the measures which are to be adopted, in the terms prescribed by regulation. Once the request has been received by the labour authority, it will ascertain whether the request fulfils the necessary requirements, and if it does not, the employer must rectify the situation within ten days (*sec. 51(2) and (3)*, Workers= Charter). Consultation with the legal representatives of the workers should last not less than 30 natural days, or a fortnight in the case of enterprises employing fewer than 50 workers (*sec. 51(4)*, Workers= Charter). At the end of the process of consultation the employer must communicate to the labour authority the outcome of the deliberations. If there is an agreement between the parties, the labour authority must hand down a decision within a fortnight. However, if the labour authority determines, *ex officio* or at the request of the party concerned, the commission of fraud, damage, coercion or abuse of law in the conclusion of the agreement, it will submit its decision to the judicial authority, with a suspension of the time limit to make the decision (*sec. 51(5)*, Workers= Charter). In the event that the period of consultation is concluded without agreement, the labour authority must hand down a decision within a period of 15 natural days. The decision of the labour authority must be justified and compatible with the wishes of the enterprise (*sec. 51(6)*, Workers= Charter).

## Severance pay

Workers dismissed for valid reasons receive compensation of 20 days= wages for each year of service, up to a maximum sum of 12 months= pay (for periods of service under a year, this is prorated by the number of months of service) (*sec. 53(1)(b)*, Workers= Charter).

Workers who are unlawfully dismissed received compensation of 45 days=wages for each year of service, up to a maximum of 42 months=pay (for periods of under a year, this is prorated by the number of months of service). Compensation will also be awarded for the sum of the outstanding wages from the date of dismissal up to notification of the decision that the dismissal was unlawful or until the worker has found alternative employment if such placement took place before the decision was handed down (*sec. 56(1)(a) and (b)*, Workers= Charter).

Collective dismissal leads to severance payments equal to compensation of 20 days= wages for each year of service for up to a maximum of 12 months=pay (for periods of under a year, this is prorated by the number of months of service) (*sec. 51(8)*, Workers=Charter). In undertakings employing fewer than 25 workers, the Wage Guarantee Fund must pay 40 per cent of the legal compensation due to the workers (*sec. 33(8)*, Workers= Charter).

### Avenues for redress

In the event of dismissal the possible channels of recourse which may be made before the labour court are: appeal, cassation and review. The time limit for appeal is 20 working days for both disciplinary dismissal and dismissal for objective reasons (*secs. 103 and 121*, LPA).

If the employer does not fulfil the requirements established under *sec. 53(1)*, the decision to terminate employment will be declared null and void,<sup>2</sup> and the employer will be instructed to pay the worker, according to the provisions applicable in the event of disciplinary dismissal (*sec. 53(4)*, Workers= Charter). The wages due during the period of deliberations may not be deducted from the wages corresponding to the notice period (*sec. 123(2)*, LPA).

If dismissal is declared unlawful, within a period of five days from the notification of the decision, the employer must make a choice between the reinstatement of the worker and payment of a sum of money.<sup>3</sup> Electing compensation is only an option if the person dismissed was a workers= legal representative or a union representative. By not exercising this option, it will be taken that reinstatement has been chosen. Whenever the option, expressed or presumed, is exercised in favour of reinstatement, it will be legally binding (*sec. 56(4)*, Workers= Charter).

If dismissal is carried out in a manner which does not comply with the provisions of *sec. 55(1)* of the Workers=Charter, the employer may renew the dismissal complying with the requirements omitted in the previous case, within 20 consecutive days of the initial dismissal (*sec. 55(2), (5) and (6)*, Workers= Charter).

A dismissal which fails to observe the rules of procedure will be declared null and void. In the case of annulment, the decision will be in favour of the immediate reinstatement of the worker with payment of outstanding wages (*sec. 113*, LPA).

The judicial body, *ex officio* or at the request of the party concerned, will declare null and void the agreement taken by the employer to effect collective dismissal for economic, technical, organizational or productive reasons, *force majeure* or extinction of the legal personality of the employer if prior administrative authorization has not been obtained (*sec. 124*, LPA). In such cases the ruling will be

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<sup>2</sup> Failure to give notice will not annul the termination, but the employer will be obliged to pay wages corresponding to the period in question.

<sup>3</sup> See *sec. 56(1)(a) and (b)* of the Workers= Charter as discussed above.



determined by *sec. 113* of the LPA, namely, reinstatement of the worker with payment of outstanding wages.

## *Sri Lanka*

### **Sources of regulation**

The main pieces of legislation governing the termination of employment in Sri Lanka are the Termination of Employment of Workmen (Special Provisions) Act of 1971 (TEWA), and the Industrial Disputes Act of 1950, as amended (IDA).

### **Scope of legislation**

Both the IDA and TEWA apply to workers in the private sector. However, the TEWA does not apply to employees in establishments with fewer than 15 workers, or to workers with less than six months= service (*sec. 3(a) and (b)*, TEWA). The TEWA applies to an extensive range of industries, listed in the Schedule to that Act, including all shops, offices and factories.

### **Contracts of employment**

Both the IDA and TEWA define a workman broadly as any person who works under a contract of employment in any capacity, including apprentices (*sec. 3(2)*, TEWA, and *sec. 48*, IDA). No distinction is made in the legislation between casual, probationary and fixed-term employees.

### **Termination of employment**

The TEWA provides that employment may terminate with the written consent of the workman (*sec. 2(1)*, TEWA). Aside from this, both the TEWA and the IDA only regulate termination of employment at the initiative of the employer.

#### **Termination of employment at the initiative of the employer**

The legislative provisions governing termination of employment at the initiative of the employer in Sri Lanka are somewhat unusual, in that they do not set any standard against which dismissals are to be measured, yet provide stringent procedural controls on dismissals. Indeed, the TEWA specifically provides that the Labour Commissioner (from whom the employer must seek authorization to dismiss) may decide the application in his absolute discretion (*sec. 2(b)*, TEWA) and further, that the decision of the Labour Commissioner is non-reviewable (*sec. 2(f)*, TEWA). The Commissioner may also order reinstatement of any worker.

However, the IDA does make it an offence to dismiss an employee because that employee has become entitled to the benefit of any collective agreement, award or order (*sec. 40(k)*, IDA), or because

the employee takes part in any proceedings against the employer, either as a party or witness (*sec. 40(j) and (p)*, IDA).

### **Notice and prior procedural safeguards**

Those employees not covered by the TEWA, who are not seasonal employees and work for an establishment of greater than 15 workers, and who have been employed for more than a year (*sec. 31E*, IDA), are entitled to one month's notice of any retrenchment. In such cases, the employer must also give this period of notice to the Government and any relevant union (*sec. 31F(a)*, IDA). Nor may the employer effect the dismissal until two months after notice has been given, unless an agreement to the contrary has been reached with the employee or his or her representative (*sec. 31G*, IDA).

As discussed above, employers must obtain the approval of the Labour Commissioner for the dismissal of employees covered by the TEWA. In addition, for these employees, the employer must notify the employee of the reasons for the termination before the expiry of the second working day after the termination (*sec. 2(5)*, TEWA, as inserted by the 1988 Amendment Act).

### **Severance pay**

There is no legislative provision governing severance pay in Sri Lanka. However, under *sec. 50* of the IDA, retrenched workers have priority for re-employment by their former employer.

### **Avenues for redress**

*Sec. 5* of the TEWA provides that any dismissal without the approval of the Labour Commissioner is null and void. However, there is no machinery for persons aggrieved by the decision of the Commissioner to appeal, as the decision is final (*sec. 2(f)*, TEWA).

For dismissals which are invalid under the IDA, the employee may apply to a Labour Tribunal for reinstatement or compensation (*secs. 31B(1)(a) and 31B(6)(c)*, IDA).

## *Swaziland*

### **Sources of regulation**

Security of employment in the form of protection from arbitrary dismissal at the initiative of the employer is given legislative force in Swaziland under the Employment Act, 1980 (EA), and the Industrial Relations Act, 1996 (IRA). In addition, provisions under collective agreements and case law developed by the Industrial Court of Swaziland and under the common law supplement the legislation on termination of employment.

### **Scope of legislation**

Public employees, agricultural workers, domestic workers and employees who are members of the employer's immediate family are exempted from the provisions of the EA (*sec. 2*). Provisions requiring dismissals to be fair specifically exclude apprentices, probationers and those whose contracts of employment require them to work less than 21 hours each week (*sec. 35*, EA). Persons employed in manufacturing and processing are regulated by the Regulation of Wages Order 1995.

### **Contracts of employment**

Apart from the distinctions noted above, for the purposes of termination of employment the relevant legislation does not distinguish between types of employment contracts.

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C employee retirement;
- C the expiry of a fixed-term contract; and
- C the completion of the task for which the contract was concluded.

### **Termination of employment at the initiative of the employer**

Under Swazi law, all dismissals are required to be substantiated by a good reason in law, and a general prohibition against unfair dismissals is contained in *sec. 35* of the EA. The EA also outlines certain reasons which would be deemed automatically unfair or fair. However, in addition to automatically unfair dismissals, the Industrial Court will assess dismissals on a case-by-case basis to ascertain whether there is a valid reason for termination.

Reasons for dismissal deemed automatically unfair under *sec. 35* of the EA include:

- C membership or participation in an employee organization's activities outside working hours or, with the permission of the employer, within working hours;
- C the employee acting in the capacity of an officer of a trade union;
- C race, colour, religion, marital status, sex, national origin, tribal or clan extraction, political affiliation or social status;
- C where the employee is certified by a medical practitioner as being incapable of carrying out his or her normal duties because of a medical condition brought about by his or her employment duties, except where the employer proves that he or she has no suitable alternative employment to offer that employee; and
- C absence from duty due to sickness certified by a medical practitioner for a period not exceeding six months, or due to an accident or injury arising out of his or her employment, except where the employer proves that in all the circumstances of the case, it was necessary to permanently replace the employee.

*Sec. 37* of the EA also makes provision for the situation known under common law as constructive dismissal, that is, where the conduct of the employer is such as to entitle the employee to lawfully terminate the employment relationship. In such circumstances, the employee will be deemed to have been unfairly dismissed and is therefore entitled to the usual compensation granted for other cases of unfair dismissal.

The law also makes provision for maternity leave and specifies that during statutory maternity leave an employer may not dismiss a worker for reasons connected to such leave. In addition, the employer may not dismiss the worker on the grounds that she is pregnant (*secs. 103-105*, EA).

Under *sec. 36* of the EA, certain reasons for dismissal are deemed automatically fair. These are:

- C where the employee's conduct or work performance, after written warning, is such that the employer cannot reasonably be expected to continue employing him or her;
- C where the employee is guilty of dishonesty, violence, threats or ill-treatment towards his or her employer or towards any member of the employer's family or other employee;
- C where the employee wilfully causes damage to the building, machinery, tools, raw materials or other objects connected with the employment undertaking;
- C where the employee either by imprudence or carelessness endangers the safety of the undertaking or any person employed or resident there;
- C if the employee wilfully reveals manufacturing secrets or matters of a confidential nature to another person which is, or is likely to be, detrimental to his or her employer;
- C because the employee has been absent from work for more than a total of three working days in any period of 30 days without either the permission of the employer or a certificate signed by a medical practitioner certifying that he or she was unfit for work due to illness;
- C because the employee refuses to adopt safety measures issued by the employer;
- C where the employee is committed to prison;
- C because the employee is unable to continue in employment without contravening the EA or any other statute;
- C because of redundancy as defined by the law;

- C where the employee reaches the age for retirement; and
- C for any other reason which entails for the employer or the undertaking similar detrimental consequences to those set out under *sec. 36* of the EA.

It should be noted that the last criteria is limited to a *reasonable cause* as determined by the Industrial Court.

Provisions regulating collective dismissals are found under *sec. 40* of the EA. These provisions, however, exclude casual employees, seasonal workers and those persons employed under a contract for a fixed term of six weeks or less and which does not provide for re-engagement at the end of that period.

### **Notice and prior procedural safeguards**

Although prior procedural safeguards have not been outlined under legislation, such safeguards have been established as part of the good industrial practices standard expected by the Industrial Court and labour law custom in Swaziland. Consequently, a worker who is facing dismissal on the grounds of misconduct is entitled to a fair hearing in accordance with the principles of natural justice. Before an employee is dismissed for misconduct, he or she must also have been given a written warning relating to the same offence on a previous occasion.

Notice or payment in lieu of notice must be given where employment is to be terminated. The exception is where the employer exercises the right to summarily dismiss an employee. The minimum period of notice (*sec. 33*, EA) is as follows:

- C for periods of continuous employment of three months or less, one week;
- C for continuous employment of a duration of less than one year but more than three months, two weeks or two days for each completed month of continuous employment up to and including the twelfth month, whichever is the greater; and
- C for continuous employment of more than 12 months, the period of notice is two weeks and four days= additional notice for each completed year of continuous employment after the first year of employment.

These minimum legislative periods of notice do not prejudice the right of the employer to dismiss summarily *for just cause* (*sec. 34*, EA). However, summary dismissal cannot be carried out unless the reasons for the dismissal are such as to warrant the immediate cessation of the employer/employee relationship and where the employer cannot be expected to take any other course (*sec. 33(8)*, EA).

The provisions of the EA stipulate that in establishments of five workers or more, at least one month's notice of redundancy must be given by the employer. Such notice must be given to the worker, his or her trade union and to the Labour Commissioner. The notice must contain certain information about the proposed redundancies, such as the number of employees likely to become redundant, the occupations and remuneration of the employees affected, the reasons for the redundancies and the date when the redundancies are likely to take effect. There is not, however, a requirement of prior authorization. Beyond these provisions, there are no other safeguards against collective dismissals for economic reasons and these matters are left to the collective bargaining process.

## **Severance pay**

Except in situations of dismissal for automatically fair reasons under *sec. 36*, EA, where an employee's contract of service is terminated, he or she is entitled to a severance payment (*sec. 34*, EA). This payment amounts to ten working days wages for each completed year, in excess of one year, that the employee has been continuously employed.

## **Avenues for redress**

An employee wishing to contest his or her dismissal may, in the first instance, initiate a claim to the Labour Commissioner, who will attempt to settle the matter. If the Labour Commissioner is unable to effect settlement within 21 days, the complaint is treated as an unresolved dispute and the Labour Commissioner must submit a full report of the matter to the Industrial Court for adjudication.

The burden of proof in termination of employment cases lies with the employer to establish that termination was carried out with good reason (*sec. 42*, EA).

In addition to awards by the Industrial Court in the form of damages, employers who fail to respect the mandatory notice requirements of the EA or the procedural requirements with respect to redundancy may also be liable for a fine or imprisonment for three months (*sec. 44*, EA). Under *sec. 15* of the IRA, provision is made for the Industrial Court to order reinstatement and/or compensation. Reinstatement is to be the primary remedy (*sec. 15(3)*, IRA). Compensation awards are not to be less than six months, or greater than 24 months remuneration, having regard to the employee's loss, age, future employment prospects and the circumstances of the dismissal, including any contribution to the termination by the employee. The minimum compensation may not apply to purely procedural defects. Compensation under the IRA is in addition to any severance pay or compensation due under any agreement.

## *Sweden*

### **Sources of regulation**

The legal provisions on termination of employment may be found in the following laws: the Security of Employment Act, 1984 (SEA) (as amended on 20 December 1994), the Act respecting the Status of Trade Union Representatives at Workplaces, 1945 (as amended in 1974), the Labour Disputes Act, 1982, the Act respecting Co-determination at Work, 1977, and the Act respecting Certain Measures for the Promotion of Employment, 1984 (as amended in 1993 and 1994). In addition, an agreement on employment protection was signed in 1973.

### **Scope of legislation**

The SEA constitutes the main source of regulation on dismissal and applies to all contracts of private law. The amendment of the SEA in areas related to the public sector extended its scope to include public servants. However, the following groups of persons continue to fall outside the purview of this Act: persons who live in the same household as the employer, relatives of the employer and management personnel.

### **Contracts of employment**

In general, a contract of employment must be concluded for an unspecified period. However, the SEA allows in certain cases the conclusion of an employment contract for a specified period, for example:

- C** for a specified period, season or job if the particular features of the work so warrant;
- C** for temporary replacement work as a trainee or a holiday job;
- C** for a period not exceeding 12 months<sup>246</sup> in total over a period of two years if a temporary accumulation of work so warrants;
- C** up to the date on which the employee begins compulsory military service or any other comparable service whose duration exceeds three months; and
- C** for work performed after the date on which an employee retires if he or she has reached the age at which he or she is obliged to retire on an old-age pension or, where there is no such obligation, if he or she has reached the age of 65.

For such contracts, termination with notice is not possible.

Under *sec. 6* of the SEA a contract may be concluded for a probation period of limited duration which may not exceed 12 months.<sup>247</sup> If the employer wishes to terminate the employment relationship

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<sup>246</sup> The duration has been amended by a law which entered into force on 1 Jan. 1994. Prior to this date the duration was six months.

<sup>247</sup> Prior to 1994, the maximum duration was six months.



after the probation period he or she must give the employee notice at least two weeks before the expiry of the probation period. If the employee is a member of a trade union the employer must also inform the union. A contract of employment may be terminated at any time during the probation period.

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of a fixed-term contract; and
- C employee retirement.

### **Termination of employment at the initiative of the employer**

Dismissal is possible on the condition that notice is given and provided that there is a valid reason. *Sec. 7* of the SEA stipulates that notice must be materially justified. In general a distinction is made between two types of reasons: those related to a shortage of work and those related to the employee him/herself.

The following are considered valid reasons for termination of employment:

- C reason related to the conduct of the employee (e.g. refusal to obey the employer's orders<sup>3</sup> and lack of punctuality); however, these offences must be serious in order to constitute just cause;<sup>4</sup>
- C if the employee does not cooperate with his or her colleagues;<sup>5</sup>
- C incapacity of the employee; however, after the probation period the application of such claims are limited;<sup>6</sup> and
- C criminal offences against the employer.

Provisions in relevant legislation refer to a shortage of work not only in cases where there have been staff reductions or plant closures but also if there have been changes in the nature of the work to be performed.<sup>7</sup> Consequently, a shortage of work encompasses everything which is not a personal reason but it never constitutes grounds for summary dismissal.

### **Notice and prior procedural safeguards**

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<sup>3</sup> The refusal to obey has even been considered sufficient cause for summary dismissal (see the *International encyclopaedia of labour law* (The Hague, Kluwer Law International, 1999), p. 114).

<sup>4</sup> Alcoholism as a disease is not accepted as a valid reason for dismissal (see the judgement in the *Social and Labour Bulletin*, 1979, p. 182).

<sup>5</sup> This reason is valid only in small undertakings.

<sup>6</sup> *International encyclopaedia of labour law*, op. cit., p. 113.

<sup>7</sup> In the event that the employee does not have the skills necessary to fill the new post.

*Sec. 11* of the SEA specifies the terms under which notice should be given. If the employee has been in the service of the employer for the past six months or for a total of at least 12 months over the past two years, he or she is entitled to a period of notice as follows:

- C two months if the employee has reached the age of 25 years;
- C three months if the employee has reached the age of 30 years;
- C four months if the employee has reached the age of 35 years;
- C five months if the employee has reached the age of 40 years; and
- C six months if the employee has reached of age of 45 years.

The employer is obliged to notify the employee of his or her decision to terminate the employment relationship at least two weeks before the notice period begins to run (*sec. 30(1)*, SEA, item 3). Under this provision, if the employee concerned belongs to a trade union the employer is obliged to inform the local employees= organization at least two weeks before he or she takes steps to terminate the employment. The union and the employee may wish to discuss the action to which the notification relates, in which case the dismissal may not be carried out before such consultation.

*Sec. 8* of the SEA establishes that notice of termination should be provided in writing and the employer should also inform the employee of the procedure to be followed if he or she wishes to assert that the notice is invalid.

The same procedure holds for dismissal with immediate effect. It is worth noting, however, that in Sweden this form of dismissal is unusual because the courts consider such dismissal appropriate only in the event that no other solution is possible.

*Secs. 11 and 14* of the SEA deal with co-determination at work, and provide that in the event of dismissal on economic grounds, the employer is obliged to enter into negotiations with the trade unions before taking steps aimed at drastically changing its operations and the nature or conditions of work. In the first instance, negotiations will be held with the local representatives of the union. If these discussions fail to bring a settlement, the employer should then approach the central organization.

In accordance with *sec. 1* of the SEA (which deals with measures to promote employment), the employer must provide information on any fall in production which might result in the reduction of the number of workers when at least five employees are expected to be made redundant. *Sec. 5* of that Act states that notification must contain the following information:

- C the reason for the reduction;
- C the date on which the proposed redundancy will take place; and
- C the number of persons likely to be affected.

The period for submitting this information is as follows:

- C two months in advance if 25 or fewer workers are affected;
- C four months in advance if between 25 and 100 workers are affected; and
- C six months in advance if more than 100 workers are affected.

## **Avenues for redress**

If an employee intends to apply for a declaration that notice of termination or dismissal is invalid according to the provisions of *sec. 40* of the SEA, he or she shall notify the employer to that effect within two weeks after receiving the notice of termination. If the employer has not informed the employee of his or her rights the time limit shall be increased to one month.

Where consultation with the trade union fails, legal proceedings before the Labour Court<sup>8</sup> may be initiated. *Sec. 34(2)* of the SEA establishes that during this period of legal proceedings the employer is obliged to continue the employment relationship until the case is settled. The local court is the competent jurisdiction for such proceedings involving non-unionized employees.

The employer must prove that his or her reasons for terminating employment are valid. Such proof shall contain the reasons for which the continuation of the employment relationship is untenable for the undertaking and why alternative employment cannot be offered.

When dismissals are effected for economic reasons remedies are available in two instances:

- C if the employee believes that a shortage of work is a mere pretext and that the real reason is of a personal nature; and
- C if the procedures prescribed by law are not observed.

In the event of unjustified dismissal, the court, taking into account the circumstances, may order the payment of financial compensation or reinstatement.

According to *sec. 38* of the SEA, the employee is entitled to compensation for damages, the amount of which shall be determined by the court with due consideration to the employee's length of service in the undertaking, his or her age and potential to find alternative employment.

Under *sec. 39* of the same Act, if the employer fails to comply with a decision of the court to reinstate the employee the employment relationship is thereby terminated. However, the employee may claim even more in damages corresponding to:

- C 16 months= wages for less than five years= employment;
- C 24 months= wages for at least five but less than ten years= employment; and
- C 32 months= wages for ten or more years= employment.

Where the employee has reached the age of 60 years, the amount shall be increased to correspond to 24, 36 and 48 months, respectively.

If the employee has been employed for less than six months, the amount shall correspond to six months= wages.

In the case of dismissal for economic reasons, the employer's failure to observe the prescribed procedure will incur the obligation to pay a penalty, but the dismissal will not be annulled.

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<sup>8</sup> In Sweden there is a single Labour Court, the composition of which is determined by the regulations on labour disputes.

## *Switzerland*

### **Sources of regulation**

The sources of labour law are to be found in the Code of Obligations (CO) of 30 March 1911, as amended by the Act of 17 December 1993, Part X of which is entitled **Contracts of Employment** (*secs. 319-362*<sup>248</sup>) and the Federal Act (FA) respecting work in industry, handicrafts and commerce of 13 March 1964.<sup>249</sup> In addition, labour law is governed by, among others, collective contracts of employment (CCE), such as the one on the mechanics industry of 1 July 1993.<sup>250</sup>

It is worth noting in this regard that the national CCE concerning hotels, restaurants and cafés (CCE for 1996) covers the subject of dismissal. It prescribes notice periods which are shorter than those contained in the CO (a month for the completion of between one month and five years of service, and two months after the fifth year of service).

### **Scope of legislation**

The CO applies to every contract of private law and regulates the employment relationship between employers and employees who conclude individual employment contracts. According to *sec. 320* of the CO, such contracts do not require for their validity any special form.

Written contracts are considered mandatory in the case of special contracts, such as those made for apprentices and travelling sales staff (*secs. 344a(1) and 347a(1), CO*, and *sec. 69, FA* on marine transport).<sup>251</sup>

### **Contracts of employment**

Under an individual employment contract the worker undertakes to perform work in the employer's service for either a fixed or an indefinite period of time and the employer is obliged to pay wages based either on time periods, or on the work performed (time wage or piece-work wage). The concept of an employment contract also includes contracts whereby the employee undertakes to regularly perform work in the employer's service on an hourly, half-day or daily basis (part-time work).

While fixed-term contracts are concluded between the parties for a limited time period, a contract for an indefinite period may be terminated by either of the parties. The party giving notice shall, upon the request of the other party, state the reason for having given notice (*sec. 335, CO*<sup>252</sup>).

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<sup>248</sup> *Secs. 334-339* deal with termination of the employment relationship.

<sup>249</sup> Amended by Federal Act 8BG 822.11.

<sup>250</sup> In Switzerland, CCEs may be either national or cantonal such as, for example, the collective labour agreement on the cleaning services in the Canton of Geneva.

<sup>251</sup> Contracts for home work are also considered special individual employment contracts, but the conclusion of such contracts in written form is not considered mandatory.

<sup>252</sup> Amended on 18 Mar. 1988.

## Termination of employment

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of an employment relationship for a fixed term;
- C notice from the employee;
- C the employee without notice in instances of employer insolvency, unless the employee is furnished security for his or her claims arising from the employment relationship within an adequate period of time (*sec. 337a*, CO); and
- C the death of the employer; however, the employee may claim reasonable compensation for damage caused to him or her because of the premature ending of the employment relationship (*sec. 338a(2)*, CO).

## Termination of employment at the initiative of the employer

Justification is not required in the Swiss legal system for a normal dismissal, and dismissal with notice is not linked to the existence of a valid reason. Notice periods may be the same for the two parties; if an agreement provides for different time periods, the longest period of notice is applicable to the two parties. If the employer has indicated his or her intention to terminate the contract, or if he or she terminates the contract for economic reasons, shorter notice periods may, however, be prescribed in favour of the worker, by agreement, standard employment contract or collective employment contract.

During the probation period, either of the parties may terminate the employment relationship with a notice period of seven days; the first month of the employment relationship is deemed to be the probation period (*sec. 335b(1)*, CO). Deviating provisions may be agreed upon by written agreement, standard employment contract or collective employment agreement; however, the probation period may be extended only to a maximum of three months (*sec. 335b(2)*, CO).

In the event that a probation period is interrupted due to sickness, accident or the performance of a legal duty which is not voluntarily assumed, the probation period shall be prolonged correspondingly (*sec. 335b(3)*, CO).

An employment relationship for a fixed period of time ends without notice of termination. If such a relationship is tacitly continued after the expiration of the agreed period, it is deemed to be an indefinite employment relationship. After ten years, either of the parties may terminate a fixed-term employment relationship which has been entered into for a longer period with a notice period of six months (*sec. 334(1), (2) and (3)*, CO).<sup>6</sup>

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<sup>6</sup> New element introduced in Chapter I of the FA of 18 Mar. 1988, in force since 1 Jan. 1989.

Collective dismissals are those made by the employer within a period of 30 days for reasons which are not inherent in the personality of the workers and affecting the following numbers of workers (*sec. 335d, CO*):<sup>7</sup>

- C ten workers in establishments employing between 20 and 100 workers;
- C 10 per cent of the workforce in establishments employing between 100 and 300 workers; and
- C 30 workers in establishments employing more than 300 workers.

Notice of termination is improper if one of the parties gives it (*sec. 336, CO*):

- C because of a quality inherent in the personality of the other party, unless such quality relates to the employment relationship or significantly impairs cooperation within the enterprise;
- C because the other party exercises a constitutional right, unless the exercise of such right violates a duty of the employment relationship or significantly impairs cooperation within the enterprise;
- C to solely frustrate the formation of claims of the other party arising out of the employment relationship;
- C because the other party asserts in good faith claims arising out of the employment relationship;
- C because the other party performs compulsory Swiss military service, civil defence service, military women's service, or Red Cross service, or a legal duty not voluntarily assumed;
- C because the employee belongs or does not belong to an employee association, or because he or she lawfully exercises a union activity;
- C during the period the employee is an elected employee representative in a company institution or in an enterprise affiliated thereto, provided that the employer cannot prove a justified motive for the termination (note that the protection of the employee representative whose term of office has ended because of a transfer of employment relationships remains in effect up to the moment when this term would have expired if the transfer did not take place);<sup>8</sup> or
- C without respecting the consultation procedure prescribed for collective dismissals.<sup>9</sup>

Upon expiry of the probation period, the employer may not terminate the employment relationship (*sec. 336c(1), CO*):

- C during the other party's performance of compulsory Swiss military service, civil defence, women's military service, or Red Cross service and, in case such service lasts more than 12 days, during the four weeks prior to and after the service;
- C during the period that the employee is prevented from performing his or her work fully or partially by no fault of his or her own due to sickness or accident for 30 days in the first year of service, for 90 days as of the second year of service until and within the fifth year of service, and for 180 days as of the sixth year of service;
- C during pregnancy and during the 16 weeks following confinement; or
- C during the employee's participation with the agreement of the employer in a foreign aid service assignment abroad ordered by the competent federal agency.

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<sup>7</sup> Introduced by Chapter I of the FA of 17 Dec. 1993, in force since 1 May 1994.

<sup>8</sup> New element introduced in Chapter I of the FA of 18 Mar. 1988, in force since 1 Jan. 1989.

<sup>9</sup> Procedure introduced by Chapter I of the FA of 17 Dec. 1993, in force since 1 May 1994.

The employer may at any time terminate the employment relationship without notice for valid reasons. A valid reason is considered to be any circumstance under which the terminating party can in good faith not be expected to continue the employment relationship (*sec. 337(1), (2) and (3), CO*).

If the employer dismisses the employee without notice in the absence of a valid reason, the latter will have a claim for compensation of what he or she would have earned if the employment relationship had been terminated by observing the notice period or until the expiry of any applicable fixed-term period. Offset against this compensation will be any amount the employee saved because of the termination of employment relationship, or any amount he or she earned from other work, or which he or she intentionally failed to earn. The presiding judge may order the employer to pay an indemnity to the employee which the judge may determine at his or her discretion, taking into account all circumstances. Such indemnity may not, however, exceed the employee's wages for six months (*sec. 337c, CO*).<sup>10</sup>

### **Notice and prior procedural safeguards**

The employment relationship may be terminated at the end of a month, during the first year of service with a notice period of one month; in the second year and up to and including the ninth year of service, with a notice period of two months; and thereafter with a notice period of three months. These periods may be altered by written agreement, standard employment contract or collective employment contract. They shall, however, be reduced to less than one month only by collective employment contract and only for the first year of service (*sec. 335c(1) and (2), CO*).

The employer must consult the employee representatives and allow them to formulate proposals on the means of averting collective dismissals or to limit the number of persons affected and minimize the consequences. The employer must state in writing the reasons for dismissal, the number of workers affected, the number of workers regularly employed and the period in which the dismissals are to take place. He or she must send a copy of this statement to the Cantonal Labour Office, which will try to find solutions to the problems posed by the collective dismissals. The employee representatives may submit their observations (*sec. 335f and g, CO*).

If a worker wishes to claim compensation, he or she must file a written objection against the termination with the party who gave notice of termination no later than by the end of the notice period. If the objection is validly made, and if the parties cannot agree on a continuation of the employment relationship, the party who has received notice of termination may assert his or her claim for compensation. The claim is forfeited if no legal action is taken within 180 days after the employment relationship has ended (*sec. 336b(1) and (2), CO*). The procedure is conducted at the cantonal level, and such appeals are usually heard by a civil court. Some cantons have established labour courts. The cantons are required to follow a simple and rapid procedure in dealing with all actions brought relating to employment contracts involving sums under 20,000 Swiss francs (*sec. 343, CO*).

Notice given during the periods stated in *sec. 336c(1), CO*, shall be void (see above). If the notice is given prior to the beginning of such period, the expiry will be suspended and will continue only after termination of the final period (*sec. 336c(2)*).

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<sup>10</sup> Amended 18 Mar. 1988.

## Severance pay

Upon termination of the employment relationship of an employee of at least 50 years of age and with 20 or more years of service, the employer shall pay the employee a severance allowance, the amount of which may be fixed by written agreement, standard employment contract or collective employment contract, but it should not be less than an amount equal to the employee's wages for two months (*secs. 339b and 339c, CO*). If the amount of the severance pay is not fixed, a judge may set it at his or her discretion, but it should not exceed the amount equal to the employee's wages for eight months. Severance pay may be reduced or eliminated if the employment relationship was terminated by the employee without a valid reason or by the employer with a valid reason. Collective employment contracts may contain additional provisions in this regard.

## Avenues for redress

The employment relationship ends 30 days after the notification of collective dismissal to the Cantonal Labour Office. Dismissal is considered abusive if the employer has not respected the consultation procedure prescribed for collective dismissals. If this is the case, compensation corresponding to the employee's wages for a period of up to two months will be due.<sup>11</sup> However, an applicable CCE may contain provisions for the payment of additional compensation (*secs. 336c(2) and 336a(3), CO*).

The party which improperly gives notice of termination of the employment relationship must pay the worker compensation in an amount to be determined by the presiding judge; however, such compensation must not exceed an amount corresponding to the employee's wages for six months. Claims for damages based on other legal grounds are unaffected. There are no provisions for reinstatement (*secs. 336a(1), (2) and (3), CO*<sup>12</sup>).

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<sup>11</sup> Introduced by Chapter I of the FA of 17 Dec. 1993, in force since 1 May 1994.

<sup>12</sup> New element introduced in Chapter I of the FA dated 18 Mar. 1988, in force since 1 Jan. 1989.



## *Syrian Arab Republic*

### **Sources of regulation**

The sources of labour legislation in the Syrian Arab Republic are Act No. 91 of 5 April 1959 promulgating the Labour Code (LC), and Legislative Decree No. 49, respecting the dismissal of individual workers, of 3 July 1962.<sup>253</sup>

### **Scope of legislation**

The LC applies to relations between employers and workers. The terms *Aemployer@*, *Aworker@* and *Awage@* are defined in *secs. 1, 2 and 3*.

The general provisions of the LC specify the persons to whom the Code does not apply; that is, workers employed by the Government or by public establishments and administrative units having independent legal personality, as well as domestic servants and similar workers.

### **Contracts of employment**

Through a contract of employment, a worker undertakes to work under the direction or supervision of an employer in return for a wage (*sec. 42, LC*).

The contract shall be made in writing, in Arabic and in duplicate, with a copy for each party (*sec. 43, LC*). The period of probation shall be fixed in the contract, but it may not exceed three months, nor can it be renewed by the same employer (*sec. 44, LC*).

A contract of employment may be made for a definite or indefinite period. If it has been concluded for a definite period and both parties continue to abide by it after the date of its expiry, it shall be deemed to be renewed for an indefinite period (*sec. 71, LC*).

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, such as by expiry of a fixed-term contract.

### **Termination of employment at the initiative of the employer**

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<sup>253</sup> Legislative Decree No. 127 of 9 June 1970 amends certain sections of Legislative Decree No. 49.

No employer may terminate a contract without notice or compensation for damages, unless the worker (*sec. 76, LC*):

- C has assumed a false identity or submitted false certificates or recommendations;
- C has been engaged on probation;
- C is guilty of any act which causes serious material damage to the employer, provided that the latter has reported the matter to the competent authorities within 24 hours of its coming to his or her knowledge;
- C has, in spite of written warning, failed to observe the written instructions issued for the safety of the workers and the establishment;
- C has absented himself or herself without a valid reason for more than 20 days in any one year, or for more than ten consecutive days, provided that the dismissal is preceded by a written warning after ten days= absence in the former case and after five days= absence in the latter;
- C does not discharge his or her essential duties under the contract;
- C has revealed secrets of the establishment in which he or she is employed;
- C has been sentenced by a final decision for a crime or for a misdemeanour involving dishonour, dishonesty or immorality;
- C has been found during working hours in a state of drunkenness or under the influence of drugs; or
- C has assaulted his or her employer or the manager in charge or has seriously assaulted any of his or her superiors during, or in connection with his or her work.

### **Notice and prior procedural safeguards**

The notice period shall be 30 days in the case of workers paid by the month and 15 days in the case of all other workers (*sec. 72, of the LC*).

All applications for authorization to dismiss staff shall be submitted to the Directorate of Social Affairs and Labour for the *mohafazat* one month before the proposed date of dismissal. The application shall indicate the name of the worker(s) the employer wishes to dismiss, the actual wages of the worker(s), the work being performed and the grounds for dismissal. The Directorate of Social Affairs and Labour shall intervene on the administrative level between the employer and the worker in order to reach an amicable settlement. If no settlement can be reached, the Directorate shall forward the application within a week to the Dismissals Board for the *mohafazat* (*sec. 5(1) and (2), Legislative Decree No. 49 of 3 July 1962*).

### **Severance pay**

Where a contract made for a definite period expires or where a contract made for an indefinite period is terminated by the employer, he or she shall pay the worker a severance allowance which is to be calculated on the basis of a half month's pay in respect of each of the first five years of service, and one month's pay in respect of every additional year. Compensation shall be calculated on the basis of the worker's most recent wage rate (*sec. 73 of the LC*).

### **Avenues for redress**

A worker who believes that his or her dismissal is unjustified may apply for an injunction or stay of execution of the dismissal by submitting his or her application to the Directorate of Social Affairs and Labour, not later than ten days following the date of his or her dismissal by the employer. The Directorate shall follow the procedure described in section 6 above (*sec. 6*, Legislative Decree No. 49 of 3 July 1962).

An appeal may be brought against decisions of the Dismissals Board to the Court of Civil Appeal of the *mohafazat* not later than the fifth day following the date on which notice of the decision is conveyed to the parties concerned. The judgement given by the Court shall be final (*sec. 16*, Legislative Decree No. 49 of 3 July 1962).

An employer who proceeds to dismiss a worker notwithstanding a decision of the Board rejecting his or her application, or dismisses a worker without submitting the case to the competent board, shall be bound to pay the minimum wage applying to his or her worker or 80 per cent of the dismissed worker's pay, whichever is higher (*sec. 13*, Legislative Decree No. 127 of 9 June 1970).

## ***United Republic of Tanzania***

### **Sources of regulation**

The central sources of legislative regulation on the termination of employment in the United Republic of Tanzania are the Security of Employment Act 1964 (as amended) (SEA), the Employment Ordinance 1956 (as amended) (EO) and the Severance Allowance Act 1962 (as amended) (SAA).

### **Scope of legislation**

*Sec. 4* of the SEA excludes, from that Act's ambit, members of the armed forces, police, prison service, civil service and united teaching service (unless civil servants are auxiliary grade employees), and casual employees and apprentices. Dismissals of employees on probation are also deemed not to be terminations of employment and are therefore excluded from the protection of the SEA.

Similarly, the EO also excludes members of the police, prison service and armed forces (*sec. 1*).

### **Contracts of employment**

The EO distinguishes between oral and written contracts in relation to termination. Both oral or written contracts for a fixed term or fixed piece of work may terminate upon the expiry or completion of the terms, without giving rise to liability by the employer to pay compensation, or enabling the employee to challenge the termination (*secs. 30 and 51*, EO). However, oral contracts for a set period of time are deemed to be renewed for the same period on the same terms and conditions unless notice of termination has been lawfully given to the employee (*sec. 30*, EO). Furthermore, oral contracts may not be for a period exceeding six months.

### **Termination of employment**

The death of the employee terminates both oral and written contracts (*secs. 23 and 51*, EO). The death of the employer terminates written contracts, with the approval of the Labour Officer (*sec. 52*, EO), and terminates oral contracts after one month (*sec. 21*, EO). A written contract may also be frustrated, or terminated by mutual agreement, provided a Labour Officer approves the conditions of termination (*sec. 51*, EO).

### **Termination of employment at the initiative of the employer**

Employees may not be dismissed, *inter alia*, for belonging to a trade union or for being an employees=representative (*sec. 14A*, EO). While maternity leave is provided for, there is no express legislative prohibition on dismissal for taking maternity leave.

*Sec. 19* of the SEA provides that no employer shall summarily dismiss an employee except for violations of the Disciplinary Code, and subject to the procedural requirements discussed below. The Disciplinary Code (the Second Schedule to the SEA) sets out in detail those disciplinary offences which may immediately result in summary dismissal and those (such as lateness or failing to complete a task) which require several reprimands or warnings before dismissal can be effected. *Sec. 37* of the EO, in a similar vein, also limits summary dismissals to:

- C misconduct inconsistent with the terms of the contract of service;
- C wilful disobedience of lawful orders;
- C lack of skill which the employee has warranted they possess;
- C habitual or substantial neglect of duties; and
- C absence from work without permission or reasonable excuse.

### **Notice and prior procedural safeguards**

*Sec. 31* of the EO sets out the statutory notice periods for oral contracts as follows:

- C 24 hours= notice where the oral contract is for less than a week;
- C 14 days= notice for oral contracts not paid daily but at intervals not exceeding a month; and
- C 30 days= notice for oral contracts of a week or more.

Oral contracts may be terminated by a payment in lieu of notice.

Employees on written contracts are entitled to not less than 28 days=notice (*sec. 37*, SEA), except for cases of summary dismissal. Such notice must also be given to any relevant workers= committee.

Employers who employ more than ten union members (and who are therefore required to establish a workers= committee) must inform the committee of any contemplated summary dismissals, and, if no representations are received from the committee, delay implementing the dismissal until three days after informing the committee. If representations are received from the committee, the employer and committee must meet to discuss the proposed dismissal. The employer may not dismiss an employee unless agreement is reached with the committee, or the employee elects not to refer the matter to the Conciliation Board (see below) (*sec. 21*, SEA).

Where no committee is required, an employer is required to explain the reasons for the dismissal to the employee and to report the dismissal to the Labour Officer. Again, an employer cannot implement a dismissal until three days after reporting the matter to the Labour Officer, or until the employee elects not to contest the dismissal (*sec. 22*, SEA).

### **Severance pay**

Two forms of severance pay are payable in the United Republic of Tanzania. The first is a severance allowance under the SAA, which is paid for all terminations of employment by the employer,

except summary dismissals for cause, and for terminations giving rise to an entitlement by the employee to a pension.

The second form of severance pay is statutory compensation under the SEA, which is payable for all terminations by the employer, except those involving:

- C the business being wound up or transferred from the United Republic of Tanzania;
- C the expiry of fixed-term or fixed-project work;
- C the suspension of work for reasons outside the employer's control (such as climatic reasons or natural disasters);
- C the completion of seasonal or temporary work;
- C redundancy dismissals;
- C dismissals due to the employee's neglect or poor performance, or absence from work beyond the entitlement to leave;
- C the employee reaching the age of retirement;
- C the reinstatement of another employee;
- C summary dismissal;
- C the employee undermining the authority of the employer or the workers' committee; or
- C the Minister of Labour certifying that, in the interests of good industrial relations, the employee should not be paid statutory compensation.

Statutory compensation is equal to the amount of severance allowance payable (or that would be payable if the employee was covered by the SAA) or 500 Tanzanian shillings, whichever is the greater.

### **Avenues for redress**

An employee who wishes to contest a dismissal may appeal to a tripartite Conciliation Board within seven days. The Board is to adjudicate on whether the dismissal is justifiable, and may reinstate dismissed workers, except for domestic servants or personal assistants, clerks or secretaries. The Board may also order the payment of statutory compensation and reimbursement of lost wages. Either the employer or employee may refer the matter, by way of appeal from the Conciliation Board, to the Minister of Labour, whose decision is final.

## *Thailand*

### **Sources of regulation**

The Thai law governing contracts of employment is laid down in the Civil and Commercial Code (CCC) (*secs. 575-586*) and in a number of notifications of the Ministry of Interior and, more recently, the Ministry of Labour and Social Welfare.<sup>254</sup> Severance pay is primarily governed by the Notification of the Ministry of Interior Re: Labour Protection, 16 March BE 2515, 1972<sup>255</sup> (NMI), as most recently amended by the Notification of Ministry of Interior Re: Labour Protection (No. 11), BE 2532, 1989 (No. 14), BE 2536, 1993, and the Notification of Ministry of Labour of Social Welfare Re: Labour Protection, BE 2537, 1994 (NML). The Labour Relations Act, BE 2518, 1975 (LRA) restricts the termination of employment of employees carrying out functions of the labour relations machinery (as detailed below). The Act on the establishment of Labour Courts and Labour Court Procedure BE 2522, 1979 (ALC), governs the judicial settlement of disputes related to termination of employment.

### **Scope of legislation**

The CCC defines a hire of services as a contract whereby a person, called the employee, agrees to render services to another person, called the employer, who agrees to pay remuneration for the duration of the services (*sec. 575, CCC*). The NMI does not apply to central, provincial or local administrations or to domestic workers (*secs. 1 and 2, NMI*). The LRA does not apply to the central administration, the provincial administration, the local administration (including the Bangkok Metropolitan and Pattaya City Administration), state enterprises falling under the State Enterprise Labour Relations Act BE 2534, 1991 (SLR), and establishments excluded by Royal Decree (*sec. 4, LRA*).

### **Contracts of employment**

The CCC distinguishes between contracts concluded for a definite period and indefinite contracts.

Every establishment employing at least 20 employees must have an agreement on conditions of employment, negotiated between the employer or his or her representative and a maximum of seven elected representatives of the employees. This agreement must contain particulars on, *inter alia*, conditions of work or employment and termination of employment (*sec. 11, LRA*), which will be binding on the employer and the employees who have given their signatures or who have participated in the election of representatives to conduct the negotiations (*sec. 19, LRA*). An agreement on conditions of employment can only be negotiated following a request to be notified by the employer or the employees to the other party following the procedure set out in *sec. 13, LRA*.

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<sup>254</sup> These notifications are issued pursuant to Announcement of the National Executive Council No. 103.

<sup>255</sup> All Thai legislation is officially dated BE. BE stands for Buddhist Era, an era which began in 543 BC. Thus the year AD 1972 is the equivalent of BE 2515.

## Termination of employment

If upon expiry of a contract concluded for a definite period, the employee continues to render services with the knowledge of the employer, then the parties are presumed to have made a new contract of hire on the same terms. Both employer and employee can, however, terminate the new contract under the same conditions as a contract concluded for an indefinite period (*sec. 581, CCC*).

### Termination of employment at the initiative of the employer

An employer may dismiss an employee who wilfully disobeys or habitually neglects the lawful commands of his or her employer; absents himself or herself from service; is guilty of gross misconduct; or otherwise acts in a manner incompatible with the due and faithful discharge of his or her duties (*sec. 583, CCC*).

The NML introduced specific provisions governing the retrenchment of workers due to the restructuring of the work unit, the production process, or the distribution or provision of services, resulting from the introduction or change of machinery or technology (*sec. 46bis and ter, NMI*).

The employer cannot, except with the approval of the Labour Court, terminate employment of, or reduce the wages of, or punish a member of an employees=committee (*sec. 52, LRA*). Such committees are set up by employees in establishments employing at least 50 employees (*sec. 45, LRA*). An employer must meet at least once every three months with such a committee to discuss matters such as employees= welfare, employees= petitions, pending disputes in the workplace and work rules (*sec. 50, LRA*).

It is generally unlawful for an employer to terminate the employment or transfer the duties of the employees, their representatives, the committee members, subcommittee members, or members of the labour union, or committee members or subcommittee members of the labour federation, who are involved in the presentation, negotiation or reconciliation of a request to renegotiate an agreement on conditions of employment. Termination or transfer is, however, lawful if the persons concerned dishonestly perform their duties or wilfully commit a criminal offence against the employer; wilfully cause damage to the employer; neglect work for three consecutive working days without a suitable reason; or violate the rules, regulations or lawful orders of the employer, provided the employer has issued a warning in writing. The written warning is not required in severe cases (*sec. 31, LRA*). The same protection applies to the same employees while an agreement on conditions of employment or equivalent award is in effect, with one additional category of permitted dismissal (i.e. when the employee commits any act of instigation, encouragement or persuasion to violate the agreement on conditions of employment or equivalent arbitration award) (*sec. 123(5), LRA*).

The LRA prohibits as an unfair practice the termination of employment by the employer:

- C on the ground that the employee is a member of the trade union;
- C of certain persons (listed below) carrying out functions of the labour relations machinery for certain acts related to the fulfilment of their duties; and
- C on the ground that the employees or the labour union are about to undertake such acts (*sec. 121, LRA*).



The persons specifically referred to are employees, employees= representatives, committee members of the labour union or of the labour federation. The specified acts are calling a rally, filing a petition, submitting a claim, filing a lawsuit or negotiating it, appearing as a witness before or producing evidence to competent officials under the law on labour protection, the Registrar, labour dispute conciliators, labour dispute arbitrators, labour relations committee members, or the labour court.

### **Notice and prior procedural safeguards**

Both employer and employee can terminate a contract concluded for an indefinite period by giving notice at, or before, any time remuneration is paid. The termination will normally take effect at the following time remuneration is paid, but parties are under no obligation to give more than three months= notice (*sec. 582(1)*, CCC). If the employer terminates the contract, he or she has the option of paying the employee his or her remuneration up to the expiry of the notice instead of having the employee serve the notice period (*sec. 582(2)*, CCC).

An employee dismissed for misconduct as outlined in the previous section is not entitled to notice or compensation (*sec. 585*, CCC).

The employee is entitled to a certificate stating the length and nature of his or her services. If the employer has borne the costs of the journey of an employee originating from a place other than the place of work, the employee can also claim the costs of return upon termination of the contract, subject to three conditions:

- C the applicable contract does not provide otherwise;
- C the contract has not been terminated due to an act or fault of the employee; and
- C the employee returns within a reasonable time to the place from where he or she was transported (*sec. 586*, CCC).

In the event of retrenchment due to restructuring, the employer must, at least 60 days in advance of the date of termination of employment, inform the labour inspection services and the employees of the grounds for termination and the names of employees affected (*sec. 46bis*, NMI).

### **Severance pay**

The employer must pay compensation to the employee when terminating the contract of employment, or when the employer commits any act to prevent the employee from continuing to work or discontinues payment of wages to this end. This compensation is also due when the termination is the result of the employer=s inability to continue business operations. The compensation is not due upon termination of a contract concluded for a definite period (*sec. 46*, NMI), or when the employee:

- C has been dishonest on duty;
- C has deliberately committed a criminal offence against the employer;
- C has intentionally caused damage to the employer;
- C has violated working rules or lawful orders from the employer;
- C has been absent for three consecutive working days without justification;

- C has caused serious damage to the employer due to negligence; or
- C has been sentenced to imprisonment (*sec. 47, NMI*).

The provisions on compensation apply to fixed-term employment up to a maximum of two years on a temporary project or seasonal work which is not part of the employers= core business, provided that the employment relationship has been put in writing from the beginning (*sec. 46, NMI*).

The amount of compensation depends on the length of service. For an uninterrupted period of service between 120 days and one year the compensation for time-rate and piece-rate work alike amounts to the last 30 days=wages. For a period of service between one and three years, compensation equals the last 90 days=wages. For a period of service of over three years the amount of compensation corresponds to the last 180 days=wages. The period of service includes holidays, leave days and days that the employee has been exempted from work for the convenience of the employer. Discontinuity of the employee=s service intended by the employer to deprive the worker of his or her rights is disregarded, regardless of the assignment of the employee and the length of the gap between assignments (*sec. 75, NMI*).

In the event of retrenchment following restructuring (see paragraph 5), an employer who does not give notice or gives notice less than 60 days in advance must pay compensation in lieu of notice, equal to the last 60 days=wages (*sec. 46bis, NMI*). This compensation substitutes for the normal compensation in lieu of notice provided for in the CCC. If the employee has been employed for at least six years, however, the employer must pay additional compensation equal to 15 days=wages for every year of employment, with a maximum amount equal to 360 days= wages. With respect to this additional compensation, a period of work of more than 180 days constitutes a year (*sec. 46ter, NMI*).

### **Avenues for redress**

An employee whose employment has been terminated following an unfair practice by the employer (see paragraph 5) may file a complaint with the Labour Relations Committee<sup>3</sup> within 60 days of such violation (*sec. 124, LRA*). This Committee will issue an award and an order within a further 90 days, unless the Minister has decided to extend the period for decision (*sec. 124, LRA*). The employee can also file a criminal complaint against the employer, but only after the Labour Relations Committee has passed an arbitration award and the employer has failed to comply with the Committee=s order (*sec. 127, LRA*).

Disputes regarding termination of employment must be brought before a labour court. This can be the Central Labour Court if the place of work is Bangkok Metropolis or its surrounding provinces, a regional or provincial labour court if one has been established in the region or province of the place of work, or a Court of First Instance if the place of work is not situated within the territorial jurisdiction of any labour court (*secs. 5, 6, 7 and 9, ALC*). Administrative remedies provided under the NMI and LRA must be exhausted, however, before a lawsuit may be filed with a labour court (*sec. 8, ALC*).

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<sup>3</sup> The Labour Relations Committee is established within the Ministry of Labour and Social Welfare (*sec. 8, LRA*) to settle particular labour disputes with an award (see *Ch. 2, LRA*). It is composed of between eight and 14 members, three of which must be employers=representatives and three employees=representatives (*sec. 37, LRA*).

Employers and employees may give power of attorney to the employers= association or the labour union of which they are members, or to the competent officer empowered to take legal action under the NMI or LRA, to proceed on their behalf (*sec. 36, ALC*).

If the labour court considers that an employee has been unfairly dismissed, the court may order reinstatement at the level of remuneration applying at the time of dismissal (*sec. 49, ALC*). If a labour court considers that the cooperation between employer and employee has been disrupted beyond repair, the court may fix an amount of damages as compensation to be paid by the employer by taking into consideration the age of the employee, the length of service, the hardship of the employee at the time of dismissal, the cause of the dismissal and the compensation the employee is entitled to receive (*sec. 49, ALC*).

Any judgement or order is binding only upon the parties in the proceedings, unless the court prescribes that the judgement be also binding upon other employers and employees having a joint interest in the case (*sec. 53, ALC*). A judgement or order can be appealed to the Supreme Court within 15 days of its pronouncement, but only on points of law (*sec. 54, ALC*).

## *Tunisia*

### **Sources of regulation**

The main legislative text governing termination of employment in the Republic of Tunisia is the Labour Code of 1966 (LC), Act 66-27 of 30 April 1966, last amended in 1996. Another important source of regulation is the Staff Collective Agreement of 1992 (SCA) (concluded on 20 March 1973 and modified in 1992).

### **Scope of legislation**

In the private sector, the dismissal provisions are found under the LC, collective agreements and also through decisions of the courts.

Those individuals working at sea are covered by a Code of Maritime Labour promulgated in 1967, and those working in the public sector are covered by Law No. 83-112 of 12 December 1983 and Law No. 85-78 of 5 August 1985.

One category of worker in Tunisia does not benefit from the protective provisions of the LC, namely household employees (domestic workers). Their relationship with their employer continues to be subject to the general provisions of civil contract law.<sup>256</sup>

### **Contracts of employment**

The LC indicates in *secs. 6 and 14* that there are two types of contracts of employment: contracts of employment for an indefinite period and contracts of employment for a specified period.

The contract of employment for an indefinite term is standard practice. The contract of employment for a specified period is usually transformed into a contract of employment for an indefinite term if the wage earner continues working after the expiration of the fixed term and the employer does not express opposition (*sec. 17*, LC).

### **Termination of employment**

*Sec. 14* of the LC provides that all contracts of employment may be terminated, other than at the

C initiative of the employer, by:

- C agreement between the parties;
- C serious breach by the employer;
- C rescission pronounced by a court; or

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<sup>256</sup>F. Mehri: ATunisia@, in R. Blanpain (ed.): *International encyclopaedia for labour and industrial relations*, (The Hague, Kluwer Law International, 1999), Vol. 12, p. 44.

C impossibility of performance resulting either from the death of the employee or the occurrence, before or during the performance of the contract, of *force majeure*.

A contract of employment for a specified period terminates by the expiration of the agreed term or by the completion of the task to which the contract relates. In these situations neither the employer nor the worker has to justify the termination or comply with any formalities (*sec. 14, LC*).

A contract of employment for an indefinite period may be terminated on notice by the employee (*sec. 14, LC*).

### **Termination of employment at the initiative of the employer**

The termination of employment is unlawful unless there is a real and serious reason and legal procedures or procedures prescribed under collective agreements are observed (*sec. 14(C), LC*). One of the real and serious reasons for dismissal is serious misconduct. A list of serious misconduct able to justify dismissal is set out in *sec. 14(D)* of the LC. Serious misconduct includes:

- C wilful damage to the property of the undertaking;
- C wilful reduction of the product volume or product quality;
- C non-observance of rules related to safety and health;
- C neglect of the duty to take necessary measures to assure personal security or to safeguard confidentiality;
- C disobedience of legitimate orders;
- C bribe-taking;
- C theft;
- C turning up for work in a state of intoxication;
- C consumption of alcohol at the workplace;
- C absence or desertion of the workplace without good cause or the employer's permission;
- C violence or threats against colleagues or other persons during working hours;
- C divulging trade secrets; and
- C refusal to lend assistance in case of imminent danger to the firm or persons at the workplace.

Termination of a contract of employment by one of the parties will be deemed wrongful in certain situations. For example, termination is wrongful when it is unlawful. Unlawful dismissal includes dismissal because of absence from work during a period before or after childbirth or because of illness (provided the illness is not sufficiently serious or prolonged and the circumstances do not oblige the employer to replace the ill wage earner) (*sec. 20, LC*). Termination is also unlawful when a member of a works committee is dismissed without the applicable special procedure being followed (i.e. submitting the dismissal to the decision of the competent labour inspector and complying with his or her decision) *except* when the existence of a real and serious reason justifying dismissal is proved by a court which entertains jurisdiction (*sec. 166, LC*). Certain sector-based collective agreements (banks, insurance, perfumeries, etc.) have also extended this protection to trade union representatives. Termination may be wrongful not because it is unlawful, but because the circumstances of the termination disclose misconduct

on the part of the employer. Such misconduct may consist of an intention to harm, of disloyalty or even of harmful imprudence.<sup>2</sup>

Dismissal may also be effected for economic and technological reasons, provided the applicable procedure is followed (see below).

### **Notice and prior procedural safeguards**

Before dismissal, the wage earner has a right to appear before the Discipline Council (*conseil de discipline*) to defend his or her case. The Council is composed of an equal number of employers= and workers= representatives.

The worker also has a right to present to the Council a written statement of his or her case and to receive the assistance of a wage earner of his or her own choosing, a trade union= representative or a lawyer (*sec. 37, SCA*).

Employers and employees are required to give one month= notice. This period of notice is the same for all categories of employees. If there are provisions which result from a contractual or collective agreement, general practice or vested rights that require a longer period of notice, these provisions are applied (*sec. 14(B), LC*).<sup>3</sup>

If compensation is paid in lieu of notice, the amount paid must at least be equal to damages payable for the length of notice period or for the remaining period of notice (*sec. 16, SCA*).

The employee has a right to time off to seek other employment during the second half of the notice period. This leave of absence is considered as time worked and does not reduce the compensation payable (*sec. 14(1), LC*).

Every employer who wants to dismiss all or part of his or her permanent personnel for economic or technological reasons has first to refer the matter to the labour inspectorate (*L'inspection du Travail*), which will attempt conciliation (*sec. 21, LC*).

If conciliation is unsuccessful, the labour inspectorate calls together the Commission for the Control of Dismissals (*Commission de contrôle des licenciements*) chaired by the chief of the territorial labour inspectorate. This Commission is also composed of a trade union and an employers= association representative (*secs. 21-3, 4 and 5, LC*).

The Commission can accept the dismissals as justified, refuse to accept the dismissals, or make proposals for alternative solutions, such as redeployment programmes for employees, re-orientation of the firm= activity towards new products, temporary suspension of all or part of the activity, revisions of conditions of work (e.g. reduction of working time) or early retirement (*sec. 21-9, LC*).

When the Commission is not consulted on the dismissals, except in cases of agreement between the parties or *force majeure*, these dismissals are unlawful (*sec. 21-12, LC*).

In practice, in most cases, the Commission comes to a solution other than dismissal (e.g. lay-off for a short period, reduction of hours of labour, early granting of annual holidays and so on).

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<sup>2</sup> F. Mehri, op. cit., p. 76.

<sup>3</sup> For example, the period of notice for journalists (*sec. 398, LC*) and commercial travellers and sales representatives (*sec. 410, LC*) is calculated at between one and three months.

If no alternative solution is possible, or no solution is accepted by the parties, the Commission puts forward an opinion about redundancy pay which may be awarded, after considering the laws (*sec. 21-10*, LC). The Commission endeavours to conciliate the severance pay and to settle the amount immediately. According to *sec. 29-11* of the LC, the official record of conciliation is enforceable against the parties.

In the absence of agreement, every party involved retains a right of appeal to the court which entertains jurisdiction. On appeal, the court may definitively fix the redundancy compensation which is payable, with regard to the laws in force (*sec. 21-11*, LC).

The reduction in personnel for economic reasons takes place taking account of occupational skills, family circumstances and length of service. Moreover, wage earners whose employment is terminated for economic reasons are given priority in re-engagement (under the conditions of their remuneration at the moment of dismissal) if the firm wants to re-engage wage earners with the same professional skills (*sec. 21-13*, LC). This right can be exercised for one year. The order of re-engagement is determined according to the length of service in the firm (seniority).

### **Severance pay**

Except for serious misconduct, every employee bound by a contract of employment for an indefinite term and dismissed after the expiration of the probationary period receives a severance allowance, calculated on the basis of one day's salary (which is paid at the moment of the dismissal) for each month of effective service in the same firm (*sec. 22*, LC).

The compensation cannot exceed three months' salary, whatever the duration of effective service has been. But collective agreements have raised the amount of compensation substantially.

### **Avenues for redress**

The intervention of the Discipline Council does not preclude the wage earner's right of appeal against a dismissal to the courts which entertain jurisdiction (*sec. 38*, SCA). The courts are not bound by the decision of the Council. The court with jurisdiction over individual labour disputes is a specialized labour court (*Conseil de prud-hommes*) of tripartite composition. Appeals from its decisions are to courts of general jurisdiction (*secs. 183 and 184*, LC).

According to *sec. 14(E)* of the LC, it is up to the court to judge the existence of a real and serious reason and the observance of legal or prescribed procedures, or those in collective agreements, on the basis of the evidence presented by both sides. The judge can order all measures of investigation which he or she deems necessary.

A wage earner dismissed without justification cannot lay claim to re-engagement or reinstatement into the enterprise.<sup>4</sup>

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<sup>4</sup> M. Hellal: «Les pouvoirs de l'arbitre en matière de règlement des conflits collectifs de travail», in *Revue Tunisienne de droit social* (Tunis, Association tunisienne de droit social, 1995), p. 126. The concept of a null and void dismissal is not recognized in Tunisian law, whatever the degree of abuse. See A. Safi: «Prud-hommes et contrat de travail. A propos de la Réforme de février 1994», in *Revue Tunisienne de droit social*, 1995, No. 1, p. 123.

The compensation for unjustified dismissal is an award of damages. The amount of compensation depends solely on the length of service of the dismissed employee and not on the harm caused by the employer's actions.

In the absence of a real and serious reason for dismissal, the amount of damages for unjustified termination of a contract of employment for an indefinite term varies from one or two months' salary for each year of service, up to a maximum of three years' salary (*sec. 23(1)*, LC).

The existence and the extent of the employee's losses are judged by the court, taking into account the worker's qualifications, his or her length of service in the firm, age, remuneration, family situation, the impact of dismissal on his or her retirement, compliance with the specified procedures and any special circumstances.

If it transpires that the termination of employment is justified by a real and serious reason, but has been effected without observing legal procedures or those under collective agreements (notice periods, procedures for dismissal of a worker's representative or for economic or technological reasons, etc.), the dismissal is considered unjustified, but the amount of damages is limited to an amount between one and four months' salary (*sec. 23(1)*, LC).

The amount of damages for unjustified termination of a contract of employment for a specified period corresponds to the payment due for the remaining contract period or for the remaining work left to perform (*sec. 24*, LC).



## ***United Kingdom***

### **Sources of regulation**

The United Kingdom law governing contracts of employment derives from three main sources: common law, statute and law of the European Community. The main statute governing termination of employment is the Employment Rights Act 1996 (ERA).<sup>257</sup> Other legislation relevant to the termination of employment includes the Disability Discrimination Act, 1995, the Trade Union and Labour Relations (Consolidation) Act, 1992 (TULRA), the Sex Discrimination Act, 1975, the Race Relations Act, 1976, and the Equal Pay Act, 1970.

Special provisions under collective agreements may achieve legal effect if they are incorporated into individual contracts of employment. Incorporation is not automatic. This is in sharp contrast to many other countries, where the clauses of collective agreements apply to employment contracts if the provisions are more favourable to the employee.

On 22 May 1998 the United Kingdom Government published a White Paper for consultation on proposed changes to, *inter alia*, the law regulating termination of employment. This led to the Employment Relations Bill, which was introduced before the Government on 27 January 1999. In summary, the changes proposed by the Bill in relation to employment termination include:

- C dismissal of lawful strikers will be automatically unfair; and
- C the current maximum compensatory award of , 12,000 is to be increased to , 50,000.

In addition, the Secretary of State had the power, under the ERA, to reduce the qualifying period for which an employee must work in order to be eligible to bring a claim for unfair dismissal (currently two years). The qualifying period has been reduced from two years to one year for dismissals on or after 1 June 1999. .

### **Scope of legislation**

Protection under the ERA is only available to employees with two years of continuous uninterrupted service, (*sec. 108*, ERA), subject to a pending challenge to this provision under European law.<sup>258</sup> This does not, however, apply if the dismissal is on the grounds of union membership, for health and safety activities, sex discrimination or racial discrimination.

Protection under the ERA also does not extend to:

- C employees of normal retirement age for the particular job or, if there is no such age, the age of 65;
- C share fishermen (*sec. 199*, ERA);
- C persons ordinarily working outside the United Kingdom (*sec. 196*, ERA);
- C persons employed on United Kingdom registered ships wholly outside the United Kingdom or not ordinarily resident in the United Kingdom (*sec. 199*, ERA);

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<sup>257</sup> Which consolidated the Employment Protection (Consolidation) Act, 1978, as amended.

<sup>258</sup> *R v. the Ministry of Defence, ex parte Seymour Smith* [1997] IRLB 556.

- C persons employed under fixed-term contracts for one year or more, if they have waived their rights in writing (*sec. 197*, ERA);
- C members of Her Majesty's naval, military and air forces (*sec. 138(3)*, ERA); or
- C police officers (*sec. 200*, ERA).

Protection under the Race Relations Act and Sex Discrimination Act applies to all employment under a contract of service or apprenticeship; however, the Race Relations Act, unlike the Sex Discrimination Act, does not cover employment in private households, unless the discrimination is by way of victimization.

### **Contracts of employment**

A contract of employment means a contract of service or apprenticeship, whether it is express or implied, and if it is express, whether it is oral or in writing (*sec. 230(2)*, ERA). In addition to contracts for indeterminate periods, there are contract for fixed, short-term, and probationary contracts as well as apprenticeships. Fixed-term workers engaged for more than a year can contract out of their statutory right to claim unfair dismissal. There is also no dismissal automatically upon the expiry of a fixed-term contract. The expiry of a period of extension of less than a year of an original fixed-term contract of more than a year is also deemed to be not a dismissal.<sup>3</sup>

Temporary workers are defined as those whose services are supplied by an intermediary (employment agent or business) for the benefit of a third party (hirer) for a limited period of time.

There is no separate legal category, however, for casual workers or home workers. They must establish both a contract of service and necessary continuity of service to qualify for protection.

### **Termination of employment**

The employee is entitled to terminate an employment contract at will (by the provision of due notice), unless otherwise agreed in the contract. Contracts of employment may also be frustrated, by an event external to the parties, which renders the further performance of the contract impossible, and may terminate by operation of law, or by the death of the employee or employer.

#### **Termination of employment at the initiative of the employer**

According to the common law, any contract may be terminated by either party with due notice. However, the common law has been restricted by legislation aimed at curbing unfair dismissal. The ERA includes, as a principle, the right of an employee not to be dismissed unfairly (*sec. 94(1)*, ERA).

According to *sec. 98* of the ERA, a dismissal may be fair if the employer shows that the reason or the principal reason for the dismissal is contained in *sec. 98(2)* of that Act. (The employee has the initial evidentiary burden of proving a dismissal has taken place, then the burden of showing cause shifts to

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<sup>3</sup> *BBC v. Kelly-Phillips*, unreported, 8 April 1998, Court of Appeal.

the employer.) Where the employer has fulfilled this requirement, it rests with the Industrial Tribunal to decide whether in all circumstances the employer acted as a reasonable employer in dismissing the employee (*sec. 98(4)*, ERA).

The employer's grounds for dismissal must fall within one of the following categories (*sec. 98*, ERA):

- C dismissal on grounds of a worker's aptitude in relation to personal capability or ill health (*sec. 98(2)(a)*, ERA);
- C dismissal on grounds of a worker's conduct (*sec. 98(2)(g)*, ERA);
- C for taking part in any kind of industrial action, provided all employees who took part in that action were dismissed without discrimination and not re-engaged within three months (*sec. 238*, TULRA);
- C dismissal on grounds of the establishment's needs, if further employment would contravene a duty or restriction imposed by law either on the employer or on the employee (*sec. 98(2)(a)*, ERA). This case might, for example, arise if an employee, who has to use a vehicle at work, had his or her driver's licence suspended;
- C dismissal for reasons of redundancy, where the employer has a wide discretion to determine when it is necessary to dismiss a worker for redundancy (*sec. 98(2)(c)*, ERA); and
- C dismissal for some other substantial reason of a kind such as to justify the dismissal of an employee (*sec. 98(1)(b)*, ERA).

There are a number of instances which render a dismissal automatically unfair, such as where the principal reason for dismissal involves:

- C trade union membership, elected representatives of the employees, representatives of a recognized trade union, or trade union activities (if the employee was or proposed to become a member of an independent trade union or if the employee had taken, or proposed to take, part in activities of an independent trade union) (*sec. 152(1)(a) and (b)*, TULRA; and *sec. 103*, ERA *for employee representatives*);
- C refusal to belong to a trade union (if the employee was not a member of any trade union, or of a particular trade union, or had refused, or proposed to refuse, to become or remain a member) (*sec. 152(1)(c)*, TULRA);
- C unfair selection for redundancy (in breach of an agreed procedure or customary arrangement or if the employee made redundant has been chosen because of his or her union membership/union activities) (*sec. 153*, TULRA; and *sec. 105*, ERA);
- C pregnancy and confinement (*sec. 99*, ERA);
- C racial and sexual discrimination (*sec. 4(2)*, Race Relations Act, 1976, and *sec. 6(2)*, Sex Discrimination Act, 1975) or (subject to defences) discrimination on the grounds of disability (Disability Discrimination Act);
- C dismissal for raising health and safety concerns (if the concerns are raised by safety representatives and others acknowledged by their employer as performing a health and safety function) (*sec. 100*, ERA);
- C seeking to enforce a statutory employment protection right (*sec. 104*, ERA);

- C transfer of an undertaking (*sec. 8(1)*, Transfer of Undertakings (Protection of Employment) Regulations, 1981), unless it falls within the scope of *sec. 8(2)* of those regulations (i.e. unless the dismissal is justified by an economic, technical or organizational reason entailing a change in the workforce);
- C conviction of an offence or failure to disclose such a conviction when the conviction is **Aspent@** within the meaning of the Rehabilitation of Offenders Act 1974 (*sec. 4(3)(b)*);
- C industrial pressure exercised on the employer (e.g. if employees threaten to start industrial action unless a certain employee is not dismissed) (*sec. 107*, ERA);
- C shop workers and betting workers who refuse Sunday work (*sec. 101*, ERA); and
- C trustees of occupational pension schemes (*sec. 102*, ERA).

In all other cases where a dismissal is not automatically unfair, it must be for a potentially fair reason (see above) and be **Areasonable@**. The employer has wide discretion in determining what is reasonable. If the dismissal is contested in an Industrial Tribunal, the tribunal does not substitute its own opinion for that of the employer; rather, it decides whether the finding to dismiss an employee fell within the band of reasonable responses which a reasonable employer might have adopted (*sec. 98*, ERA). If it is shown that dismissal was taken to safeguard national security, the Industrial Tribunal has to dismiss the case irrespective of the question of fairness.

There is no reference to the term **Acollective dismissal@** in the statutes. However, certain obligations (consultation and notification in due time) for the employer arise in circumstances where a certain number of employees are affected by dismissal caused by redundancy. Generally, redundancies are **Acollective@** dismissals if they concern 20 or more employees within a period of 90 days.

The definition of redundancy is that the employee's dismissal is attributable wholly or mainly to the fact that:

- C the employer has ceased or intends to cease to carry on that business in the place where the employee was so employed; or
- C the requirements of that business for employees to carry out work of a particular kind in the place where the person affected was so employed have ceased or diminished or are expected to cease or diminish (*sec. 139(1)*, ERA).

### **Notice and prior procedural safeguards**

If the employee has been continuously employed for one month or more, an employer is required to give notice. The length of notice relates to the length of continuous uninterrupted service, according to the provisions of *sec. 86* of the ERA. The minimum periods of notice are as follows (*sec. 86*, ERA):

- C one week, if continuously employed for less than two years;
- C one week for each year of continuous employment if the period is between two years and less than 12 years; and
- C 12 weeks if the period of continuous employment is 12 years or more.

In cases where the required period of notice has not been observed, the Industrial Tribunal may grant payment in lieu of the period that should have been observed.

If the employee has been continuously employed for at least two years, the employer is required upon request to hand over a written statement, explaining the reasons for the dismissal (*sec. 92, ERA*).

Outside of this there are no statutory requirements for a certain procedure; however, the courts expect employers to follow their own guidelines for termination where they exist. These procedural guidelines must bear a minimum of fairness. Under common law, failure to follow fair procedures alone may render a dismissal unfair, even though, had the procedure been abided by, it might have been fair to dismiss the employee.

If more than 19 employees are affected by the redundancy, the employer must notify the Secretary of State in writing (*sec. 193, TULRA*). Failure to do so may result in a fine (*sec. 194, TULRA*). A copy of this notification must be sent to each workers= representative who is to be consulted on the redundancy.

In addition, if more than 19 employees are proposed to be made redundant, employee representatives are to be consulted by the employer (*sec. 188, TULRA*). These representatives are to be representatives of an independent trade union or, in the case of the absence of a recognised trade union in the workplace, representatives specially elected by the employees for the purpose of consultation on redundancy (*sec. 188(1)(1b), TULRA*). They are to receive specific information on the redundancies from the employer prior to the consultation (*sec. 188(4), TULRA*). The consultation should begin ~~in~~ good time@and, in any event, where the employer is proposing to dismiss 100 or more employees, at least 90 days (otherwise at least 30 days) before the first of the dismissals takes effect (*sec. 188(1)(1A), TULRA*). The consultation shall include ways to avoid or reduce the dismissals, and ways to mitigate their consequences. They should be undertaken by the employer with the view to reaching an agreement (*sec. 188(2), TULRA*).

If the obligation to consult is not observed, a complaint may be presented to the Industrial Tribunal which may make a protective award to the effect that the employees are to be kept on the payroll for the period set out in the award (*sec. 189, TULRA*). The period is to be of such length as the Tribunal determines to be just and equitable in all circumstances having regard to the seriousness of the employer=s default (*sec. 189(4), TULRA*).

## **Severance pay**

An employee whose contract has been terminated on the grounds of redundancy is entitled to receive a redundancy payment in accordance with *sec. 135* of the ERA. The amount of the payment is calculated according to the length of uninterrupted employment. The employee is to receive:

- C one-and-a-half week=s pay for each year of employment in which the employee was not below the age of 41;
- C one week=s pay for each year of employment in which the employee was not below the age of 21; and
- C one half-week=s pay for each year of employment for each year not falling within the above.

The maximum week=s pay shall not exceed , 205. Moreover, wherever an employee has been dismissed for redundancy reasons but the dismissal has been unfair, the redundancy compensation received will be subtracted from the compensation payable to the employee for the unfair dismissal (*secs. 122(4) and 123, ERA*).

Both employers and employees have to contribute to the National Insurance Fund, out of which redundancy payments are financed in case the employer is financially unable to do so (*secs. 166/168, ERA*).

### **Avenues for redress**

Only after a minimum period of two years of uninterrupted service is an employee entitled to claim unfair dismissal (*sec. 108, ERA*). However, there is no such period for employees claiming to have been dismissed on grounds of union activities, health and safety activities, maternity, race or sex.<sup>4</sup> A claimant can launch a claim through the Industrial Tribunal or civil courts.

Employees who believe their rights have been infringed (i.e. that they have been dismissed unfairly) may make a complaint to the Industrial Tribunal (*sec. 111(1), ERA*) within three months of the date of termination, or such further period where the Tribunal is satisfied it was not reasonably practicable for the complaint to be presented within three months (*sec. 111(2), ERA*). A conciliation officer from the Advisory, Conciliation and Arbitration Service (ACAS) is then appointed to deal with the case. If no settlement is reached, the case will then receive a hearing in the Industrial Tribunal. The Employment Rights (Dispute Resolution) Act, 1998, introduced a new arbitration scheme, as an alternative way of resolving unfair dismissal disputes. This Act also introduced changes to the Tribunal's internal procedure, designed to improve its efficiency.

Employees may sue employers for breach of contract in the civil courts. In addition, there is the possibility of seeking a temporary, interim injunction. Under certain (very limited) circumstances, they may also seek a permanent injunction against their dismissal in the civil courts.

The employer has to establish that the principal reason for the termination is capable of justifying the termination. The question of whether in fact it did justify the termination will depend upon whether the Tribunal is convinced that the employer acted reasonably in all the circumstances in treating the reason as sufficient.

If a dismissal is for reasons of union membership or activities, or a failure to be a member of a union, and the employee has not completed the two-year service period set forth in *sec. 108* of the ERA, then the onus of proof rests with the employee to show that the dismissal has been for the prohibited reasons.<sup>5</sup>

According to the ERA, reinstatement or re-engagement should be the primary remedies (*secs. 112 and 113, ERA*). However, in practice, the Industrial Tribunal has wide latitude regarding whether to order reinstatement or re-engagement or to award compensation. The Industrial Tribunal must consider both the interests of the employee as well as those of the employer. The Tribunal must also consider whether an order to reinstate or re-engage a dismissed employee is practicable.<sup>6</sup> The employer has a right to object and may argue it is not practicable to re-engage the employee, in which case the Industrial Tribunal may agree and award compensation to the employee, and a further special award where it

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<sup>4</sup> As mentioned above, the future of this qualifying period is subject to legal challenge on the grounds that this provision (indirectly) discriminates against women. The challenge is currently awaiting decision by the European Court of Justice, after referral by the House of Lords: *R v. the Ministry of Defence ex parte Seymour Smith*, op. cit.

<sup>5</sup> *Smith v. Hayle Town Council* [1978] IRLR 413, [1978] ICR 996 (CA).

<sup>6</sup> *Port of London Authority v. Payne* [1994] IRLR 9.

finds the employer's reasons for not re-engaging the employee insufficient. The special award is calculated in accordance with *sec. 125* of the ERA and shall not exceed , 27,500.

An employee may claim compensation for job loss. However, it should be borne in mind that unless a qualifying period of two years of uninterrupted service is fulfilled, a worker does not qualify for compensation. The amount depends on the length of uninterrupted service between the age of 20 and 65. For unjustified dismissal, there is a basic award (which is calculated similarly to a redundancy payment to a maximum of , 6,150) on the basis of age and years of service, and a compensatory award (*sec. 118*, ERA). The compensatory award (*sec. 123*, ERA) compensates the employee for the loss (of earnings, pension rights, injury to feelings and other non-pecuniary loss) he or she has sustained in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The maximum compensatory award is , 12,000 (1996), but in cases of sex discrimination and race discrimination, there is no limit on the amount of the compensatory award. There is a minimum award in cases where:

- C dismissal is unfair due to reasons of redundancy but no redundancy payment is paid because the employee accepted or unreasonably refused alternative employment (minimum award of two weeks' pay must be ordered (*sec. 121*, ERA));
- C dismissal is unfair on the grounds of health and safety activities in accordance with *sec. 100* of the ERA (compensation shall not be less than , 2,770 (*sec. 120(1)*, ERA)); or
- C the employee is dismissed for union membership, union-related activities or for not being a member of a union (minimum basic award is , 2,770 (*sec. 156(1)*, TULRA)).

If the dismissed employee seeks but does not obtain an order for re-employment/re-engagement, he or she shall be paid an additional special award not exceeding , 27,500 (*secs. 157/158*, TULRA).

Damages may be sought in the civil courts as well as the Industrial Tribunal. Damages may be awarded for loss of opportunity provided by the contract or for mental distress, anxiety and illness caused by the loss.

In exceptional circumstances an injunction may be granted to ensure suspension of notice during court proceedings. This can be done by invoking a breach of contract under common law. In general, courts will grant an injunction only if damages are inadequate and complete confidence in the relationship has been maintained. A further condition is that an injunction can only be granted in so far as the contract is still extant. For example, the contract will be no longer extant where the employee accepts a breach of repudiation by the employer.

Under the aegis of the Industrial Tribunal, those who claim that they have been dismissed for trade union membership/activities or refusal to join a union qualify for interim relief, which allows the Tribunal to order reinstatement, re-engagement or, if the employer refuses to do so, suspension on full pay until final determination. Such interim relief might be awarded if there is a likelihood of the employee succeeding in the final hearing (*sec. 128*, ERA).

## ***United States***

### **Sources of regulation**

The United States is one of the few countries in the world which still embraces the employment-at-will concept. Although, as elsewhere, the pure concept of employment-at-will has been eroded somewhat by jurisprudence, it is still predominant, particularly when one compares it to employment security law in other Western and developed countries. Consequently, with the exceptions of the State of Montana,<sup>259</sup> the Commonwealth of Puerto Rico, and the non-metropolitan territory of the US Virgin Islands, as yet there is no legislation specifically focused on termination of employment. However, other legislation is relevant to the issue of termination of employment at the initiative of the employer. In the main, these statutes concern protection from discriminatory treatment on various grounds. The most important of these for present purposes include: the National Labor Relations Act (NLRA) (governing collective bargaining agreements and protection of freedom of association); the Civil Rights Act, 1964 (Title VII), which seeks to prevent discrimination on the basis of race, national origin, sex or religion, the Age Discrimination in Employment Act, 1967 (ADEA); the Pregnancy Discrimination Act, 1974 (PDA); the Whistleblower Protection Act, 1989 (WPA); and the Americans with Disabilities Act 1990 (ADA), prohibiting discrimination against disabled persons.

### **Scope of legislation**

These federal statutes, which in general apply to employers having a certain minimum number of employees (e.g. 15 or more under Title VII), are supplemented in many of the 50 States by similar legislation that covers smaller employers as well as state and local government.

### **Contracts of employment**

There is no federal legislation which distinguishes between the various types of employment contracts in relation to termination of employment.

### **Termination of employment**

The contract of employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C employee resignation on the appropriate notice;
- C employee retirement;
- C the expiry of a fixed-term contract; and
- C the completion of the task for which the contract was concluded.

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<sup>259</sup> Mon. Code Ann., *sec. 39-2-901*.



## Termination of employment at the initiative of the employer

The emphasis on the master and servant relationship in employment, which forms the basis of the employment-at-will concept, means that workers may be dismissed for any reason or no reason at all.<sup>2</sup> Nevertheless, protection from arbitrary termination of employment may be given to American workers in three ways. First, employees covered by collective agreements are often protected by provisions requiring that dismissals must be for a valid reason (Ajust cause@). However, the low collective bargaining coverage rate means in effect that this is an insufficient avenue for securing employment security to the working population at large and does not counterbalance the limited legal protection of individual employee rights. AThe private sector [union] density rate is currently an anemic 10.9 per cent, the lowest figure since 1936.@<sup>3</sup> Secondly, developments in the common law, specifically tort law and contract law, may be applied to cases of dismissal along with public policy principles.

As mentioned above, employees may have recourse to anti-discrimination statutes to determine the legitimacy of dismissals in employment. Thus, the ADEA prohibits dismissal based on age discrimination; Title VII prohibits discrimination on the basis of race, national origin, sex or religion; and the ADA prohibits dismissal arising out of discrimination against disabled persons. In addition, the WPA seeks to protect employees who disclose information about their employer=s improper activities or crimes from being dismissed or sanctioned and the PDA outlaws dismissal on grounds of pregnancy, childbirth or related medical conditions. Finally, it is unlawful for an employer to dismiss a beneficiary of a defined benefit pension plan for exercising any right under an employee benefit plan or to prevent any entitlement under such a plan from being attained.

In relation to unionized employees, the NLRA encompasses substantive and procedural requirements on termination of employment and also has an indirect influence on dismissal law by giving unions the opportunity to bargain for a just cause or valid reason provision in collective agreements. *Sec. 8(a)(3)* of the NLRA makes it an unfair labour practice for an employer Aby discrimination in regard to hire or tenure of employment ... to ... discourage membership in any labor organization ...@. *Sec. 8(a)(4)* also makes it an unfair labour practice for an employee to be discharged if he or she has filed charges or given testimony against the employer.

Due to the harsh nature of the employment-at-will concept, several courts have created exceptions to the rule in order to grant some job security to employees. However, there is a lack of uniformity both among state courts and between the federal and state courts, and the law on termination of employment can perhaps best be described as being in a state of flux.<sup>4</sup>

One of the most widespread exceptions to employment-at-will created by the courts is the notion of a breach of an implied contract of employment, which requires that dismissal be for good cause. An

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<sup>2</sup> An estimated 70 to 75 per cent of workers are employed Aat will@. Approximately 2 million Americans are discharged annually from their jobs without valid cause, including for reasons such as filing workers=compensation claims or testifying against their employers (C. Barber: AComparison of International and U.S. Employment Procedures@, in *Syracuse Journal of International Law and Commerce*, 1993, Vol. 19, pp. 165-6).

<sup>3</sup> C. Craver: ARearranging deck chairs on the Titanic: The inadequacy of modest proposals to reform labour law@, in *Michigan Law Review*, 1995, Vol. 93, p. 1616.

<sup>4</sup> For a description of major recent case law, see A. Goldman: *Labor and employment law in the United States* (The Hague, Kluwer Law International, 1996), pp. 65-77.

implied contract can result from oral or written representations or a course of conduct or precedent set by the employer which leads to a legitimate expectation on the part of the employee that his or her employment will not be terminated except for good cause.

In the case of *Foley v. Interactive Data Corp.*,<sup>5</sup> for instance, the employee was dismissed from his job at the bank for reporting to the bank's vice-president that his immediate supervisor was being investigated for embezzlement of funds. It was successfully argued that an implied contract, limiting the employer's right to terminate him arbitrarily, was in existence. This implied contract was premised on oral assurances given to him by the employer that his job was secure as long as his performance was adequate.

The adoption of the breach of an implied contract doctrine in employment law is, in truth, not so much an exception to the employment-at-will concept as the application of basic contract principles to the employment contract. In essence, promises and assurances by the employer which can be seen as having binding contractual effect will be enforced. One of the most popular avenues for claiming such implied contracts has been the "employee handbook rule". The majority of courts and states now recognize that specific promises embodied in personnel handbooks may be binding upon employers when they are seen as bestowing beneficial enforceable rights on the employee.<sup>6</sup> A note of caution is warranted here as the courts have also stated that an employer could avoid stating specific personnel policies or unilaterally revise its handbook if it wished to remain an at-will employer.<sup>7</sup>

Despite the availability of the implied contract theory as a doctrine to substantiate claims for wrongful or unjust dismissals, in practice the theory is not an effective one for securing job protection. This is because, firstly, the application of the theory is still riddled with uncertainty as is evident by the apparent confusion in the case law.<sup>8</sup> Secondly, it is often difficult for an employee to displace the burden of proof to substantiate the claim that assurances were made. This is particularly true in situations where an implied contract based on oral assurances is pleaded. Finally, as employers have now been alerted to the potential application of the doctrine in the employment relationship, they are able quite easily to avoid making any assurances which could lead to liability.

Basic contractual principles have also given rise to a recognition of an implied covenant of good faith and fair dealing in labour and employment law, leading to an assumption that dismissals should be fair. This theory holds that a duty of good faith and fair dealing is owed in the performance and enforcement of all contracts. An example is where the employee is dismissed in order to avoid paying a large sales commission owed to him or her.<sup>9</sup>

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<sup>5</sup> 47 Cal. 3d at 654, 765 P. 2d. at 373 (Cal. 1988). See also *Bernard v. IMI Sys. Inc.*, 131 N.J. 91, 618 A. 2d. 338 (1993).

<sup>6</sup> R. Pratt: "Unilateral modification of employment handbooks: Further encroachments on the employment-at-will doctrine", in *University of Pennsylvania Law Review*, 1990, Vol. 197, p. 208..

<sup>7</sup> See *Toussaint v. Blue Cross & Blue Shield of Michigan*. 292 N.W. 2d. 880 (Mich. 1980), p. 894.

<sup>8</sup> The theory remains troubling because of those instances in which application of contract law is a transparent invitation to the fact-finder to decide not what the "contract" was, but what "fairness" requires. *Rowe v. Montgomery Ward and Co.* 473 N.W. 2d. 268 (Mich. 1991), p. 269.

<sup>9</sup> *Fortune v. National Cash Register Co.* 364 N.E. 2d. 1251 (Mass. 1977). For further explanation of this doctrine, see Goldman, op. cit., pp. 68-71.

The employer's right to terminate employment may also be curtailed on grounds of public policy. The public policy exception under case law is available largely to protect employees from dismissal in those situations where they refuse to commit an illegal or unethical act requested by the employer<sup>1</sup> or where they choose to exercise a statutory right, for example rights under the Occupational Safety and Health Act, 1970, or the Fair Labour Standards Act, 1938 (covering minimum wage and overtime). There is also room under the public policy exception to encompass dismissals that violate more generalized public policy principles not embodied in statute or criminal law, and recent cases point to this.<sup>2</sup>

Wrongful dismissal actions may also give rise to independent tort actions, in particular claims of intentional infliction of emotional distress. For a claim to be successful on this ground the defendant's conduct must have been extreme and outrageous, should have intentionally or recklessly caused harm to the employee and must have resulted in distress. The claim is not normally available for typical kinds of dismissal.<sup>3</sup>

Notwithstanding the absence of specific legislation on termination of employment, an attempt has been made to provide legislative guidelines for dismissals under a model act. In 1991, the National Conference of Commissioners of Uniform State Laws adopted a Model Employment Termination Act which would protect workers employed on average 20 hours a week for at least 26 weeks in the preceding year if they are dismissed without good cause by an employer of at least five persons.<sup>4</sup> The model legislation, which has not been enacted into law, is similar in scope and intention to the ILO Termination of Employment Convention, 1982 (No. 158). Remedies would include reinstatement and back pay or severance pay, plus reasonable attorney fees and costs. The Model Act envisages eliminating the common law claims and remedies previously available to the employee. This differs, for example, from similar legislation in other countries, such as Canada, which merely supplements the common law.

Collective dismissals are permissible, but may be subject to certain procedures (see below).

## **Notice and procedural requirements**

There is no legal requirement for notice to be given prior to termination of employment. Collective agreements usually include provisions for a reasonable period of notice. However, these do not always guarantee compensation in lieu of such notice.

There is no legal policy or statute which requires the employer to grant the worker a fair hearing or follow any other natural justice process before dismissing him or her. Typically, collective agreements provide a mechanism for challenging dismissals for cause, normally through a grievance arbitration

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<sup>1</sup> See, for example: *Petermann v. International Brotherhood of Teamsters*, 344 P. 2d. 25 (Cal. C. App. 1959), where dismissal for refusing to lie before a legislative committee at the employer's request was found to be void on public policy grounds.

<sup>2</sup> For example, dismissal for refusing to date a foreman, although this would now be covered under guidelines against sexual harassment under Title VII.

<sup>3</sup> For further discussion of this and other collateral sources of relief for dismissal, see Goldman, op. cit., pp.74-76.

<sup>4</sup> Goldman, op. cit., p. 65.

procedure or other alternative dispute settlement mechanism. Where states have enacted statutes on non-discrimination or wrongful discharge, these sometimes contain due process clauses which mandate that certain procedures be followed.

The Worker Adjustment and Retraining Notification Act of 1988 (WARN) requires employers with 100 or more employees to give 60 days=advance notice of redundancies, plant closure or mass lay-off of workers. Mass lay-off is defined as 500 employees, or 50 or more employees if they constitute one-third or more of the workforce. The notice must be given to the employees or their union representatives, as well as to local officials. If the employer does not provide the requisite advance notice, the employer must provide a day=s wages for each day notice was not given.

The employer is excused from the notice obligation if:

- C it provided reasonably accessible alternative work opportunities;
- C the workforce reduction was compelled by unpredictable business changes or natural disaster;
- C good faith efforts to avert the reduction compelled the employer not to publicize its adverse business situation;
- C the reductions were caused by labour disputes; or
- C on hiring, the employees were told the duration of the project was for a specified period.

Several states have enacted legislation supplementing the provisions of WARN, which is also known as the Plant Closing Act. Provisions relating to redundancies may also be included in collective agreements or privately negotiated in individual contracts of employment.

The NLRA, as amended, governs collective bargaining agreements and requires that employers bargain with unions regarding certain conditions of employment. Consequently, the legislation may be used to force employers to bargain over those partial closures of businesses which would result in mass lay-offs. Under a typical agreement, employers are obliged to bargain over the effect of the redundancy and must notify the representative union. However, employers are under no legal obligation to consult with or inform the workers themselves about operational modifications or plans leading to redundancy.

### **Severance pay**

Severance pay is usually governed by the terms of the collective bargaining agreement, if any. As a matter of practice, most large employers voluntarily provide some redundancy pay for employees terminated for economic reasons.

### **Avenues for redress**

As there is no separate institutional mechanism for termination of employment procedures, there is no special judicial or quasi-judicial body which could deal with dismissal claims in particular. Rather, different avenues for redress of dismissal claims are dependent on the applicable statutory provisions and on the route which the employee has taken in order to pursue such claims. For example, under the NLRA employees may pursue their claims under special appeal procedures set up under this statute. Claims based on discrimination charges arising out of any of the various statutes prohibiting

discriminatory practices must be settled before the ordinary courts of law if attempts to resolve the matter administratively have not succeeded.

There is a recent trend to conclude individual contracts of employment containing clauses that stipulate a designated procedure for resolving claims, including dismissals. The National Academy of Arbitrators has opposed mandatory arbitration as a condition of employment when it requires a waiver of direct access to a judicial or administrative forum for the pursuit of statutory rights.<sup>1</sup>

Where there is a grievance *and* arbitration procedure under a collective agreement, the employee will have recourse to this. Typically, the burden of proof is placed on the complainant in arbitration proceedings, generally being the employee in a dismissal case.

Under the NRLA and other statutes, employees are provided with specific remedies where a dismissal has been found to be unlawful. These remedies may include reinstatement and the reimbursement of back pay as well as traditional remedies of damages. Where common law actions based on contract or tort are successful, these will attract the usual remedies available for actions in such suits. Litigants may be awarded equitable relief such as reinstatement and back pay, monetary damages such as reimbursement for lost wages, compensatory damages for pain and suffering and punitive or exemplary damages where the employer is found to have acted maliciously.

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<sup>1</sup> Arbitrators=Academy votes to oppose mandatory arbitration of job disputes@, in *Labor Relations Week* (Washington, DC, BNA), 4 June 1997, Vol. 11, No. 22, p. 585.

## Venezuela

### Sources of regulation

Art. 88 of the Venezuelan Constitution<sup>260</sup> states that the law shall adopt measures intended to guarantee stability of labour and shall establish the benefits to compensate for seniority of service of a worker and protect him in case of unemployment.

The primary source relating to labour is the Basic Labour Act (BLA) of 27 November 1990.<sup>261</sup> Collective agreements are another source of law which often encompass termination of employment, making particular reference to dismissal for invalid reasons, procedures and benefits. In practice, tripartite commissions established through agreements place high priority on problems linked to dismissal. The case law of labour courts and decisions of the labour inspectorate (and decisions to settle legal disputes) supplement these sources of regulation, particularly in the area of immunities.

### Scope of legislation

Career officials and white-collar employees in public service at the national, state or municipal levels are not covered by the provisions of the BLA in so far as they are governed by the administrative career regulations. Nevertheless, in any matter not so regulated they may enjoy benefits through labour legislation applicable to workers in the private sector. Members of the armed forces and state security corps are also excluded from the scope of this legislation (*secs. 7 and 8, BLA*).

All enterprises, establishments, undertakings and businesses, whether state-owned, in existence or yet to be founded in Venezuela, and in general any performance of personal service involving employers and workers in any form whatsoever, are subject to the provisions of the BLA, the sole exceptions being those explicitly mentioned in the Act (*sec. 15, BLA*).

Apprentices, young persons, domestic workers, caretakers, home workers, professional sports people, rural workers, persons employed in land, air and inland water transport, seafarers, motorized workers, actors, musicians, folklorists and other intellectual and cultural workers and disabled persons are covered by special conditions (*Title V, Special Conditions, BLA*).

### Contracts of employment

Pursuant to *sec. 67* of the BLA, an employment contract is one whereby a person undertakes to render services to another, under the control of the latter and in return for remuneration.

There are no statutory provisions for probation periods. There is a trial period of 90 days for workers assigned to a higher post, although this can in no way be construed as constituting indirect dismissal (*sec. 103(2), BLA*).

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<sup>260</sup> 1961 Constitution, amended in 1979 and 1983.

<sup>261</sup> Rules relating to remuneration and dismissal were amended in 1997 as a result of a tripartite agreement in April of that year.

In principle, a contract is deemed to be of indeterminate duration if the parties do not explicitly state the desire to be bound by an employment relationship solely for a specified task or for a specified period (*sec. 72 and onwards*, BLA). The following three conditions govern the conclusion of contracts for a specified period:

- C for a contract for a specified period, blue-collar workers, one year maximum;
- C for a contract for a specified period, white-collar workers, three-year maximum; and
- C for a contract for a specified task, the time necessary for its performance.

In the first two cases, contracts may be concluded only when the nature of the service warrants it, for example, the provisional and legitimate replacement of a worker and when Venezuelan workers conclude contracts to work outside the country. An extension may be granted, although in the case of two or more extensions the contract is considered to be of indeterminate duration. The contract is also deemed of indeterminate duration if, within a month of its expiry, a new contract is concluded between the same parties, unless the parties clearly demonstrate their mutual wish to end the relationship.

If, within a month of the termination of a contract for a particular task, the parties conclude a new contract for the performance of another task, it will be understood that they were bound from the outset of the relationship for an indeterminate period.

## **Termination of employment**

Employment may be terminated, under *sec. 98* of the BLA, other than at the initiative of the employer, by mutual agreement by the parties, for reasons foreign to the wishes of both,<sup>3</sup> and on the resignation of the worker.

*Resignation* is the unilateral termination of the employment relationship by the worker. The BLA does not impose an obligation on the worker to submit written notice of resignation stating the reason, if any, for such action. Indeed, the BLA provides for termination of employment by the worker without reason and requires only the submission of notice ranging from seven to 30 days, depending on the worker's length of service (after a month, seven days; after six months, 15 days; and after one year, 30 days). In lieu of notice, in the case of contracts of indeterminate duration, the worker must indemnify the employer by payment of a sum corresponding to the wages he or she would have earned during the notice period (*sec. 107*, BLA). In the case of contracts for a specified period or task, the judge may order a worker to pay as compensation for damages an amount which must not exceed one half of the remuneration which would have been due up to the completion of the task or service (*sec. 110*, BLA).

However, if resignation is for a justified reason, there is a 30-day period in which the worker may invoke the right to resign (*sec. 101*, BLA). Resignation is considered justified when it is based on a reason prescribed by statute and its financial effects are equivalent to those of unjustified dismissal (see below). Dishonesty, immoral actions with regard to the worker or his or her family, insult or serious lack of respect towards the worker or his or her family, forgetfulness which jeopardizes safety or health in the workplace, serious breach of the obligations under the contract of employment, and any act amounting to indirect dismissal (*secs. 100 and 103*, BLA) constitute just cause for resignation.

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<sup>3</sup> For example, death or incapacity of the worker which make it impossible for him or her to continue rendering his or her services and *force majeure* in case of plant closure or fortuitous bankruptcy.

*Dismissal* is indirect when an employer who wishes to terminate employment uses indirect means to induce the worker to resign, and gives cause for justified resignation. Indirect dismissal is also considered by law to cover the following cases (*sec. 103(1)*, BLA):

- C if a worker is required to do work which is distinct from that for which he or she was engaged, or which is incompatible with the worker's dignity or qualifications;
- C if a worker is required to perform services which occasion a change of residence which was not stipulated in the contract or implied in the nature of the work;
- C if remuneration or grade of the worker's post are lowered; or
- C if working hours are arbitrarily changed or any similar actions are taken.

### **Termination of employment at the initiative of the employer**

According to Venezuelan law, dismissal is the manifestation of the employer's desire to end the employment relationship (*sec. 99*, BLA). Dismissal is unjustified when the worker has committed no action to justify it. Such justification must be claimed within 30 consecutive days after the date on which the worker is informed, or should have been informed, of the facts constituting grounds for the unilateral termination of employment by the employer (*sec. 101*, BLA). This also applies to reasons relating to the operational requirements of the undertaking such as collective dismissal and staff reduction without prior notification. Mass dismissal is classified as the loss of employment by 10 per cent of the workers in an enterprise employing more than 100 persons, 20 per cent of more than 50 workers, or ten workers in an undertaking employing fewer than 50 workers, within a period of three months (*sec. 34*, BLA).

The contract of employment may be terminated for (*sec. 102*, BLA):

- C dishonesty or immoral behaviour;
- C acts of violence except in legitimate self-defence;
- C insult or serious lack of respect towards the employer, his or her representatives or family members living in his or her home;
- C deliberate action or a gross negligent act affecting safety or health in the workplace;
- C forgetfulness or carelessness seriously affecting safety or health in the workplace;
- C unjustified absence from work for three working days within the period of one month;
- C material damage to the plant, tools, furniture belonging to the enterprise, raw materials, finished or partly processed products, plantations or other relevant property, whether deliberate or resulting from serious negligence;
- C disclosure of secrets of production, construction or process;
- C serious breach of the obligations under the contract of employment; or
- C abandonment of work, which is defined as:
  - leaving the workplace inopportunistically or without valid reason during working hours, without authorization from the employer or his or her representative;



- refusal to perform the assigned tasks under the agreed terms of the labour contract or legislation. However, the refusal to undertake work which might create an imminent or serious hazard to the life or health of the worker is not considered abandonment; or
- unjustified absence by a worker responsible for a process or machine when such absence entails disruption in the rest of the service or production process.

Venezuelan law provides that certain workers, for various reasons, are irremovable and may not be dismissed, transferred or employed in less favourable working conditions without just cause approved in advance by the labour inspector (*sec. 449*, BLA). This protection is, generally, reserved for trade union promoters and board members, promoters of collective agreements and workers involved in collective disputes against employers, but has also been extended to other categories of persons, whether or not they are linked to trade union activity or collective relations. The following may therefore enjoy protection under the BLA:

- C a worker who has been suspended from work (*sec. 94*);
- C a pregnant woman, during pregnancy and up to one year after confinement (*sec. 384*);
- C an adoptive mother, during the year following adoption (*sec. 384(1)*);
- C board members of a trade union, during their management and up to three months after the expiry of the term for which they were elected (*sec. 451*);
- C promoters (and applicants for memberships), from the date of notification until registration of the union, which should not exceed three months (*sec. 450*);
- C the trade union delegate aboard a ship flying the Venezuelan flag (*sec. 356*);
- C workers during trade union elections, from the notice of convocation until the election itself, a period which should not exceed three months within a period of two years (*sec. 452*);
- C workers involved in a collective labour dispute (*secs. 458 and 506*);
- C workers affected by a draft collective agreement, during the period of negotiations and up to 180 days, which may be extended by 90 days in exceptional circumstances (*secs. 458 and 520*);
- C workers who accept changes in working conditions for economic reasons which jeopardize the work or existence of the enterprise, during the period the agreement is in force (*secs. 525 and 526*);
- C workers affected by the request procedure of the standard-setting labour meetings, during the meeting session (*secs. 528 and 533(f)*);
- C workers who are appointed labour directors or substitutes during their terms in office (*sec. 617*); and
- C members of the safety and health committee of the enterprise while they are exercising their functions on the committee (*sec. 37*).<sup>4</sup>

### **Notice and prior procedural safeguards**

Notice of dismissal must be made in writing and state the reason on which it is based. An employer is not permitted to subsequently rely on a reason for dismissal that is not specified in the notice.

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<sup>4</sup> Basic Act on prevention, working conditions and the working environment.

Where a dismissal has been issued orally, the absence of a written document does not prevent an employee who wished to challenge his or her dismissal from using other evidence to prove that he or she has been dismissed (*sec. 195, BLA*). Furthermore, the employer is required to inform the district labour-stability judge of the dismissal, stating the reasons justifying his or her action within five working days. Failure to do so will be interpreted as the employer's acknowledgement of lack of justification for the dismissal (*sec. 116, BLA*).

Notice in the case of unjustified dismissal must be conveyed in advance according to the following schedule (*sec. 104, BLA*):

- C after one month's service, one week;
- C after six months' service, two weeks;
- C after one year's service, one month;
- C after five years' service, two months; and
- C after ten years' service, three months.

In lieu of notice, the worker should be paid a sum equivalent to the remuneration he or she would have received during the corresponding period (*sec. 106, BLA*). In addition, a worker will receive compensation in lieu of notice as follows (*sec. 104, BLA*):

- C 15 days= wages when the period of service is more than one month but six months or less;
- C 30 days= wages when it is more than six months but less than one year;
- C 45 days= wages when it is one year or more;
- C 60 days= wages when it is two years or more but less than ten years; and
- C 90 days= wages when it is ten years or more.

The Ministry of Labour may suspend collective dismissals, for social reasons, by a special ruling and submit the dispute to arbitration if the parties cannot reach an agreement, or if reasons of an economic, technological or structural nature are invoked (*sec. 34, BLA*). The trade union to which the workers belong or, in the absence of a trade union, the workers themselves must be notified of the employer's application. There are no express provisions for compensation in this case. The worker is entitled to a period of notice, as follows (*sec 104, BLA*):

- C after one month's service, one week in advance;
- C after six months' service, two weeks in advance;
- C after one year's service, one month in advance;
- C after five years' service, two months in advance; and
- C after ten years' service, three months in advance.

In lieu of notice, the worker may be compensated with a sum equivalent to the remuneration he or she would have received during the corresponding period (*sec. 106, BLA*).

Legislation (*sec. 453, BLA*) lays down an administrative procedure for requests submitted by the employer to dismiss, transfer or justifiably lower the working conditions of the worker enjoying trade union immunity. Similarly, a statutory provision provides (*sec. 454, BLA*) for these workers the procedure of reinstatement (*reenganche*) in the event that the employer may have dismissed, transferred or lowered the working conditions of a worker without fulfilling the above-mentioned requirements.

## Severance pay

In the case of unjustified dismissal in contracts for a specified task or service, the employer is obliged to pay compensation for damages in an amount equal to that of the remuneration which would have been due up to the completion of the task or expiry of the period (*sec. 110, BLA*).

If the employer insists on dismissing the worker he or she must pay, in addition to the salaries which the worker would have earned during the legal proceedings, compensation amounting to ten days=wages if the employee's length of service is between three and six months; 30 days=wages if the length of service is six months or more, and then 30 days=wages for each year of service, up to a maximum of 150 days=wages (*sec. 125, BLA*). Moreover, the employer may, upon dismissal, double the severance allowance and thereby avoid legal proceedings for reinstatement mentioned below and the payment of wages accrued during the course of such proceedings (*sec. 126, BLA*).

In accordance with the 1997 revision of the law, the worker has the right to a seniority bonus that accrues interest and that is to be paid monthly or upon termination of the employment relationship at the worker's initiative (*sec. 108, BLA*). This is the equivalent of:

- C after three months of service, five days=wages;
- C after the second year of service, an additional two days=wages per year of service, up to a maximum of 30 years.

When the employment relationship ends, the worker has a right to a seniority benefit, up to 75 per cent of which can be payable in advance. The amount is:

- C 15 days=wages or, if monthly contributions or deposits have been made, the proportion of this amount remaining to be paid, when the period of service is between three and six months;
- C the difference between the amount contributed or deposited monthly and 45 days=wages when the period of service is more than six months but less than one year; or
- C the difference between the amount contributed or deposited monthly in the year in which the employment relationship ended and 60 days=wages, after the first year of service, and provided the worker has been working for greater than six months of the relevant year.

Bankruptcy is one of the hypothetical reasons for the termination of employment and in such cases the rights derived from the relationship of employment are preferential. Payments to workers are handled independently of bankruptcy proceedings by creditors. The amount of compensation varies depending on whether the bankruptcy was fraudulent or fortuitous. If bankruptcy is deemed to be caused by third parties or through negligence, the worker has the right to double compensation, whereas if bankruptcy has resulted from unforeseen or inevitable events it is considered fortuitous.

## Avenues for redress

Reinstatement of the worker represents an option between admission to employment and compensation by the employer.

Depending on the circumstances and nature of the termination, the presiding judge may rule that the worker should be reinstated and back wages paid. Rehiring is also an option for the employer (*secs.*

125 and 126, BLA). However, temporary, provisional, occasional and domestic workers are not entitled to reinstatement. Likewise, employers who regularly employ fewer than ten persons are not obliged to reinstate dismissed workers (*secs. 112 and 117, BLA*).

Once the type of dismissal has been established, the judge must give notice to the employer to submit his or her rebuttal within five working days, initiating a probation period of eight working days, unless the judge deems it unnecessary. When this period has expired, the judge must pronounce a verdict on the justification or inadmissibility of the dismissal in a time-limit not exceeding 15 working days, provided that a request has not been made for the constitution of a tribunal to pronounce a verdict (*secs. 117, 118 and 119, BLA*).

Appeals against the verdict may be lodged with the Higher Labour Tribunal which will decide on the substance of the dispute and confirm or reject the plea for reinstatement and payment of forfeited wages. No appeal is allowed to the court of cassation against a decision of this Tribunal (*secs. 121, 122 and 123, BLA*).

## ***Viet Nam***

### **Sources of regulation**

The termination of contracts of employment is governed by the Labour Code, 1994 (LC), and Decree No. 198 on Employment Contracts, 1994 (DEC). Separate provisions governing apprenticeship contracts are laid down in Decree No. 90 on Apprenticeship.

### **Scope of legislation**

The LC applies to all workers, and to all organizations or individuals employing workers under an employment contract in all economic sectors and all forms of ownership (*sec. 2, LC*). A worker is a person of at least 15 years of age who is able to work and has entered into an employment contract (*sec. 6, LC*). Trainees and apprentices and domestic workers also come within the scope of the LC (*sec. 2, LC*). Vietnamese nationals working in foreign enterprises or organizations established in Viet Nam, or in export processing zones, also enjoy the protection afforded by the LC.

Civil servants and public employees, elected, appointed or assigned officials, members of units of the people's armed forces and the police, members of people's organizations and other political and social organizations, and members of cooperatives are only incidentally covered by the LC.

### **Contracts of employment**

A contract of employment must be concluded in one of the following forms:

- C** a contract with an indefinite term (**Atype I@**);
- C** a contract with a definite term of one to three years (**Atype II@**); or
- Ca** contract for seasonal work or a specific task of less than one year's duration (**Atype III@**).

Parties cannot choose the type III contract for work of a regular nature for more than one year, except in specific cases involving the temporary replacement of workers (*sec. 27, LC*).

The employer and the employee may agree on a probationary period of work not exceeding 60 days in respect of highly specialized technical work, or 30 days in respect of other work (*sec. 32, LC*).

In the course of a contract of employment, any party who wishes to modify the content of the contract must give notice of his or her intention to the other party at least three days in advance. The contract of employment may be modified by way of amendments to the existing contract or by the conclusion of a new contract (*sec. 33(2), LC*). However, in the event of a merger, division, transfer or use of property of the enterprise, the new employer is under an obligation to ensure the continuation of the contract until he or she and the worker agree on the amendment or termination of the contract, or until they conclude a new contract.

Foreign-owned enterprises or organizations, unlike Vietnamese employers, must recruit Vietnamese workers through employment service agencies, the activities of which are coordinated by the Ministry of Labour, War Disabled and Social Affairs (MOLISA) (*sec. 132(1)*, LC).

### **Termination of employment**

A contract of employment ends, other than at the initiative of the employer, when:

- C the contract expires;
- C the work under the contract has been completed;
- C both parties agree to terminate the contract;
- C the worker is sentenced to imprisonment or is prohibited from resuming his or her work by decision of the court; or
- C the worker dies or is declared missing by the court (*sec. 36*, LC).

In a number of cases the worker employed under a type II or III contract of employment is entitled to unilaterally terminate the contract before its term, provided he or she gives proper notice. A pregnant female worker who must stop working to protect the foetus from being adversely affected can unilaterally terminate the contract of employment without paying a severance allowance (which resigning employers may otherwise have to pay), provided she produces a doctor's certificate and respects the period of notice specified by the certificate (*secs. 37 and 112*, LC).

A worker employed under an employment contract with an indefinite term has the right to terminate the contract unilaterally at any time, provided he or she gives the employer at least 45 days' notice (*sec. 37(3)*, LC).

During the trial period, each party shall have the right to cancel the trial work agreement without having to give notice or to pay compensation if the work performed does not meet the agreed requirements. If the work performed meets the agreed requirements, the employer must accept the worker for regular employment as previously agreed.

Either party may renounce its intention to unilaterally terminate a contract of employment prior to expiry of the notice period (*sec. 40*, LC).

### **Termination of employment at the initiative of the employer**

In a number of cases the employer has the right to terminate the contract of employment unilaterally, subject to discussion and agreement with the executive committee of the enterprise's trade union. In some other cases the employer is entitled to do so as long as he or she gives proper notice. Agreement with the trade union must be reached when:

- C the worker regularly fails to fulfil the tasks assigned under the contract;
- C the dismissal of the worker is a disciplinary measure; or
- C the worker is ill and there is no foreseeable recovery of working ability after having received treatment for 12 consecutive months in respect of a type I contract, six consecutive months for a

type II contract and half the contract duration for a contract for less than one year (*sec. 38(1) and (2), LC*).

Dismissal is the ultimate disciplinary measure for workers contravening labour discipline (*sec. 84(1), LC*). It can only be applied to workers:

- C who commit acts of theft, embezzlement, disclosure of technological and business secrets, or other acts causing severe loss to the property and interest of the enterprise;
- C who are transferred to another job as a disciplinary measure and who again commit the same breach of labour discipline when the disciplinary measure is still in effect; or
- C who have been absent for a total of seven days per month or 20 days per year without legitimate reasons.

Upon dismissal in these cases, the employer must notify the provincial labour office (*sec. 85, LC*).

It is unlawful for an employer to unilaterally terminate a contract of employment when the worker is under treatment or care as prescribed by doctors for sickness, industrial accident or occupational disease, except in the case of an enduring working disability outlined above, or when the employer ceases its activities. Similarly, the employer cannot terminate the contract of a worker who is on annual leave, leave for personal reasons, or any other type of leave permitted by the employer.

Female workers enjoy specific protection against dismissal or unilateral termination of employment. Marriage, pregnancy, maternity leave or breast-feeding a child under 12 months of age are not lawful grounds to unilaterally terminate an employee's contract of employment, except in cases where the enterprise ceases its activities (*sec. 111(3), LC*).

When, due to technological or structural changes, workers become redundant, the employer can only terminate their employment contract after verifying that there are no new jobs in the enterprise for which workers with at least 12 months of service could be retrained (*sec. 17(1), LC*).

Dismissal or unilateral termination by the employer of the employment contract of a worker who is a member of a trade union executive committee requires the consent of that committee. If the worker is the president of the trade union executive committee, the consent of the higher-level trade union organization is required.

### **Notice and prior procedural safeguards**

The employer can unilaterally terminate a type I contract by giving at least 45 days=notice, a type II contract with at least 30 days= notice and a type III contract with at least three days= notice (*sec. 38(3), LC*) in the following circumstances:

- C in the event of natural disasters, fire or other cases of *force majeure*;
- C when the employer has made every effort to overcome difficulties but is nevertheless compelled to reduce production and its workforce; or
- C when the employer ceases its activities.

Termination of the employment contract of workers made redundant is subject to:

- C publication of a list of workers;

- C selecting workers for redundancy in accordance with the enterprise's business requirements, the workers' length of service, qualifications, family circumstances and other factors concerning each worker;
- C consultation and agreement with the executive committee of the trade union; and
- C notification of the local labour office (*sec. 17(2)*, LC).

The employer and the worker must settle, within seven days (30 days in exceptional circumstances) from the date of termination of the contract of employment, all questions relating to the rights and interests of each party. If the termination results from the bankruptcy of the enterprise, this settlement must be in accordance with bankruptcy legislation. Before returning the worker's work book to the worker, the employer must state the reasons for the termination of employment in it. Apart from this statement the employer may not make any remark detrimental to the worker in finding new employment.

### **Severance pay**

Unless the worker has been dismissed as a disciplinary measure, he or she is entitled to a severance allowance at the rate of one-half month's salary plus other benefits, if any, for each year of service. The employer must pay such allowance when terminating the contract of employment of any worker who has been employed for at least one year (*sec. 42*, LC) and within seven days of the date of termination of the employment contract (*sec. 43(1)*, LC).

Retrenched workers are entitled to a loss of employment allowance at the rate of one month's salary for each year of employment but no less than the equivalent of two months' wages (*sec. 17(1)*, LC). In order to ensure the timely payment of allowances to the workers concerned, enterprises must establish a reserve fund for loss of employment allowances.

### **Avenues for redress**

In the event the employer and the executive committee of the trade union fail to reach an agreement on the termination of a contract of employment where this is required (see above), they must submit a report to the competent body or organization, and only after a period of 30 days from the date of notification of the labour office does the employer have the right to make a final decision. If the trade union executive committee or the worker continue to disagree they can apply within six months for settlement of a labour dispute.

Enterprises employing at least ten workers must establish a Labour Conciliation Council, comprising an equal number of workers' and employers' representatives (*sec. 163*, LC). Within seven days of the day of the receipt of the application for conciliation the Council must proceed with conciliation resulting in either a formal record of conciliation or non-conciliation. By submitting the record of non-conciliation, each party to the dispute may then request the People's Court at the district level to settle the dispute. Disputes concerning disciplinary measures consisting of dismissal or unilateral termination of an employment contract can be directly submitted for settlement by the People's Court within one year of the final decision of the employer (*secs. 166 and 167*, LC).



Individual labour disputes at enterprises employing fewer than ten workers and disputes involving domestic workers are settled by labour conciliators instead of a Labour Conciliation Council, according to the procedure set out in the previous paragraph (*sec. 165, LC*).

When an employer has unilaterally terminated an employment contract in contravention of the law, he or she must reinstate the worker and pay compensation equal to the amount of wage corresponding to the period during which the worker was not allowed to work. A worker who does not wish to return to work is, in addition, entitled to a severance allowance.

## ***Zambia***

### **Sources of regulation**

Legislative provisions regulating termination of employment in Zambia are found in the Employment Act, Cap. 512 (EA) of 1965, the Employment (Amendment) Act No. 18 of 1982 and Act No. 15 of 1989 (EAA), the Industrial and Labour Relations Act, 1993 (ILRA) (as amended in 1997), the Minimum Wages and Conditions of Employment (General) Order, 1994 (MWG), and the Minimum Wages and Conditions of Employment (Shop Workers) Order, 1994 (MWS). In addition, collective agreements typically contain termination of employment provisions and can therefore be considered to be an important source of regulation of termination of employment in Zambia for those persons covered by them.

### **Scope of legislation**

The EA and EAA extend to all employed persons except persons in the Defence Force, members of the Zambia Police Force and Zambia Prison Service. Under *sec. 2(2)* of the EA, the Minister of Labour has power to exempt or exclude certain persons or categories of persons from the ambit of the legislation, but to date no such exemptions have been made. Judicial and Security Services are excluded from the application of the ILRA (*sec. 2(1)*).

Before 1991, termination of employment in the state sector was regulated by separate legislation and was excluded from general employment provisions on termination of employment (Employment (Special Provisions) Regulations, 1989). However, since that date, the statute has been repealed (pending revision) and all categories of employees in the public service are no longer excluded from the scope of the legislative protections. It is also noteworthy that the common law notion of dismissal by pleasure of the Crown or Royal Prerogative has been discarded.

Daily paid workers are excluded from provisions regulating termination of employment under *sec. 19(iii)* of the EA, as are casual workers engaged for a short period. Moreover, an employer who has been declared bankrupt is exempted from the legal obligations in relation to termination of employment.

### **Contracts of employment**

There is a clear dichotomy in the law of Zambia between contracts of employment which are required by law to be written, which are not in practice the usual form of employment contract in Zambia (addressed under *Part V*, EA), and other contracts, which can be made orally (under *Part IV*, EA). This dichotomy is reflected in the provisions regulating termination of employment. Contracts required to be in writing under *Part V*, *sec. 28(1)*, are those which are made for a fixed period of service exceeding six months; contracts stipulating conditions of employment which differ materially from those customary in the district of employment for similar work; contracts of foreign service; and contracts to be performed

personally in relation to some specific work (a fixed task) which could not reasonably be expected to be completed within six months.

### **Termination of employment**

Depending on the type of contract involved, employment can terminate, not at the initiative of the employer, in certain circumstances, including by:

- C the expiry of a fixed-term contract;
- C the completion of the task for which the contract was concluded;
- C the death of the employee; or
- C any other manner in which a contract of service may be lawfully terminated or deemed to be terminated, whether under the provisions of the EA or otherwise (for written contract, see *sec. 36(1), Part V, EA*).

### **Termination of employment at the initiative of the employer**

In relation to all contracts except those governed under *Part V* (i.e. written contracts), *sec. 20* of the EA provides that either party to a contract of employment may terminate with notice and without giving any reason. Pay in lieu of notice is also an acceptable option for terminating employment (*sec. 21, EA*). This provision does not, however, apply to contracts of fixed duration and specified as non-renewable.

However, it should be noted that provisions under various collective agreements, which are enforceable under Zambian law, are an important source of law protecting employees from arbitrary or unjust dismissal at the initiative of the employer. Further, recent legislation in the form of the ILRA, including a wide jurisdiction to inquire into any disputes between employer and employee (*sec. 85(4)*), gives the Industrial Relations Court the power to inquire into dismissals from employment.

Under *sec. 25* of the EA, provision is also made for summary dismissal, that is, dismissal without notice or pay in lieu of notice on the grounds of serious misconduct. The notion of serious misconduct sufficient to justify summary dismissal is defined by the common law notions of the term and includes serious misconduct such as theft, fraud or other dishonesty, habitual negligence or absence from work, wilful disobedience of the employer's instructions and wilful destruction of the employer's property.<sup>262</sup> In addition, collective agreements typically specify the kinds of misconduct which would justify dismissal and prescribe the relevant procedures to be followed where dismissal is contemplated. It is usual for three warnings of misconduct to be given before dismissal can take place.

*Sec. 36(1), Part V*, of the EA, concerning written contracts as defined in the Act, provides that such contracts may be terminated in any manner in which a contract of service may be lawfully terminated or deemed to be terminated, whether under the provisions of that Act or otherwise. Provisions are also made for the employee to be discharged under medical grounds where he or she is unable to fulfil the written contract of service (*sec. 36(2), EA*).

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<sup>262</sup> Under the now repealed Employment (Special Regulations) Act, 1989, provision was made for lawful termination on the grounds of incompetence, wilful disobedience, misconduct and neglect.

Where termination of employment arises out of a breach of contract in relation to the terms of the contract of employment, the employee is also entitled to initiate an action for unlawful dismissal, including submitting the matter as a collective dispute.

A general prohibition against termination of employment on discriminatory grounds is contained in *sec. 108* of the ILRA. The grounds listed are race, sex, marital status, religion, political opinion or affiliation, tribal extraction or status of the employee. This section is reinforced by *art. 23* of the Constitution of Zambia. In addition, *sec. 5* of the ILRA prohibits termination of employment on the grounds of trade union activity or membership, non-membership in a trade union or the making of a complaint against the employer or giving evidence against him or her in any proceedings.

By amendment to the EA in 1982, under *sec. 15* of the EAA, a provision prohibiting employers from terminating employment of women workers due to sick leave by reason of pregnancy or absence for statutory maternity leave was enacted.

The EA also provides for statutory sick leave with full pay and employment cannot be terminated on this ground during this leave period (*sec. 54*).

The EAA, 1989, contains provisions relating to redundancy or termination of employment for economic reasons or for technological or other structural change to the business. This statute contains a definition of redundancy; in effect, it is a statement of the common law definition of the term.

### **Notice and prior procedural safeguards**

The Constitution of Zambia entrenches the principles of natural justice, specifically the right to be heard. Although constitutional law is strictly enforceable only against the State and not individual private employers, the principles of natural justice, in particular the right to a fair hearing, have been embraced in private employment law in Zambia and given effect under collective agreements. It can now be viewed as a labour law custom or norm in that country and could consequently take effect, even where legal provisions under a collective agreement are not in place. The right to be heard would apply where an employee is being dismissed in relation to some charge of misconduct or wrongdoing and would also incorporate the opportunity to defend oneself. In Zambia, this is translated into the right to be informed of the specific charge and the ancillary right to the services of the trade union representative or a lawyer to defend such a charge (*sec. 91*, ILRA). Further, where the governmental labour authority gives effect to his or her investigatory powers in relation to dismissal matters, the rules of natural justice will be followed.

Before proceedings for dismissal may commence, an employee is entitled to three warnings about conduct considered to be wrongful, thus giving him or her the opportunity to reform.

In the case of written contracts, as described under the EA, an employer may only terminate the contract of employment on medical grounds in a situation where the employee is unable to fulfil his or her obligations, with the written consent of a governmental labour officer. The officer is also empowered to impose such conditions as he or she thinks fit for the purposes of safeguarding the right of the employee to any outstanding wages or deferred pay, any compensation in respect to any accident or disease, and any repatriation rights (if the employee is covered by a contract of foreign service) or other benefits (*sec. 36*).

*Secs. 20 and 21* of the EA make provision for termination of employment by way of notice or payment in lieu of notice. Parties to the contract of employment may agree as to the requisite period of such notice but the statute sets minimum standards consisting of:

- C 24 hours where the contract is for a period of less than a week;
- C 14 days where the contract is a daily contract under which, by agreement or custom, wages are payable not at the end of the day, but at intervals not exceeding one month; and
- C 30 days where the contract is for a period of one week or more.

Such notice is not required to be in writing. It should be noted, however, that parties to a contract of employment may contract out of their minimum rights to notice under the EA, as *sec. 19* explicitly recognizes. Contracts expressed to be terminable without notice. This implies that the legislation does not, in fact, provide for minimum standards of protection from dismissal in the form of notice.

Where a worker is to be dismissed summarily, his or her employer must, within four days of such dismissal, deliver to the appropriate government labour officer a written report of the circumstances leading to, and the reasons for, such dismissal. The labour officer is then required to register the details of the report in a specific register maintained for this purpose (*sec. 25, EA*) and to supervise an investigation into the alleged misconduct.

There is no law limiting the number of workers who may be retrenched at any particular time and no requirement for prior authorization or even regulation of redundancies as these requirements have now been repealed (previously under the Employment (Special Provisions) Regulations, 1989). However, regulatory provisions on termination of employment on the grounds of redundancy are commonly found in collective agreements. The usual practice is that where redundancy is contemplated, the employer and the trade union concerned must negotiate the terms of the proposed redundancy at least one month prior to carrying out the redundancy. For such negotiation to take place, the trade union and employees must be given appropriate information in relation to the proposed termination, including a statement of the reason for such termination, the number and categories of employees likely to be affected, the period over which the terminations are likely to be carried out and the redundancy package proposed.

The MWS requires that where employees employed in shops or shop-related businesses are to be dismissed for reason of redundancy, negotiations between the employer and the trade union concerned must take place and the employer must give notice three months in advance of the intention to dismiss (*sec. 14*).

## **Severance pay**

Non-civil service employees of the Government are entitled as part of their conditions of service to a long-service bonus after four years' service upon termination of employment. The MWG makes provision for employees whose services have been terminated to obtain severance pay benefits. Such employees are also entitled to draw any pension entitlements from the Zambia National Provident Fund (a national fund), or any occupational pension schemes arranged by individual employers for the benefit of their employees. Where workers in the private sector not covered by collective agreements are dismissed for operational reasons, under *clause 7* of the MWG, they are entitled to two weeks' pay for each complete year of service. Workers employed in any shop or business or connected with the business of any shop, who are declared redundant after having served a minimum period of six months,

are entitled to at least two months= notice and redundancy benefits of two months= pay for each completed year of service (*clause 14, MWS*).

Under the EAA, 1989, an employer who terminates the services of an employee by reason of redundancy is required to pay to the employee a redundancy payment calculated in a manner prescribed by the Minister.

Various collective agreements provide for payment of long-service bonuses upon attainment of at least five years=continuous service in cases of termination of employment for reasons other than serious misconduct or redundancy.

Under *sec. 26* of the EA, a worker, when summarily dismissed for lawful cause, is entitled to wages due up to the date of the cause of dismissal. Where the employee is dismissed other than summarily, or for reason other than redundancy, he or she is entitled to any overtime pay or other allowances accruing at the date of dismissal, including any wages owed at that date, in addition to the long-service bonus.

### **Avenues for redress**

An employee having reasonable cause to believe that his or her services have been terminated on discriminatory grounds as listed under *sec. 108* (ILRA) may make a complaint before the Industrial Relations Court within 30 days of the termination. However, the court has discretion to extend this 30-day time limit for a further three months after the date on which the complainant has exhausted any available administrative channels (*sec. 108*).

The Industrial Relations Court has original and exclusive jurisdiction to hear and determine any industrial relations matters or proceedings under the ILRA. In relation to termination matters, the court has jurisdiction to determine matters specified under the ILRA, such as termination on the grounds of trade union membership or activity and on discriminatory grounds. An important point to note is that the court also has jurisdiction to hear and determine any dispute between any employer and an employee notwithstanding that such dispute is not connected with a collective agreement or other trade union matter. It is clear that the jurisdiction is not confined to collective agreements and does not solely depend on the complaint being taken up as a collective dispute. Rather, an individual will have standing to take a matter to the Industrial Relations Court (*sec. 85(4)*, ILRA). Complaints must be made within 30 days of the event complained of, unless leave is obtained (*sec. 85*, ILRA as amended).

Where the Industrial Relations Court finds in favour of the complainant, it has the discretion to grant damages, compensation for loss of employment, re-employment or reinstatement or to deem the applicant to be retired, retrenched or redundant, or make any other order or award if the Court sees fit (*sec. 85(A)*, ILRA). In making an award, the Court will consider the gravity of the discriminatory action under *secs. 5 and 108* (ILRA) or other wrongful termination.

## ***Zimbabwe***

### **Sources of regulation**

The Labour Relations Act, 1996 (LRA), which is largely a consolidation of all amendments to the Labour Relations Act 1984; the Labour Relations (General) Regulations, 1993; and the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1991 (the Regulations), which do not appear to have been repealed by the 1996 Act, are the main source of regulation on termination of employment in Zimbabwe. Specific regulations relating to retrenchment are also found under the Labour Relations (Retrenchment) Regulations, 1990 (the Retrenchment Regulations), as amended. Again, these regulations do not appear to have been repealed. These statutory provisions are supplemented by provisions in collective agreements, which are given legal force under the same statute, as the objective of the LRA is only to provide for the minimum conditions that must apply to all employment contracts in the private sector.

### **Scope of legislation**

Public servants are covered by separate legislation (the Public Service Act, 1995). Beyond that, no specific category of employee is excluded from the provisions of the 1996 Act, which is stated to apply to all employers and employees except those whose conditions of employment are otherwise provided for by or under the Constitution (*sec. 3*). Moreover, as the legislation in place provides for only minimum levels of protection, where collective agreements, individual contracts of employment or other legal provisions provide more protective provisions, these will supersede the provisions of the LRA and the regulations issued under it. However, casual workers (that is, workers who do not enjoy fixed schedules as regards rates and time of pay) are not entitled to the same level of protection in relation to notice as other employees. The employment of domestic workers is also governed by separate regulations, the Labour Relations (Domestic Workers) Employment Regulations, 1992, which provides more limited protection to domestic workers. However, domestic workers are entitled to protection against dismissal while ill, a minimum notice period equal to the remuneration period, and a termination gratuity based on service.

### **Contracts of employment**

Contracts of employment may be for a fixed term or of indefinite duration.

### **Termination of employment**

Fixed-term contracts expire at the end of the term or specified task, and employment may be terminated by mutual agreement (*sec. 2*, the Regulations). The contract of employment is not ended by the death of the employer until the end of the period of notice that the employer would have had to give if he or she were alive (*sec. 15*, LRA). In addition, contracts of employment continue after the transfer of an undertaking (*sec. 16*).

## Termination of employment at the initiative of the employer

Dismissal on the grounds of race, tribe, creed, place of origin, colour, sex, religion, political opinion, trade union membership or activity constitutes an unlawful reason for dismissal under the LRA (*secs. 4 and 5*). Discriminatory dismissals are also deemed to be *unfair labour practices* under the Labour Relations (Settlement of Disputes) Regulations, 1992. However, the Minister of Labour may make a *disposal order* under *sec. 107* of the LRA enabling an employer to dismiss a worker who is unlawfully on strike, or suspend a worker whose work is affected by a lawful or unlawful strike. Dismissal because the worker is due a minimum wage is unlawful and women workers who are statutorily entitled to maternity leave may not be dismissed for reasons connected to such leave (*sec. 18, LRA*).

The law makes provision for lawful dismissal on grounds where the employee:

- C commits any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his or her contract;
- C is guilty of wilful disobedience of a lawful order given by the employer;
- C wilfully destroys the employer's property;
- C is guilty of theft or fraud;
- C is intoxicated to the extent that it renders him or her incapable of performing his or her duties properly;
- C is absent for a period of five or more working days without reasonable excuse;
- C is habitually and substantially negligent in his or her duties; or
- C lacks a skill which he or she expressly or implicitly stated he or she possessed (*sec. 3, the Regulations*).

Dismissal on the grounds of retrenchment is permitted, provided the mandatory procedure is followed (see below).

## Notice periods and prior procedural safeguards

*Sec. 12* of the LRA lays down mandatory periods of notice or payment in lieu of notice to be given by the employer for terminating employment in the absence of any (longer) period stated in the contract. The periods are:

- C if wages are paid monthly, a month's notice;
- C for wages paid fortnightly, two weeks' notice;
- C for weekly paid contracts, one week's notice; and
- C one day's notice for contracts where wages are paid daily or hourly.

Where wages are paid in any other manner to the above, or are not fixed at all, no notice is necessary. However, if a worker has been employed continuously for more than six months but less than two years, at least one week's notice must be given regardless of the manner in which wages are paid. Similarly, if the employee has been employed continuously for more than two years, he or she is entitled to at least one month's notice.

There is a mandatory procedure to be followed for retrenchments that requires the employer to notify the appropriate workers' committee or trade union, giving detailed reasons for the proposed



retrenchment. This includes giving reasons for the proposal, names of workers proposed for retrenchment and submitting financial statements. A copy of this notice must also be sent to the tripartite Retrenchment Committee, which refers it to a labour relations officer for investigation. The labour relations officer must attempt to secure agreement on whether retrenchment should be allowed and on the terms and conditions of any retrenchment which is agreed upon within one month. The officer submits a report to the Retrenchment Committee, a tripartite committee.

The Retrenchment Regulations also specify the factors which are to be considered by the Retrenchment Committee, the Minister and the labour authority in assessing a retrenchment proposal (*sec. 7*, the Retrenchment Regulations). These are:

- C that retrenchment should be avoided so far as possible, where this can be done without prejudicing the efficient operation of the undertaking; and
- C that the consequences of retrenchment should be mitigated as far as possible.

Regard shall also be had to:

- C the reasons put forward for the proposed retrenchment; and
- C the effect of the proposed retrenchment upon employees, including their prospects of finding alternative employment and the terminal benefits to which they will become entitled.

Consequently, retrenchment will only be permitted after a thorough investigation, including the possibility of alternative measures to retrenchment or measures to minimize the effects of retrenchment such as short-time work or reduction in the working week, early retirement or even rotational unpaid leave. The Retrenchment Committee makes recommendations as to as to the retrenchments to the Minister of Labour. The Minister's decision may be appealed to the Labour Relations Tribunal.

Where retrenchment of an employee is effected without the approval of the appropriate governmental body, such retrenchment is void. The employer is also subject to a fine (*secs. 9 and 10*, the Retrenchment Regulations).

*Sec. 4* of the Retrenchment Regulations also prohibits lay-off and work on a short-time basis without prior approval of the proper governmental authority. However, following the 1992 amendments to the Retrenchment Regulations, employers may agree with workers' committees on special measures to avoid retrenchment such as reduced working hours, reduced remuneration, or shift work.

For retrenchment there is a minimum notice period of one month.

## **Severance pay**

There is no statutory provision for severance payments or long-service payments in the event of termination of employment (except for domestic workers). However, this is often provided for under collective agreements. It is customary that where an employee is entitled to severance pay, this may be forfeited where the employee owes money to the employer or has damaged the employer's property.

## **Avenues for redress**

If either party to the determination of a termination of employment matter by a government official is unsatisfied with the result, he or she may appeal to the Labour Relations Tribunal. An appeal from the

Labour Relations Tribunal lies with the Supreme Court, on points of law only. The LRA specifically preserves the right of the employee to apply to an ordinary court of law where he or she believes any of his or her statutory rights have been infringed.

The LRA also makes special provision for employees whose employment has been terminated on discriminatory grounds. In addition to appeals to the Labour Relations Tribunal, such employees also have the right of recourse to the ordinary courts of law in the first instance (*sec. 5*).

All determining authorities, that is, the labour relations officer, and the Labour Relations Tribunal have a discretion to award damages in the form of monetary compensation for unlawful dismissal, or to order reinstatement without loss of benefits.

Where termination of employment has occurred on discriminatory grounds, the ordinary courts of law also have jurisdiction to order damages. An employer who discriminates against the employee is also liable for a fine or imprisonment not exceeding one year.

