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PARTENA

Giving reasons for dismissal: the employer's new obligation

Barring special cases, an employer has never previously had a general duty to give a worker reasons for dismissal. From 1 April 2014, however, Collective Agreement No. 109 entitles dismissed workers to request a written statement of the reasons why they are being dismissed.

01 Overview of Collective Agreement No. 109

The Single Employment Status (Manual and Non-manual Workers) Act of 26 December 2013 provided for the statutory provision on unfair dismissal of manual workers (Section 63 of the Act of 3 July 1978) to be repealed when a Collective Agreement concluded in the National Labour Council on giving reasons for dismissal entered into force.

After some hard bargaining, management and labour came to an agreement on giving reasons for dismissal enshrined in the newly-concluded Collective Agreement No. 109 of 12 February 2014.

This collective agreement gives a **worker** (regardless of employment status) the right **to know the reasons for** his dismissal **and** an entitlement to **compensation for manifestly unreasonable dismissal**.

The idea of unfair dismissal is also reintroduced in the collective agreement for manual workers who can be dismissed with derogation periods of notice, i.e., shorter than the normal periods.

02 Workers concerned

Collective Agreement No. 109 on giving reasons for dismissal applies to private sector workers and employers who are bound by a contract of employment. The requirement of a contract of employment means that Collective Agreement No. 109 does not apply to apprentices ("small firms and independent traders" industrial trainees), persons hired under a "small firms and independent traders" work placement contract and persons employed under an on-the-job vocational training contract (combined practical training and work experience for jobseekers and unemployed in receipt of benefit - IBO, PFI, FPI).

The Act of 26 December 2013 (s. 38) provides that separate but similar rules to those under Collective Agreement No. 109 will be introduced for public sector contract workers. Pending that, public sector workers can still invoke the unfair dismissal provisions of Section 63 of the Act of 3 July 1978. Civil servants can still claim abuse of right under the rules of ordinary law.

Dismissals falling outside the rules

The rules on giving reasons for dismissal do not apply to:

1. workers dismissed/made redundant in the following cases (s. 2, § 2):
    - during the first 6 months' employment, previous successive fixed-term or temporary agency employment contracts for the same job with the same employer will be taken into account when calculating the first 6 months' employment;
    - when working under a temporary agency employment contract;
    - when working under a student employment contract;
    - to access a registered unemployed receiving employer-paid compensation (old bridging pension scheme);
    - to terminate a permanent employment contract from the first day of the month following that in which the worker reaches state pension age;
    - permanent discontinuance of the business activity;
    - where the employer is going out of business;
    - as part of a mass redundancy;
    - for serious misconduct (s.2, § 4).

2. workers for whose dismissal/redundancy the employer has to go through a special severance procedure prescribed by statute or collective agreement (e.g., candidate or elected workers' rep on the works council or health and safety committee), or workers dismissed as part of a mass redundancy in connection with restructuring as defined at industry level (s.2, § 3).

3. workers in either of the two categories below (s.2, § 5):

    - those **temporarily** subject to a **derogation scheme of notice** up to 31 December 2015. This concerns certain manual workers who fall under joint bargaining committees (CPs) 109, 124, 126, 128.01, 128.02, 140.04, 142.02, 147, 301.01, 311, 324 and 330;
    - those **permanently** subject to a **derogation scheme of notice**, without time limit. This concerns certain manual workers who fall under joint bargaining committees 124 and 126.

Manual workers in these two categories remain subject to the unfair dismissal rules laid down in Section 63 of the Employment Contracts Act of 3 July 1978 as at 31 March 2014 (see below, point 5).

03 Notifying the reason(s) for dismissal

1 General rule and procedure

A dismissed worker is entitled to know the specific **reason(s)** for his dismissal.

But that information must be received through a specific procedure.

A written request by the worker

The employer does not need to voluntarily notify the reasons. If the worker wants to know the reasons for his dismissal, he must set the procedure going by making a written request to the employer.

This request must be made by registered letter within the following times:

- where the employer terminates the contract with pay in lieu of notice, within **two months** after the employment contract has terminated;
- where the employer terminates the contract with notice to be worked, within **six months** of notice of dismissal but no later than two months after the employment contract has terminated. "Notice of dismissal" means the day on which notice of dismissal takes effect.

NB! – A worker dismissed with more than 6 months' notice must notify his request to the employer before his contract terminates.

Communicating the reasons

The employer must then within **2 months** from the date of receipt of the registered letter containing the worker's request (s. 5) (the 2 months period starts to run from the 3rd working day after the date on which the worker's request is posted) give the worker by registered letter a statement of the facts that will inform him of the **specific reasons** for terminating his contract.

The reasons must not be too general or abstract (e.g., financial difficulties, incompetence) or be couched in vague, unspecific or stock terms like "unsuitable", "reorganization of the business or service"; such terms do not establish sufficiently specific reasons for dismissal.

The reason(s) given must be sufficiently specific and state the key facts (e.g., time and place...) not only so that the worker knows with relative (!) accuracy why he is being dismissed but also to enable the court in any legal proceedings to determine the reasonableness of the reason(s) given.

An employer will often do well to substantiate the dismissal by collecting and keeping evidence to prove the reasons given.

An employer will be well-advised therefore to compile a "record" of, for example, instances of the worker's professional misconduct, unacceptable conduct, written warnings, customer complaints, performance appraisal reports and, if applicable, selected economic, commercial, financial and accounting information; all this evidence can go to help the employer prove the facts he is alleging (see point 4).

NB! – If the employer has **voluntarily** given the employee written notice of the specific reasons for his dismissal, he does not have to accede to the worker's request provided his notification contains the particulars that allow the worker to know the reasons for his dismissal (s. 6).

2 Penalties

An employer who does not reply to a worker's request for the specific reasons for his dismissal or does reply but not within the specified times will be liable to pay the worker a lump-sum civil penalty equal to **2 weeks' pay**.

This penalty is a separate specific penalty and will be payable even if proceedings in the labour tribunal/court determine that the dismissal was not manifestly unreasonable.

No penalty will be payable, however, if the employer has voluntarily given the employee written notice of the specific reasons for his dismissal.

Notes:

- The National Labour Council has asked for this penalty not to be considered as pay and hence that social security contributions should not be deducted from it.
- This penalty cannot be offset against any compensation the employer may have to pay for manifestly unreasonable dismissal (see below).

04 Manifestly unreasonable dismissal

While employers enjoy considerable freedom or autonomy in how to run and organize their business, they still cannot simply sack employees at will: a dismissal must not be manifestly unreasonable.

1 What does it mean?

Collective Agreement No. 109 defines manifestly unreasonable dismissal as “the dismissal of a worker employed under a permanent contract for reasons that are unconnected with the worker’s suitability or conduct or are not based on the operational requirements of the undertaking, establishment or service and would never have been decided by an ordinary, reasonable employer”.

In other words, a dismissal will be manifestly unreasonable:

- if the contract is terminated for reasons unconnected with the worker’s suitability or conduct;
- or the dismissal is not based on the operational requirements of the undertaking, establishment or service;
- **AND** the dismissal would never have been decided by an ordinary, reasonable employer; any review by a court, therefore (see below) could only be a limited review.

Comments:

- a claim of manifestly unreasonable dismissal may only be made by workers employed under permanent employment contracts.
- since there must be a “dismissal”, neither termination due to supervening impossibility (force majeure) nor the worker’s own resignation can be claimed to be manifestly unreasonable; in the latter case, the employer should claim abuse of law in any proceedings.

2 Reviewing the reasons for dismissal

A worker who believes that his dismissal was manifestly unreasonable may apply to the labour tribunals/courts for a finding to that effect. However, in determining whether the dismissal was unreasonable, the court may not consider the circumstances of the dismissal.

The court must confine itself to a finding of whether the dismissal is or is not connected with the worker’s suitability or conduct, or to the undertaking’s operational requirements and whether the decision to dismiss would also have been taken by an ordinary, reasonable employer.

In other words, it is only a limited review; the court cannot make a finding as to the advisability of the employer's management decision.

This is because the employer must remain free to choose between the different management decisions that may be available to him.

Example:
If an employee has not got or no longer has the skills to perform the work assigned to him, the employer must retain a choice between having him undergo "upskilling" training, reassign him to another job or position, or in the event, dismiss him ... In the latter case, the dismissal cannot in principle be considered as manifestly unreasonable since that decision is one which an ordinary, reasonable employer might come to!

3 Penalties

Compensation for the worker – A court which finds a dismissal to be manifestly unreasonable may order the employer to pay the worker fixed compensation of between 3 and 17 weeks' pay as a penalty.

The court will fix the amount of compensation by reference to how manifestly unreasonable the dismissal was; this gives it wide discretion.

No concurrent awards – This compensation may not be combined with any other form of severance compensation payable by the employer, except for:

- pay in lieu of notice;
- non-competition compensation;
- compensation to a dismissed sales rep for the loss of customers brought to the company;
- supplementary compensation paid on top of social security benefits.

However, the above compensation can be combined with the penalty of 2 weeks' pay payable by an employer who fails to notify the reasons for dismissal at all or within the prescribed time (see above).

Social security and tax treatment of compensation – Social security contributions will not be deducted from the compensation (of 3 to 17 weeks' pay) but PAYE income tax deductions should be made.

4 Burden of proof

Collective Agreement No. 109 lays down specific rules on the burden of proof in disputes and court/tribunal cases that will vary with whether or not the employer has given reasons for dismissal.

There are three possibilities.

1. **The employer has notified the reasons within the prescribed time**
   Here, the burden of proving facts claimed lies on the party claiming them. A worker who believes his dismissal to be manifestly unreasonable must prove his claim (e.g., false reason given; exaggerated or incorrect statement of facts), while the employer will need to prove the reality of the reasons given for the dismissal. Here, the burden of proof lies equally on both parties.

2. **The employer has not notified the reasons**
   If the employer has not notified the specific reasons for dismissal in line with the prescribed procedure – i.e., within 2 months of the worker's request - (or has not notified them correctly), he will have to prove that the dismissal was not manifestly unreasonable. The full burden of proving the reasons claimed for dismissal will lie on him.

3. **The employer has not notified the reasons for dismissal and the worker has not requested them**
   If the worker has not requested the reasons for his dismissal from the employer (or the request has not been properly made) he will bear the entire burden of proving the facts that indicate that his dismissal was manifestly unreasonable.

05 Some workers can still be “unfairly dismissed”

As a result of Collective Agreement No. 109, and as was provided in the Single Employment Status (Manual and Non-manual Workers) Act of 26 December 2013, Section 63 of the Act of 3 July 1978 on unfair dismissal will cease to apply from 1 April 2014.

Nevertheless, unfair dismissal rules will still apply to manual workers in sectors exempted from the duty to give reasons. That rule is re-enacted in Article 11 of Collective Agreement No. 109.

1 Workers concerned

Rules on unfair dismissal still apply to two categories of workers:

- manual workers covered by joint bargaining committees (CPs) Nos. 124 and 126 who have no fixed place of work and are performing work on temporary or mobile construction sites; in other words these are workers to whom the derogation periods of notice (or shortened notice period) provided under Section 70 § 4 of the Act of 26 December 2013 apply;
- manual workers covered by joint bargaining committees (CPs) 109, 124, 126, 128.01, 128.02, 140.04, 142.02, 147, 301.1, 311, 324 and 330.03 dismissed under the temporarily reduced notice period provisions of Section 70 § 1 of the Act of 26 December 2013. Note, however, that the unfair dismissal rules will apply to this category of worker only until 31 December 2015, and the rules on giving reasons for dismissal as described above will apply from 1 January 2016.

2 When is dismissal unfair?

Dismissal will be unfair as defined by Collective Agreement No. 109 where the dismissal of a manual worker employed under a permanent contract is dismissed:

- for reasons unconnected with the worker’s suitability or conduct; or
- for reasons not based on the operational requirements of the undertaking, establishment or service.

Note also that a claim of unfair dismissal can only be brought by a manual worker employed under a permanent contract which has been unilaterally terminated by the employer.

Dismissal based on the worker’s suitability or conduct – A worker dismissed on the grounds of suitability or conduct is not in principle unfairly dismissed. Professional incompetence, lack of professionalism, neglect and irresponsibility can all be good reasons for dismissal.

Similarly, flagrant misbehaviour, repeated insubordination, unjustified absences, failure to comply with the contract provisions or works rules and disagreement with the employer are other examples of reasons that can indicate that the dismissal was not groundless.

Caution! It is not enough for the employer to prove the existence of a reason connected with the worker’s suitability or conduct; he must also prove that it is a valid reason and not manifestly unreasonable (Cass, September 27, 2010, JTT 2011, p 7; Cass, November 22, 2010, JTT 2011, p 3)...

The requirements of the undertaking – The employer must be able to retain control of the policy, organization and conduct of his business. Therefore, dismissals will not in principle be deemed unfair if made in particular for reasons of:

- the worker's lack of skills in relation to the modernization of equipment;
- employee restructuring.

While the labour court/tribunal called on in such a situation to determine whether the dismissal was unfair or not has no jurisdiction to consider the economic and financial advisability of the dismissal in particular, it can nevertheless look at the reality of the reasons given for dismissal (e.g. restructuring) and whether the necessary direct link between the reason given and the dismissal exists...!

3 Burden of proof

If the manual worker challenges the validity of the dismissal, the employer will have to produce objective and specific facts to prove the dismissal is not unfair; the worker will then be obliged to prove, if applicable, that the information or facts reported are inaccurate or that the version of events given by the employer is not correct and not what happened!

4 Penalties for unfair dismissal

The penalty for unfair dismissal is the payment of lump sum compensation equal to six months' pay, unless other compensation is provided for by a collective agreement made compulsory by royal decree (statutory instrument).
The compensation will be owed regardless of whether the worker was dismissed with or without notice.

NB! – Social security contributions will not be deducted from the compensation for unfair dismissal but PAYE income tax deductions should be made from it.

It cannot be combined with severance compensation for the following events: maternity, paid educational leave, standing for election to the works council or health and safety committee. ■

Francis Verbrugge, *Senior Legal Counsel*

Social news

Annual report of the ISPPW: forms to be returned before 1 April 2014

Each year the employer must send a report about the functioning of his Internal Service for Prevention and Protection at Work (ISPPW) to the General Directorate of the Inspectorate of Well-being at Work.

General

Every employer is obliged to take measures that are necessary to improve to the employees' well-being at work. To this end the employer must develop and implement a preventative policy in each company. To be able to meet all the objectives of this policy, the employer must appeal to the expertise required within his company (internal service) and, if necessary, to external expertise (external service).

Every employer must establish an ISPPW, irrespective of the size of his company. This ISPPW must consist of at least one prevention consultant elected among the staff members. In companies employing less than 20 employees, the employer can take up this post himself. He must then imperatively appeal to an accredited External Service for Prevention and Protection at Work (ESPPW).

Annual report

Each year every employer must send a **report about the functioning of the ISPPW** to the Regional Directorate(s) of the General Directorate of the Inspectorate of Well-being at Work that is competent for his place(s) of business (or to the Inspectorate Division of chemical risks if it regards establishments classified Seveso). That annual report, drawn up by the prevention advisor, must be submitted within three months following the calendar year to which it refers. For 2013 this means **before 1 April 2014**.

The report must be drawn up by means of the ad hoc form (A, B or C depending on the organisation of the ISPPW) available on the website of the FPS Employment, Labour and Social Dialogue (www.emploi.belgique.be) or at the Regional Directorates or the General Directorate of the Inspectorate of Well-being at Work (address: rue Ernest Blérot 1 in 1070 Brussels, tel.: 02/233.45.11, e-mail: cbe@emploi.belgique.be).

An explanatory note, that is also available on the website, helps you to complete the various sections of the forms. The sections concern more in particular the identification details of the employer, the organisation of the ISPPW and the committee for prevention and protection at work if any, work accidents and accidents on the way to or from work, safety at work, health and hygiene at work, training and information of the staff, as well as the prevention of psychosocial load caused by work. ■

Catherine Legardien, *Legal Counsel*

Social news

Parental leave: calculation of a protective award according to the Court of Justice of the European Union

On 27 February 2014, the Court of Justice of the European Union ruled on the method of calculating the amount of the protective award payable to a worker who was dismissed without compelling or sufficient reason during part-time parental leave.

Background

There used to be a huge amount of judicial controversy over the question of calculating severance pay during part-time parental leave.

The Belgian Court of Cassation and then the Constitutional Court had both considered that in such case, compensation must be calculated on the basis of the salary in force at the time of dismissal, i.e., on the basis of the current salary for part-time working hours.

Following an appeal brought before the Court of Justice of the European Union, this Court considered, on the contrary, that the calculation of severance pay under parental leave that is taken on a reduced working hours basis must be based on the salary to which the worker would have been entitled if he had not reduced his working hours, i.e., in principle, on the basis of his full-time salary (C.J.E.U., 22 October 2009, Ch. Meerts v Proost NV, Case C-116/08, J.T.T. 2010, p. 52).

Calculating severance pay since 10 January 2010

To comply with European law, the Belgian lawmakers immediately modified § 3 of Article 105 of the Law on financial stabilisation containing social provisions of 22 January 1985.

Now, more precisely since 10 January 2010, when an employment contract is terminated with payment of severance pay at a time when the worker is availing himself of arrangements for reduced working hours under parental leave, **the payment in lieu of notice must be calculated on the basis of the salary to which the worker would have been entitled if he had not reduced his working hours**, i.e., in principle, on the basis of his full-time salary.

And what about the protective award (6 months)?

According to certain authors, it could not be inferred from the C.J.E.U.'s judgment in the case of Meerts v Proost NV (see above) that the protective award equal to 6 months' salary payable to the worker on part-time parental leave should also be calculated on the basis of the salary in force before taking part-time parental leave.

That is why, in proceedings between a Belgian company and a worker who was unlawfully dismissed during parental leave, the Labour Court (*Arbeidshof*) of Antwerp made in 2012 a request for a preliminary ruling concerning the calculation of the fixed-sum protective award payable because of an unlawful dismissal during part-time parental leave to the Court of Justice of the European Union.

The Court of Justice of the European Union has recently delivered its judgment. It considers that the fixed-sum protective award as provided for by the Belgian legislation (i.e., 6 months' salary) and payable to a worker granted part-time parental leave must also be determined, in the event of unilateral termination by the employer without compelling or

sufficient reason, on the basis of the full-time salary of that worker (C.J.E.U., judgment of 27 February 2014, Lyreco Belgium NV v Sophie Rogiers, Case C-588/12, www.curia.europa.eu).

Without doubt, the **protective award** must, therefore, **be calculated in the same manner as ordinary severance pay**, i.e., on the basis of the salary in force prior to taking part-time parental leave.

***Francis Verbrugge**, Senior Legal Counsel*

Social news

Benefits in kind: loans at a reduced rate of interest or interest-free loans (2013)

The rates of interests for determining the value of some benefits in kind have been published in the *Moniteur Belge (RD of 21 February 2014 – M.B. 26.02.2014).* On the basis of these rates of interests, the value can be determined of the benefits granted in 2013 (and 2014 pending the publication of the rates of interests 2014 and under an administrative tolerance) in the form of various loans.

Mortgage loans with a fixed rate of interest

Year in which the loan agreement is concluded	Reference rate of interest	
	Loans guaranteed by a mixed life insurance policy.	Other loans
2012	4.63 %	3.32 %
2013	**4.45 %**	**3.20 %**

Non-mortgage loans with a fixed term

Year in which the loan agreement is concluded	Loans to finance the purchase of a car (monthly charge rate)	Other loans (monthly charge rate)
2012	0.14 %	0.17 %
2013	**0.12 %**	**0.23 %**

Non-mortgage loans without a specific term

Year in which the borrower disposed of the loaned sums	Reference rate of interest
2012	9.50 %
2013	**8.80 %**

***Peggy Criel**, Legal Counsel*

Remuneration

Wage adjustments in March 2014

Index figures for February 2014

Consumer price index 2013: ➜ *100,66 (+ 0,16)*
Health index 2013: ➜ *100,75 (+ 0,15)*
Averaged quarterly health index: ➜ *100,51 (+ 0,14)*

Collectively-negotiated indexations and increases: selected forecasts

Joint Bargaining Committee (CP) 218: ➜ *approx. +0.90% indexation in January 2015*
Average monthly minimum wage/Welfare benefits: ➜ *+ 2% in November 2014*

Wage indexations and adjustments in March 2014	
102.2	**Blue and white limestone quarries in the provinces of Liège and Namur:** +1% indexed increase on all wages.
102.3	**Porphyry quarries in the provinces of Walloon Brabant and Hainaut and quartzite quarries in the province of Walloon Brabant:** +1% indexed increase on all wages.
102.5	**Opencast kaolin and sand quarries in the provinces of Walloon Brabant, Hainaut, Liège, Luxembourg and Namur:** +1% indexed increase on all wages.
106.1	**Cement works:** +0.14% indexed increase on minimum wages only.
106.2	**Concrete industry:** +2% indexed increase on all wages.
106.3	**Fibrocement:** +2% indexed increase on all wages.
116	**Chemical industry:** Adjustment of the subsistence security allowance from 01.11.2014.
117	**Oil industry and retail trade:** +0.14% indexed increase on minimum wages only.
120.2	**Flax processing:** Adjustment of the index system (twice per year: 1 April and 1 October) from 01.01.2014.
128.1-2-3-5	**Hides, skins and substitutes industry:** Adjustment of the subsistence security allowance from 01.01.2014.
139	**Inland navigation:** Dragging, pushing or pulling of sea-going vessels: Indexation on minimum wages only equalling a fixed amount per category from 01.03.2014 and not from 01.02.2014.
216	**Non-manual workers in notary/solicitor's firms:** Award of eco vouchers to a value of €150, unless company provides equivalent benefit before 31.03.2012. Qualifying period from 01.01.2013 to 31.12.2013. Prorated for part-timers. Not applicable for non-manual workers having received an equivalent, recurring benefit since 2009-2010. Not applicable for students and non-manual workers employed under an employment contract, as part of a specific training, insertion or retraining scheme or supported by the government.
226	**Non-manual employees in the international transport and distribution trade:** +1.40% indexed increase on all wages (wages equalling or higher than €4,299.31 are indexed only on the part lower than €4,299.31).
303.3	**Cinema operation:** +2% indexed increase on all wages. Indexed increase of the sector bonus.
306	**Insurance companies:** Award of eco vouchers to a value of €190 to all workers bound by an employment contract on 31.03.2013 and paid more than €16 over the minimum wage scale (on 01.01.2012), unless company provides equivalent benefit. Qualifying period from 01.01.2013 to 31.12.2013.
308	**Mortgage, savings and pension funding companies:** +0.28% indexed increase on minimum wages only.
309	**Brokerage firms:** +0.27940% indexed increase on minimum wages and wages actually paid (up to the same amount).

Wage indexations and adjustments in March 2014	
310	**Banks:** +0.28% indexed increase on minimum wages only.
326	**Gas and electricity industry:** +0.14% indexed increase on minimum wages only.
331	**Flemish social assistance and health care sector:** Adjustment of the scaled wages due to removal of the starting age for all levels (cba of 10.02.2014) from 01.01.2013.

If you are affiliated to the payroll and HR services bureau but are looking for information on index forecasts for other industries that concern you, please e-mail ***previsionsindex@partena.be.***

Olivier Henry, *Legal Counsel*

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Dates	SAM/Level Five Training	Where	Language
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16/04/2014	Export Word/Excel	Bruxelles	FR
17/04/2014	Plus (Expert Training)	Bruxelles	NL
18/04/2014	Plus (Expert Training)	Bruxelles	FR
22/04/2014	Plus (Expert Training)	Liège	FR
24/04/2014	Export Word/Excel	Liège	FR
13/05/2014	Export Word/Excel	Charleroi	FR
15/05/2014	Plus (Expert Training)	Gand	NL
19/05/2014	Export Word/Excel	Bruxelles	NL
20/05/2014	Export Word/Excel	Bruxelles	FR
22/05/2014	Plus (Expert Training)	Charleroi	FR
16/06/2014	Export Word/Excel	Bruxelles	NL
17/06/2014	Export Word/Excel	Gand	NL
17/06/2014	Plus (Expert Training)	Liège	FR
17/06/2014	Export Word/Excel	Bruxelles	FR
19/06/2014	Plus (Expert Training)	Bruxelles	NL
20/06/2014	Export Word/Excel	Liège	FR
20/06/2014	Plus (Expert Training)	Bruxelles	FR

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