

Global HR Hot Topic

February 2013

Threshold Dismissal Circumstances Overseas

Good Cause, Economic Necessity, Employee Rank and Status



Challenge:
Multinationals facing overseas dismissals too often skip ahead to check local laws on pre-termination notice, severance pay and dismissal procedures. But often, threshold circumstances override these rules.

A multinational dismissing an overseas executive or doing an international layoff needs to know exactly what local laws require as to pre-termination notice, severance pay and dismissal procedures. But too many multinationals facing overseas dismissals skip ahead and look into local laws regulating these topics without bothering to verify whether the default doctrines actually reach the particular dismissal at issue.

To understand any given jurisdiction’s employment dismissal rules, first determine whether the specific employee being fired triggers any exceptions. That is, never focus on how a foreign jurisdiction regulates “plain vanilla” dismissals without first ascertaining whether your particular dismissal *actually is* “plain vanilla,” not some other, more exotic flavor. Check whether any factors in the dismissal in question either suspend otherwise-mandatory notice/severance pay/dismissal procedure obligations or impose extra obligations. Specifically, watch for three threshold dismissal circumstances: good cause; economic necessity; and employee rank/status. We discuss each.

Good Cause

An employer dismissing staff outside US employment-at-will needs to know what pre-dismissal notice, severance pay and dismissal procedures apply. To check this, “step one”—always—is determining whether the employer will fire the targeted worker for good cause. Where an employer can demonstrate good cause, the dismissal becomes much cheaper, and in some places (in so-called “lifetime employment” jurisdictions like Japan, Korea, Iraq, Romania and Russia) the dismissal becomes *possible*—lifetime employment jurisdictions prohibit most no-cause dismissals.

Where a firing is for demonstrable good cause, most countries offer broad freedom to dismiss without much or any notice or severance pay. But this principle is a lot narrower than

Best practices tip:
To understand any given jurisdiction’s employment dismissal rules, watch for three threshold dismissal circumstances: good cause; economic necessity; and employee rank/status.

Each monthly issue of *Global HR Hot Topic* focuses on a specific challenge to globalizing HR and offers state-of-the-art ideas for ensuring best practices in international HR management and compliance. White & Case’s International Labor and Employment Law practice helps multinationals globalize business operations, monitor employment law compliance across borders and resolve international labor and employment issues.

Donald C. Dowling, Jr.
International Employment Partner
New York
+ 1 212 819 8665
ddowling@whitecase.com

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
United States
+ 1 212 819 8200

Threshold Dismissal Circumstances Overseas

Good Cause, Economic Necessity, Employee Rank and Status

it sounds, because “good cause” is much less than a *good business reason*. Employers always have good business reasons for firing someone—no rational employer fires staff whom business needs weigh in favor of retaining. So “good cause” necessarily means more than merely a good business reason. Good cause usually means the employer can prove the targeted employee willfully committed material misconduct. Each jurisdiction has its own notion of what employee misconduct constitutes good cause justifying a no-severance-pay summary dismissal, and of course each case turns on its facts. But we can make a simple generalization: Outside US employment-at-will, good cause tends to mean *egregious misconduct*. Few jurisdictions’ notions of good cause reach poor performance, imperfect attendance, bad attitude or mismatched skill set (although a few jurisdictions such as Korea occasionally recognize as good cause well-documented, outrageously poor performance over a long period). And justifications external to a targeted employee himself—business downturn, internal restructuring, sale of business assets—might offer *economic justification* for a dismissal (which we discuss below), but that issue is usually quite distinct from good cause.

Italy offers us a representative conception of good cause. According to employment lawyers in Rome, an Italian employer can fire an employee for good cause (*giusta causa*) only when the employee’s act of “misconduct”

‘makes the continuation of the employment relationship impossible.’ Examples of just cause are theft, riot and insubordination. [Italian] case law shows a series of sharply contrasting precedents which make it extremely difficult in practice for an employer to [invoke good cause as grounds to fire an employee] with speed and certainty. [Lauro Sovani & Associati Law Firm, *Employment in Italy in a Nutshell* (2013), at ¶ 26(a) (www.lauro-sovani.it)]

The standard for good cause overseas happens to be closely analogous to a similar concept under domestic US law—the willful misconduct standard under state unemployment compensation systems. According to a Pennsylvania decision:

As a general principle[,] in order to deny unemployment compensation benefits to an employee, his...action must involve a wanton or willful disregard of the employer’s interest, a deliberate violation of the employer’s rules, a disregard of standards of behavior which the employer has the right to expect of his employees, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to the employer. [*Unemployment Compensation Review Board v. Vereen*, 29 Pa. Commw. 252 (1977)]

Where an overseas employee commits an act of willful misconduct that, if committed stateside, would be egregious enough to defeat a US state unemployment benefits claim, then we might expect a foreign labor court to uphold a firing for good cause. The corollary is that where an overseas employee misbehaves in an innocuous enough way that, stateside, his actions would not defeat a state unemployment benefits claim, then a foreign labor court will not likely uphold a firing as for good cause.

Embezzling money, vandalizing equipment, bribing officials, attacking co-workers, shooting up a workplace—all are grounds for good-cause dismissal. But short of serious crime, the issue gets murky. A common conundrum in good-cause analysis is the employer that thinks it has good cause because a targeted employee broke a posted work rule, human resources policy or code of conduct provision. Imagine, for example, an overseas salesman who “entertains” clients at a strip club, dropping hundreds of expense-account dollars on “tips.” If the employer can make a strong case that these actions violate a standing employer work rule, HR policy or code of conduct provision on business entertainment (or on use of expense accounts, on bribery/improper payments or on sexual harassment), can this executive be fired for good cause? Perhaps not.

By anyone’s definition, intentionally breaking a rule is willful misconduct. But overseas the analysis gets nuanced. Being able to prove someone broke a posted rule/policy/code is not necessarily enough, particularly if the infraction is innocuous or if the rule is a technicality. Countries as far-flung as Costa Rica, Czech Republic, Indonesia, Malawi, Peru, Philippines, Russia, Saudi Arabia, Ukraine, Vietnam and many others list dischargeable infractions right in their labor codes. We might call these “statutory list” jurisdictions; in them, an employer may not have grounds to fire a rule-violator unless the breached rule happens to mimic one of the grounds for dismissal on the country’s statutory list.

Imagine a manufacturing multinational that posts a globally applicable work rule instructing factory workers to shut down their machines at the end of their shifts, and saying that violators are subject to dismissal for a first offense. Excellent business reasons likely support this rule: safety, plant security, machine maintenance, power conservation. Also imagine all workers in the company’s factories worldwide signed acknowledgements agreeing to comply. Having globally implemented this rule and having collected employee acknowledgements, American headquarters may assume it can fire, for good cause, any worker who intentionally clocks out leaving his machine running. But this assumption is wrong. In what we are calling “statutory list” jurisdictions, firing someone for breaking this rule will not

likely be for good cause because “leaving machine running” will not likely appear on any country’s list of statutory dismissal grounds.

- **Work rules.** This said, an employer overseas is usually well-advised to articulate comprehensive rules that set out grounds for good-cause dismissal, particularly in countries such as France, Japan and Korea that require written work rules. An employer’s argument that a misdeed amounts to good cause is always stronger where the infraction violates a pre-existing work rule that purports to subject violators to dismissal.

Sometimes local law prohibits employers from dismissing for cause even employees who commit infractions that *do* appear on a country’s statutory list. For example, probably every country on Earth recognizes theft as grounds for a good cause firing, but labor courts abroad often excuse proven theft of small change and cheap goods. German Civil Code § 626 includes “theft” as grounds for dismissal without any express *de minimus* exception, but in 2009 Germany’s highest labor court held otherwise in its widely publicized *Emmely* case involving an employee (known across Germany both as “Barbara E.” and “Emmely”) who had pocketed a handful of employer coupons worth €1.30. Canadian courts apply a “proportionality” test that makes every dismissal a fact question; a Canadian fired for proven theft might not be fired for good cause if dismissal is disproportionate to the employee’s act of theft. (See, e.g., *McKinley v. BC Tel.*, [2001] 2 SCR 161 (Sup. Ct. of Canada); *Kidd v. Hudson’s Bay Co.*, [2003] O.J. No. 1474; *Varsity Plymouth Chrysler v. Pomerleau*, [2002] A.J. No. 929.)

These wrinkles aside, though, employers overseas do from time to time demonstrate good cause justifying a dismissal. At that point the question becomes: What does demonstrating good cause mean for an employer? The answer differs depending on whether the jurisdiction is a so-called “lifetime employment” jurisdiction like Iraq, Japan, Korea, Romania and Russia. In lifetime employment jurisdictions, no-cause firings are flatly illegal. When an employer needs to fire someone who refuses to leave, the employer must demonstrate good cause (or economic necessity, discussed below). No good cause means no dismissal. Indeed, for that reason, in lifetime employment jurisdictions statutory severance pay tends not to come into play and may not even exist: A worker either gets fired for good cause and gets no pay or else the worker is victim of a wrongful dismissal and so is entitled to a court award of reinstatement and back pay, but not severance pay.

Outside lifetime employment jurisdictions, good cause for dismissal is not a *sine qua non* of an employer’s dismissal decision, but it makes a big difference. In the words of an Argentine lawyer explaining the rule in Argentina (a typical

no-lifetime-employment jurisdiction), the “general principle in force [is] private sector employers *can freely dismiss their employees without just cause* by paying severance [pay] based on the salary and seniority of the employee.” (Alejo Baca Castex & Alejandro López Tilli, “Discriminatory Dismissal in Argentina,” 22 *IBA Employment & Ind. Rel. Law* no. 1, at 51 (Mar. 2012).) Employers in these jurisdictions can usually fire staff unilaterally without good cause, but subject to both dismissal procedure rules and to separation pay liability—notice pay and severance pay plus all payments due in any dismissal, such as final paycheck, proportional accrued vacation, proportional bonus, proportional “thirteenth month pay” and other accrued benefits.

Having good cause tends not to excuse obligations under statutory dismissal procedures such as dismissal communication requirements, grievance resolution procedures, and notice to employee representatives and government labor agencies. Indeed, the very reason countries impose these procedures is to probe employer grounds for dismissal. In a highly publicized 2008 case, Parisian rogue trader Jérôme Kerviel singlehandedly lost his employer, Société Générale bank, US\$7.2 billion in unauthorized trades. French police arrested and incarcerated Kerviel, giving the bank good cause to dismiss him without severance pay. But French dismissal procedure laws blocked a quick firing. In a front-page article, the *Wall Street Journal* chronicled why complications of French dismissal procedure law forced Société Générale to retain Kerviel on its “headcount” for over a month. (“French Twist,” *Wall St. J.*, Feb. 1, 2008 at A-1.)

- **Negotiated settlements.** We have been addressing employers that invoke good cause for dismissal directly to fire employees who, in turn, go on to sue in court challenging the grounds for dismissal. In practice, though, employers everywhere (even in “lifetime employment” jurisdictions) usually negotiate an *agreed separation* with a release of claims—that is, a resignation and waiver in exchange for a cash payout. Employers and employees negotiate against the backdrop of the legal issues we discussed. Some jurisdictions confer a special legal status on mutually-agreed separations, such as the French *rupture conventionnelle*, letting employees resign while retaining eligibility for unemployment benefits.

Economic Necessity

We have seen that “good cause” for dismissal implicates employee fault. We now turn to justifications for dismissal that transcend employee fault—economic reasons beyond an employee’s control, such as business changes, loss of a major customer, economic pressures, sale of business assets and the like. Does economic necessity let an employer sidestep local-law dismissal obligations?

Threshold Dismissal Circumstances Overseas

Good Cause, Economic Necessity, Employee Rank and Status

We already noted that employers always have good business reasons for dismissals (no rational employer fires someone whom business needs weigh in favor of retaining). Obviously, then, merely having a good business reason does not excuse an employer's obligations in firing someone. But do urgent economic reasons for a layoff, like recession, losing a major customer or dropping a line of business (what Europeans call "economic, technical and organizational" reasons for a "redundancy") ever rise to justifiable grounds for dismissal? Sometimes they do.

"Economic necessity," in essence, is the employer argument that good grounds for dismissal exist not because of worker fault but, rather, because of *employer* fault or other grounds outside the control of the worker. From the employer standpoint, a dismissal on these grounds should be justified because it is impossible to employ someone when there is no longer enough work for him to do. From the worker standpoint, though, losing a job for economic reasons is losing it through no fault of one's own, and in fact is a result of employer mismanagement or employer business decisions, and so should not excuse the employer from having to pay severance pay and follow dismissal procedures. Both employer and worker views here are reasonable. There is no right answer. And so different jurisdictions treat the economic necessity issue in very different ways. For example:

- **Japan and Korea** are so-called "lifetime employment" jurisdictions that, in large part, prohibit no-cause dismissals. But Japan and Korea offer employers statutory procedures for dismissals because of urgent business reasons.
- **Argentina** credits but does not excuse employers that economically justify a dismissal—Argentina reduces but does not eliminate severance pay where a dismissal is because of a *force majeure* such as economic reason for layoff.
- In **Spain**, an employer that can meet the statutory definition (broadened in 2010) of a Spanish "economic dismissal" saves a lot in severance pay—liability drops from the usual Spanish severance award of 45 or 33 days' pay per year of service (capped at 42 months' pay) down to 20 days' pay-per-year (capped at 12 months' pay).
- In **Italy**, a dismissal for economic necessity is for a "justified reason" (*giustificato motivo*), which the law recognizes as less than good cause (*giusta causa*). Employers of over 15 employees must seek permission from the government Labor Office to dismiss for economic necessity—whereas permission is not necessary for a good-cause dismissal.
- **Nigeria** goes its own way in this regard. In Nigeria, a termination because of a "management decision to reduce the number of staff strength by terminating the appointment of some staff" actually can be deemed good cause for dismissal. This, though, is a rare exception.

Most jurisdictions that reduce employer severance pay liability for layoffs on the ground of economic necessity impose fairly rigorous accounting or proof requirements. Employers cannot just give their word that genuine economic necessity requires a layoff: What about the employer that gives "economic necessity" as an excuse to get rid of a problem employee, but shortly afterward hires or transfers in a replacement? Many jurisdictions require employers to provide financial statements and business projections, to guarantee recall/rehire priorities, and to conduct pre-dismissal consultations with employee representatives and government agencies that resist economic necessity determinations. Therefore, in practice, multinationals often decide against making the case for economic necessity except in extreme situations like large-scale "restructurings" and reductions-in-force. Many jurisdictions impose a separate set of regulations governing employment dismissals in bankruptcy.

Employee Rank and Status

Beyond good cause and economic necessity, the third threshold issue to confront before dismissing an overseas employee is rank and status. Always check whether the rank or status of an employee targeted for dismissal alters dismissal obligations under local law. In many jurisdictions, severance pay obligations and firing procedures can differ markedly depending on the category of the employee dismissed. Some statuses (like probation) make employees easier to fire while others (like pregnancy) restrict an employer's power to dismiss:

- **Probation.** An employee serving a lawful probation period is almost always easier to dismiss, although in many countries (China, Israel, Japan, New Zealand, others) probationary employees are not terminable at-will.
- **Fixed term.** Fixed-term employees are subject to special termination rules linked to the end date of their contracts. Terminating them early can accelerate front pay through the contractual end date.
- **Expatriate.** An expatriate might in some exceptional cases be easier to dismiss than locals, but expatriates are harder to dismiss when they enjoy dismissal rights under both home and host-country laws.
- **Dismissal-insulated special categories.** Jurisdictions from Europe to Asia to Latin America to Africa insulate certain special classes of employees from firings; commonly these special classes include worker representatives, pregnant women, women who have recently given birth and employees out on leave. These dismissal protections are virtually absolute and often apply even where the employer has good cause or economic necessity to dismiss. These protections are not discrimination laws, and so they apply even where the employer harbors no discriminatory animus and there is no disparate

impact. Some examples: Russia prohibits firing (except with government permission) employees under age 18, pregnant women and employees with two or more dependents. Chile offers new mothers job “stability,” protection from firing in most all situations until the child is 15 months old. Italy insulates, among others, pregnant women and women within one year of marriage. Argentina imposes a pre-dismissal judicial approval procedure before an employer can fire a union official, even for good cause. Mexico prohibits firing, among others, staff with 20 or more years of service unless the employer can establish super good cause. Some countries boost severance pay for certain special-status employees rather than flatly prohibiting dismissals. For example, Argentina requires employers pay dismissed pregnant and nursing women and the newly married an extra year’s severance pay and requires paying enhanced severance awards to fired traveling salesmen.

- **Executives and managers.** Many jurisdictions apply separate termination rules when an employer fires certain executives, such as directors, “managing directors,” officers and locally defined categories of white collar workers like *cadres* in France and *dirigenti* in Italy. In some countries, special-status white collar employees get extra protections, but in many jurisdictions—including for example India, Italy, Singapore, Spain, Sweden—executives or white-collar workers are actually easier to fire. This is because in these jurisdictions local dismissal protections expressly reach only lower-level (presumably blue collar) workers, on the theory that executives enjoy more bargaining power and so need less protection, and also on the theory that management needs flexibility to staff its leadership ranks as it deems necessary.
- **Employment contracts and policies.** Individual and collective employment agreements commonly include termination provisions that grant employees extra rights beyond legal minimums. Employer severance pay plans and employer dismissal and layoff policies can have the same effect. Always check these before dismissing someone.