“COMMON GROUND IN EUROPEAN DISMISSAL LAW”

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Labour Law Topics

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Article 153º TFEU

“1. With a view to achieving the objectives of Article 151º, the Union shall support and complement the activities of the Member States in the following fields:
(a) improvement in particular of the working environment to protect workers' health and safety;
(b) working conditions;
(c) social security and social protection of workers;
(d) protection of workers where their employment contract is terminated;“

2. To this end, the European Parliament and the Council:
(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation (…)
In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously (…)”
At present, unanimity in this field is not very likely among the 27 Member States of the European Union.

3 approaches in this area are being discussed:

1. The idea of a common floor of rights
2. The protection of precarious workers
3. The common principles of dismissal law
1. A common floor of rights

The idea of a floor of rights is usually used to promote a set of rules covering all workers regardless of the status of their contract.

This implies:

**Certain basic rights are common to every type of worker, including workers without an employment contract, (eg. freelance workers, casual workers and temporary agency workers).**

**These basic rights may include:**

- protection against discrimination
- the right to organise in unions
- protection of health and safety
1. A common floor of rights

Nevertheless, more advanced rights are not part of that floor of rights, because they are restricted to specific groups of workers like those who are within a permanent employment contract.

Those rights include among others those relating to:

- unfair dismissal
- protection of minimum wage
2. Protection of precarious workers

- **Standard** VS **Non-standard types of contracts**

The EU has focused in several directives on atypical workers: part-time workers, fixed-term workers, temporary agency workers because there was the basic idea that workers in Europe were mainly employed on the basis of a standard employment contract for an indefinite term.

- The new types of contracts were originally seen as deviations from the standard contract.

- Development of a minimum standard of legal protection against discrimination and against the abuse of these new forms of work.
3. Common principles of dismissal law

One of the basic values of the EU is the protection against unlawful dismissal.

Charter of fundamental rights of EU

Article 30°

Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.
3. Common principles of dismissal law

Article 53°

Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.
Article 24° – The right to protection in cases of termination of employment

With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

a) the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;

b) the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body.
Basic rules of article 24º:

- Every worker shall have the right to protection against dismissal without a valid reason.

- What is regarded as a dismissal without a valid reason must be specified in a binding source (in accordance with national law and practices).

- Every dismissed worker is entitled to be informed of the reason for dismissal in order to be able to evaluate whether it is justified.

- Every worker must be entitled to appeal to an impartial body in case of dismissal.

- Every worker who has been dismissed without a valid reason must at least be entitled to adequate compensation or other appropriate relief.
ILO Convention 158

- a valid reason for termination (Article 4)
- a list of invalid reasons (Article 5 and 6)
- opportunity to defend in advance (Article 7)
- appeal to an impartial body (Article 8)
- division of the burden of proof (Article 9)
- sanctions: reinstatement or financial compensation (Article 10)
- notice period (Article 11)
- severance allowance or social security unemployment benefits (Article 12)
- rules for collective dismissals (Article 13 and 14)
a. The principle of a valid reason is recognised in the majority of countries.

b. Lists of invalid reasons are either already recognised in European Directives and in all national law systems.

c. The right of an employee to defend himself against dismissal in advance is also recognised in several countries.

d. Appeal to an impartial body is recognised, also because of Article 6 of the European Convention on Human Rights and Fundamental Freedoms.
Basic Principles of European Dismissal Law

e. Some countries have rules on the burden of proof. However, a basic general principle could be that the employer has to give reasons for the dismissal and therefore prove that these exist.

f. By offering the choice between reinstatement or financial compensation, most countries have a sufficient sanction against unfair dismissal.

g. The principle of a notice period is recognised by most countries.

h. Most countries provide for severance allowances and/or social security benefits in case of unemployment.
Other common principles

- Objective of criteria for selection of employees
- Proporcionalidad ("ultima ratio" principle)
- Promotion of employability – life-long learning
Employees need to be protected against the loss of employment and to be supported in finding further employment;

All national law systems require the existence of reasons for dismissal;

Legislators attempted to further concretise the reasons for dismissal by enumerating situations in which unilateral terminations are, in principle, considered admissible;
Conclusion

- Growing influence of Fundamental Rights;
- Labour Law should be prepared to defend basic principles also in times of increasing flexibility;
- The major trend of current dismissal law seems to be that there is no trend of evolution. The countries have not changed much during the last years, most rules remained the same.
Article 53º Constitution of the Portuguese Republic

Job security

Job security is guaranteed to all employees, as unfair dismissal is prohibited and no dismissal can be based on political or ideological views.
“Article 351° Portuguese Labour Code

Notion of just cause for dismissal

1. Constitutes just cause for dismissal the intentional behaviour of the employee that, due to its seriousness and consequences, makes it immediately and practically impossible to maintain the labour relationship.”

SUBJECTIVE JUST CAUSE FOR DISMISSAL
Just cause for dismissal

**Article 328º Portuguese Labour Code**

**Disciplinary sanctions**
1 – Within disciplinary powers, the employer may apply the following disciplinary sanctions:
   a) Reprehension
   b) Registered reprehension
   c) Monetary sanctions
   d) Loss of vacation days
   e) Suspension from work with loss of salary and loss of seniority
   f) Dismissal without any indemnization or compensation.

**Article 330º Portuguese Labour Code**

**Decision criterion and application of the disciplinary sanction**
1 – The disciplinary sanction should be proportional to the seriousness of the offence and the guilt of the offender and more than one sanction can be applied in relation to the same offence.
Just cause for dismissal

2. **Namely**, the following behaviour of the employee shall constitute just cause for dismissal:
   a) Illegitimate disobedience of orders given by his superiors;
   b) Breach of the rights and guaranteed of the undertaking’s employees;
   c) repeatedly provoking conflicts with other company employees;
   d) Repeated disinterest in performing, with the required level of care, the duties inherent to the position or work post entrusted to the employee;
   e) Serious damage to company assets;
   f) False statements regarding the justification of absences;
   g) Unjustified absences from work that cause direct damage or serious risk to the undertaking or, regardless of any damage or risk, when the number of unjustified absences in any calendar year reaches 5 successive or 10 interrupted absences;
   h) Intentional non-compliance with hygiene and safety rules at work;
   i) Physical violence, insults or other offersences punishable by law, committed at the work place, in relation to other employees, members of the corporate bodies or the individual employer not belonging to such bodies, or his delegates or representatives;
   j) Sequester and in general all crimes against freedom of those persons referred in the previous sub-clause;
   k) Breach of refusal to comply with court or administrative decisions;
   l) Unusual reduction of productivity.
Procedure - Just cause for dismissal

Article 329.º Portuguese Labour Code
Disciplinary procedure and prescription
6 – The disciplinary sanction can not be applied without the prior hearing of the employee.

1. Article 353º - Offence Report
2. Article 354º - Preventive suspension of the employee
3. Article 355º - Response to the offence report
4. Article 356º - Hearing Proceedings
5. Article 357º - Decision
Article 381.º

General grounds of unlawful dismissal

Without prejudice of the following articles and special legislation, the dismissal by the initiative of the employer in unlawful when:

a) It is based on political, ideological, ethnical or religious reasons, even if a different reason has been invoked;

b) The reasons invoked to justify the dismissal are considered invalid;

c) It has not been preceded by the respective procedure.
OBJECTIVE JUST CAUSE FOR DISMISSAL

- Collective dismissal (article 359° et seq.)
- Dismissal due to the extinction of work position (article 367° et seq.)
- Dismissal for unsuitability (article 373° et seq.)