RIGHTS OF TERMINATION

VAA *Verband Angestellter Akademiker (Association of Employed Academics and Executives in the Chemical Industry)*

PREFACE

Managers in the chemical-pharmaceutical industry are frequently confronted with questions concerning the rights of termination. This can happen if a manager is a superior wishing to let an employee go or is himself or herself the subject of a dismissal of which an employer intends to give notice or has already given notice. The rights of termination constitute a complicated and confusing area of the law. The provisions governing termination are wide-ranging and subject to constant further development. The legal layperson must rely on expert advice and competent assistance on this issue. To this end, VAA members who (must) negotiate with their company about a termination of employment or who are the subject of a termination enjoy legal protection from their association and legal representation from a highly qualified lawyer.

This brochure cannot and is not meant to replace individual legal counselling on the rights of termination. Instead, it offers an insight into the most important legal issues and rules of conduct involved. The brochure seeks to provide information about rights and risks people should be aware of, so they avoid making mistakes.

January 2020

TABLE OF CONTENTS

1. TERMINATION OF THE EMPLOYMENT RELATIONSHIP

An employment relationship can be terminated in the following ways:

1.1. Termination

Termination comprises a unilateral declaration of intent to bring about the end of the employment relationship at a future date or with immediate effect. It requires acknowledgment of receipt.

1.2. Separation agreement

The employment relationship can be terminated with immediate effect or at a later time by means of a freely rendered contractual agreement (declaration of concurring intent by both parties as regards a legal transaction). The so-called settlement agreement (Abwicklungsvertrag) is also ultimately a separation agreement (Aufhebungsvertrag), but usually governs the end of the employment relationship after a notice of termination has been given.

1.3. Fixed-term employment

Employees are subject to fixed-term employment if they enter into an employment agreement for a set period of time. This occurs if a period of time according to the calendar has been specified (fixed-term employment agreement based on the calendar) or results from the type, purpose or nature of the work being done (fixed-term employment agreement based on purpose). Basically, the admissibility of fixed-term employment must be checked separately against the German Act on Part-Time Work and Fixed-Term Employment (Teilzeit- und Befristungsgesetz, TzBfG). For more information, please consult the separate information brochure on this subject.

1.4. 1.4. Attainment of pension age

Employment does not automatically end when the employee reaches the regular pension age (up to age 67 depending on the year the employee was born).

If the employment agreement does not contain the restriction that employment ends when the employee reaches the regular pension age, employment continues beyond that point in time for an unlimited period. An agreement that provides for termination prior to the respective regular pension age is deemed to be concluded for the period up to the employee reaching the regular pension age unless the agreement has been concluded within the three years prior to this premature termination date or has been confirmed by the employee.

The clause still encountered in contracts that the employer reserves the right to retire an employee even prior to he or she reaching age 65 has no legal effect in the sense that this step may not be carried out without notice or without the employee's consent. The reserved right to send someone into early retirement also requires a notice of termination. Its validity is based on the general principles of labour law if the employer wants to carry it out unilaterally. The same also applies if employees are granted the right to demand early retirement. In actual practice, early retirement agreements are concluded in this case.

1.5. Death of the employee

The employee must perform his/her duties in person, so the employment relationship ends automatically upon his/her death.

2. NOTICE OF TERMINATION

2.1. Content

Notices of termination must be given clearly and unequivocally. However, the word "notice of termination" does not have to be used. But there must be a clear indication that the end of the employment relationship is wanted.

The point in time at which the employment relationship is supposed to end must also be clear, whereby the indication of an incorrect (overly short) period of notice does not mean that the notice of termination as such is invalid. Instead, the termination is deemed valid at the next admissible termination date.

2.2. Formal requirements

Pursuant to Section 623 of the German Civil Code (Bürgerliches Gesetzbuch, BGB), termination of employment by notice of termination or by separation agreement (Aufhebungsvertrag) must be executed in writing to be effective, as must fixed-term employment contracts (Section 14 (4) of the German Part-time and Fixed-term Employment Act (Teilzeit- und Befristungsgesetz, TzBfG). By contrast, the agreement to a certain mode of transmission (e.g. by registered mail) usually only has the function of preserving evidence. Non-compliance with the agreed mode of transmission does not render the notice of termination invalid in this case, provided the contracting party giving notice can prove that the written notice of termination was delivered in a timely fashion to the contracting party being given notice. A notice of termination by e-mail or fax does not accord with the written-form requirement under Section 623 BGB.

As a precautionary measure, however, VAA members should also seek legal advice immediately if given notice of termination orally, particularly to determine the further strategy in a possible dismissal protection lawsuit.

2.3. Receipt

Notices of termination do not become effective until they are received by the person being given notice. With a written notice of termination, the notice is regularly deemed to be received upon the written document being handed over or for example, being put in the recipient's home letterbox. Registered letters are generally not deemed to be received until they are actually handed over by the postal service. They are not deemed to have been received already on the day a notification slip is deposited in the letterbox.

This does not apply if the employee had to reckon with being served a notice of termination by the employer by registered letter and intentionally picked it up late or not at all. If the employee is giving notice of termination, he or she should have the receipt of the notice confirmed on the notice of termination letter.

2.4. 2.4. Indication of reasons for termination

Indicating reasons for termination is not a prerequisite for the validity of the termination. However, the employee must be notified of the reasons for dismissal promptly in writing at his/her request in the event of a termination for cause. If the employer fails to comply with this request, its failure to do so has no ramifications on the validity of the termination for cause.

3. TYPES OF TERMINATION

3.1. Routine dismissal

A routine dismissal (i.e. within the time limit; also referred to as an ordinary dismissal or ordinary termination) occurs if the relevant period of notice under the individual contract or the collective agreement or the law is complied with.

3.2. Termination for cause

With a termination for cause (without notice; sometimes referred to as an extraordinary dismissal), the relevant period of notice under the individual contract or the collective agreement or the law is not complied with. The prerequisite for the validity of a termination for cause is the existence of an important reason for it (e.g. serious breaches of contract) that makes it unreasonable to expect the contracting party to continue the employment relationship until the expiry of the regular period of notice. The notice of dismissal can only be carried out within two weeks from the time the party authorised to dismiss becomes privy to the facts relevant to the dismissal. As a rule, a termination for cause is issued as a dis-

missal without notice but it can also contain a so-called social phase-out period (soziale Auslauffrist) in exceptional cases.

3.3. Dismissal with the option of modified conditions of employment

With this type of dismissal (referred to below as “dismissal with option” for short), the party giving notice wants to impose a change in the working conditions. The dismissal is therefore linked to an offer to continue the employment relationship under modified conditions after the period of notice expires. The offer on these modified conditions can precede or follow a notice of dismissal but the most frequent case is that the notice of dismissal and the offer of modified conditions are issued simultaneously. If the offer is rejected, the notice of dismissal with option basically serves as a notice of termination. A dismissal with option can also be contested by means of a change protection lawsuit (Änderungsschutzklage), although certain special conditions apply (refer to section 5.7 below).

4. PERIODS OF NOTICE

4.1. Period of notice in the probationary period

If a probationary period (of up to a maximum of six months) is explicitly agreed at the beginning of the employment relationship, the statutory period of notice is two weeks to any desired date. This period of notice applies if the contract for the probationary period does not provide for a longer period of notice.

In the scope of the Framework Collective Agreement for University Graduates (Akademikermanteltarifvertrag, Akademiker-MTV), the minimum period of notice in the probationary period amounts to six weeks to the end of the month, whereby the probationary period is not allowed to exceed six months under an employment relationship concluded for an unlimited amount of time. However, if the probationary work relationship is entered into as a contract limited in time (up to a maximum duration of twelve months), this relationship cannot be terminated during this time according to the provisions of the Akademiker-MTV.

If the employment relationship is not intended to be continued after the probationary period expires, the employer must make this fact known to the other contracting party in writing at the latest six weeks prior to expiry for a probationary period of less than twelve months and at the latest eight weeks prior to expiry for a probationary period of twelve months.

4.2. Statutory periods of notice

Pursuant to Section 622 (1) BGB, the basic period of termination for employers and employees is four weeks to the 15th or to the end of a calendar month. For notice of termination by the employer, Section 622 (2) of the BGB stipulates the following periods of notice for the indicated duration of the employment relationship in the business or the enterprise:

- one month after two years,
- two months after five years,
- three months after eight years,
- four months after ten years,
- five months after twelve years,
- six months after fifteen years,
- seven months after twenty years,

to the end of the calendar month in each case.

4.3. Periods of notice under collective agreements

Pursuant to the 2 May 2000 version of the Framework Collective Agreement for University Graduates Working in the Chemical Industry (Manteltarifvertrag für akademisch gebildete Angestellte in der chemischen Industrie or Akademiker-MTV for short), the applicable periods of notice for both contracting parties are longer than the statutory ones. Unfortunately, the Akademiker-MTV still does not apply geographically in the

new German federal states (former East Germany (GDR)). There are two categories of individuals falling under the Akademiker-MTV: first, salaried employees holding a degree in a technical or natural science field from a full university, provided they mainly perform duties requiring this university education; and second, salaried employees with a different educational background who are subject to this collective agreement based on an individual agreement.

A requirement for the automatic application of the Akademiker-MTV is that the salaried employee be a VAA member and the employer be a member of the respective regional employers' association of the chemical industry, provided the scope applies in terms of geography as well as the persons and the specialty field involved.

The periods of notice under the collective agreement are determined by the length of service in the business or enterprise following the scale below:

- up to five years – three months to the end of the month,
- after five years – six months to the end of the quarter,
- after ten years – nine months to the end of the quarter,
- after fifteen years – twelve months to the end of the quarter.

4.4. Periods of notice under individual contracts

The periods of notice under the law and/or under collective agreements can be exceeded by means of individual contracts. In this case, the longer period of notice that has been contractually agreed applies. If the period of notice under the individual contract is shorter, the salaried employee can invoke the minimum period of notice stipulated by law or by the collective agreement.

4.5. Period of notice in the case of insolvency

Pursuant to Section 113 of the German Insolvency Statute (Insolvenzordnung), the period of notice in the case of insolvency for the insolvency administrator is three months to the end of the month unless a shorter period of notice is binding. This three-month period of notice applies even if an individual contract, a collective agreement or the law provides for a longer period of notice.

5. SOCIAL JUSTIFICATION FOR TERMINATION OF EMPLOYMENT

Pursuant to the German Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG), a routine notice of termination by the employer (within the time limit) is only valid if it is justifiable on social grounds.

However, application of the Protection against Dismissal Act first requires that an employment relationship has lasted at least six months and that there are a certain number of employees working in the enterprise. Pursuant to amended legislation that took effect on 1 January 2004, the threshold values in this instance vary depending on when the employment relationship began. When determining the number of employed workers, part-time employees with a regular weekly work time of no more than 20 hours are calculated as half of a full-time equivalent (0.5 FTE) and those with a regular weekly work time of no more than 30 hours as three quarters of a full-time equivalent (0.75 FTE).

The old rule applies to workers who were already employed prior to 1 January 2004: The Protection against Dismissal Act applies if more than five employees work in the enterprise. This means (taking into account the part-time employees) at least 5.25 employees are working there, who were also employed in the enterprise prior to the reference date.

For employees whose employment relationship began after 31 December 2003, this minimum number of employees has been raised to more than ten employees. This means that the Protection against Dismissal Act does not apply to employment relationships established from 2004 onward unless there is the calculated equivalent of at least 10.25 employees working at the enterprise.

The Protection against Dismissal Act basically also applies to executive staff within the meaning of that term in the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

5.1. Dismissal for operational reasons

A termination is also deemed socially justifiable if it is necessitated by urgent operational requirements that preclude a continuation of employment for the employee. Urgent operational requirements can arise from internal operational circumstances (e.g. streamlining measures, change or limitation of production) or for external operational reasons (e.g. lack of orders, decline in sales).

A termination for internal operational reasons is justified if the employer in the corporate entity decides on an organisational measure whose internal operational implementation eliminates the need to continue employing one or more employees. However, termination is not permitted if the employee can be employed in another vacant position in the same enterprise or another enterprise in the company.

The business decision that ultimately results in the elimination of the position is itself not subject to review by the labour courts. The only exception is if the employer's decision is obviously irrelevant, unreasonable or arbitrary.

Based on the ultima ratio principle, a termination for operational reasons is only permitted if the employer is unable to address the modified operational situation technically, organisationally or economically with any measures other than to undertake a dismissal.

5.2. Conduct-related dismissal

Grounds for dismissal related to the employee's conduct include, in particular, a wide variety of breaches of contract or other types of conduct by the employee in connection with his/her performance of the obligations under the employment agreement. These breaches can entail non-performance or poor performance of a work duty or a breach of confidentiality obligations to the employer. It always depends on the actual case at hand and the severity of the violation.

Before the issuing of a conduct-related routine dismissal due to shortcomings exclusively in performance, at least one prior written warning (Abmahnung) must have been given to no avail.

This written warning is also a declaration of intent requiring acknowledgment of receipt whose purpose is to document and warn that further breaches of contract will no longer be tolerated and can lead to a termination of the employment relationship.

A written warning is dispensable by way of exception if it has no promise of success as regards the employee's ability to reason and act or if the breach of contract is so severe that a prior written warning appears unreasonable.

5.3. Dismissal for personal reasons

A dismissal can also be justified for personal reasons related to the employee that so greatly affect the ratio of work performance to remuneration that the employer cannot be reasonably expected to continue the employment relationship. Thus, a personal reason exists if the employee lacks the ability and aptness to render, in full or in part, the work performance that is owed.

The inability to work due to illness is the main situation in which a dismissal for personal reasons occurs. This may entail a long-term illness or repeated short-term illness. Certain guidelines have been developed for the various types of cases but further elaboration on them exceeds the bounds of this publication, which is intended to be a summary.

5.4. Social selection

If an employee has been dismissed due to urgent operational requirements,

the dismissal is nonetheless socially unjustified if the employer fails to make any or sufficient allowances for social considerations in selecting the employee. The employer is required to carry out a social selection (Sozialauswahl) among all comparable employees at the enterprise. This comparison group is formed horizontally, i.e. it includes only the employees whose work and duties are basically interchangeable and who are also at the same hierarchical level in the enterprise.

The social considerations that must be taken into account in the social selection consist of length of service, age, number of maintenance obligations of the employee and possibly also a severe disability. Independent of these four social criteria enumerated in the law, case law always indicates the need to examine the individual case involved so that any other hardships that may exist can be considered in the social selection process. Young employees with the shortest length of service, without maintenance obligations and without a severe disability are the priorities for dismissal.

In the amended German Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG), lawmakers have also stipulated that the social selection should not include employees whose continued employment is deemed to be in the employer's justified operational interest, especially due to their knowledge, skills and performance or in order to safeguard a balanced personnel structure within the operations. If a collective agreement or a works agreement pursuant to Section 95 of the German Works Constitution Act (Betriebsversfassungsgesetz, BetrVG) specifies how the social criteria are to be weighted in relationship to each other, this approach can only be reviewed for gross errors.

5.5. Reconciliation of interests and designation by name

Terminations on operational grounds often do not consist of a single measure but rather are the result of more broad-based restructuring. If the latter involves a change in business, the employer and the works council must basically negotiate a reconciliation of interests and where required, a social plan as a follow-up.

Pursuant to Section 1 (5) of the Protection against Dismissal Act, the parties have the option of adding a list of names to the agreement on the reconciliation of interests to be concluded. In the case of a dismissal due to a change in business, if the employees to be dismissed are designated by name in an agreement on the reconciliation of interests between the employer and the works council, it is presumed that the dismissal is due to urgent operational requirements. The social selection of the employees can subsequently also only be reviewed for gross errors.

If a list of names is drawn up in conjunction with a reconciliation of interests, this means the dismissed employee whose name is on this list must specifically prove in a dismissal protection lawsuit that no urgent operational requirements were in play to occasion the employer to undertake a dismissal. However, as the employee usually does not even know the details of the facts leading to an operationally related dismissal, it is hardly possible for him/her to prove that no urgent operational requirements existed for the dismissal. Moreover, the social selection criteria are generally not so patently unfair that labour courts could correct them. The prospects for the success of a dismissal protection lawsuit are therefore quite meagre if the dismissed employee is on the list of names agreed along with the reconciliation of interests.

5.6. Claim to severance pay in connection with a dismissal for operational reasons

Another special provision under termination law has been introduced with Section 1a of the Protection against Dismissal Act. If the employer dismisses an employee due to urgent operational requirements and if, up to the expiry of the regular period for action of three weeks, the employee brings no action to establish that this employment relationship has not been dissolved by means of this dismissal, the employee has a right to severance pay on expiry of the period of notice.

The right, however, requires the employer to indicate in the notice of dismissal that the dismissal is due to urgent operational requirements and that the employee can claim the severance pay if he or she allows the

deadline for taking action to lapse. The severance pay amounts to half the monthly pay for each year the employment relationship has existed. To determine the duration of the employment relationship, a period of more than six months must be rounded up to a full year.

In the case of a dismissal for operational reasons, the employer has also had the option up until now to reach agreement with the employee and avoid a lawsuit by rendering severance pay. This new legislative provision therefore does not constitute a substantial expansion of employee rights. This provision is therefore rarely encountered in actual business practice.

5.7. Dismissal with the option of modified conditions of employment

A dismissal with the option of modified conditions of employment (referred to below as "dismissal with option" for short) contains a compound legal transaction combining a notice of termination of the still existing employment relationship with the option of continuing the employment relationship under modified conditions. These dismissals are also subject to examination under the Protection against Dismissal Act. Thus, there must be reasons that make the dismissal with option appear socially justified. A dismissal with option must therefore be based on reasons related to operations, conduct or the person involved. In the weighing of mutual interests, the employer's offer of the modified conditions of employment must be considered.

On receiving the employer's notice of dismissal with the option of modified conditions of employment, the employee has three possibilities:

- To accept the option within three weeks after the receipt of this notice of dismissal, which results in the continuation of the employment relationship at the modified conditions upon expiry of the period of notice.

- To accept the option with the proviso that the change in the conditions of employment is indeed socially justified and to file simultaneously a so-called modification of conditions lawsuit (Änderungsschutzklage) whose aim is to have the court establish whether the change in employment conditions is invalid and/or socially unjustified. This proviso must be expressed within three weeks after receipt of the dismissal with the option of modified conditions of employment. The lawsuit must be filed with the labour court within this same period.

- The employee rejects the offer of modified conditions and takes legal action against the remaining notice of termination. This step results in the employment relationship being continued at the old conditions if the dismissal protection lawsuit is won or the employment relationship being ended on expiry of the period of notice if the dismissal protection lawsuit is lost.

In any event, the change in the employment conditions does not take effect until the expiry of the period of notice that would also apply to a notice of termination.

6. CONSULTATION OF THE WORKS COUNCIL AND EXECUTIVES' COMMITTEE

6.1. Consultation of the works council

The following applies to employees falling under the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG) (with the exception of executive staff (Leitende Angestellte) within the meaning of Section 5 (3) BetrVG):

- The works council must be consulted before every dismissal. If the employer fails to meet this mandatory obligation, the dismissal is invalid in each case regardless of whether or not reasons for dismissal exist. However, a dismissal protection lawsuit claiming the non-validity of a termination due to failure to meet the obligation to consult the works council must be filed with the labour court within three weeks after receipt of the notice of termination and the court must subsequently establish this non-validity.

- The employer must inform the works council of the major reasons for termination that went into its decision to terminate and, in particular, make known the social data of comparable employees, particularly in the case of dismissal for operational reasons. During the proceedings, the employer is not allowed to subsequently add other reasons for termination that existed at the time the works council was advised of the matter, that were known to the employer and that led to its decision to terminate. The works council can consent to the termination, raise concerns about it, object to it or remain silent. If the works council raises concerns about or rejects the termination, it must do so in writing within one week after commencement of a consultation procedure for a routine dismissal and without delay but at the latest within three calendar days for a termination for cause. If the works council fails to address the matter within the respective period, it is deemed to have given its consent.

- The employer may not give notice of termination until a period of one week (or three days) has passed unless the works council has already issued its opinion on the matter beforehand. A violation of this mandatory procedural provision renders the notice of termination invalid.

- The employer is also not hindered from giving the notice of termination even if the works council raises concerns or objects to the intended termination. The question of the legal validity of the notice of termination is not prejudged by these actions. The same applies to a case in which the works council consents to the notice of termination or fails altogether to state its opinion on the matter.

6.2. Consultation of the executives' committee

If an executive staff member (ein leitender Angestellter) is given a notice of dismissal, the following principles apply pursuant to the German Executives' Committee Act (Sprecherausschussgesetz): If the employer wants to terminate an executive staff member, it must consult the executives' committee prior to giving the notice of termination. If the employer fails to meet this obligation, the termination is in each case invalid regardless of whether or not reasons for termination exist.

However, in the event of a breach of the duty to consult the executives' committee, it is mandatory that the corresponding action with a complaint about the failure to consult the executives' committee be submitted within three weeks after receipt of the notice of termination. For the rest, the same legal principles apply to the consultation of the executives' committee as to the consultation of the works council. However, no right to object exists for the executives' committee and thus also no derivative claim to continued employment under collective bargaining law for executive staff.

7. DISMISSAL PROTECTION PROCEEDINGS

7.1. Period for bringing an action

If the employee deems a notice of dismissal to be socially unjustified or believes the dismissal to be invalid for other reasons, he or she must compulsorily file a lawsuit against the dismissal with the labour court within three weeks after receipt of the notice of dismissal. The same applies in the case of a termination for cause or in the case of a dismissal with the option of modified conditions of employment (Änderungskündigung). If the employee wants to assert that the fixed term in an employment agreement is legally invalid, he or she must also file an action for a ruling that his/her employment relationship has not been terminated due to the fixed term. This action must be brought at the latest within three weeks after the agreed end of the fixed-term employment agreement.

If this three-week period is allowed to lapse, the dismissal is deemed to have been legally valid from the outset. Subsequent filing of the action can be permitted only in the rare case in which the employee is hindered from filing the action on time despite exercising all the diligence one could reasonably expect of him/her. A request of this kind must be lodged with the labour court within two weeks after the hindrance is eliminated. The request can no longer be filed after six months have elapsed,

as calculated from the date of the missed deadline. Ignorance of the mandatory three-week period that has to be met for bringing the action is not sufficient, in itself, to allow a subsequent filing.

The three-week period applies to all possible grounds for the invalidity of a notice of dismissal, in other words also to grounds lying outside the scope of the German Protection against Dismissal Act, such as the failure to consult the works council.

In any case, contacting the legal experts at VAA immediately after receiving a notice of dismissal is recommended as a mandatory line of action.

7.2. Conciliation hearing

The dismissal protection proceedings are initiated by a conciliation hearing (Güteverhandlung) prescribed as compulsory under law. This conciliation hearing is not held before the full labour court (professional judge as the presiding judge and two lay judges) but rather only before the presiding judge. The conciliation hearing revolves (chiefly) around the question of reaching a settlement to discharge the action.

If both parties signal a basic willingness to settle without already having reached agreement, the court often issues a settlement proposal. In the dismissal protection proceedings, a settlement proposal of this kind regularly includes termination of the employment relationship along with the rendering of severance pay. The amount of the severance pay suggested by the court is frequently based on a rule of thumb. This rule of thumb says severance pay should be calculated as one half or one full gross monthly salary times the number of years an employee has been with the company.

The factor applied to the gross monthly salary in the calculation of severance pay varies widely however.

In individual cases, the employee's need of social protection plays a role, but of course also the momentary estimation of reciprocal litigation prospects and risks. If the court has not yet formed a picture of this aspect, it deviates upward or downward from the rule of thumb. Generally, severance pay for executive staff is calculated on the basis of the contractual salary plus the bonus as well as a compensation payment amounting to 1% of the non-cash benefit for a company car provided for personal use.

7.3. Hearing to consider the case on its merits

If the conciliation hearing (Güteverhandlung) does not arrive at a result, the court sets a hearing date to consider the case on its merits. In preparation for this hearing, the two parties or their counsels file briefs. If conflicting facts are presented, evidence is taken where appropriate. This situation usually results in at least one further hearing before the full court. However, this rarely occurs. The employer bears the evidential burden (Darlegungslast) and the actual burden of proof (Beweislast) for the justification of the termination.

If a social selection was faulty or did not take place, the employee initially has the right to obtain information from the employer on how the latter handled this social selection. It is only after this information has been given that the employee must produce and provide evidence on why he or she is worthy of more protection than anyone else.

As a rule, the proceedings in a dismissal protection lawsuit in the first instance rarely last less than six months, usually much longer – depending on the court docket and the required hearing dates.

7.4. Judgment

There are basically three possible outcomes to the dismissal protection proceedings through a court decision:

- The court recognises the social justification for the termination and its validity on other grounds. In this case, the action is dismissed and the employment relationship ends on the termination date.

- The court rules that the termination is socially unjustified or that it is invalid for other reasons. In this case, the court upholds the lawsuit, and the employment relationship continues beyond the termination date.

- The court rules the termination to be unacceptable on social grounds and therefore invalid. On petition of one of the parties (or both of them), the court dissolves the employment relationship on the termination date and determines an appropriate amount of severance pay. The prerequisite for a dissolution decision is that the court finds that the employee cannot be reasonably expected to continue the employment relationship (upon the employee's petition for dissolution) or that there are factors rendering it unlikely that a continued working relationship between the employer and the employee would be beneficial to the company's business interests (upon the employer's petition for dissolution). This latter type of dissolution petition is quite rare in actual practice.

For executive staff, the employer's petition for dissolution requires no grounds pursuant to Section 14 (2) of the Protection against Dismissal Act if the person given notice of termination is a managing director, an operations manager or a similar type of managerial employee who has the authority to independently hire or dismiss employees. In German companies, the four-eyes principle applies to the hiring or dismissal of personnel, i.e. two people must take these types of decisions jointly. Therefore, truly independent executive staff within the meaning of Section 14 (2) of the Protection against Dismissal Act are far and few between.

As regards the amount of severance pay to be set in the event that the court dissolves the employment relationship, the Protection against Dismissal Act provides only for upper limits. Basically, the top limit is set at twelve monthly salaries. It increases to 15 monthly salaries after the employee has attained the age of 50 and been employed at the company for 15 years and to the maximum of 18 monthly salaries after he or she has attained the age of 55 and been employed at the company for 20 years.

A monthly salary is deemed to constitute the monetary and non-monetary remuneration the employee receives for his/her regular monthly working time in the month the employment relationship ends. Basically, this means that further guaranteed special payments besides the agreed contractual salary must be taken into account (e.g. 13th monthly salary, annual premium, value of remuneration in kind, etc.). Benefits with a bonus character (e.g. Christmas bonus, long-service bonus, etc.) are not considered.

Within these top limits, the court must consider all circumstances when determining the severance pay. This includes not only the duration of the employee's employment relationship and age, but also his/her maintenance obligations, consequences of the termination of the employment relationship, his/her prospects on the labour market, loss of forfeitable pension entitlements and the degree to which the termination is socially adverse. After all, the employment relationship can be dissolved by the labour court on petition of one of the two parties only if the underlying termination is unjustified on social grounds.

Based on experience, the severance pay that is set generally amounts to between a half and a full gross monthly salary (or to one twelfth of the annual pay) per year of service at the company. It is rarely more than that. However, lower severance pay amounts may be customary depending on the labour court.

7.5. Appeal

Both parties can file an appeal with the competent higher labour court (Landesarbeitsgericht) against a decision of the labour court of first instance within one month of being served the latter's judgment including the grounds for it.

The higher labour court is also a trier of fact and can therefore rule on facts that deviate from the judgment in the first instance. In particular, it can take new evidence. When the higher labour court hands down its ruling, the trial generally comes to a legal conclusion.

An appeal to the German Federal Labour Court (Bundesarbeitsgericht) is

possible only under strictly defined conditions. Thus, the appeal is only permitted if the legal matter is of fundamental significance or the decision of the higher labour court deviates from a decision of the German Federal Constitutional Court (Bundesverfassungsgericht) or the German Federal Labour Court or, in the event that the German Federal Labour Court has not yet ruled on the legal matter, from a decision by another chamber of the same higher labour court or by a different higher labour court and the decision is based on this deviation. The only grounds for the appeal are that a judgment of the higher labour court violates a legal norm.

A period of up to two years must be calculated for the proceedings, namely from the filing of the action with the labour court to a legally binding judgment from the higher labour court.

7.6. Executive staff in dismissal protection proceedings

Executive staff members also enjoy legal protection against unfair dismissal. A special provision applies only to a small group of executive staff who are authorised to hire or dismiss employees independently. For these individuals, the employer's petition to dissolve the employment relationship through a severance pay ruling does not have to indicate grounds despite a termination found to have adverse social effects. In other words, the labour court must uphold a dissolution petition from the employer in each case.

Practical experience shows, however, that most dismissal protection proceedings are handled by means of a trial settlement or out-of-court settlement. This applies in particular to dismissal protection proceedings initiated by executive staff, because a court-mandated continuation of the employment relationship usually causes major difficulties in the collaboration between employee and employer. However, this does not rule out the possibility that, in a given case, the employee views his/her main interests in bringing about the continuation of his/her employment.

7.7. Right to continuation of employment during dismissal protection proceedings

If the validity of a termination for cause or routine dismissal is disputed in court, the general principle is initially that the employee's right to employment ceases upon expiry of the period of notice (i.e. immediately in the case of termination without notice). In particular, this also means that the employer stops paying remuneration. Only when the invalidity of the termination is legally established (and thus the legal continuation of the employment relationship) can back-payments of salary and a right to employment be enforced.

If a right to continuation of employment is asserted at the same time as the dismissal protection lawsuit is filed, this has the following consequences: If the labour court establishes that the termination is invalid, it must at the same time order the employer to continue the employment unless the employer has pleaded special circumstances indicating that the employer has an interest in non-employment that is overwhelmingly deserving of protection in the individual case. As a rule, the employee can therefore enforce a right to continuation of employment after a court of first instance has ruled in his/her favour and does not need to wait until the court of second (or possibly third) instance has reached its final conclusion.

7.8. Right to continuation of employment under works constitution law

If the works council has objected to a routine dismissal within the time limit and in due form and if the employee has filed an action under the German Protection against Dismissal Act (Kündigungsschutzgesetz) to establish that his/her employment relationship is not dissolved by the notice of dismissal, the employer must keep the employee in its employ, at the latter's request and with no change in work conditions, after expiry of the period of notice pending the final resolution of the litigation.

This request for continuation of employment must be made in writing to the employer before expiry of the period of notice. The employer can only

be released from this obligation to continue employment under certain conditions. As a result, an objection made by the works council within the time limit and in due form usually has a positive impact for an employee who has received notice of dismissal even if said objection does not initially indicate anything about the validity of a dismissal.

8. SPECIAL PROTECTION AGAINST DISMISSAL

Certain categories of employees enjoy special protection against dismissal in addition to general dismissal protection under the German Protection against Dismissal Act (Kündigungsschutzgesetz). The following list is not exhaustive.

8.1. Maternity protection, parental leave and care leave

Under the German Maternity Protection Act (Mutterschutzgesetz), any dismissal of a woman during pregnancy or in the first four months after birth is inadmissible if the employer was aware of the pregnancy or birth at the time of the dismissal or is informed of the pregnancy or birth within two weeks of receipt of the notice of dismissal.

In addition, under the German Parental Allowances and Parental Leave Act (Bundeselterngeld- und Elternzeitgesetz), the employer cannot terminate the employment relationship from the moment that parental leave is requested, but at most eight weeks prior to the start of parental leave and during parental leave. This prohibition of dismissal applies accordingly if the employee works part-time for his/her employer to the permitted extent (no more than 30 hours per week) during parental leave or, without taking parental leave, works part-time for his/her employer and is entitled to parental allowance during the period in which entitlement to this allowance exists. Section 5 (1) of the German Care Leave Act (Pflegezeitgesetz, PflegeZG) stipulates that the employer cannot terminate the employment relationship from the announcement, but at most 12 weeks before the requested start date, until the end of the short-term absence from work pursuant to Section 2 PflegeZG or the end of a period of care leave pursuant to Section 3 PflegeZG.

8.2. Protection for severely disabled employees

In accordance with Book IX of the German Social Code (Sozialgesetzbuch IX, SGB IX), Rehabilitation and Integration of Disabled People, the employer is obliged to obtain the prior consent of the Integration Office before terminating the employment relationship of a severely disabled employee under Section 85 et seq. SGB IX. The prerequisite here is that the employee has a degree of disability of at least 50% or he/she is recognised as being of equivalent status.

Any notice of dismissal issued without the consent of the Integration Office is invalid. This also applies if the employer is not aware of the severely disabled status or equivalence at the time of dismissal and therefore failed to initiate the consent procedure at the Integration Office. In this case, the employee must inform the employer of his/her severely disabled status after notice of dismissal has been issued in order to invoke the invalidity of the dismissal under Book IX of the German Social Code. The employee has three weeks within which to do so. According to the current case law of the German Federal Labour Court (Bundesarbeitsgericht) of 22 September 2016 (reference no. 2 AZR 700/15), the following applies in summary:

The rule of thumb for the dismissal of severely disabled or equivalent employees is “three weeks before – three weeks after”. This means that these employees have special protection against dismissal if an application was made to have their severe disability or equivalent recognised at least three weeks before receipt of the notice of dismissal (“three weeks before”). When issuing the notice of dismissal, the employer does not have to be aware of the special protection against dismissal. However, the employee must subsequently inform his/her employer of this protection in due time. In principle, the employee has a period of three weeks after receipt of the notice of dismissal in which to do so (“three weeks after”). The German Federal Labour Court has not conclusively established the number of days by which this period may be extended if necessary.

Individuals with a degree of disability of less than 50% but at least 30% may apply to the German Federal Employment Agency (Bundesagentur für Arbeit) to have their disability recognised as being equivalent to a severe disability if they are unable to find or retain a suitable job on account of their disability without this equivalency. Equivalency results in the disabled employee being entitled to the same protection dismissal rights as a severely disabled individual with a 50% degree of disability, but without the other additional rights such as extra leave, for example, or free use of public transport.

In addition, it should be noted that severely disabled or equivalent employees only enjoy special protection against dismissal after they have been employed for at least six months.

8.3. Works council members

Of particular note is the special protection enjoyed by members of the works council (Betriebsrat) in their position under individual employment law. Routine dismissal of a works council member is prohibited during his/her term in office and for a period of one year after that term has ended pursuant to Section 15 (1) of the German Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

Under Section 15 (4) KSchG, exceptions only apply if the entire business or a department of the business shuts down. In the latter scenario, the works council member must be transferred to another department.

8.4. Company officers

Lawmakers have introduced special protection against dismissal in certain cases for employees with public law functions in the field of environmental protection. The following employees cannot be ordinarily dismissed: the Immission Control Officer under Section 58 (2) of the German Federal Immission Control Act (Bundesimmissionsschutzgesetz), the Major Accident Officer under Section 58d of the German Federal Immission Control Act, the Water Protection Officer under Section 21f of the German Water Resources Act (Wasserhaushaltsgesetz), the Waste Management Officer under Section 55 (3) of the German Closed Substance Cycle and Waste Management Act (Kreislaufwirtschafts- und Abfallgesetz) in conjunction with Section 58 (2) and the Data Protection Officer under Section 4f of the German Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG).

Routine dismissal is prohibited for the duration of the special commission and for another year after removal from the special commission. However, the employment relationship of any of the officers mentioned above may be terminated if facts are present that entitle the employer to terminate the relationship for a compelling reason without complying with a notice period.

There is no special protection against dismissal if the appointment of the data protection officer is voluntary and not due to a legal obligation (Section 4f (3) sentence 5 BDSG). However, the special protection against dismissal of Section 4f (3) sentence 5 BDSG only applies to data protection officers appointed by law. Employers should not be deterred from voluntarily appointing a data protection officer, whose employment can still be terminated by routine dismissal.

There is special prohibition of dismissal for immission control officers who are at the same time employed by the plant operator. Nevertheless, termination for cause is in principle possible according to the clear wording, provided there is a compelling reason under Section 626 of the German Civil Code (Bundesgesetzbuch) for termination without notice.

Termination for cause is not permitted, however, if the officer is solely accused of breaching his/her official duties. In these circumstances, the employer may instead immediately remove the employee from office. Termination for cause is only permitted if the breach of official duties also constitutes a serious breach of the duties arising from the employment relationship.

9. SEPARATION AGREEMENT

9.1. General information

If an employer wants to let a senior executive go, this is often done outside the formal issuing of a dismissal notice and subsequent dismissal protection lawsuit. Instead, negotiations are started with the aim of concluding a separation agreement to terminate the employment relationship by mutual agreement in order to avoid dismissal.

If another notice of dismissal is issued before the start of or during the negotiations, a three-week time limit for filing a dismissal protection lawsuit must in all events be observed. The dismissal protection lawsuit can subsequently be withdrawn at any time if the negotiations are concluded successfully. The proceedings may also be suspended during the period of negotiations; however, this period of suspension may not exceed six months since the lawsuit is otherwise deemed to have been withdrawn.

9.2. Termination of the employment relationship

As a general principle, the employee's contractual period of notice is complied with in termination agreements. Compliance with this notice period is particularly important with respect to the suspension of unemployment benefit while the employee is receiving severance pay.

In the event of long periods of notice, in particular, the employer often has an interest in terminating the employment relationship before the date on which the notice period is due to expire. This may well also be in the employee's interest, for example if he/she already has the prospect of a new employment relationship in sight. If a termination date is brought forward, remuneration is often paid in full or in part as additional severance pay until the ordinary period of notice has expired.

9.3. Severance pay

The regulation of a severance payment is an important aspect of the separation agreement. The agreement of severance pay and its amount and the agreement of other termination arrangements is a matter of contractual freedom. Experience has shown that it is quite possible to achieve higher severance payments out of court than in court. However, it must be pointed out that there is generally no legal entitlement to severance pay following termination of employment.

An exception to this is provided in Section 1a of the German Protection against Dismissal Act (Kündigungsschutzgesetz). Under this act, the employee is entitled to severance pay if he/she has received notice of dismissal based on urgent operational requirements and the employer has indicated that the employee will receive severance pay if the latter does not file a dismissal protection lawsuit after three weeks. The employee is entitled to half a month's pay for each year of service; this is due after the three weeks have expired.

9.4. Occupational pension scheme

Under Section 4a of the German Occupational Pensions Act (Betriebsrentengesetz), the expected amount of vested occupational pension entitlements upon termination of the employment relationship must be disclosed to the employee by the employer in accordance with the right to information.

9.5. Other payment claims

Separation agreements (Auflösungsverträge) should define arrangements for the payment of special benefits, such as bonuses, premiums or long-service payments, etc., in individual cases. The amount to which the employee is entitled and the payment date must be specified here. Ideally, a tax advisor should be consulted in this regard. This applies in particular if the employer intends to cancel the bonus or pay it with the severance payment.

What happens with the company car should also be regulated in this context. Ideally, the employee should be allowed to continue to use the car

for personal purposes as before until the date on which his/her employment ends. If this is not possible, a compensation payment amounting to 1% of the non-cash benefit should be agreed.

If the employee has a working time account (Wertkonto) at the company, it must be wound up as a result of this 'disruptive event' (Störfall). The savings must be paid out to the employee or, at his/her request, transferred to the German Pension Insurance Association (Deutsche Rentenversicherung Bund).

9.6. Release from duties

Another aspect that may need to be regulated is release from the performance of employment duties or an agreement on the granting of leave. When an employee is released from his/her duties, it must be agreed whether this is an irrevocable or revocable release. In the case of an irrevocable release from duties, the employer is permitted to cancel the outstanding holiday and leave entitlements. In return, the employer is forbidden from summoning the employee back to the company to complete any tasks as required. In the case of a revocable release from duties, the employee retains his/her holiday and leave entitlements but must be ready to perform any work that needs to be completed.

9.7. Other provisions

Otherwise, any further claims of the employee should be taken into account. These include the payment of travel expenses, the protection of business and trade secrets, the continued payment of compensation for employee inventions, company apartments, business documents, work equipment and employment documents.

Working time accounts that are held by the employee via the employer are usually paid out to the former by means of a 'disruptive event regulation' (Störfallregelung) or transferred to the German Pension Insurance Association. This option is handled separately in the separation agreement.

For details and information on wording, please refer to the dismissal and separation agreement checklist, which can be requested as a VAA information brochure at any time.

A special provision should be made for the reference (Zeugnis). Ideally, this should stipulate a grade and right of proposal as well as the issuing of an interim reference and final reference.

9.8. Post-contractual prohibition of competition

If a post-contractual prohibition of competition is agreed in the employment contract or in a special document, forbidding the employee from engaging in competitive activity after the employment relationship has ended in return for payment of compensation, this post-contractual prohibition of competition can be revoked in the separation agreement. Neither contracting party may then derive any more claims from this. If this matter is not covered by the separation agreement, the prohibition of competition generally remains in force.

However, particular caution is required if a separation agreement does not contain a provision on a post-contractual prohibition of competition but a general and comprehensive compensation clause is agreed.

This is because, according to the case law of the German Federal Labour Court (Bundesarbeitsgericht), a compensation clause of this kind may lead to the employee's claims for compensation for observing competitive restriction being deemed settled.

Moreover, the employer has the option to unilaterally waive the prohibition of competition prior to termination of the employment relationship. A waiver of this kind must be made in writing – with the consequence that the employee is immediately released from the prohibition of competition and the employer must continue to pay compensation for observing competitive restriction for a period of 12 months following receipt of the waiver.

This obligation, which arises from the provisions of the German Commercial Code (Handelsgesetzbuch) and the Framework Collective Agreement for University Graduates (Akademiker-MTV), may also be relevant to the dissolution negotiations and lead to the agreement of additional severance pay in order to cover claims for compensation for observing competitive restriction. Furthermore, in accordance with legal requirements, compensation for observing competitive restriction must amount to at least 50% of the last contractual remuneration received.

The Framework Collective Agreement for University Graduates even provides for compensation for observing competitive restriction of 100% of the last contractual remuneration for the entire term of the post-contractual prohibition of competition. Remuneration includes the contractual salary, bonus and, if applicable, the non-cash benefit of 1% of a company car used for personal purposes. Some other income may also be taken into consideration.

9.9. Compensation clause

Caution is required when agreeing a compensation clause. A general compensation clause in a separation agreement indicates that there are no longer any mutual claims arising from the employment relationship and its termination. A clause of this kind may result in the employee waiving claims that were neither the subject of the severance negotiations nor were they covered by the separation agreement.

Even if compensation clauses formulated in general terms do not necessarily result in the cancellation of statutory and collective agreement claims, they may lead to considerable legal problems. Care should therefore be taken to ensure that it is made clear in the text of the separation agreement which rights are not affected by the compensation clause (for example, claims arising from the occupational pension scheme, the issuing of references, employee-inventor compensation or compensation for observing competitive restriction in accordance with a post-contractual prohibition of competition).

10. SOCIAL WELFARE CONSEQUENCES OF SEPARATION AGREEMENTS

If the employee is unable to transfer seamlessly to a new employment relationship, termination of the employment relationship by means of a separation agreement may have detrimental consequences in respect of unemployment benefit, health and long-term care insurance, and pension insurance.

10.1. Unemployment insurance

If the employee has to claim unemployment insurance, termination of the employment relationship by means of a separation agreement may result in a waiting period (Sperrzeit) under Section 159 of Book III of the German Social Code (SGB III) of up to 12 weeks before the employee can receive unemployment benefit. Moreover, the imposition of a waiting period would reduce the total period of receipt of unemployment benefit by up to a quarter, taking into account the 12-week waiting period.

A waiting period is always imposed if the employee terminated the employment relationship or caused the employment relationship to be terminated due to conduct in breach of his/her employment contract without having a compelling reason for this conduct. VAA members can find out more in the VAA information brochure Arbeitslosengeld und Sperrzeit (“Unemployment benefit and the waiting period”).

In addition, if a severance payment is made pursuant to Section 158 SGB III, suspension of the entitlement to unemployment benefit may also be ordered. Suspension of unemployment benefit may be considered if the date on which the employment relationship ends, as regulated in the separation agreement, does not coincide with the end of the ordinary period of notice, but instead the ordinary period of notice has been shortened. In this case, entitlement to unemployment benefit is suspended from the end of the employment relationship until the date on which the employment relationship would have ended if this period of notice had been observed, but for a maximum of one year.

There is not usually any other way of setting off severance pay against unemployment benefit unless the severance pay is “hidden” remuneration or leave compensation. In this scenario, entitlement to unemployment benefit may also be suspended pursuant to Section 157 SGB III.

It is important that any employee who has been given notice of dismissal or is leaving a company by means of a separation agreement registers as a jobseeker at the competent employment agency (Agentur für Arbeit) as soon as possible. In any event, he/she should do so no later than three months before the end of the employment relationship or, if the end is within the three-month notice period, immediately (i.e. within three working days) after receiving notice of dismissal or after concluding the separation agreement and thus finding out the date on which the employment relationship will end. If an employee who has been given notice of dismissal does not comply with this obligation, a waiting period of one week will be imposed.

10.2. Health and long-term care insurance

During a period of unemployment, the unemployed person is a compulsory member of the statutory health and long-term care insurance scheme. However, a prerequisite is that the unemployed person is actually claiming unemployment benefit. If a waiting period has been imposed before he/she is able to receive unemployment benefit, the previously insured person continues to be protected by health and long-term care insurance for one month after leaving the employment relationship.

From the start of the second month until the end of the 12th week of a waiting period, the unemployed person continues to remain a member of the health and long-term care insurance scheme. To this end, the unemployed person is treated as if he/she were in fact receiving unemployment benefit from the fifth to the 12th week of a waiting period.

However, if a suspension of unemployment benefit is imposed pursuant to Section 158 SGB III, the unemployed person must take out voluntary insurance in the statutory health and long-term care insurance scheme if he/she does not have private health and long-term care insurance.

10.3. Pension insurance

During a period of unemployment, the German Federal Employment Agency (Bundesagentur für Arbeit) pays contributions to the statutory pension insurance scheme, but only for periods in which the unemployed person is actually receiving unemployment benefit. Unlike health and long-term care insurance, however, no contributions are paid to the relevant pension insurance institution for periods in which the unemployed person does not receive unemployment benefit, for example because of the waiting period.

11. TAX TREATMENT OF SEVERANCE PAYMENTS

11.1. Full taxation

In general, severance payments due to a dissolution of the employment relationship initiated by the employer or imposed by a court must be taxed in full. Social insurance contributions are not levied.

Each individual VAA member should consult an experienced tax advisor to discuss the possible application of the “one-fifth rule” (Fünftelregelung), the associated payment of severance pay, the contribution of some of this severance pay to a pension scheme and the best possible payment date.

DISMISSAL CHECKLIST – SAMPLE SEPARATION AGREEMENT

1. INTRODUCTION

The aim of this leaflet is to give a brief overview, in the form of a checklist, of the legal aspects that must be considered when employment is terminated by the employer, to present possible content of a separation agreement on the basis of examples, and to provide assistance with wording.

However, this leaflet is not intended to replace the information brochure “Rights of Termination” (December 2019 edition) from the VAA brochure series, which provides a detailed overview of all dismissal protection rights, including the treatment of social security and taxation issues.

In addition to termination by the employer, termination of contract by mutual agreement is an instrument that is widely used in practice to end an employment relationship. Termination of the employment relationship by mutual agreement is referred to below by the umbrella term “separation agreement”.

If the employment relationship ends by mutual agreement without being preceded by a notice of dismissal, this is referred to as a “standard” separation agreement. If it is preceded by a notice of dismissal that was not agreed between the parties, this is what is known as a “genuine” termination agreement. If, on the other hand, the preceding notice of dismissal is only part of an agreement between the contracting parties, this is a “non-genuine” termination agreement.

Ultimately, there is always the not insignificant risk that the employee involved in the termination of his/her employment relationship will face a waiting period (Sperrzeit) combined with a reduced period of receipt of unemployment benefit. One way of avoiding this is to consult the VAA lawyers.

Senior executives, in particular, prefer a quick and fair arrangement for the termination of their employment relationship in the form of a separation agreement to an often-lengthy dismissal protection lawsuit. A separation agreement is an effective means of preventing both contracting parties from dismantling the employment relationship and frequently makes the most economic sense.

In addition to conduct that is always contractually compliant, the best basis for successfully negotiating a separation agreement is the agreement of optimal conditions when concluding the employment contract, in particular long periods of notice under Section 2 item 2a of the Framework Collective Agreement for University Graduates Working in the Chemical Industry (Akademiker-MTV).

To ensure a successful negotiation strategy, it is first essential for the employee to be clear whether he/she wishes to take legal action to pursue his/her continued employment, with all the associated risks, or whether he/she wishes to end the employment relationship by mutual agreement on truly reasonable terms.

When negotiating the conclusion of a separation agreement, the employee should always argue objectively and calmly, even if he/she is understandably hurt by the employer’s wish to part company.

It goes without saying that the employee will continue to perform his/her contractual obligations without restriction during and after the conclusion of the agreement negotiations.

The preparation of a joint negotiation concept, taking into account the relevant factual and legal situation, is one of the key advisory services provided by the VAA lawyers in connection with the termination of employment relationships. As part of this advisory service, the VAA member will be presented with possible contents of a separation agreement tailored to his/her personal situation.

It is not just about the criteria for assessing the severance payment and

its specific amount. Another element of the separation agreement is that it sets out the terms on which the employment relationship ends, taking into account the rights and obligations of both parties.

There are no legal standards for determining severance pay.

There is widespread use of a rule of thumb according to which a severance payment amounting to half a month's gross salary per year of service is paid when an employee loses his/her job. However, this rule of thumb is based on court settlement proposals in conciliation hearings. In the case of senior executives, the labour courts take into account not just the contractual salary, but also the bonus and a 1% non-cash benefit for company cars used for personal purposes (one twelfth of the annual income).

Senior executives can certainly achieve higher severance payments when negotiating a separation agreement in order to avoid a compulsory redundancy. Experience has shown that these payments are between three quarters and one and a half times the gross monthly salary per year of service or the corresponding pro rata annual remuneration.

Particularly in the case of short periods of notice, it may make sense for the employee threatened with dismissal to seek an extension of the employment relationship beyond the period of notice during the contract negotiations in order to avoid imminent unemployment, and to accept less severance pay in return. An appropriate regulatory measure here is a provision according to which, if the employee succeeds in entering into a new employment relationship before the contractually fixed termination date, the remuneration still outstanding until the end of the contract term is paid as an additional severance payment.

To ensure that a separation agreement is drafted as effectively as possible, it is essential that the basic principles of protection against dismissal are taken into account when negotiating the agreement. This is another area of focus for the VAA lawyers in their advisory activities.

2. CHECKLIST

2.1. Determination of circumstances of the parties

- Social data of employee (length of service, age, maintenance obligations and severe disability), status (employee not covered by collective agreements/executive staff member)
- Name/company name of employer, place of business, right of representation, membership of employers' association

2.2. Receipt of the notice of dismissal and time limit for making an appeal

- Determination of the exact date of receipt of the written notice of dismissal
- Determination of the expiry of the three-week time limit for making an appeal pursuant to Section 4 of the German Protection against Dismissal Act (KSchG)

2.3. Formalities of the dismissal

- Compliance with the written-form requirement pursuant to Section 623 of the German Civil Code (BGB)
- Examination of the possibility to immediately reject notices of dismissal pursuant to Section 174 BGB (original power of attorney missing)

2.4. Applicability of the German Protection against Dismissal Act

- Determine size of the business pursuant to Section 23 (1) KSchG (workforce of more than five or more than ten employees)
- Expiry of six-month waiting period pursuant to Section 1 (1) KSchG

2.5. Involvement of employee representatives

- Due consultation of the works council pursuant to Section 102 (1) of the German Works Constitution Act (Betriebsverfassungsgesetz, BetrVG)
- Examination of an objection of the works council, made within the time limit and in due form, to the intended dismissal pursuant to Section 102 (2, 3) BetrVG (initiates the special right to continuation of employment pursuant to Section 102 (5) BetrVG)
- Due consultation of the executives' committee pursuant to Section 31 (2) of the German Executives' Committee Act (Sprecherausschussgesetz, SprAuG)

2.6. Determine type of dismissal and reasons for dismissal

- Personal reasons, usually illness-related
- Conduct-related reasons (relevant warning usually required)
- Operational reasons
  - Continued employment in a vacant position company-wide
  - Dismissal with the option of modified conditions of employment (Änderungskündigung)
  - Company-wide social selection, comparing employees at the same hierarchical level (horizontal comparability) taking into account length of service, age, maintenance obligations and severe disability)
  - Existence of social selection guidelines in a collective agreement or works agreement pursuant to Section 1 (4) KSchG
  - Existence of a list of names in a reconciliation of interests between employer and works council pursuant to Section 1 (5) sentence 1 KSchG
- Termination without notice for a compelling reason pursuant to Section 626 (1) of the German Civil Code (Bürgerliches Gesetzbuch, BGB) – observe compliance with the two-week time limit pursuant to Section 626 (2) BGB
- Dismissal with the option of modified conditions of employment (acceptance of the offer or consideration of acceptance in due time subject to Section 2 KSchG or rejection of the offer, then termination of employment)

2.7. Existence of special protection against dismissal

- Works council members and other works constitution officers pursuant to Section 15 KSchG in conjunction with Section 103 BetrVG (members of the executives' committee and employee representatives on the supervisory board do not enjoy special protection against dismissal)
- (Expectant) mothers pursuant to Section 9 of the German Maternity Protection Act (Mutterschutzgesetz, MuSchG)
- Employees entitled to parental leave pursuant to Section 18 of the German Parental Allowances and Parental Leave Act (Bundeselterngeld- und Elternzeitgesetz, BEEG)
- Severely disabled employees pursuant to Section 85 et seq. of Book IX of the German Social Code (Sozialgesetzbuch IX, SGB IX)
- Employees on care leave pursuant to Section 5 of the German Care Leave Act (Pflegezeitgesetz, PflegeZG) and on family care leave pursuant to Section 2 of the German Family Care Leave Act (Familienpflegezeitgesetz, FPfZG) in conjunction with Section 5 PflegeZG
- Company officers
  - Data protection officers pursuant to Section 4f of the German Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG)
  - Immission control officers pursuant to Section 58 (2) of the German Federal Immission Control Act (Bundesimmissionsschutzgesetz, BImSchG)
  - Major accident officers pursuant to Section 58d BImSchG in conjunction with Section 58 (2) BImSchG
  - Water protection officers pursuant to Section 21f (2) of the German Water Resources Act (Wasserhaushaltsgesetz, WHG)
  - Waste management officers pursuant to Section 55 (3) of the German Closed Substance Cycle and Waste Management Act (Kreislaufwirtschafts- und Abfallgesetz, KrW-/AbfG) in conjunction with Section 58 (2) BImSchG
- Special protection against dismissal due to collective agreement or works agreement
- Special protection against dismissal as an elected representative, regulated in the relevant laws for the federal, state, district and municipal level

2.8. Compliance with the period of notice

The period of notice that is applied is always the longer period that is more advantageous for the employee. This results from:

- the legal provisions pursuant to Section 622 (1, 2) BGB
- the collective agreement regulations pursuant to Section 2 item 2a of the Framework Collective Agreement for University Graduates Working in the Chemical Industry (Akademiker-MTV)
- agreements in individual contracts

2.9. Existence of a post-contractual prohibition of competition pursuant to Section 6 of the Framework Collective Agreement for University Graduates Working in the Chemical Industry (Akademiker-MTV) and pursuant to Section 74 et seq. of the German Commercial Code (HGB)

2.10. Occupational pension scheme

2.11. Listing of any other items

These include, for example, remuneration (13th or 14th month's salary, special payments, Christmas bonuses, profit-based bonus or other bonus), rights to employee-inventor compensation, company apartment, company car, (interim) reference and employment documents.

2.12. Examination of whether there are any collective agreement or individual contract (double) cut-off periods, commitment clauses or repayment prohibitions

2.13. Most important contents of a separation agreement/ checklist – sample agreement

The checklist below and the sample agreement set out the most important contents of a separation agreement. Neither the checklist itself nor the sample agreement is intended to be exhaustive. The particular features of the individual case must always be taken into account when drafting the contents of a separation agreement.

However, a separation agreement – which must be made in writing pursuant to Section 623 BGB – should always include the following regulatory contents:

- Date of and reason for termination – observe waiting period (Sperrzeit) for unemployment benefit
- Continued payment of the contractual remuneration until the end of the contract (ongoing monthly payments, one-off and special payments, premium, profit-based bonus, other bonus, any other outstanding elements of remuneration)
- Release from duties (revocable or irrevocable), with any income from interim employment not taken into account (please note: there is also a contractual prohibition of competition during the release phase)
- Severance pay with heritability clause
- Entitlement of the employee to leave the company prematurely with concurrent payment of the released remuneration as additional severance pay
- Company car
- Company apartment
- Post-contractual prohibition of competition
- Rights to employee-inventor compensation
- Occupational pension scheme
- Outplacement
- (Interim) reference
- Return of work items (mobile phone, laptop, PC, etc.)
- Confidentiality obligation
- Employment documents
- Compensation clause

SAMPLE SEPARATION AGREEMENT

The following

Separation Agreement

is made between

Ms/Mr ...

– hereinafter referred to as “Employee” –

and

the company ...

– hereinafter referred to as “Employer” –

Section 1 End of employment

The employment relationship that has existed between Employee and Employer since ... will end at the close of ..., observing the ordinary period of notice, to avoid an otherwise inevitable compulsory redundancy. Restructuring activities at Employer are resulting in the loss, without replacement, of Employee’s job. There is no possibility of continued employment.

Section 2 Termination of employment relationship

Until the termination date, the employment relationship will be terminated and settled in accordance with the contract, unless provided otherwise. In particular, Employee will continue to receive his/her gross monthly salary of ... euros. For the current financial year, Employee will receive a bonus payment based on the 100% fulfilment of his/her individual goals according to the applicable arrangement at Employer. For the following financial year, this bonus will be paid on a pro rata basis.

Section 3 Release from duties

Employee is irrevocably released from the obligation to perform work with continued payment of the contractual remuneration until the end of the employment relationship.

There is agreement between the parties that there are no more holiday and leave entitlements. Holiday is already granted in kind. Any income from interim employment undertaken by Employee during his/her release from duties will not be taken into account.

Section 4 Severance pay

On account of the termination of the employment relationship, Employer will pay Employee severance pay of ... euros to compensate for the loss of his/her job in appropriate application of Sections 9 and 10 of the German Protection against Dismissal Act (KSchG) in conjunction with Sections 24 and 34 of the German Income Tax Act (EStG). The entitlement to severance pay will arise upon signature of this Agreement and is thus heritable.

Section 5 Premature departure from the employment relationship

Employee is entitled to terminate the employment relationship at any time by giving one week’s written notice to the end of the calendar month. In the event of premature termination by Employee, the outstanding contractual remuneration from the date of premature departure to the date of termination will be paid as additional severance pay. Premature termination of the employment relationship is in accordance with the wishes and interests of Employer.

Section 6 Company car

Employee is entitled to use the company car ... provided to him/her

under the existing contractual terms and conditions until the date on which his/her employment ends. He/she is obliged to return this car to Employer, along with vehicle documents, keys, fuel card and any other accessories, by the date on which his/her employment ends.

Section 7 Post-contractual prohibition of competition

The post-contractual prohibition of competition that exists between the parties is not affected by this Separation Agreement.

Or:

The parties revoke the post-contractual prohibition of competition with immediate effect.

Section 8 Employee inventions

Employee will receive compensation of ... euros for the employee inventions listed in the appendix.

Or:

Employee will receive a final compensatory payment of ... euros for all inventions in which he/she is involved as inventor or co-inventor.

Section 9 Outplacement

Employer will assist Employee in his/her search for subsequent employment. To this end, Employer will bear the costs of an individual outplacement programme of up to ... euros plus value-added tax.

Section 10 Occupational pension scheme

Employer has acquired a vested entitlement to benefits under Employer's occupational pension scheme. Certification pursuant to Section 4a of the German Occupational Pensions Act (BetrAVG) will be issued separately.

Or:

Upon termination of the employment relationship, Employer grants Employee the right to continue the direct insurance policy (no. ...) taken out with ... insurance company and will submit the necessary declarations to the insurer at its expense.

Section 11 Reference

Employer will immediately issue Employee with a favourably formulated interim reference, containing an assessment of the performance and conduct of Employee (qualifiziertes Zeugnis), with the grade ... Employee has a right of proposal. Employer will only deviate from Employee's proposals for a compelling reason. Upon termination of the employment relationship, Employer will issue Employee with an appropriate final reference.

Section 12 Return of company items

Employee will return the items provided to him/her by Employer (mobile phone, laptop, PC, etc.) to the latter no later than one week after signing this Agreement.

Section 13 Employment documents

Upon termination of the employment relationship, Employer will duly fill out and send the employment documents to Employee.

Section 14 Confidentiality

Even after the employment relationship has ended, Employee will hold in confidence all confidential business matters and procedures of Employer, companies affiliated with it and their customers that became known to him/her in the course of his/her work.

Section 15 Settlement clause

The contracting parties agree that upon fulfilment of the above obligations, all mutual claims of the parties arising from the employment relationship and its termination will be settled.

IMPRINT ——

Publisher:
VAA – FÜHRUNGSKRÄFTE CHEMIE, MOHRENSTRASSE 11 – 17, 50670 KÖLN
Concept:
Ilga Möllenbrink
Editing:
Ilga Möllenbrink, Timur Slapke
Design & layout:
Ina Brocksieper, Ursula Statz-Kriegel
Printing:
flyeralarm GmbH, Alfred-Nobel-Straße 18, 97080 Würzburg

VAA
Mohrenstraße 11 – 17
50670 Köln
Tel + 49 221 160010
Fax + 49 221 160016
Mail info@vaa.de

VAA
Kaiserdamm 31
14057 Berlin
Tel + 49 30 3069840
Fax + 49 30 30698420
Mail info.berlin@vaa.de

www.vaa.de

vaa
DIE VERTRETUNG DER
FACH- UND FÜHRUNGSKRÄFTE
IN CHEMIE UND PHARMA