

## **Association Leadership Academy**

# Justifying dismissals & Flexibility needs

▶ **Sophie Maes**  
Attorney-Partner

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# 1. Justifying dismissals

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## Case study

- ▶ You are running an international not for profit organisation and you want to dismiss an employee.
- ▶ Do you have to justify the dismissal?



# 1. Justifying dismissals

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## Since 1 April 2014: Motivation

- ▶ Every blue **and** white collar employee
- ▶ With at least six months service

=> Are taken into account:

- previous consecutive fixed-term employment contracts;
- temporary agency employment contracts;  
for an equal position with the same employer



# 1. Justifying dismissals

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## Since 1 April 2014: Motivation

### ► Exceptions

- Termination of temporary agency employment contracts
- Termination of employment contracts for students
- Dismissal in view of (early) retirement
- Dismissal in the framework of collective dismissal, closure or termination of the activity, multiple dismissals as defined on industry branch level
- When a specific dismissal procedure, prescribed by law or CBA, has to be followed (ex. employees protected within the framework of social elections, special dismissal procedure provided by CBA, ...)

# 1. Justifying dismissals

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## Since 1 April 2014: Motivation

- ▶ After request of the employee
  - within 2 months following the end of the employment contract (indemnity)
  - within 6 months following the notification of the notice period, but without exceeding 2 months following the effective termination of the employment contract (notice period)
  - by registered mail
  
- ▶ Possibility, but no obligation for the employer to communicate the reasons of dismissal at his own initiative (without request)
  
- ▶ (!) Obligation for the employer to declare the reason for dismissal on the so-called “unemployment form” (“C4”)

# 1. Justifying dismissals

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## Since 1 April 2014: Motivation

- ▶ Answer of employer
  - within two months following 3<sup>rd</sup> day after the request has been sent by registered mail
  - by registered mail
  - must mention the specific reasons
  - use of correct language
  - not required if employer already communicated the reasons for dismissal at his own initiative
  
- ▶ Penalty = 2 weeks of salary
  - if employer does not respond (+ no communication at own initiative)
    - Basis of calculation?
    - No social security contributions ( art. 19, §2, 2° KB 28/11/1969 according to the advice no. 1.891 of the NLC)
    - Can be cumulated with the indemnity for a manifestly unfair dismissal

# 1. Justifying dismissals

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## Since 1 April 2014: manifestly unreasonable dismissal

- ▶ Dismissal is manifestly unreasonable (indefinite EC)
  - if based on reasons which are not connected to the ***suitability or behaviour*** of the employee  
*and/or*
  - if not based on the ***necessities*** of the organisation of the company, institution or service  
*and*
  - would never have been approved by a normal and reasonable employer

# 1. Justifying dismissals

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## Since 1 April 2014: manifestly unreasonable dismissal

### ► Penalty?

⇒ 2 options for employee

(1) Indemnity of 3 to 17 weeks' salary

- depending on the degree of the manifest unreasonableness

(2) Indemnity based on actual losses

- Employee must prove:
  - fault made by the employer
  - losses
  - causality between fault and losses





# 1. Justifying dismissals

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## Since 1 April 2014: manifestly unreasonable dismissal

Decision of 8 October 2015 (Labour Tribunal Leuven)

- 3 reasons for dismissal:
  - Negative impact on working of the organisation as a result of multiple absences (justified absences (sick notes))
  - Bad example for other employees since “leading” position
  - Complaints from clients/employees concerning a-commercial attitude
- Decision Labour tribunal ? Manifestly unreasonable or not ?

# 1. Justifying dismissals

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## Since 1 April 2014: manifestly unreasonable dismissal

Decision of 8 October 2015 (Labour Tribunal Leuven)

- No manifestly unreasonable dismissal:
  - Marginal assessment of employer's decision, no opportunity test -> tribunal does not check (i) whether employer took the right decision but only if reasons are not manifestly unreasonable and (ii) the circumstances of the dismissal
  - Absence of individual profitability has an impact on the good working of the organisation
  - The employee held a "leading" position and was not easily replaceable.

# 1. Justifying dismissals

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## Action Plan

- ▶ You must be able to justify a dismissal + consistency with C4-form
- ▶ **Suitability/behaviour** or **economic/organisational needs**

## Proof + case building !

- ▶ Keep track of any performance/behaviour issue in **writing** (appraisals, warnings, performance plans, etc)
- ▶ Clause in settlement agreement



## 2. Flexibility needs

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### Case study A

- ▶ You are running an international not for profit organization and the workload has seriously **increased**.
  
- ▶ There is no budget/will to hire an new employee under an employment contract for indefinite time.
  
- ▶ What are your options?
  - New resources:
    - Internally: fixed-term employment contract / Defined work
    - Externally: temporary agency work or subcontracting
  - Temporary increase the working time – small flexibility

## 2. Flexibility needs

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### Case study A

#### Option 1: Internal

Fixed-term employment contract / employment contract  
for a defined work



## 2. Flexibility needs

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### 1. Internal – Fixed-term employment contract / Defined work

- ▶ Hire a new employee under a fixed-term contract or for a defined work
  
- ▶ Fixed-term: no minimum/maximum duration (exception: subsequent fixed-term contracts)
  
- ▶ Defined work
  - clearly defined
  - extent & duration can be assessed with reasonable certainty

## 2. Flexibility needs

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### 1. Internal - Fixed-term employment contract / Defined work

#### ▶ Formalities

- written employment contract, for each employee individually
- duration & end date/event
- Signed by both parties at the latest at the entry into service
- **penalty**: employment contract for indefinite time

#### ▶ Termination ?

- Automatically at the end of the term or realisation of the defined work
- Serious Cause



## 2. Flexibility needs

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### 1. Internal – Fixed-term employment contract / Defined work

#### ▶ Early termination ?

- New 2014: normal notice periods during first half of agreed period and maximum 6 months
- Only for first contract + watch out for periods of suspension !
- If not: remuneration up to the end with max 2 x severance indemnity in case of indefinite employment contract

#### ▶ Performing after the agreed term ?

- Employment contract for an indefinite term



## 2. Flexibility needs

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### 1. Internal – Fixed-term employment contract

▶ **Example 1** : employment contract 8 months

4 months

4 months



- Rule 1: normal notice first half of duration= 4 months
- Rule 2: normal notice first 3 months= 2 weeks and 4th month= 4 weeks
- Rule 3: dismissal after 4 months → sanction = remuneration end 8th month with max double normal notice
  - 5th + 6th month= 4 weeks \* 2= 8 weeks < 3 / 2 months
  - 7th + 8th month: 6 weeks \* 2= 12 weeks > up to end

## 2. Flexibility needs

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### 1. Internal – Fixed-term employment contract

- ▶ Subsequent fixed-term employment contracts
  - If justified by the nature of the work or by the circumstances
    - \* e.g. economical situation
    - \* restrictive interpretation
    - if not: indefinite duration
  - Exceptions
    - (1) max 4 contracts, each at least 3 months, max 2 Y in total
    - (2) max 3 Y, each at least 6 months, permission Social Inspectorate

## 2. Flexibility needs

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### Case study A

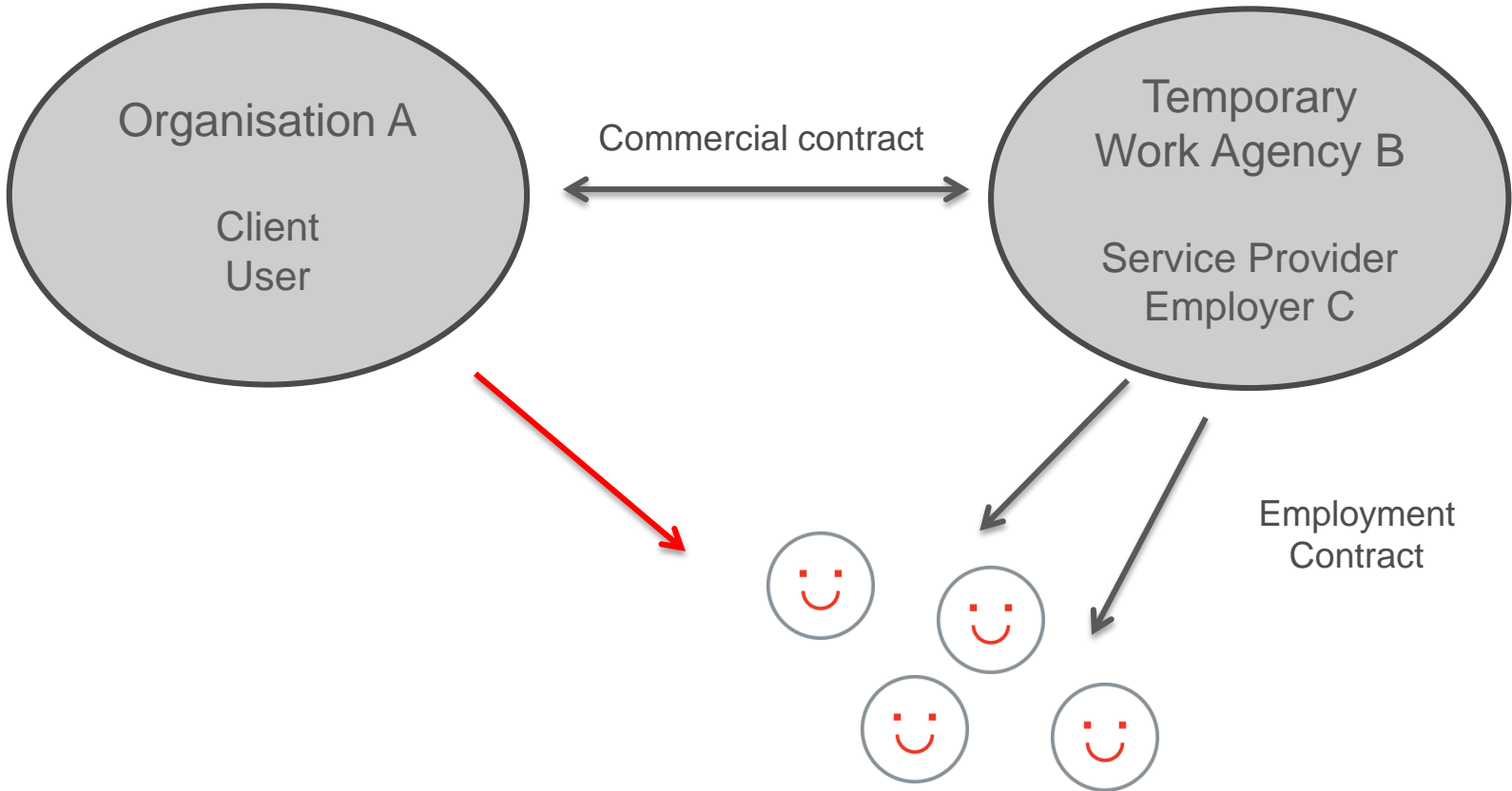
#### Option 2: External

Temporary Agency Work or Subcontracting



# 2. Flexibility needs

## 2. External



## 2. Flexibility needs

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### 2. External

- ▶ Watch out for Prohibited Lease of Employees (“PLE”) !!!
- ▶ *Employer leases the employee to a third party who (1) **uses** the employee and (2) exercises (a part of) the employers’ **authority** over the employee*
- ▶ In principle forbidden
- ▶ Exceptions:
  - Temporary agency work **if** conditions are complied with
  - Subcontracting **if** conditions are complied with

## 2. Flexibility needs

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### 2. External

#### ▶ Prohibited Lease of Employees (“PLE”)

#### ▶ Civil penalties

- Employment contract for indefinite time between user (organisation) and employee
- User (organisation) and employer are jointly liable for social contributions, remuneration, benefits and indemnities

#### ▶ Criminal/administrative penalty level 3

- Criminal fine between 600 and 6,000 EUR or administrative fine between 300 and 3,000 EUR x number of employees (max. x 100)



## 2. Flexibility needs

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### 2. External – Temporary Agency Work

- ▶ Employee with an employment contract with Temporary Work Agency A but performing for and under the authority of Organisation B
- ▶ Only possible if:
  - the conditions/formalities are complied with
  - Temporary Work Agency (employer) has special license



## 2. Flexibility needs

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### 2. External – Temporary Agency Work – replacement of permanent worker

Reason for replacement	Formalities	Duration	Extension ?
Suspension (e.g. maternity, sickness, ..)	N/A	Unlimited	
End of EC - Notice - Serious cause	If no TUD - Notification to Social Fund for Temporary Agency Workers (20) - Second Notification after 5 m.	6 months	6 months (same formalities)
End of EC (other reason)		6 months	6 months (formalities)



## 2. Flexibility needs

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### 2. External – Temporary Agency Work – temporary increase of work

Reason	Formalities	Duration	Extension
<ul style="list-style-type: none"> <li>- Temporary increase of work</li> </ul>	<ul style="list-style-type: none"> <li>- If no TUD:</li> <li>- Notification to Social Fund for Temporary Agency Workers (20)</li> <li>- Second Notification after 5 m.</li> </ul>	<ul style="list-style-type: none"> <li>- If no TUD:</li> <li>- 6 months</li> </ul>	<ul style="list-style-type: none"> <li>- If no TUD:</li> <li>- First extension (6 months)</li> <li>- Second extension 6 months (application with Commission Good Services)</li> <li>- Third extension 6 months (consent trade unions in Joint Labour Committee)</li> <li>- Max 24 months if formalities are complied with</li> </ul>



## 2. Flexibility needs

### 2. External – Temporary Agency Work – exceptional work

Reason	Formalities	Duration	Extension
Exceptional work <ul style="list-style-type: none"> <li>- Congresses, exhibitions, annual fairs</li> <li>- Secretariat for expats</li> <li>- loading trucks</li> <li>- Short performance of specialised tasks**</li> <li>- Accidents</li> <li>- Inventories and balance sheets (7 days)</li> </ul>	If no TUD: <ul style="list-style-type: none"> <li>- No except notification to Social Inspectorate in case of **</li> </ul>	3 months (longer in limited number of cases)	If no TUD: <ul style="list-style-type: none"> <li>- First extension (6 months)</li> <li>- Second extension 6 months (application with Commission Good Services)</li> <li>- Third extension 6 months (consent trade unions in Joint Labour Committee)</li> </ul>

## 2. Flexibility needs



### 2. External – Temporary Agency Work – Insertion

Reason	Formalities	Duration	Extension
<ul style="list-style-type: none"><li>- To fill in vacancy ('test')</li></ul>	<ul style="list-style-type: none"><li>- If no TUD:</li><li>- No formalities</li></ul>	<ul style="list-style-type: none"><li>- Max 3 temporary agency workers may be tested per vacancy</li><li>- Min 1 week - max 6 months per temporary agency worker</li><li>- Max 9 months in total per vacancy</li></ul>	<ul style="list-style-type: none"><li>- No</li></ul>

## 2. Flexibility needs

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### 2. External – Temporary Agency Work

#### ▶ Obligations user (Organisation):

- ensure compliance with working time rules (working schedules), health & safety at work, Sunday work and work on public holidays, part-time work, protection of pregnant employees etc
- access to collective facilities (canteen, child care, transport)
- access to job vacancies (e.g. via general posting)

#### ▶ Employment contract for indefinite time if

- execution after the end of the temporary agency contact
- work outside legal framework/limits
- the user gives wrong information (insertion)



## 2. Flexibility needs

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### 2. External – Temporary Agency Work

► Obligations Temporary Work Agency:

- License (regional)
- Strict formalities commercial contract + employment contract temporary agency worker
- **Equal pay principle !!**
- **Also for foreign Temporary Work Agencies !**



## 2. Flexibility needs

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### 2. External – Subcontracting

- ▶ Provision of services
  
- ▶ User (Organisation) may give limited instructions to employees of service provider only if:
  - agreement in **writing** between “user” (Organisation) and employer (service provider)
  - agreement must **clearly** and **in detail** list exact instructions which can be given by “user”(organisation)
  - instructions may not, in any way, undermine the “core” employer’s authority over the employees, AND
  - factual situation must entirely correspond to wording of agreement

If not: presumption of Prohibited Lease of Employees (“PLE”)

## 2. Flexibility needs

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### 2. Subcontracting – Action Plan to reduce risk of PLE

- ▶ Make sure formalities are complied with:
  - agreement in writing or annex to existing agreement with instruction clause
  - (“user” : *inform WC/CPW/TUD of existence of agreement and hand copy of instructions timely if so requested* )
- ▶ Observe following rules of thumb in practice:
  - provided service must be real (no mere lease of employees)
  - “core” employer’s authority must always remain with employer:
    - hiring/dismissal
    - remuneration and employment conditions
    - holidays
    - sickness
    - disciplinary penalties
  - make distinction with own employees (organisational chart, e-mail address, telephone list etc)

## 2. Flexibility needs

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### Case study A

#### Option 3:

Increase of working time ?





## 2. Flexibility needs

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### 3. Increase of working time ?

- ▶ Normal working time: 38h
  
- ▶ Overtime (not for exempt employees)
  - Compensatory time off
  - Supplement (50/100 %)
  - Mostly max limit of 11h/day – 50h/week
  - Only in exceptional situations
    - exceptional increase of work
      - permission of TUD and Social Inspection needed
      - notification to sub-regional unemployment services
    - inventories and balances sheets
    - - “Force Majeure”



## 2. Flexibility needs

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### 3. Increase of working time ?

#### ▶ Small flexibility ?

- Normal working time limits can be exceeded without overtime pay being due provided that average weekly working time is observed over reference period (max. 12 months)
- Formalities: CBA or work rules
- Daily: 2 h ↑↓ (max. 9h/day)
- Weekly: 5 h ↑↓ (max. 45h/week)
- New work schedules must be in work rules

## 2. Flexibility needs

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### Case study B

- ▶ The next month there is suddenly **less work**.
- ▶ Can you reduce the working time of your employees (if no small flexibility in place)?



## 2. Flexibility needs

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### Reduce the working time

#### Working time

- ▶ Essential element of the employment contract
- ▶ Can not be changed unilaterally by the employer
  - Employee establish constructive dismissal and claim severance indemnity
- ▶ Consent is needed



## 2. Flexibility needs

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### Reduce the working time

#### ▶ Minimum working time

- working period: 3 h

#### ▶ Part-time employment contract

- min. 1/3 full-time employee → “zero hours contracts” ?
- formalities

→ working time & work schedule in annex to employment contract to be signed at the latest when the employee starts in new schedule

→ publicity measures + formalities variable work schedule + deviations in special register

# Contact

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Sophie Maes  
Attorney-Partner

T +32 2 761 46 07  
[sophie.maes@claeysengels.be](mailto:sophie.maes@claeysengels.be)

[www.claeysengels.be](http://www.claeysengels.be)

A black and white photograph of a hand holding a white rectangular card. The card is centered in the frame and contains the text 'Partners with you.' in a serif font. The period at the end of the sentence is a solid red dot. The background is a blurred image of a person's torso and arms, suggesting a professional setting.

*Partners with you.*