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RESTRUCTURING STRATEGY: UK & EU PERSPECTIVES

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Presenters

Matthew Howse

Partner, London

Charles Dauthier

Partner, Paris

Dr. Walter Ahrens

Partner, Frankfurt

Pulina Whitaker

Partner, London

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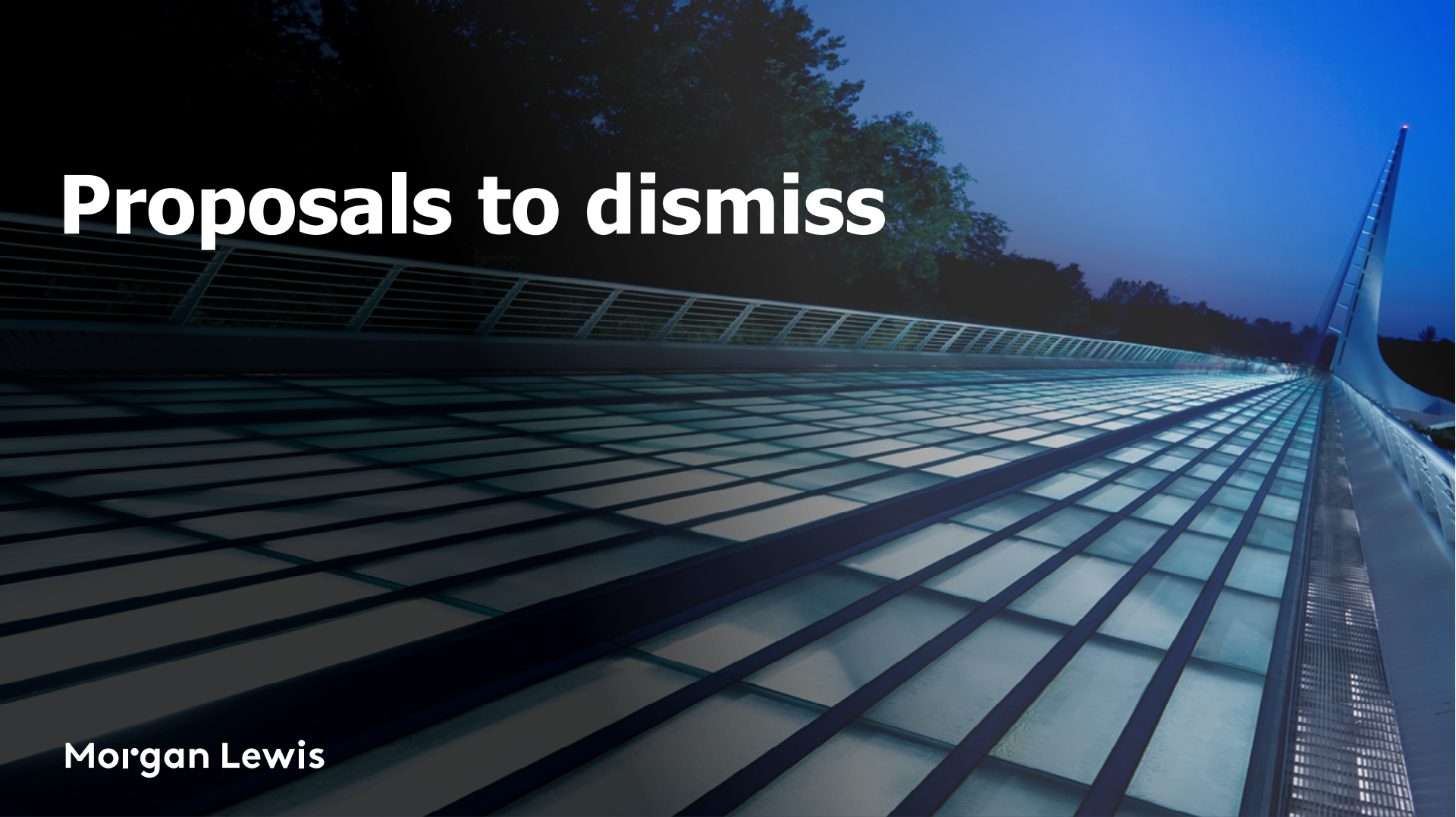
Agenda

- When do employers have **proposals** in place to dismiss, such that collective consultation obligations are triggered in the United Kingdom?
- How should employers **communicate** their restructuring and redundancy proposals to employees, and what are the risks with **remote and/or pre-recorded** redundancy announcements?
- Are there **lawful workarounds** to the applicable legal frameworks, and what are their risks and mitigating steps?
- Why is there increased scrutiny regarding **fire and rehire** practices, and what are the practical consequences?
- In **other key European jurisdictions**, what are the fundamental legal principles and statutory timelines that employers must be aware of, and what documentation must be in place?


Proposals to dismiss
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Proposals to dismiss

Collective consultation obligations are triggered where an employer is **PROPOSING TO DISMISS** as redundant 20 or more employees at one establishment within a period of 90 days or less.

Consultation obligations can therefore kick-in prior to an employer actually deciding to make redundancies.

Consultation should begin while the proposals are still at a formative stage.

When are proposals formed? Key points to note:

- More than a mere contemplation
- The employer's decision-making process must be sufficiently well advanced to have identified the fact that over 20 employees would be dismissed as redundant at one establishment within a period of 90 days or less
- Proposals can be formed even where alternatives to redundancies are also being considered

N.B. Proposals to dismiss can still be formed by an entity notwithstanding the fact that approval might be needed by a parent company to act on the proposal.

N.B. The number of any voluntary redundancies should still be taken into account in determining whether the trigger for collective redundancy consultation has been reached.

Communicating proposals & remote/pre-recorded redundancy announcements

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Communicating proposals 

Provision of Information (statutory information letter)

- Provision of certain required information to employee representatives, including:
  - Reasons for the proposed dismissal
  - Numbers and descriptions of employees whom it is proposed to dismiss as redundant
  - Methods of selecting employees who may be dismissed
- This information needs to be provided in writing
- The employer should provide sufficient information under each of the distinct heads to enable meaningful consultation to take place

Communicating proposals 

Overall communication process

- Employers tend not to want the employee representatives to be the sole source of information for affected employees
- Often, employers send letters to directly affected employees advising them of the proposals and the planned consultation arrangements
- Prudent for employers in large-scale redundancies to prepare employee briefings and communications, webcasts and intranet updates, and "Q and A" briefings during the consultation process to keep employees informed of developments
- Employers should also take care to identify employees on long-term sick leave, maternity, paternity, shared parental, adoption or parental leave, secondment and holiday, ensuring that they are included in the communication process
- Announcing possible redundancies at a very early stage in the process is likely to impact work production and decrease moral. Employees the company wishes to retain may start looking for alternative roles – balance to be struck
- Will employer be communicating with the whole pool of affected employees or just those selected as "at risk" of redundancy?

Remote/pre-recorded redundancy announcements

Remote and pre-recorded announcements

- **Legal Risks**
- **Non-Legal Risks**
- **Best Practice**

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Remote/pre-recorded redundancy announcements

- Pre-recorded redundancy announcements have made the headlines recently
- Issues can arise with pre-recorded redundancy announcements when they are made in lieu of a consultation process
- UK law is prescriptive about the process and nature of redundancy consultation and pre-recorded redundancy announcements can contravene such obligations
- Risk of unfair dismissal claims and/or for breaches of the collective consultation regime (where applicable)

Remote/pre-recorded redundancy announcements (legal risk) 

Collective consultation obligations are onerous.

Employers sometimes think their time is better spent making a job-loss announcement instead of any consultation process and compensating employees at levels commensurate with the amount they could obtain via a successful employment tribunal given:

- the disruption and management time spent complying with such obligations; and
- the company's expectation that any consultation would be fruitless in light of the prevailing business circumstances.

Although this might appear commercially attractive to some employers in administratively complicated or financially challenging circumstances, employers should bear in mind the significant legal risks inherent in this approach, as well as the non-legal risks.

Remote/pre-recorded redundancy announcements (non-legal risk)

Announcing redundancy dismissals through a pre-recorded message has the potential to give rise to wide-ranging employee relations issues and in turn, the risk of significant reputational damage.

The detrimental impact of these announcements on affected employees is clear, in that it can paint an unsympathetic picture of the employer and affect employee trust.

An important factor in this respect is that such an approach may decrease the employer's chances of employees engaging in settlement discussions and mitigating its risk of claims as a result.

Further, given its controversial nature, this method also risks affecting the morale of existing employees who are not in line for redundancy.

Remote/pre-recorded redundancy announcements (unintended consequences)

Employers who adopt this method also run the risk of various unintended consequences should this method be exposed publicly.

As seen recently, examples of such consequences include increased regulatory or governmental focus on the employer's particular sector and potential legislative change or regulatory action brought about as a consequence of confirming redundancies by recorded message, in addition to employee protests and possible trade union activity.

Remote/pre-recorded redundancy announcements (best practices) 

Announcing job losses remotely is a permissible approach provided that it is part of a lawful consultation process, which itself can be carried out remotely.

Where possible, employers should avoid announcing job losses remotely as a stand-alone tactic in lieu of a consultation process.

The next slides lists some useful best practices when carrying out remote consultations…

Remote/pre-recorded redundancy announcements (best practices)

Do employees have the necessary technology?

Video link > telephone

Virtual town-hall meetings & FAQ docs

Consider any rights to be accompanied

Circulate rules for participating in virtual meetings (i.e. to reduce risk of leaks)

Consider how reps will be elected virtually

Check software is secure


Are there lawful workarounds to the applicable legal frameworks, and what are their risks and mitigating steps?
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Lawful workarounds (voluntary redundancies)

Potential dismissals could be structured as voluntary redundancies in the first instance.

Employers can say that if the voluntary programme is not sufficient, compulsory redundancies or other changes e.g. furlough or reduced hours/pay terms may need to be imposed.

Voluntary redundancies are deemed to be resignations with a severance payment. Employers should make the applications subject to employer approval.

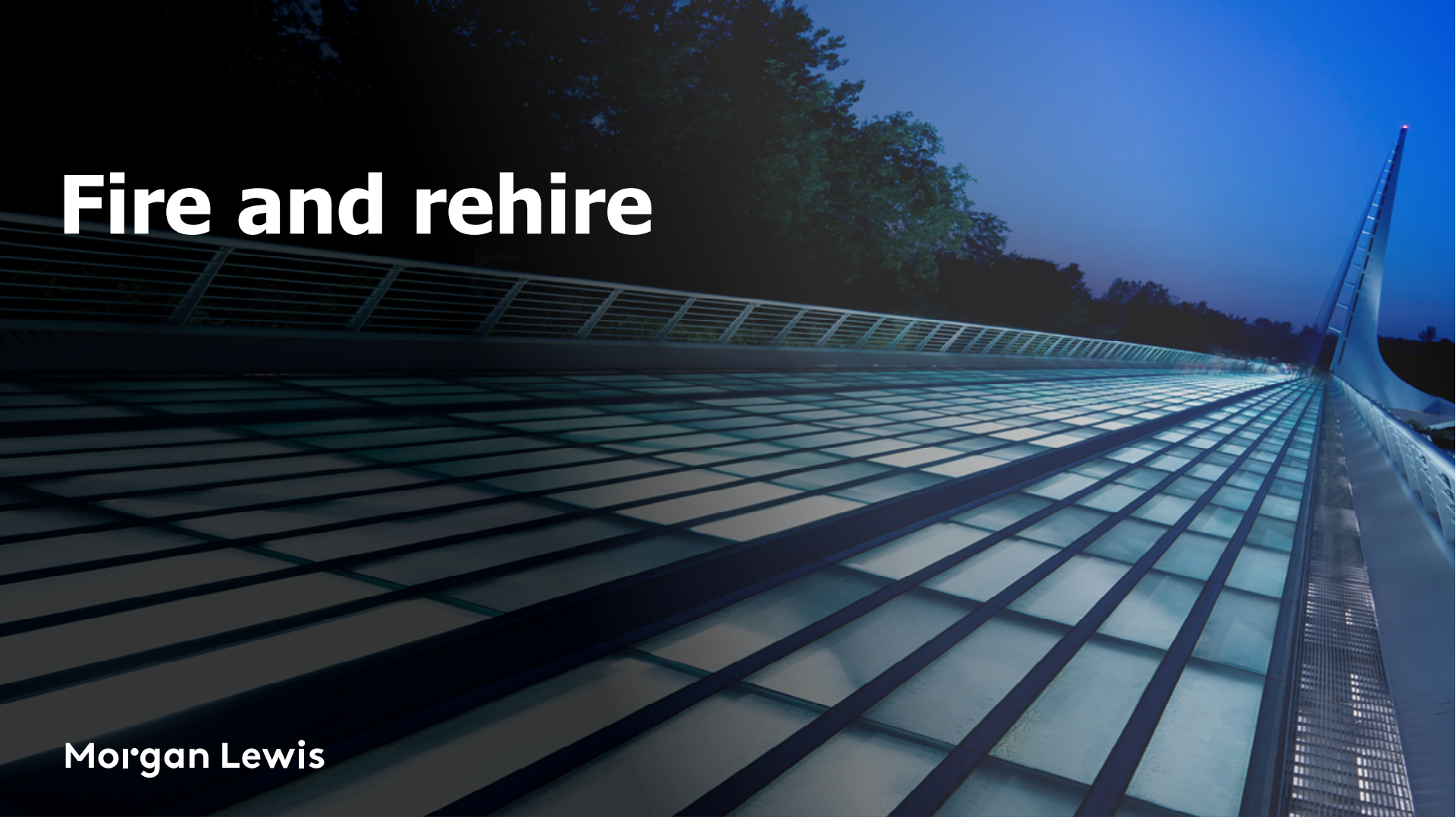
Consultation is key – employees should be incentivized e.g. severance, garden leave, training, outplacement counselling.

Employers should consider how best to achieve cost savings or eliminate workforce inefficiencies when structuring the voluntary process.

Lawful workarounds (voluntary redundancies)

ADVANTAGES	DISADVANTAGES
Simpler. Avoids the need to identify and consult with an appropriate pool of individuals.	**Cost**. It is likely to be a more expensive process, given that an enhanced redundancy payment will likely be needed to attract people to leave.
Better for moral and less disruptive. It is a less demoralising and disruptive process. It can also help to reduce the risk of legal claims as employees who are willing to accept redundancy will not be issuing claims against the company as a result of their dismissal or make payments conditional on severance.	**Risk of losing talent**. Even if the voluntary programme is conditional on employer approval, key talent may be unhappy not to be approved for selection and choose to leave anyway.
Easier to coordinate alongside non-UK redundancy processes. Depending on the number of anticipated employee exits, conducting a voluntary process may be easier to coordinate with other jurisdictions.	**Compulsory process may still be needed**. The programme may not achieve the relevant objectives (workforce reduction, cost savings etc).
	Voluntary processes can still trigger collective consultation obligations. Employers need to be mindful of the numbers of employees selected for redundancy.

Fire and rehire



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Fire and rehire

> *"Using fire and rehire as a negotiation tactic is a quick-fire way to damage your reputation as a business. Our new code will crack down on firms mistreating employees and set out how they should behave when changing an employee's contract"*

Grant Shapps, 24 January 2023
Business Secretary (at the time)

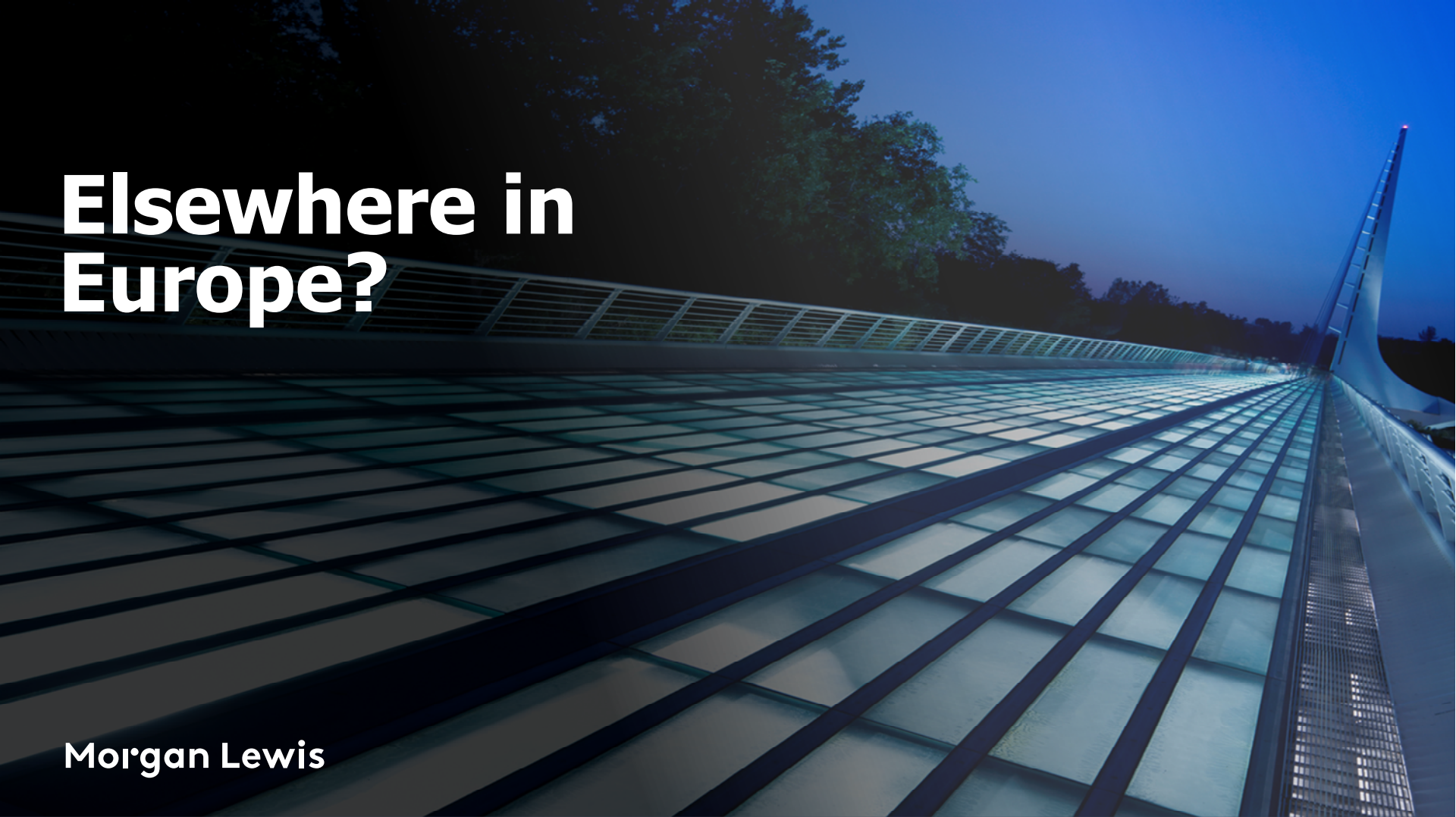
Fire and rehire 

What is it?

- Fire and rehire = implementing changes to existing terms and conditions of employees' employment by dismissing the employees in question and offering to rehire them on new terms and conditions
- Fire and rehire is controversial and viewed negatively but is not unlawful
- In the spotlight with P&O Ferries
- The Labour Party has pledged to make fire and rehire practices unlawful

New Code of Practice?

- Draft Code of Practice was published on 24 January 2023 – open for public consultation that closed on 18 April 2023
- Code is focused on meaningful consultation with employees and practically supporting employees through the process. Code would apply irrespective of the number of employees affected or the employer's reasons for seeking to implement new terms and conditions, but would not apply to genuine redundancy situations
- Employment tribunals would be required to take the Code's provisions into account when deciding relevant claims, and could increase or decrease certain tribunal awards by up to 25% where employers or employees have unreasonably failed to comply with the Code


Elsewhere in Europe?
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France 

- Obligation to engage in consultation process with works council if 2 or more employees are impacted by the redundancy project
- Consultation process must be engaged before any final decision is taken to implement a reduction in workforce, but at a time when the project is sufficiently developed to allow useful information of employee representatives
- Consultation process remains relatively simple to the extent the number of employees impacted stays below 11 employees:
  - Opinion of the works council is not binding
  - Maximum period for works council to provide an opinion is 1 month
- No obligation to set up a costly plan including measures to help employees find a new job
- No need to obtain approval from labor authorities

France

- If an employer wants to dismiss 11 or more employees over a 30-day period, three routes are opened:

	Collective agreement for amicable separation agreements (RCC)	Voluntary departure plan (PDV)	Social plan (PSE)
Advantage	• No need to have an economic ground • No need to offer strong redeployment measures	• No need to have a valid economic ground • Can be put in place unilaterally	• Can be put in place unilaterally • No need to have volunteers
Disadvantage	• Collective agreement is required (cannot be put in place unilaterally) • Employer needs to commit not to carry out any economic dismissals	• Important limitations on the targeting of employees who can leave • Expensive as plan must be sufficiently attractive	• Need to have a valid economic ground • Heavy legal canvas • High risk of litigations

France 

- **Communication process**
  - Considering that the works council should be informed and/or consulted before any decision is taken to implement the project of reduction in workforce, announcing possible redundancy at an early stage presents both civil and criminal risks
  - Announcements should stay in the conditional tense and outline that all is subject to discussion with employee representative bodies
  - During consultation process, it is recommended to keep all employees informed of the progress of the discussions and not let the employee representatives be the only source of information
- **Fire and rehire**
  - Not unlawful but not very attractive considering the cost and complex dismissal process
  - Employers could consider negotiating a "collective performance agreement" (APC) in which employees accept less favorable employment conditions against commitments from the employer which could vary (e.g., not to proceed with dismissal over a given period, reduction of remuneration of top managers, non distribution of dividends, etc.)

Germany 

- Germany is different
  - Termination notices and agreements must be in writing (wet signatures)
  - Termination protection claims in the labour courts are the rule, not the exception
  - More than 10 employees in Germany:
    - Reasons for termination are subject to detailed judicial review (workload analysis)
    - Selection based on social criteria, not performance
    - Remedy is reinstatement with back pay, not severance
  - More than 20 employees in Germany:
    - Collective dismissal notification (subject to thresholds)
  - Plus works council:
    - Information and consultation (subject to thresholds)
    - Implementation agreement and social plan to be agreed with works council (subject to thresholds)

Germany 

- Proposals to dismiss
  - Similar discussion but significantly less relevant
  - Key is that employer does not give termination notices prior to:
    - Signing of the implementation agreement or, failing agreement, completion of dispute resolution procedure (where required)
    - Collective dismissal notification to federal employment agency (where required)
- Communicating proposals
  - Works council is addressee, not employees
  - Key is to engage with the works council to get the implementation agreement signed
  - Implementation agreement and social plan are linked
  - An unconvincing business case increases social plan costs (severance)
  - No remote/pre-recorded redundancy announcements where information and consultation are required

Germany 

- Voluntary redundancies
  - Workaround in a different way
    - Collective dismissal notification and implementation agreement still required
    - Separation agreements, i.e. no termination protection claims in court
- Fire and rehire
  - Amendment termination, i.e. termination with offer to continue employment under different terms and conditions
  - Possible if no more than 10 employees in Germany
  - Subject to detailed judicial review if more than 10 employees in Germany
    - Not legally possible just to reduce pay and/or benefits

Summary

- Top tips for restructuring process in the UK and Europe:
  - Take privileged legal advice at an early stage. This will assist in identifying potential risks and finding the smoothest path to swift, successful departures
  - Consider potential disadvantages of a "drip-feed" approach – it may be necessary to conduct redundancies on a staggered basis but can impact morale; important to think ahead and be transparent and honest about the path forward
  - Where significant change is anticipated, consider appointing a longer-standing employee representative body to navigate upcoming changes
  - Where enhanced severance is offered, ensure appropriate documentation is in place to mitigate legal risk
  - Always check for consistency in approach and avoid inadvertent discrimination claims
  - Maintain good relations wherever possible – positive transitions can benefit the business and individuals in the longer term

Biography

Matthew Howse
London
+44.20.3201.5670
matthew.howse@morganlewis.com

As practice group leader for Morgan Lewis's labor and employment practice in London, Matthew Howse represents clients in the financial services, media, legal, and insurance industries in High Court and employment tribunal litigation and in class actions, collective actions, and group litigation. His experience includes employment law as well as privacy and cybersecurity law. In addition to litigating both contentious and noncontentious issues, Matthew provides strategic employment law advice and counsels clients on the employment law aspects of transactions.

As part of Morgan Lewis's cross-practice Global Workforce team, Matthew helps provide integrated cross-border advice, counseling, and strategic planning across a spectrum of labor, employment, benefits, and immigration issues.

Biography

Charles Dauthier
Paris
+33.1.53.30.44.74
charles.dauthier@morganlewis.com

Charles Dauthier advises French and international clients on both labor and employment matters, as well as data privacy and cybersecurity. He advises clients on executive terminations, collective terminations and other employment matters, as well as data privacy issues that surface in mergers and acquisitions, restructuring and outsourcing, and other types of reorganization. He counsels clients on employment matters attendant in employee benefits and employee representation matters.

Charles works with clients to comply with the General Data Protection Regulation (GDPR) and helps them manage employee misconduct investigations.. Prior to joining Morgan Lewis, Charles was an associate at another international law firm. His native language is French and he is fluent in English.

Biography

Dr. Walter Ahrens
Frankfurt
+49.69.714.00.766
walter.ahrens@morganlewis.com

Walter Ahrens counsels employers on labor and employment law issues, including workforce changes, mergers and acquisitions, European and German works councils, employment contracts, terminations, pensions and benefits, and data privacy. He also represents employers in labor courts against employees, works councils, and trade unions. Walter is part of Morgan Lewis's cross-practice global workforce team, which provides integrated cross-border advice, counseling, and strategic planning on labor, employment, benefits, and immigration. Walter is also the leader of the labor and employment practice for the Frankfurt office.

Walter is an author on several publications, including serving as a contributing author and editor for *Getting the Deal Through—Labour and Employment* 2006–2023, an annual series of deskbooks on international employment law and policy, and co-author of the Germany chapter in *International Labor and Employment Laws* 2006–2020, published by the Section of Labor and Employment Law of the American Bar Association.

Biography

Pulina Whitaker
London
+44.20.3201.5550
pulina.whitaker@morganlewis.com

Pulina Whitaker's practice encompasses data privacy and cybersecurity as well as employment matters. Co-head of the firm's global privacy and cybersecurity practice, she manages employment and data privacy issues on an advisory basis and in sales and acquisitions, commercial outsourcings, and restructurings. Pulina manages international employee misconduct investigations as well as cross-border data breach investigations. She has been appointed as a Compliance Monitor for the United Nations and has completed a three-year Monitor engagement of a UK charity for USAID. She is also a trustee of Hostage International.

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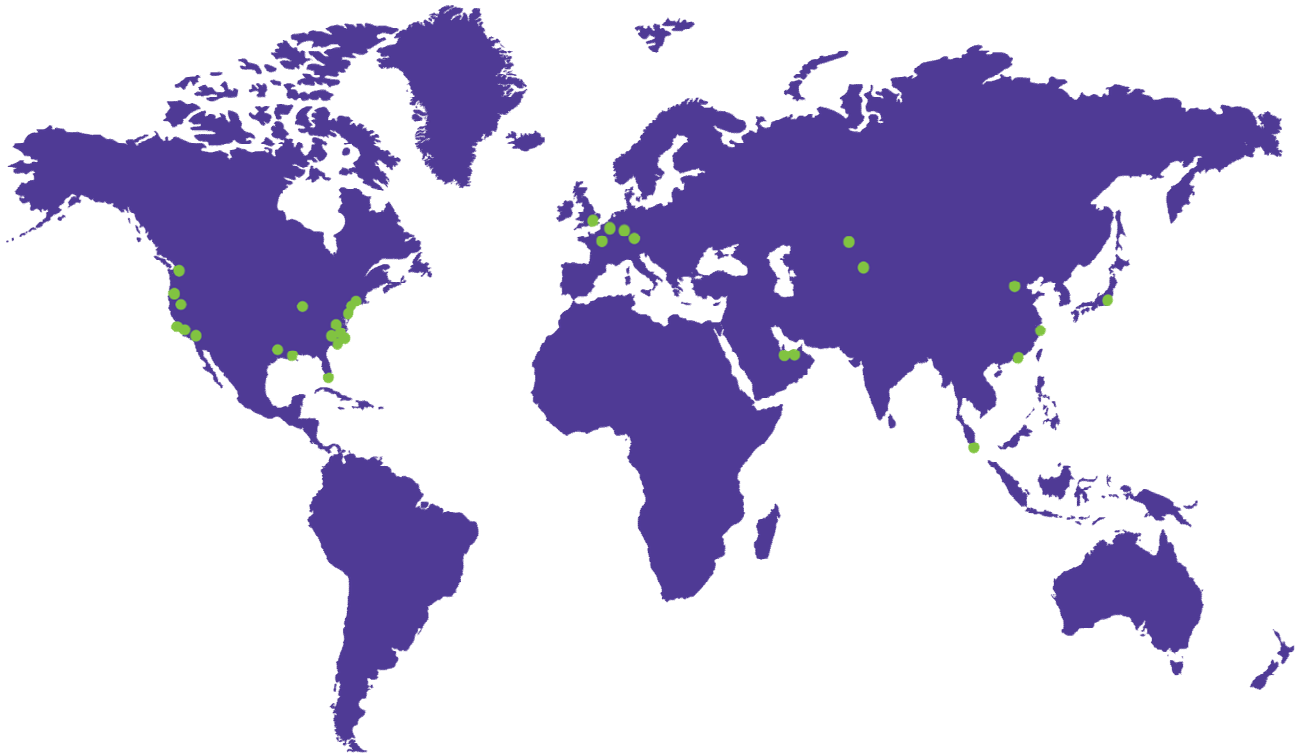

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