Dismissal Procedures

IV : Federal Republic of Germany [1]

General Principles and Sources of Regulation

In the Federal Republic of Germany the regulation of dismissal is dealt with in a number of laws, which contain very detailed provisions on the various aspects of the termination of the employment relationship at the initiative of the employer. In addition to the Civil Code, which contains in sections 620-630 some basic and general provisions on the termination of the contract of employment, there are the more specific provisions of the Industrial Code for industrial workers (sections 122 et seq.) and of the Commercial Code for commercial employees (sections 66 et seq.) as well as of special laws for specific categories of workers such as agricultural workers [2], mine workers [3], seamen [4], and crew members in inland navigation.[5] Furthermore, an Act of 9 July 1926 provides for prolonged notice of dismissal in the case of salaried employees who have had five years or more of service with the same employer.[6] Consultation by the employer of the works council before dismissals is regulated by the Works Constitution Act of 11 October 1952.[7]

The most important piece of legislation and the one which gives the German system its characteristic stamp is, however, the Act of 10 August 1951, which provides for protection against unwarranted dismissals.[8] In addition to the laws mentioned, a number of legislative provisions are to be found in other laws which grant special protection against dismissal of employees under specific circumstances, e.g. women workers before and after childbirth, and workers who have been called up for military service.

Since dismissal procedures are regulated in detail by legislation not much room is left for additional standards negotiated by the parties to collective agreements, although collective bargaining is a well developed practice in German labour-management relations. The provisions dealing with dismissals usually found in collective agreements

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[1] For the first three articles in this series, dealing respectively with France, the United States and the U.S.S.R., see Vol. LXXIX, No. 6, June 1959, and Vol. LXXX, No. 1, July 1959, and No. 2, Aug. 1959.

[2] Provisional Agricultural Workers Ordinance of 24 January 1919. See *I.L.O. Legislative Series* (hereafter cited as *L.S.*), 1919 (Ger. 3).

[3] Prussian Mining Act of 24 June 1865, as amended.

[4] Seamen's Act of 26 July 1957. See *L.S.*, 1957 (Ger. F.R. 4).

[5] Inland Navigation Act of 15 June 1895, as amended.

[6] *L.S.*, 1926 (Ger. 7).

[7] *L.S.*, 1952 (Ger. F.R. 6).

[8] *L.S.*, 1951 (Ger. F.R. 4).

mostly refer to the relevant legislative provisions and often fix periods of service proportionate to length of service.

The German system of dismissal regulations, like that of many European countries, makes a primary distinction between dismissal with notice and dismissal without notice (summary dismissal). While it was originally conceived that both parties to a contract of employment should be free to terminate their relationship at any time provided that a certain period of notice was observed (unless, of course, an urgent reason justified a summary termination of this relationship) [1], this idea has been progressively replaced by the notion that the formal equality between employer and employee under the law is in sharp contrast to their economic inequality. It was argued that, since the loss of his job would seriously affect the situation of an employee and his family, he should be given some protection against arbitrary dismissals or, in other words, the liberty of the employer to sever his relationship with his employees should be restricted by considerations of a social nature. This argument finally found its expression in the text of the Act of 1951 respecting protection of workers against socially unwarranted dismissals. It is the essence of this legislation that a dismissal other than a justified summary dismissal must not only be subject to a period of notice but must also be justified from a social point of view.[2] It should be mentioned that the Act of 1951 is based on a text which had been negotiated and agreed upon between the Confederation of German Employers' Associations and the German Confederation of Trade Unions.[3]

It is important to note that grievances and complaints of dismissed employees based on alleged violations of the legal or contractual regulations on dismissals are usually brought before the labour courts, which ensure that the regulations are enforced and which have, through their decisions, contributed considerably to the establishment and interpretation of legal standards.

The following pages will first describe the regulations governing dismissal with notice, including socially unwarranted dismissals, and will then deal with summary dismissal, procedures prior to dismissal (consultation of the works council and mass dismissals), protection against dismissals in special cases, remedies available to dismissed employees and, finally, the position of the dismissed employee.

Dismissal with Notice

In the German system the primary consideration is whether the reason for dismissal alleged by the employer obliges him to give notice or justifies summary dismissal. In the latter case the cause must be of such an important and urgent nature that the employer cannot be expected to continue his relationship with the employee for any period of time ; examples of this will be given below. Summary dismissal is, however, considered to be the exception and is therefore called " extraordinary dismissal " in German. The rule is the " ordinary dismissal ", which will be examined first.

[1] This concept is reflected in the Civil Code, the Industrial Code and the Commercial Code.

[2] A. Nikisch : *Arbeitsrecht*, 2nd edition, Vol. I (Tübingen, J. C. B. Mohr (Paul Siebeck), 1955), p. 610.

[3] A. Hueck and H. C. Nipperdey : *Lehrbuch des Arbeitsrechts* (Berlin and Frankfurt on Main, Franz Vahlen), 6th edition, Vol. I, p. 566.

Periods of Notice

It has already been mentioned that ordinary dismissal is, as a rule, subject to the observance of a period of notice. According to the fundamental principle laid down in the Civil Code (section 621) the length of notice must correspond to the length of the wage or salary period ; but this rule has lost much of its practical importance as longer periods have been laid down in a number of provisions in laws and collective agreements for different categories of employees. For most categories of employees, however, contractual provisions must conform to the principle embodied in the various laws that the duration of the period of notice must be the same for employer and employee. As regards length of notice German law and collective bargaining practice very often make a distinction between manual workers and salaried employees, usually providing for longer periods for the latter.[1]

Industrial Workers.

For industrial workers the Industrial Code (section 122) prescribes a period of notice of 14 days, unless the parties have agreed on another period, even a shorter one. Here collective bargaining practice is very diverse. Whereas a number of collective agreements merely include a reference to the legal period of 14 days, there are many others that fix periods of notice in proportion to the length of service, often providing for periods of four to six weeks for workers with ten, 25 or more years of service. This tendency to fix longer periods of notice by collective agreements or individual contracts of employment is rather recent ; indeed, it had long been common practice in several branches of industry not to fix periods of notice at all or to fix very short periods.[2]

Salaried Employees.

For salaried employees the periods are longer. According to the Industrial Code (section 133*a*) and the Commercial Code (section 66) salaried employees in industry and commerce can be dismissed only at the end of each calendar quarter and with at least six weeks' notice. Here, too, the parties may fix other periods and dates, but with the proviso that the period must be at least one month and that dismissal can take place only at the end of a month. In practice collective agreements very often simply repeat the legislative provisions.

An Act of 9 July 1926 [3] prescribes longer periods for the dismissal of employees over 25 years of age, proportionate to their length of service. These periods are three months after five years of service, four months after eight, five months after ten, and six months after twelve. In this case, too, dismissal may take place only at the end of a calendar quarter, but the periods of notice prescribed are minimum standards and may not be shortened by agreement. It should be noted that this Act only prescribes periods of notice to be observed by the employer and does not affect the notice to be given by the salaried

[1] The definition of manual workers and salaried employees is at present under discussion by the competent circles in Germany.

[2] This was formerly in the interest not only of the employers but also of the trade unions since, in the case of a strike, workers had first to terminate their contracts of employment and to observe the contractual period of notice in doing so. This principle has been changed following a decision regarding the legal effects of a strike handed down by the Federal Labour Court on 28 January 1955. See *Industry and Labour* (Geneva, I.L.O.), Vol. XVII, No. 11, 1 June 1957, p. 436.

[3] *L.S.*, 1926 (Ger. 7).

employee who wants to terminate the employment relationship with his employer.

Socially Unwarranted Dismissal

A dismissal that is socially unwarranted is without effect even if the appropriate notice has been given. This is the principle underlying the Act of 1951.[1] This Act has in a sense established the right of the employee to keep his job, unless special reasons justify his dismissal.[2] These reasons are defined in section 1, paragraph 2, which provides that " socially unwarranted dismissal means any dismissal not based on reasons connected with the person or the conduct of the employee or on pressing operational requirements which preclude his continued employment in the undertaking ". A great number of court decisions have built up extensive case law by interpreting this wording and by applying its standards in practice. As, however, court decisions have to take all the relevant aspects and circumstances of a given case into consideration and as they will, according to the purposes of the Act, always be the result of an appraisal of many facts in which the interests of the undertaking have to be weighed against those of the employee concerned, it is not practicable to give concrete examples of individual cases. The following remarks will therefore have to be limited to indicating in broad outline how legal theory and court practice have interpreted the text of the law.

Reasons Connected with the Person of the Employee.

Reasons connected with the person of the employee which would justify a dismissal as not being socially unwarranted could be, for instance, insufficient physical or mental ability, lack of skill, inability to absorb the training required for the job, sickness that does not entail complete incapacity to work but makes the employee unfit for the job for which he was hired, or frequent sickness that considerably reduces the value of his work to the undertaking. The fact that the employee has reached a certain age, say 65 years, does not in itself justify dismissal if his capacity to work has not become insufficient.

Reasons Connected with the Conduct of the Employee.

Reasons connected with the conduct of the employee that would give the employer the right to dismiss him might include unreliability, negligence, misbehaviour and non-compliance with contractual obligations when such conduct is not grave enough to justify summary dismissal. Whether under certain circumstances the misconduct of the employee outside the undertaking would justify his dismissal and whether the employer would be entitled to dismiss an employee on the suspicion that he may have committed a condemnable or criminal act or because of his political activities—these questions have been the subject of widespread discussion and of many court decisions.[3]

[1] The Act is applicable only to workers aged 20 years or over who have been continuously employed in the same establishment or undertaking for more than six months (section 1) and only to undertakings or offices normally employing more than five workers, excluding apprentices (section 21). It does not apply to employees in managerial positions (section 12).

[2] HUECK and NIPPERDEY, op. cit., p. 578.

[3] HUECK and NIPPERDEY, op. cit., p. 579 ; NIKISCH, op. cit., p. 621 ; W. HERSCHEL and G. STEINMANN : *Kommentar zum Kündigungsschutzgesetz*, 3rd edition (Heidelberg, Recht und Wirtschaft, 1955), p. 67.

Reasons Based on Pressing Operational Requirements.

The third category of reasons which may justify a dismissal relates to pressing operational requirements which preclude the continued employment of the worker concerned in the undertaking. Such reasons may be of an economic, technical or organisational nature. Examples are marketing or credit difficulties for the products of the undertaking, lack of orders, lack of raw materials, scarcity of coal or electricity, rationalisation measures, installation of new labour-saving machinery, change in production methods, closing of departments, etc.[1] The word " pressing " has been interpreted as meaning that dismissals may take place only if they are really necessary in the interest of the undertaking. This means that the employer is obliged to make every reasonable effort to avoid dismissal by distribution of work (e.g. by a reduction of hours of work), or by transferring the employee to another job, if such measures are feasible.[2] For the practical application of these provisions it is important to determine to what extent the labour courts are competent to examine whether the economic measures taken by the employer which give rise to dismissals were useful or necessary. It is generally established by court practice that the employer is free to organise his undertaking as he chooses and that the labour courts are neither authorised nor able to examine and judge the appropriateness and necessity of such measures. This principle also applies if the employer decides to close his undertaking or to take rationalisation measures which save labour costs. In other words the labour courts may not inquire into whether or not the employer should, for instance, have installed a labour-saving machine, but they can examine whether, after the installation of the machine, the employer has made every effort to keep his employees on the payroll. Since, as has already been pointed out, the rulings handed down by the labour courts are very diverse and are always based on the circumstances of each individual case, the principles outlined above are merely indications of the purpose and extent of the legislative provisions.

Selection of Employees for Dismissal.

A dismissal based on pressing operational requirements may nevertheless be regarded as socially unwarranted, if, as the Act goes on to say (section 1, paragraph 3), " when selecting that particular employee for dismissal, the employer failed to take account or took insufficient account of social considerations ". The legislature has left it to legal doctrine and court decisions to define and interpret the wording of the Act and, in particular, the term " social considerations ". According to the practice of the labour courts social considerations that must be taken into account before an employee is dismissed include his age, his seniority in the undertaking, his family status, his general economic situation, his dependants (children, parents, relatives), the income and employment situation of other members of his family and similar circumstances. Since the law, using the words " social considerations ", does not establish an order of priority for these various considerations and does not enumerate them, the employer must take into account all relevant circumstances in every individual case. Only by weighing all considera-

[1] For special procedures to be followed in the case of mass dismissal see below.

[2] HUECK and NIPPERDEY, op. cit., p. 580 : HERSCHEL and STEINMANN, op. cit., p. 77.

tions can social hardships be avoided and the purpose of the law fulfilled.[1] When selecting the employees to be dismissed for economic reasons the employer is, however, free to base his choice primarily on the requirements and interests of the undertaking. Social considerations must be taken into consideration in the case of several employees who, from the point of view of the interests of the undertaking, would be equal and therefore comparable. Operational considerations have priority over social considerations, but the latter must not be overlooked. An employee who is more productive, capable and reliable than another can be kept on the payroll though the one dismissed is in less favourable social conditions.[2] On the other hand it would not be socially justified to dismiss an employee who has been for decades in the same undertaking only because he is less productive than younger employees.[3] There is much discussion and much diversity in court practice about the practical implementation of the Act and it is not possible to draw hard and fast conclusions. The above examples are given only to show the basic ideas underlying the legal provisions, the purpose of which is to require the employer, in consultation with the works council, to examine every individual case of dismissal carefully according to its merits and to weigh objectively the interests of the undertaking against the interests of the employee concerned.[4]

Effect of Socially Unwarranted Dismissal.

As has already been mentioned a socially unwarranted dismissal is without effect, i.e. it is null and void and the contractual employer-employee relationship has not been interrupted. In case of dispute the matter can be brought before the labour courts for decision. Details concerning procedure before the courts will be discussed below.

Summary Dismissal

General

Whereas " ordinary " dismissal is subject to the observance of a period of notice and to the condition that it is not socially unwarranted, " extraordinary " dismissal is not linked with a period of notice but can only take place in special circumstances. According to the various legislative provisions for the different categories of manual workers and salaried employees a summary dismissal is possible only if there is an important reason. This reason must be so urgent and serious that the employer cannot be expected to observe the period of notice. For most categories of workers the law merely uses the term " important reason ", sometimes supplemented by illustrative enumerations which are, however, not limitative.[5] Under the provisions applicable to wage earners in industry

[1] Monjau : " Die Auswahl bei der betriebsbedingten Kündigung ", in *Recht der Arbeit* (Munich), Jan. 1959, p. 8.

[2] Herschel and Steinmann, op. cit., p. 80.

[3] Monjau, op. cit., p. 9.

[4] Hueck and Nipperdey, op. cit., p. 578.

[5] Section 626 of the Civil Code ; sections 133*b* and 133*c* of the Industrial Code for industrial salaried employees ; sections 70 and 72 of the Commercial Code for commercial employees ; section 16 of the Agricultural Workers' Ordinance for agricultural workers ; sections 88*d* and 89 of the Prussian Mines Act for salaried employees in mines ; and section 20 of the Inland Navigation Act.

and mining any important reason can justify summary dismissal unless the duration of the contract of employment is less than four weeks or the period of notice established is 14 days or less, when summary dismissal can be based only on certain specified causes.[1]

Causes for Summary Dismissal

Causes for summary dismissal include the fact that the employee produced false or falsified documents when he was recruited, that he commits theft, embezzlement or fraud, that he leaves his work without permission, that he consistently refuses to comply with his obligations, that he does the employer bodily harm or grossly insults him, that he intentionally and unlawfully causes material damage, that he grossly neglects his obligations, that he betrays the confidence placed in him, etc.

The reasons which could justify a summary dismissal need not always be connected with the conduct of the worker. Such causes may also be attributable to other circumstances like incapability to continue his work by reason of protracted disease or, in the case of seamen, the loss of the ship.[2] As a general rule economic reasons, like the closing down of an entire undertaking or parts of it, will not justify a summary dismissal of the employees concerned, as the employer who bears the business risks can usually be expected to observe the period of notice. Only under very exceptional circumstances, like war or serious economic or political crisis, especially if the employer is not responsible for and could not foresee the situation and if the retention of all his employees would menace the existence of the undertaking, could summary dismissals be justified on economic grounds.[3] For all these and many other causes for summary dismissal which fall within the general definition of " important reason " there have been a multitude of labour court decisions laying down in detail the criteria to be applied.

Procedures before Dismissal

Before a dismissal takes place the employer is usually required to take certain steps. As a general rule he has to consult the works council [4] and in the case of mass dismissals he has to follow a special procedure with the works council and the employment office.

Consultation of the Works Council

Consultation Procedure.

The employer must inform the works council of every intended dismissal [5] and of the reasons for it, and must ask for its opinion within

[1] Section 123 of the Industrial Code and section 82 of the Prussian Mining Act.

[2] Section 66 of the Seamen's Act.

[3] This can particularly be the case if the periods of notice are very long. Cf. Hueck and Nipperdey, op. cit., p. 529.

[4] According to the Works Constitution Act of 11 October 1952 in every undertaking with at least five workers a works council is to be established composed of workers' representatives elected by secret ballot by all the workers in the undertaking. Under the law the works council is given certain rights of consultation and co-decision with the management in social, personnel and economic matters. These rights include the above-mentioned right of the works council to be consulted before every dismissal (section 66).

[5] The question of whether the employer has to consult the works council also in the case of a summary dismissal when a quick decision is justified is at present under discussion in German labour law doctrine and court practice.

a reasonable period of time. It is the purpose of the consultation of the works council to bring about a discussion between management and workers' representatives with a view to examining and weighing the various aspects of the case, and it is a well established practice in many German undertakings that management and works council discuss every case of dismissal thoroughly until they reach an agreement. This is especially important in view of the requirement that a dismissal must be based on facts and considerations that make it " socially warranted ". However, the employer is not bound by the opinion of the works council. On the other hand, a dismissal to which the works council has agreed beforehand is not necessarily " socially warranted " ; the right of the employee to sue his employer before the labour court alleging a " socially unwarranted " dismissal is not affected by the opinion expressed by the works council.

Effect of Failure to Consult the Works Council.

The effect of the employer's failure to consult the works council before giving notice has been the subject of much discussion. Section 66 of the Works Constitution Act which places the obligation on the employer does not provide any sanctions in case he fails to do so. The Federal Labour Court therefore handed down a decision in 1954 [1] according to which prior consultation of the works council is not a condition for a valid dismissal and a dismissal pronounced without such consultation would not be null and void. However, if the employer has unlawfully and intentionally failed to consult the works council he cannot, if the matter is brought before the labour court, allege that the dismissal was socially justified. Hence the court will find that the dismissal was " socially unwarranted " and therefore null and void. After the decision of the labour court the employer is, of course, free to attempt to dismiss the employee again, this time after consultation with the works council.

Dismissal at the Request of the Works Council.

In certain circumstances the works council may also take the initiative in the dismissal of an employee if this is justified by specific reasons. " If through anti-social or unlawful conduct an employee repeatedly causes serious disturbance in the undertaking, the works council may request the employer to dismiss or transfer him." [2] If the employer does not accede to the request, the works council may apply to the labour court for a declaration that its request is well founded. If the labour court, after hearing the employee concerned, finds that the request of the works council is justified, the employer is obliged to carry out immediately the action requested by the works council, observing the appropriate periods of notice. In such cases, although the employer is not obliged to dismiss the worker summarily, he is entitled to do so if the reasons justify it. If the employer does not comply with the decision of the labour court, he can be fined. The fact that the labour court has declared the request of the works council well founded does not prevent the dismissed employee from bringing an action in the labour court alleging that his dismissal is socially unwarranted, but this possibility

[1] The essence of this decision is reproduced in H. GALPERIN and W. SIEBERT : *Kommentar zum Betriebsverfassungsgesetz*, 3rd edition (Heidelberg, Recht und Wirtschaft, 1958), p. 476 ; cf. also *Recht der Arbeit* (1954), p. 400.

[2] Section 66, paragraph 4, of the Works Constitution Act.

will not be of great practical importance, since the dismissal is to be regarded as justified by pressing operational requirements because it has been ordered by the labour court on the grounds that the conduct of the employee repeatedly caused serious disturbance in the undertaking.

Mass Dismissals

Mass dismissals are dismissals affecting a certain minimum proportion of the total labour force of an undertaking. German law has established a special procedure to be followed by the employer in such cases. Its purpose is, however, not to protect the individual employees affected but to stagger the dismissals in an attempt to regulate their impact on the employment market. It does not constitute a limitation or prohibition, but only a postponement, of dismissals. Yet the relevant provisions merit some discussion in this context because they form an integral part of the German system of dismissal procedures. These provisions apply only to undertakings normally employing more than 20 workers.

Notification of Works Council and Employment Office.

If an employer intends to dismiss, within a period of four weeks, more than five employees in an undertaking with between 20 and 50 employees, more than 10 per cent. or more than 25 of the employees in an undertaking with between 50 and 499 employees, or 50 or more employees in an undertaking with 500 or more employees, he must notify the works council as soon as possible and consult with it on the nature and number of dismissals necessary and on means of avoiding hardship among those to be dismissed.[1] An employer who intentionally fails to comply with this obligation is liable to a fine or to imprisonment of up to six months.[2] The employer must then notify the employment office [3], enclosing the opinion of the works council.[4] The proposed dismissals cannot take effect until one month after notice is received by the employment office, unless the regional employment office gives its consent to an earlier date.[5]

The regional employment office may also extend the period to a maximum of two months. After the deadline thus fixed the dismissals may take place within one month following that date, after which fresh notice is required. The decisions of the regional employment office are taken by a committee consisting of the president of the office and two representatives each of the employers, the workers and the public authorities. Among other aspects of this procedure which can be no more than mentioned in the present study are the faculty of the regional employment office to authorise short-time work if the employer is unable to give full-time employment to his employees up to the appropriate date [6] and the direct intervention of the Federal Placement and Unemployment Insurance Institution in special cases (mass dismissals in transport and postal undertakings).

[1] Section 66, paragraph 2, of the Works Constitution Act.

[2] Section 78, subparagraph *(d)*, of the Works Constitution Act.

[3] For the German system of placement agencies see below.

[4] Section 15 of the Act on unwarranted dismissals.

[5] Section 16 of the Act on unwarranted dismissals.

[6] This authorisation entitles the employer to reduce the wages and salaries of the employees in accordance with the reduced working time.

Mass dismissals for which the procedure before the employment offices has not been followed (failure to notify the employment office or failure to observe the periods mentioned) do not take effect and therefore do not interrupt the employment relationship.

Position of the Individual Employee.

The procedure to be followed in the case of mass dismissals does not affect the right of the individual employee to initiate procedures concerning " socially unwarranted dismissals ". The decision of the regional employment office concerns only the number of employees to be dismissed and not the selection of the individuals to be dismissed. It is therefore possible that dismissals, although authorised in principle by the regional employment office, may in individual cases still be socially unwarranted, and hence null and void, if the selection of the employees to be dismissed has not been based on social considerations, or may be null and void for other reasons, e.g. failure to observe the relevant period of notice.

Protection against Dismissal in Specific Cases

The regulations governing dismissals which have been discussed so far in this report are applicable to all categories of employees with the exception of the length of the period of notice and of the specified reasons justifying summary dismissals, which sometimes differ for manual workers and salaried employees and also, in some cases, for various industrial sectors. There are, however, a number of special standards which provide supplementary protection against dismissal for certain categories of employees or under special circumstances. These standards are motivated by the fact that the workers concerned hold special positions or find themselves in situations that call for increased job security.

Works Councils

Members of a works council cannot be dismissed unless there is an important reason which entitles the employer to proceed to a summary dismissal.[1] In that case the general principles governing summary dismissal apply. Apart from summary dismissal the law permits the dismissal of a works council member only in one other case, namely the closing down of the undertaking. In this case the members of the works council cannot be dismissed before the date of closure unless their earlier dismissal is required by pressing operational requirements. Where merely a section of an undertaking is closed down, a member of the works council employed in that section must be transferred to another section of the undertaking. If such a transfer is impossible for operational reasons, he cannot be dismissed before the date of closure unless his earlier dismissal is called for by compelling operational requirements.

Maternity

According to the Maternity Protection Act of 1952[2] a woman cannot be dismissed during pregnancy and during the four months following confinement, if at the time of giving notice the employer was

[1] Section 13 of the Act on unwarranted dismissals.

[2] *L.S.*, 1952 (Ger. F.R. 2).

aware of the pregnancy or confinement or is informed about it within one week after the woman has received notice. This prohibition is absolute and extends to summary dismissals. Only in special cases may the competent authority [1] exceptionally declare the dismissal to be lawful.

Disabled Employees

Disabled employees can be dismissed only with the authorisation of the main assistance office [2] and only with a minimum period of notice of four weeks to be reckoned from the date on which the application submitted by the employer reaches the main assistance office.[3] The Disabled Persons' Act contains detailed provisions defining the circumstances in which the authorisation is to be granted (for instance, if the undertaking is closed down). These rules do not affect the employer's right to summary dismissal for an important reason in accordance with the general standards and principles of the law.

Military Service

An ordinary dismissal of employees who have been called up for military service is not permissible during the period of their absence [4], nor may such employees be dismissed before or after their period of military service for reasons connected with such service. If an employer is obliged to make dismissals on the basis of pressing operational requirements he must not, when selecting the employees who are to be dismissed, allow the fact that an employee has been called up for military service to count against him. The right to summary dismissal is not affected by this legislation.

Other Cases

Former prisoners of war may not be dismissed during the first six months of their first employment on the ground that their working capacity has been reduced by their captivity.[5] Some of the German Länder have enacted legislation [6] which provides that employees who had been persecuted under the National Socialist régime on political, racial or religious grounds cannot be dismissed without the authorisation of the competent authority [7] ; the minimum period of notice is four weeks. Similar provisions apply also to former mine workers who had to give up underground work for physical reasons and have found employment elsewhere.[8]

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[1] The supreme Land authority responsible for labour protection or the authority appointed by it.

[2] Special bodies established at the district level which are competent for assistance to disabled persons.

[3] Sections 14 et seq. of the Disabled Persons' Act of 1953. See *L.S.*, 1953 (Ger. F.R. 1).

[4] Act of 30 March 1957.

[5] Act of 19 June 1950, as amended.

[6] Ordinance of 17 December of 1952 of Rhineland-Palatinate ; Ordinance of 28 February 1945 and Act of 10 January 1950 of Baden ; Act of 8 October 1947 of Württemberg-Baden ; and Act of 20 March 1950, as amended, of Berlin.

[7] Special authorities established at the Land level which are competent to look after the interests of the victims of National Socialist persecution.

[8] Act of 10 July 1948, as amended, of North Rhine-Westphalia and Act of 6 January 1949 of Lower Saxony.

Remedies Available to Dismissed Workers

An employee who wishes to contest his dismissal, be it a summary dismissal or a dismissal with notice, as unjustified or contrary to legal or contractual provisions may appeal to the labour court. But, before the procedure to be followed by the labour court is discussed, mention must be made of the possibility that the matter may be settled earlier within the undertaking through the intervention of the works council.

Appeals to the Works Council

According to the Act regarding unwarranted dismissals (section 2) an employee who believes that his dismissal is socially unwarranted is entitled to lodge an objection with the works council within one week of being notified of dismissal. If the works council considers his objection justified, it must endeavour to bring about an understanding with the employer. This understanding may take one of many forms; the employee may be persuaded to accept the dismissal or the employer to withdraw it or to prolong the period of notice or even to pay a special indemnity to the discharged employee. In any event in order to be effective the recommendation of the works council must be accepted by both the employer and the employee concerned. To facilitate this agreement, the works council is obliged, on request, to communicate its written opinion on the employee's objection to the employer and the employee. This whole procedure is purely voluntary. It gives the works council the opportunity to act as a mediator between the employer and the worker, who are, however, entirely free to accept or to reject any proposal made. On the other hand, the works council is also free in its decision and is not bound by its previous attitude when it was consulted by the employer before the dismissal.

Appeals to the Labour Court

Regardless of whether or not the employee has appealed to the works council he is free to bring an action in the labour court [1] alleging that his dismissal is socially unwarranted and applying for a declaration that his employment relationship has not been dissolved by the dismissal.[2] But he must appeal to the labour court within three weeks of receiving notice of dismissal. The observance of this time limit is very important because, if the validity of a socially unwarranted dismissal is not contested within the three weeks, the dismissal is deemed to have been

[1] Under the German system disputes between employers and workers individually or between their organisations over the application or interpretation of provisions in laws, regulations, collective agreements and individual contracts of employment are settled by the labour courts, which constitute a special branch of the judiciary. There are three tiers of courts, consisting of the labour courts as courts of first instance, the Land labour courts as courts of second instance and, finally, the Federal Labour Court. All courts are composed of professional judges and an equal number of lay judges (assessors), who are appointed on the recommendation of the trade unions and employers' associations. Structure and procedure of the labour courts are regulated by the Labour Courts Act of 1953 (see *L.S.*, 1953 (Ger. F.R. 2) and 1955 (Ger. F.R. 2)).

[2] In the case of disputes for which the labour courts are competent German labour law does not, as a general rule, permit strikes. A strike aimed at forcing an employer to reinstate a dismissed worker would therefore not be admissible, since the worker concerned can appeal to the labour court.

effective from the date of its commencement unless it is invalid for other reasons. Only under special circumstances and in exceptional cases may the labour court entertain late actions. If the dismissal requires the approval of an authority, as in the case of special categories of employees (e.g. disabled persons), the period for appeal to the labour court is to be reckoned from the date on which the employee is notified of the decision of the authority concerned. If the employee has lodged an objection with the works council, he should annex to his complaint to the labour court a statement of the opinion of the works council. Although not bound by the opinion of the works council the court will nevertheless have to take it into account when evaluating the causes behind the dismissal and when assessing the circumstances that have a direct bearing on whether the dismissal is socially warranted or not.

Burden of Proof

The question of who bears the burden of proof during the court proceedings on dismissal cases is of great practical importance. Hence the law [1] is quite specific in this regard. The employer has to prove the facts on which the dismissal is based. It is then for the dismissed employee to prove, in the case of a dismissal based on pressing operational requirements for example, that when selecting the individual to be dismissed the employer failed to take into account or took insufficient account of social considerations. Whereupon it is again the employer who has to prove that an employee whose dismissal would have been less objectionable on social considerations is needed more in the interest of the operation of the undertaking.

Decision of the Labour Court

Invalidation of Dismissal.

If the court reaches the conclusion that the dismissal is socially unwarranted it states in its decision that the employment relationship has not been dissolved by the dismissal. This means that the legal relationship has not been interrupted and that the dismissal was of no legal effect. Consequently, the employer must pay the full wage for the period which has elapsed since the (invalid) dismissal; on the other hand the employee is obliged to resume his work at any time at the request of the employer. The total of the wage or salary for the interim period must correspond to the amount of remuneration the employee would have earned had he not been dismissed. Hence the law [2] prescribes that any sums earned for other work must be deducted from this remuneration. In addition, any sums which the employee could have earned if he had not wilfully refrained from accepting suitable employment must also be deducted. This means that the employee is expected to accept other employment until the decision of the labour court is rendered. But such employment must be suitable, i.e. it must be on a short-term or transitional basis so that the employee can always resume his work with his former employer and it must correspond to the kind of occupation and the professional standing of the employee. A salaried employee could for instance refuse to work as a manual worker. Lastly,

[1] Section 1 of the Act on unwarranted dismissals.

[2] Section 9 of the Act on unwarranted dismissals.

as the employment relationship is considered not to have been interrupted, the remuneration paid to the employee by the employer in respect of the period between the (invalid) dismissal and the labour court decision must also be reduced by any statutory payments for unemployment received by him for the intervening period from social insurance, unemployment insurance, unemployment relief or public assistance ; such amounts have to be repaid by the employer to the body which paid them.

There is also the possibility that an employee who lodged an appeal to the labour court against his dismissal, in view of the uncertainty of the outcome of the proceedings, entered into a new employment relationship and prefers to stay in his second job. If the labour court decides that his dismissal was socially unwarranted and that his first employment relationship therefore continues to exist, the employee finds himself in two jobs. The law then permits him to make a choice. If he prefers the new job he may, by making a declaration to his former employer within one week of the date on which the judgment becomes effective, refuse to continue the relationship with his former employer.[1] A written declaration posted before the expiry of the said time is deemed to have been made in due time. Such declaration has the effect that the former employment relationship is extinguished as from receipt of the declaration. On the other hand an employee who avails himself of this possibility is entitled to back pay only in respect of the period which elapsed between the dismissal and the date of entering the new employment relationship.

Dissolution of Employment Relationship and Compensation.

As can be seen from the description given so far the German system is based on the principle that a socially unwarranted dismissal is ineffective and does not dissolve the employment relationship.[2] There may, however, be cases where the continuation of the relationship would be so much against the interests of either or both of the parties that it would be more appropriate to terminate it even though the dismissal has been socially unwarranted. This would particularly be the case if, after the court proceedings, the mutual confidence on which the relationship has to depend no longer exists. In certain circumstances the law therefore gives either party the right to apply to the court for a dissolution of their relationship, the employer being ordered to pay compensation. The court can take such a decision only if formally requested by either of the parties and on the ground of specific circumstances which are different for worker and employer.[3]

In the case of the employee the labour court is to grant his application if it finds that he cannot reasonably be expected to continue the relationship. This may particularly be the case if the employer made insulting allegations about the employee in connection with the dismissal or if by the dismissal and during the proceedings before the court the relationship between them has been seriously compromised without fault of the employee or if the employee has reason to believe that if he resumes his work the employer, in order to take revenge for his lost case,

[1] Section 10 of the Act on unwarranted dismissals.

[2] According to the German law in force before 1951, in the case of a socially unjustified dismissal the employer had always the possibility to choose between two alternatives: either to take the worker back or to pay him court-awarded compensation.

[3] Section 7 of the Act on unwarranted dismissals.

will not treat him properly. In all such cases, however, the allegations or fears expressed by the employee must be based on facts which he can prove. The fact that the employee has taken up another employment would not be enough since in that case, as has been described above, the law entitles the worker to dissolve his former employment relationship without compensation.

The labour court is to make a like order if the employer applies for the employment relationship to be dissolved on the grounds that further collaboration between the worker and himself in the operational interests of the undertaking is unlikely. Here again general allegations do not suffice if they are not substantiated by facts. If the employee proves that the reasons given by the employer are inexact in material particulars or if the dismissal was manifestly made in an arbitrary manner or for trifling reasons with abuse of the employer's power in the undertaking, the court will reject the employer's application.

Employer and worker may make application for dissolution of the employment relationship at any time before the termination of the last hearing before the court of appeal. The date specified by the labour court for the dissolution of the employment relationship is the date on which the relationship would have ended if the dismissal had been socially warranted.

The amount of the compensation is fixed at the discretion of the court. The law [1] merely sets a maximum of 12 monthly remunerations, the monthly remuneration meaning the amount in cash and kind payable to the worker for the normal hours of work in the undertaking, in respect of the month in which the employment relationship is terminated. When fixing the compensation the court is to give due weight, in particular, to the employee's length of service in the undertaking and the economic situation of the worker and the employer. The compensation has neither the character of a wage nor of a fine or a welfare measure. Its purpose is to compensate the employee for the loss of his job for reasons that cannot be approved from a social point of view. Hence it cannot be reduced by the amount the employee may earn in a new job, nor does it affect the payment of unemployment benefits.

The procedures described in the foregoing paragraphs apply to dismissal with period of notice which are, or are alleged to be, socially unwarranted. The labour courts are also competent to deal with cases of summary dismissals if the worker does not accept the reason given by the employer and brings an action to that effect within three weeks. Furthermore, if the court holds the summary dismissal to be null and void the employee (but not the employer) may apply to the court—under the conditions mentioned above—to dissolve the employment relationship and to order the employer to pay compensation.

Position of the Dismissed Employee

Time to Look for Another Job

After receiving notice, and before the actual termination of his employment relationship, the employee is entitled by law [2] to a reasonable amount of time to look for another job. The length of this period is not fixed by the law. Its determination depends on the needs of both

[1] Section 8 of the Act on unwarranted dismissals.

[2] Section 629 of the Civil Code.

parties and on the circumstances of each individual case. During his absence from work for this purpose the worker retains the right to his full wage or salary. If the employer refuses without justification to grant such free time the employee is entitled, on his own initiative, to take the necessary time off within reasonable limits. This legal right, which cannot be restricted by contract, is often embodied in collective agreements.

Certificate

At the end of the employment relationship the employer is obliged [1] to give the employee a written certificate which states the nature and the duration of the employment. If the employee requests it, the employer must also include in the certificate an evaluation of his work and conduct.

Employment Placement and Unemployment Benefits

Measures to re-employ workers who have been dismissed or, in cases where new employment cannot be found immediately, to pay them unemployment benefit, form part of the functions of the Federal Institution for Placement and Unemployment Insurance. According to the Placement and Unemployment Insurance Act of 1927 as amended [2], this agency is responsible for placement, vocational guidance, unemployment insurance (contributory scheme), unemployment assistance (non-contributory scheme) and measures to prevent and combat unemployment. For this purpose it maintains a network of regional and local employment offices to serve both workers and employers. It functions through tripartite bodies, composed of representatives of employers, workers and public authorities, operating at the central, regional and local levels.

Use of the service is voluntary. It is the role of the employment service, which is public and free, to assist managements in finding suitable manpower and to assist job-seekers in finding new employment. Employers are legally required to report dismissals and engagements within three days to the competent employment office.[3] This obligation is imposed mainly for the purposes of employment statistics and labour market analysis. Closely connected with the placement functions of the employment offices are their activities in the field of vocational guidance and vocational retraining, as well as the measures they may take to prevent and combat unemployment. The importance attached to placement as the primary function of the employment service is stressed by the law, which states expressly that either placement in employment or arrangements for retraining, shall have precedence over the payment of unemployment benefits.[4]

Covered by the unemployment insurance scheme are manual workers, irrespective of their wage, and salaried employees up to a certain salary limit. The scheme is financed by contributions from employers and employees. The duration and amount of the unemployment benefit are

[1] Section 630 of the Civil Code, section 113 of the Industrial Code, section 73 of the Commercial Code.

[2] See *Industry and Labour*, Vol. XVIII, No. 3, 1 Aug. 1957, pp. 122-124, and *L.S.*, 1952 (Ger. F.R. 3) and 1957 (Ger. F.R. 3).

[3] Section 53 of the Act.

[4] Section 36 of the Act.

calculated on the basis of the length of the period of insurable employment and on the amount of the wage (or salary) earned prior to the dismissal. Workers who have not acquired the right to benefits under the contributory system or whose unemployment continues after the period of payment of unemployment insurance benefits are entitled to unemployment assistance; such benefits are subject to a means test and are financed by the Government.