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Individual Employment Rights: Focusing on Job Security in the Federal Republic of Germany

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I. INTRODUCTION

The Federal Republic of Germany has a set of individual employment rights, provided by legislation, regarding the content and termination of the employment relationship. These laws focus on providing a minimum protection for workers, thereby limiting the individual freedom of contract. This protection is not dependent on union membership or collective bargaining. Collective agreements may further improve the minimum protection for unionized workers. In relation to the legal minimum standards such agreements are nothing but additional instruments of protection.

Labour legislation is mainly federal legislation. Throughout the Federal Republic the same protective standards apply. Therefore,
although the legislation of the individual states within the Federal Republic plays an important role in many other areas of the law, it can be ignored here.

Disputes on individual employment rights are resolved by the labour courts. German labour courts are a special branch of the court system and are comprised of three levels: Labour courts of the first instance; appellate labour courts; and the Federal Labour Court. Labour courts of the first instance and appellate labour courts are composed of one or more panels. Each panel has a professional judge as chairman and one lay judge from the employer's and employee's side. The appellate labour courts are authorized exclusively to hear appeals against decisions of labour courts in the first instance. Under certain conditions, judgments handed down by appellate labour courts may be appealed to the Federal Labour Court. The Federal Labour Court is comprised of eight senates. Each senate has three professional judges and one lay judge from the employer's and employee's sides.

Each worker has easy access to the labour court system. The costs of the courts' involvement are extremely low. Parties to a dispute may represent themselves in the labour courts and in the appellate labour courts or, if they wish, they may be represented by legal counsel. In the Federal Labour Court legal counsel is required. In the labour courts and the appellate labour courts legal counsel may be provided by an attorney or, in the alternative, a legal aid representative of the union. Most of these representatives are not full-fledged lawyers. The parties themselves decide the type of representation they wish to have. Since unions only provide counsel to their members, usually free of charge (at least for the labour courts of the first instance), this serves as an incentive for workers to join such organizations.

One of the basic characteristics of the German labour law system is that the implementation of individual employment rights, at least in some especially important areas, is not merely left to the contracting parties and the labour courts as a conflict resolving agency. Another actor is involved which, in the Federal Republic of Germany, unlike many other countries, is not the union; it is the works council, the employees' statutory representative.²

Every establishment with more than five employees over eighteen years of age, three of whom have been employed for at least six months, is required by law to establish a works council. Contrary to many other countries, works councils in the Federal Republic of Ger-

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². This only refers to the private sector. In the public sector the employees' statutory representative is called “staff representation” and governed by a different statute. The function of the “staff representation” in reference to the subject matter discussed in this article is almost identical to the works council's function in the private sector.
many are made up exclusively of employees' representatives. Works councils act as counterparts to the employer. They represent all workers of the establishment whether they are union members or not. In order to prevent misunderstandings, it has to be stressed that in spite of the institutional separation between unions and works councils, there are close links in actual practice. In the following sections, individual employment rights regarding job security are used to illustrate the functioning of this interaction between parties of the individual employment relationship, works councils, and labour courts.

II. THE FORMAL STRUCTURE OF JOB SECURITY PROTECTION

A. The Reformulation of Dismissal Law

The legal protection of job security goes far beyond laws regarding the employees' protection in the event of discharge. It also covers those regulations regarding instruments which could be used as a deviation of protection in the event of discharge. As an example, the limitation on the legality of a contract of fixed duration is a very important aspect in this context. A contract of fixed duration expires automatically without any need of discharge, which makes protection against discharge useless. In order to reduce complexity and prevent confusion, these implications of the regulation of job security shall be ignored in this article. The purpose of this article is not to give a comprehensive picture of job security in the Federal Republic of Germany but to describe the functioning of individual employment rights, using those rights regarding job security as an illustration.

In order to understand the German pattern of job security protection it is important to start with a basic distinction. This distinction is between extraordinary and ordinary dismissal. The distinction dates back to the origins of labour law in the 19th century. The original regulation was based on the idea that nobody should be forced to remain in a contractual relationship which he or she does not wish to continue. Thus, if in a case of grave misconduct or other urgent reason it was no longer tolerable for either of the two parties to continue the employment relationship, the weapon of extraordinary dismissal could be used to terminate the contract without a term of notice. This pattern has survived up to now. According to section 626 of the Civil Code, an extraordinary dismissal is allowable only "if there are reasons which in view of all circumstances of the case and in evaluating

3. The most important link is the fact that the large majority of works council members are either members or officials of trade unions. For details see M. Weiss, supra note 1, at 151-53.
the interests of both parties make it intolerable for either of the parties to fulfill the contract until the period of notice." Today, as in the past, the employee is protected by the fact that an extraordinary dismissal is only legally allowed if such an exceptional cause can be proved. This, in case of dispute, is subject to judicial control.

Originally, in cases in which the preconditions of an extraordinary dismissal were not fulfilled, the ordinary dismissal could be used by either one of the parties to unilaterally terminate the contract. The only condition was to observe a term of notice; no further justification was required. This explains why the history of establishing rules for job security in Germany, to a great extent, is identical with a reformulation of the preconditions of the so called ordinary dismissal.

The first step in this direction was the increase of the minimum duration of the term of notice. Here it has to be stressed that up to now the law made a distinction between blue-collar and white-collar workers. Blue-collar workers were treated worse than white-collar workers not only in reference to the term of notice, but also in defining the criteria for calculating the term of notice.5 As far as the latter is concerned, the Federal Constitutional Court in a recent decision declared the distinction to be unconstitutional.6 Meanwhile, the question of whether the distinction between blue-collar and white-collar workers regarding the term of notice is constitutional is pending in the Federal Constitutional Court.7 It is difficult to predict the outcome of this decision, which is expected in the near future. If the Court would consider the difference to be unconstitutional, this would mean that the main distinction in the legal treatment of blue- and white-collar workers regarding individual employment rights would disappear.

Although the rules on the term of notice, at least in principle, focus on the dismissal declared by either the employer or the employee, it is different for the second and more important step in the development of job security. The second step only refers to employee’s protection against the dismissal declared by the employer. Currently, it is still possible for the employee to use the ordinary dismissal as a tool to terminate the contract unilaterally without giving any reasons as long as he observes the term of notice.

After several attempts to reformulate the original pattern,8 the present structure was finally fixed in the Act on Dismissal Protection of 1951. Since that time the Act has been amended several times. The

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5. For blue-collar workers only the time after the age of thirty-five is counted, whereas for white-collar workers it is counted after twenty-five years of age.
7. See the decision of the Appellate Labour Court of Lower Saxony of 23 April 1982, EzA Art. 3 GG number 15, in which it requests the Federal Constitutional Court to give a ruling thereon.
8. The most important one was by the Statute on Works Councils in 1920.
basic idea of this Act was to reverse the traditional structure of the ordinary dismissal declared by the employer. Whereas formerly the legality of such a dismissal was the normal case, the normal case now is the illegality; the legality has become the exception. In addition to the Act on Protection Against Dismissals, which focuses on the general minimum protection, a few special laws provide further protection for specific groups of workers.9 These groups include, but are not limited to, handicapped persons, pregnant women, members of statutory representative bodies of workers, and apprentices. Protection for specific groups, however, will not be covered in this article.

The Act on Protection Against Dismissals, in principle, applies to all employees throughout the employment hierarchy. It must be stressed, however, that small establishments below a minimum size are excluded from the coverage of the Act. Establishments with five or fewer workers (apprentices not included) are excluded. Up to 1985 this figure was decisive regardless of whether the employees involved were part-time or full-time workers. However, since 1985 the law has stated that the only workers who will be considered are those who have been employed for at least ten hours per week or forty-five hours per month. Currently the exemption excludes more than ten percent of the total workforce in the Federal Republic of Germany.10 Corresponding with this large exclusion is the fact that the frequency of dismissals in these small establishments is much higher than in establishments of larger size.11 This explains why the exemption of those small establishments still causes controversial debates.

Only workers employed for at least six months by the same employer are covered by the Act. In view of the fact that a high percentage of dismissals take place during the first six months of employment, this delay of protection is also subject to criticism.12

B. The Concept of Social Justification

According to section 1 of the Act on Protection Against Dismissal, a dismissal is normally socially unjustified and therefore illegal. The Act lists three exceptions which render a dismissal legal. Thus, when the legality of a dismissal is contested the employer must prove that the prerequisites for such an exceptional case are fulfilled. There are

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9. For a survey see M. Weiss, supra note 1, at 90 - 91.
11. J. Falke/A. Hoelland/B. Rhode/G. Zimmermann, KUENDIGUNGSPRAXIS UND KUENDIGUNGSSCHUTZ IN DER BUNDESREPUBLIK DEUTSCHLAND 961 (1980). Twenty percent of all dismissals declared by employers take place in those establishments.
12. See H. Russig, supra note 10, at 93.
three reasons that justify a dismissal: the personality of the employee; the behaviour of the employee; or economic reasons.\textsuperscript{13}

A cause for dismissal which is justified by reasons concerning the personality of the worker refers to a situation in which the worker is unable to fulfill the requirements of his job. The main example fitting this category is illness. But it should be pointed out that the economic interest of the employer in dismissing the sick worker must be carefully balanced against the interests of the worker who is ill. Thus, it is necessary to examine the details of the economic impact, the impact on the other workers, the possibility of transfer, and the duration of employment. One of the decisive factors to be evaluated is the size of the enterprise. Large enterprises are thought to cope better than small enterprises with the problems created by workers who are sick.\textsuperscript{14} In short, the dismissal is legal only if, as a last resort and after such an evaluation, it turns out to be necessary.

A cause for dismissal based on reasons concerning the behaviour of the worker refers to misconduct in its broadest sense. The dismissal differs from an extraordinary dismissal in terms of the gravity and intensity of the misconduct. Only very grave misconduct may lead to extraordinary dismissal. Since all the circumstances of a specific situation must be taken into account, it would be useless to list every type of misconduct justifying such a dismissal. The legality of the dismissal depends on the details of the particular situation.\textsuperscript{15}

A cause for dismissal based on economic reasons may be due to external influences (economic crisis, etc.) as well as measures taken by an employer (introduction of new technologies, measures of rationalization, etc.). The dismissal is justified if, due to the economic situation, it has become impossible for the employer to retain the worker any longer. The employer must prove the details of the economic situation and, thereby, imply necessity for the dismissal if the dismissal is contested in court. It must be stressed that the employer may take organizational measures (introduction of new technologies, measures of rationalization, etc.) which may lead to dismissals which are not subject to judicial control. They are considered to be part of management's prerogative.\textsuperscript{16} However, as will be shown below,\textsuperscript{17} the works council is involved to a certain extent.

\begin{footnotes}
\textsuperscript{13} For a survey see Weiss, Protection Against Unfair Dismissals in Western Germany, in PROTECTING UNORGANIZED EMPLOYEES AGAINST UNJUST DISCHARGE 153-58 (J.Stieber & J.Blackburn eds. 1983).
\textsuperscript{14} See Federal Labour Court decision of 19 August 1976, EzA § 1 KSchG - Krankheit -number 3.
\textsuperscript{15} For an illustration of the most frequent reasons belonging to this category see H. Russig, supra note 10, at 98.
\textsuperscript{16} See the basic decision of the Federal Labour Court of 26 June 1975, EzA § 1 KschG - Betriebsbedingte Kuendigung - number 1.
\textsuperscript{17} See infra pp. 91-93.
\end{footnotes}
If the employer sells the plant or part of the plant this does not constitute a justification for dismissal. According to section 613 (a) of the Civil Code the employment relationship in such situations is transferred automatically to the successor, and according to paragraph 4 of the same section any dismissal due to the selling of the plant or part of the plant is strictly forbidden. The Federal Labour Court has succeeded in defending this rigid rule against attempts to create an exception. It is evident that this rule may lead to difficulties in selling plants, and as a result, in practical effect, preserving the rule may not save jobs at all. This explains why its rigidity is highly controversial.

In a case of a dismissal based on economic reasons the main problem normally involves the selection of the employees to be dismissed. In many countries this selection is made according to the seniority rule, or according to another principle which can be easily handled. However, it is much more complicated in the Federal Republic of Germany. According to the law, the selection must take into account so called “social aspects.” The underlying concept of “social aspects” is that those who suffer the most from the effects of the dismissal should be the last ones to be dismissed. The problem with “social aspects” is that it refers to all possible factors defining the social situation of a worker (age, duration of employment, marital status, number of children, economic status, etc.). In other words, “social aspects” refers to a very complex phenomenon not easily defined. Instead of focusing on certainty, practicability, and simplicity it focuses on social justice for each individual case.

If, due to economic, technical, or other justifiable reasons it is necessary to keep specific employees who in view of “social aspects” would have to be dismissed, the criterion of “social aspects” does not apply. It must, however, be pointed out that conditions for such an exemption, by court interpretation, have become very difficult to satisfy.

Even when a cause for dismissal is based on the personality of a worker or an economic reason, the dismissal is still considered socially

18. See, for example, the Federal Labour Court’s decisions of 22 May 1985, EzA § 613 a BGB number 46, and of 25 June 1985, EzA § 613 a BGB number 48.


unjustified and, therefore, illegal if the worker can be transferred to a comparable job with comparable conditions either immediately or after retraining. In the latter case the expenses for retraining must remain at a reasonable level taking into consideration the financial resources of the employer. The dismissal is even socially unjustified when the worker has agreed to be transferred to a job with lower working conditions.

In any event, the possibility of a transfer within the same establishment should be examined. If, under certain conditions which will be explained in the next paragraph, the works council objects to the dismissal, the possibility of transfer to any establishment of the enterprise is subject to examination.

C. The Role of the Works Council in Protecting Job Security

1. The Works Council’s Involvement in Dismissals

According to section 102 paragraph 1 of the Work Constitution Act the employer is obliged to consult the works council before every dismissal, whether it is an ordinary or an extraordinary dismissal. If the employer does not fulfill this duty the dismissal is null and void. The employer has to inform the works council of the persons to be dismissed, the type of dismissal (ordinary or extraordinary), the cause of the dismissal, the effective date of the dismissal, the criteria applied for selection, and the examination of possibilities of transfer. In short, the works council is entitled to receive all the information which is needed to determine the legality of the dismissal. It has to be stressed that the works council always has to be consulted before the declaration of the dismissal. A violation of this rule cannot be corrected later.

In the case of extraordinary dismissals, the works council has a period of three days to agree to the dismissal or to declare reservations in writing. If the works council does not react during this period, agreement is presumed by law. Reservations declared by the works council do not prevent the employer from dismissing the employee. Such reservations have no legal effect, except to strengthen, in court, the case of the dismissed worker compared to the case in which the works council agrees or does nothing.

In the case of an ordinary dismissal, the works council has a period of one week to react. It can agree, do nothing, declare reservations in writing, or declare an objection to the dismissal (also in writing). If the works council does not react, agreement is presumed by law. None of the reactions prevents the employer from declaring the dismissal. The only reaction which may have some effect is the declaration of an objection.

Before discussing the effects of a declaration of objection, its pre-
requisites have to be sketched briefly. The prerequisites are enumerated in section 102 paragraph 3 of the Work Constitution Act:

a) The employer has not, or at least not sufficiently, taken account of "social aspects" in selecting the persons to be dismissed;

b) The dismissal would violate a guideline on selection;

c) The employee to be dismissed could be transferred to a comparable job within the same establishment or in another establishment of the enterprise at once or after retraining or further training; or

d) The employee has agreed to be transferred to a job with lower working conditions available within the establishment or in another establishment of the enterprise.

The works council is supposed to have a much better opportunity than the individual employee to examine the application of "social aspects" or the possibility of a transfer. It must be stressed that the works council can improve control on the selection procedure by so-called guidelines on selection. But it must also be pointed out that in the case of a dismissal, the scope of such guidelines is limited. It is not possible to reduce the criterion of "social aspects" to one or two factors (as for example age or duration of employment) and thereby pervert the aim and complexity of the notion. Such guidelines are mainly an instrument to enumerate the different factors and to put them in a certain order of priority. Only a minority of enterprises have guidelines referring to selection in dismissal cases. One of the main reasons for the hesitation of works councils to initiate such guidelines may be that they are afraid of being pushed into a role of responsibility for conditions of dismissal.

If the works council made a written objection in due time there are two legal consequences to be considered. First, the employer must hand over the written declaration of the objection to the dismissed employee simultaneously with the declaration of dismissal. This actually means that the employee is getting a strategical concept of how to fight the dismissal in court.

Second, the dismissed worker must be kept in employment until the end of the lawsuit if the dismissed worker sues the employer in court and demands to remain employed until the end of the lawsuit. It must be stressed that, at the same time, section 102 of the Work Constitution Act provides a tool for the employer to free himself from this obligation by obtaining a court injunction. Among other causes, the claim to get an injunction is justified if the continuation of employment would be "an intolerable economical burden" for the employer.

23. See H. Russig, supra note 10, at 104.
Facing the fact that a lawsuit on dismissals can last several years, it becomes evident that it is not exceptional to meet this burden.

2. The Works Council's Role in Shaping the Preconditions and Consequences of Dismissals

The works council's influence on job security can only be evaluated after understanding two further aspects. First, the works council has some input in employers' decisions which may lead to dismissals based on economic reasons. Second, the works council has an instrument to reach some employees suffering compensation disadvantages due to such measures taken by the employer. However, it should be understood that the works council enjoys these participation rights only in establishments with a minimum of twenty workers.

The works council's participation rights involve to the following decisions: reduction of operations; partial or total closure; relocation of the plant or essential parts of the plant; merger with other plants; basic changes in the organization, the purpose, or the equipment of the plant; and introduction of entirely new work methods and production processes. In those events, the employer has to provide the works council with "full information in time." Information "in time" means that it is given early in the planning stage. "Full information" means that management not only has to disclose its plans but also has to provide information on all possible alternatives and modifications which were or are to be taken into account in the particular situation. The idea is to provide the works council a significant opportunity to participate by supplying them with all the information in the employer's possession.

In addition to supplying information, the employer is required to reach a so called "compromise of interests" with the works council. This means that the employer should try to come to an agreement with the works council on whether and how the specific measures envisaged by management should be carried out. If an agreement is not reached, either side can call in the president of the State Labour Office to act as a mediator. If this mediation is not successful, or if neither the employer nor the works council wants the State Labour Office president's mediation, either side may take the issue to the arbitration committee. The arbitration committee consists of an equal number of members appointed by the works council and the employer. The committee also has a neutral president who chairs the committee. In reference to the "compromise of interests," the arbitration committee has no power to impose a binding decision on the parties, it can only make a proposal. It is up to the employer and the works council to accept or to reject the proposal. In other words, the law provides a procedure to reach a "compromise of interests," but if the procedure fails to be successful, the decision is left to the em-
ployer. The works council has no legal power to force the employer in a certain direction.

Regardless of whether the employer has fulfilled the duty to inform the works council and tried to reach a "compromise of interests," the works council is always entitled to enforce a so called "social plan." A "social plan" is simply a legally binding agreement regarding the compensation given to workers who are affected by management's decision. The social plan is by no means confined to financial compensation. It may also include programs of retraining, priority in hiring for new jobs, and so on. If agreement on a "social plan" cannot be reached, both sides are entitled to appeal to the arbitration committee, which in this case acts as a decision maker. Its decision is binding on both sides.

There is no minimum or maximum limit for a "social plan." It is up to the parties to reach a mutually agreeable plan. If a "social plan" is imposed by the arbitration committee, the committee's discretionary power is limited to a certain extent. According to the formula which was valid until 1985, the arbitration committee had to make its decision on the "social plan" considering the social needs of the affected workers as well as the financial strength of the enterprise. As this very broad formula covered almost any possible decision, judicial control turned out to be totally ineffective. This is why the formula was amended in 1985.24 According to this amendment, the determination of compensation for economic decline (especially lower wages, loss of fringe benefits, loss of the right to a pension, moving expenses to a new location, or increased traveling expenses) will take into account the circumstances of each individual case. The opportunities of the affected workers in the labour market must also be taken into consideration. Workers who may be retrained to perform an adequate job within the same plant, in another plant of the enterprise, or in another enterprise belonging to the same group of enterprises, but who nevertheless do not accept the offer of such a job, will not receive compensation. As far as the extent of the "social plan" is concerned, the committee must find a solution which does not endanger the future existence of the enterprise or the remaining jobs.

In an effort to provide stability to new businesses, the 1985 amendment established a privilege for enterprises which are in their initial stage. If the employer does not voluntarily offer a "social plan," such a plan cannot be enforced by the works council in the first four years after the formation of an enterprise.

In order to fully understand the works council's role, it is necessary to note that it is always within the works council's discretion to decide whether and how it makes use of its rights of participation. This is

true regardless of whether these rights belong to the categories described in sections A or B above.

D. The Labour Court's Role

As indicated above, the individual worker has a right to initiate a lawsuit to contest the legality of the dismissal. If the court decides that the dismissal was illegal, the continuation of the employment relationship is required. Whether or not the worker was actually performing work during the lawsuit, the employer must pay the remuneration for the length of this period.

Reinstatement is the normal remedy for an illegal dismissal. But it should be stressed that the law provides an alternative. Even in the case of an illegal dismissal, the employer may claim dissolution of the contract if it would be unreasonable to require him to continue cooperation with the worker. It is important to know that the facts proving this unreasonableness may be created during the lawsuit. If the court grants the dissolution request, the employer must pay indemnities to the worker. The law fixes only the maximum amount of those indemnities, which is normally 12 months wages. For workers older than 50 years of age who have been employed for at least 15 years, the maximum amount is 15 months wages. For workers older than 55 years of age who having been employed for at least 20 years, the maximum amount is 18 months wages. It is up to the discretion of the court to determine the exact amount according to the circumstances of the case.

While the law on protection against dismissal also applies to executive employees, there is a very important exemption in this respect. The contracts of executive employees entitled to hire and fire can be dissolved more simply, the only condition is the payment of indemnities.

Reinstatement after a time consuming lawsuit through several levels of the court system becomes difficult if, in the meantime, the worker is prevented from remaining integrated in the workforce of the establishment. This is why the right to continue working during the lawsuit has become a big issue in the Federal Republic of Germany. As shown above, the dismissed employee may claim continuation of employment during the lawsuit if the works council has objected to the dismissal. The question has been raised as to whether, aside from this very specific case requiring specific conditions, there is a general duty on the employer to employ the dismissed worker until the end of the lawsuit whether an extraordinary or ordinary dismissal is at stake and irrespective of the works council's reaction. The Federal Labour Court, in a 1985 decision, developed the following

scheme. In spite of the uncertainty of the further existence of the employment relationship, the dismissed employee has no right to continue to work except in the very exceptional case that the dismissal is evidently illegal. If according to the decision of the court of first instance the dismissal is illegal, the dismissed worker has the right to continue working for the remaining period of the lawsuit in the appellate courts—until the final decision. In other words, once there is a strong indication of the illegality of the dismissal, the employee's interest to continue working dominates over the employer's interest. The Federal Labour Court's decision has not only provoked a very stormy debate but there also have been several attempts to circumvent the court's decision, which again invoked the reaction of the Federal Labour Court.

III. PRACTICAL IMPACT ON JOB SECURITY

A. Works Council's Role

Even though the law requires each establishment with at least five employees to establish a works council, this goal is not accomplished in reality. In many small establishments (up to the size of fifty employees) there is no works council. On the whole, less than twenty percent of the establishments which are supposed to have works councils actually have such bodies. This figure, however, may be misleading. Establishments which have a works council comprise more than 60 percent of the workforce. In other words, the big majority of employees are represented by works councils.

The size of the establishment seems to be one of the most decisive factors for the frequency of dismissals declared by the employer. Less than half of the dismissals take place in establishments which have works councils. Whereas in small establishments which have up to twenty employees one employee out of seven is discharged, the danger of discharge in establishments which have above 2,000 employees is only one employee out of forty-eight. Whether this distribution is partially due to the existence and actions of works councils is difficult

27. See, e.g., Federal Labour Court decision of 19 December 1985, EzA § 1 KschG - Beschäftigungspflicht -, number 17.
31. Id. at 68.
to determine. Other factors such as the management’s organization or the company’s image may be relevant.

As far as the works council’s role in the consultation procedure is concerned, the degree of agreement with the employer’s intended dismissal is striking. Empirical research demonstrates that in about two-thirds of the cases there is agreement with the employer’s intention.\(^{32}\) But here again, the size of the establishment implies significant differences as the above figures show.\(^{33}\)

The different works council’s reactions in establishments of different size may be primarily explained by the fact that works councils in bigger establishments are much more qualified than those in smaller establishments. This gap of qualification is especially relevant in view of the expertise necessary to formulate a proper objection. The formal requirements for a declaration of objection have become so complicated that works councils in small establishments quite often are unable to meet those standards.\(^{34}\)

The frequency of agreement with the dismissal also depends on the type of and the reason for dismissal. Thus, agreement with extraordinary dismissals is more frequent than agreement with ordinary dismissals.\(^{35}\) Among the ordinary dismissals, those caused by economic reasons are provoking the most resistance of works councils. If the reasons are based on the personality of the employee (illness, decrease of working capacity), agreement tends also to be rather low. The frequency of agreement reaches its highest percentage when individual misconduct of the employee is involved.\(^{36}\)

According to the available research data, the employer in the majority of the cases is not impressed by a negative reaction of the works council toward his intention to dismiss an employee. If the works

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<th>Reaction</th>
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\(^{32}\) See J. Falke/A. Hoeland/B. Rhode/G. Zimmermann, supra note 11, at 963.

\(^{33}\) A. Hoeland, supra note 28, at 70.

\(^{34}\) See H. Russig, supra note 10, at 122.

\(^{35}\) A. Hoeland, supra note 28, at 69.

\(^{36}\) Id. at 73.
council merely declares reservations, this does not change the employer's mind in 90 percent of the cases. In such a situation the dismissal is declared anyway. However, the situation is significantly different in cases where the works council declares an objection. In this situation only slightly more than sixty percent of the cases are dismissed in spite of the objection.

Evidently there is a close relationship between the works council's reaction and lawsuits initiated by the dismissed employee. If the works council has objected, the likelihood that the employee will initiate a lawsuit is much greater than if the works council agreed expressly or did not react at all.

In spite of the law's intention, when a works council objects, only a marginal number of the dismissed workers are kept in employment during the lawsuit. Research conducted in 1978 revealed the following statistics. Works councils objected to 18,547 dismissals which were still declared by the employer. In 3,033 of those cases the dismissed employees initiated a lawsuit. In only 902 of those cases did employees claim employment during the lawsuit according to section 102 paragraph 5 of the Work Constitution Act, and in 522 cases the claim was granted. Even though this figure, when compared with the total number of objections, seems to be negligible (2.8 percent), it should be noted that more than half of those who actually sought to remain integrated in the establishment during the lawsuit were successful (58 percent). There is no data available on how the Federal Labour Court's extension of the employee's right to remain employed during the lawsuit would change the situation.

Even though the works council is supposed to control the observance of selection according to the concept of "social aspects," in cases of dismissals based on economic reasons the council cannot prevent overrepresentation by groups who have specific difficulties in the labour market. This may be because the concept of "social aspects" is so intangible that it cannot be controlled. It may also be because the works councils, as well as the employers, tend to discharge the weaker groups within the workforce in order to improve the market chances for the establishment in the future. Conclusions of this kind, however, are mere speculations.

On the whole, it should be stressed that the empirical data concerning the works council's influence on the dismissal practice may be misleading. It may be that the main function of the works council's
participation right is a preventive one. The mere possibility of the works council's involvement in many cases may lead the employer to exclude dismissal as an instrument of personnel policy; without facing such difficulties, dismissal would be used. Even if much of this area remains dark, there can be no doubt that the works council's role in the area of job security is not irrelevant. The main problem is whether the works council's participation protects only those privileged groups among the workforce who would not be endangered by the employer's policy. In other words, it may well be that the combined activity of employer and the works council is on strengthening measures which focus on minority groups. This raises the question of whether it is a good idea to deprive the individual worker of the opportunity to put pressure on the works council. The normal instrument of pressure, the threat of refusal of reelection, does not play any role in this context. Those who are dismissed will not participate in the next election.

In discussing the role of the works council it should be mentioned that works councils have proved to be very successful in achieving "social plans." Again, the negotiation of a "social plan" may have a preventive effect which does not show up in empirical data. It may well be that an employer determined to rationalize is giving up this idea in view of the works council's claims referring to the "social plan." This may save jobs in the short run, but in the long run it could result in a greater loss of jobs. In other words, whether and how far the "social plan" is an instrument to increase job security may be uncertain. This again is subject to manyfold speculation.

There is, however, no doubt that the "social plan" is an excellent tool to provide compensation for those whose dismissal could not be prevented. But here the problem of equal justice arises. It is simply fortuitous whether a dismissal is combined with a situation which implies a "social plan." And it is also fortuitous whether the amount of compensation based on the "social plan" is satisfactory or not. This depends exclusively on the economic strength of the respective company. In short, from the perspective of the dismissed worker who normally does not get any severance pay, it may be very doubtful that this should be significantly different simply due to the fact that the dismissal takes place in the context of a measure implying a "social plan" in a prosperous company.

42. See in this context M. Weiss, INSTITUTIONAL FORMS OF WORKERS' PARTICIPATION WITH SPECIAL REFERENCE TO THE FEDERAL REPUBLIC OF GERMANY, in IIRA, 7th World Congress Proceedings (1986), Volume 2, at 1-16 (p.11).
43. For a survey on the present discussion see V. BEUTHEN, DER SOZIALAUFTRAG DES SOZIALPLANS, in ZfA (1982), at 181-206.
B. The Role of the Labour Court System

First, it has to be stressed that the initiation of lawsuits by dismissed employees not only correlates with the works council’s behaviour but also with other factors. Whereas, on the one hand it is true that the frequency of dismissals is declining in bigger establishments compared to smaller ones, it is the other way around as far as the frequency of lawsuits initiated in reference to those dismissals is concerned.\footnote{J. Falke, supra note 41, at 27.} In addition, empirical data shows that when one compares white-collar to blue-collar, men to women, and foreign workers to domestic workers, the white-collar, men, and foreign workers are overrepresented among those who fight dismissals by initiating lawsuits.\footnote{Id. at 26.}

In the large majority of cases, a compromise is reached in court which leads to both the dissolution of the labour contract and to the payment of an indemnity. In such a case, the indemnity tends to be above the level which would be reached if the court would dissolve the contract according to the procedure described above.\footnote{See supra p. 93-94.} According to an empirical study conducted in 1978, only about nine percent of those who initiate a lawsuit succeed in getting reinstated.\footnote{J. Falke/A. Hoeland/B. Rhode/G. Zimmermann, supra note 11, at 861; see also J. Diekmann, Empirie betrieblicher Kuendigungen und Arbeitsgerichtsbarkeit, in R. Ellermann-Witt/H. Rottleuthner/H. Russig, supra note 28, at 97-111.} In other words, contrary to the legal pattern in which reinstatement would be the rule and dissolution of the contract combined with the payment of indemnity would be the exception, in actual practice it is exactly the other way around.

It is interesting to note that this pattern did not change in spite of the tremendous growth of unemployment. Even if the crisis caused the number of dismissals and, correspondingly, the number of lawsuits on those dismissals to increase, the distribution between reinstatement and dissolution of the contract combined with financial compensation remained more or less the same.\footnote{This statement cannot be verified by empirical research; it is based on the author’s information acquired in many conversations with labour judges.} In spite of this result it seems to be too superficial to draw the conclusion that the described system of protection against dismissals has nothing to do with job security. First, an inquiry of those who initiate lawsuits shows a very interesting result. The main motivation of those plaintiffs who were dismissed in smaller establishments is not to get reinstated by the lawsuit. It is to either intimidate the employer or to get financial compensation.\footnote{J. Falke, supra note 41, at 30.}

This attitude may result because dismissals in small establishments

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\footnote{J. Falke, supra note 41, at 27.}
\footnote{Id. at 26.}
\footnote{See supra p. 93-94.}
\footnote{J. Falke/A. Hoeland/B. Rhode/G. Zimmermann, supra note 11, at 861; see also J. Diekmann, Empirie betrieblicher Kuendigungen und Arbeitsgerichtsbarkeit, in R. Ellermann-Witt/H. Rottleuthner/H. Russig, supra note 28, at 97-111.}
\footnote{This statement cannot be verified by empirical research; it is based on the author’s information acquired in many conversations with labour judges.}
\footnote{J. Falke, supra note 41, at 30.}
are quite often combined with personal deception and a cut off of close personal ties. Thus, reinstatement is not a realistic outcome.

Even if this motivational aspect is ignored, the mere fact that the employer has to face the works council as well as the labour court should not be overlooked. It puts pressure on him to at least carefully examine whether, in case of a dispute, a satisfactory justification of the dismissal can be presented. This, at least in principle, leads to an exclusion of mere arbitrariness in dismissal policy. It remains an open question whether protection against dismissals in a market economy can achieve more without endangering the functioning of the system.

IV. CONCLUSION

In spite of its weaknesses and deficiencies the described system of job security regulation is, at least in principle, well accepted by all the relevant actors: trade unions; employers associations; and political parties. Even though the last few years have seen many attempts toward deregulation of labour law standards in order to achieve more flexibility, protection against dismissals has never seriously been included within the subject of this discussion.

In the 1970's some efforts were made to change the system in order to improve the employees' protection. A commission composed of delegates representing trade unions, employers associations, governmental agencies, and professors was established to draft a Code on individual employment rights. The result of the commission's work was published in 1977. In regard to protection against dismissals, this draft contained only negligible corrections. The most important step which could have been made would have been the full equalization of the term of notice for blue-collar and white-collar workers. The German Confederation of Trade Unions, however, published an alterna-

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tive proposal for such a Code at the same time.\textsuperscript{51} According to this proposal the change would have been more dramatic. First, the works council would have been entitled to object, without preconditions, to any dismissal. This objection would prevent the employer’s opportunity to dismiss. If the employer still wanted to discharge the employee, he would have to initiate a lawsuit. In this situation, only the court could terminate the contract. While it was evident that this proposal was meant to elevate the employee’s protection against dismissals, it became clear that such a solution would increase the gap between employees in establishments without works councils. The proposal, however, was primarily contested on the grounds that flexible reactions in market needs would be endangered.

The commission’s draft, as well as the Trade Union Confederation’s draft, remain mere proposals. In view of the economic crisis and its effects on the labour market, nobody dared to change the well established pattern of job security regulation. This attitude is still prevailing. All signs presently are supporting the assumption that the status quo will not be changed in the near future.

\textsuperscript{51} Id. at 338-345.