Termination of employment legislation digest

Country profile – Germany

Contributed, April 2006, by Judith Sawang, LL.M. (Hons), Law Studies at the Universities of Heidelberg, Melbourne and Auckland, Erstes Staatsexamen at the University of Heidelberg, Referendarin with the Higher District Court of Frankfurt/Main. This contribution was prepared during an internship with the Office of the Legal Services of the ILO, Geneva.

Sources of regulation | Scope of legislation | Contracts of employment | Termination of employment | Dismissal | Notice and prior procedural safeguards | Severance pay | Avenues for redress | Further Information

Sources of regulation

German Labour Law originates from several sources: German Constitution and European treaty law, as well as German and European legislation and jurisdiction.

Despite ongoing attempts of unification of German labour codification, there is no unified labour code. To the contrary, labour law provisions are distributed over various codices, thirty of them alone dealing with contracts labour law. The main general rules governing statutory protection against dismissal are entrenched in the Civil Code (CC, Bürgerliches Gesetzbuch), particularly §§ 611-630, and the Protection Against Dismissal Act (PADA, Kündigungsschutzgesetz).

---

1 See, inter alia, a project initiated by the Bertelsmann Foundation to unify German Labour law on http://www bertelsmann-stiftung.de/cps/rde/xchg/S1D-DA000F0A-DF5C1E50/bstl/xsl/prj_5036_5045.htm
3 For an English, but unfortunately incomplete, version from 2002, see http://www.iuscomp.org/gla/; for the most recent German version see http://dejure.org/gesetze/BGB.
4 While many sources, inter alia, http://www.dewsb erg.de/Glossar/gesetze.html prefer translation into English as “Employment Protection Act”, the more literal translation is preferred in this text with the Arbeitsplatzschutzgesetz, the more literal translation is preferred in this text, which literally translates “Employment Protection Act”, see also the translation suggested in Office for Official Publications of the European Communities, European Employment and Industrial Relations Glossary: Germany, Sweet and Maxwell, London 1992, p. 207 Note 478. For German full text see Nipperdey, supra note 3, Text No. 152 or http://www.gesetze-im-internet.de/kschg/ an English translation of the Kündigungsschutzgesetz can be found in: Business Transactions in Germany, published by Dennis Campbell and Christian Campbell; founded by Dr. Bernd Rüster, looseleaf-collection in four folders folder 2, App. 29 A, C.H. Beck, Munich in co-operation with Matthew Bender, New York, USA, 1995ff.
Moreover, labour court jurisdiction exercised by the Labour Courts (Arbeitsgerichte), State Labour Courts (Landesarbeitsgerichte) and the Federal Labour Court⁵ (Bundesarbeitsgericht) plays an important role not only in application and interpretation of the law, but also in its further development, resulting in numerous legal institutions deriving from judicial decisions⁶.

Additionally and increasingly so, German labour law is influenced by EU-Regulations and Directives, and by case law of the European Court of Justice⁷.

Scope of legislation

In general, German labour law is divided into two sub-categories, individual and collective labour law. For the purpose of this overview on termination of employment, emphasis will be put on individual labour law.

Scope of Individual Labour Law

As the name indicates, individual labour law governs individual contractual relations between single employers on the one and their single employees on the other hand. In this context, individual labour law sets up certain minimum requirements which safeguard a standard of protection considered obligatory under German legislation.

Such requirements can be found in, inter alia, the Federal Holidays Act (Bundesurlaubsgesetz)⁸ and the Continuation of Pay Act (Entgeltfortzahlungsgesetz)⁹ entitling an employee to continuation of payment (sick pay) for up to six weeks of illness, and the aforementioned PADA. Depending on circumstance, the PADA may be supplemented by the Maternity Protection Act (Mutterschutzgesetz)¹⁰ and the Severely Disabled Persons Act (Schwerbehindertengesetz) now included in the Social Code IX (Sozialgesetzbuch IX)¹¹ – to name just two examples.

Notwithstanding the regulations of the PADA, see § 13 (3) PADA, the preconditions for limiting the term of an employment contract and the legal consequences of an invalid term limitation are governed by the Part-Time and Fixed-Term Employment Act (Teilzeit- und Befristungsgesetz)¹².

---

⁵ Official Webpage both in German and English on http://www.bundesarbeitsgericht.de/ or http://www.bundesarbeitsgericht.de/allgemein/englisch/navigation_englisch.htm respectively.
⁶ Such as, e.g., the legal institutes of „operational usage“ (betriebliche Uebung) and the principle of equality in labour law (arbeitsrechtlicher Gleichbehandlunggrundsatz).
⁷ For cases by the European Court of Justice on labour law see http://www.jurawelt.com/gerichtsurteile/sonstige/arbeitsrecht/eugh/.
⁸ ILO-translation: Federal Act on holidays, see Nipperdey, supra note 3, Text No.134.
⁹ See Nipperdey, supra note 3, Text No. 215.
¹⁰ Ibid, Text No. 400 or Bundesgesetzblatt, Part I, 2002-07-02, No. 43, pp. 2318-2324
¹¹ See Nipperdey, supra note 3, Text No.698.
Acts aiming at the guarantee of minimum standards are compulsory and cannot be superseded by individual contracts unless in favour of the employee. Other Acts may be altered only through collective agreements.  

Scope of Collective Labour Law

The freedom of association (trade unions and employers’ organisations) is guaranteed by the German Constitution, Art. 9 (3) GC (Grunndgesetz). Accordingly, collective labour law governs relations between employees, employers and their respective representative bodies. It can be subdivided into collective bargaining law striving for uniform working conditions through industrial disputes and the law on labour relations at the workplace — the level dealing with co-determination and relations between employer and workforce in individual establishments.

Collective agreements are governed by the Collective Agreements Act (Tarivertragsgesetz) and constitute the most important instrument for promoting their respective members’ interests, thereby fulfilling three main functions: protection, organization and preservation of industrial peace. The application of such collective agreement is limited to the contracting parties, i.e. it applies if an employer belongs to the employers’ federation, and his or her employee is a member of the trade union which were involved in conclusion of the agreement, or if the collective agreement has been declared generally applicable under § 5 of the Collective Agreements Act. While a collective agreement remains in force, employees are prohibited from going on strike.

The law on labour relations at the workplace is regulated by the Works Constitution Act (Betriebsverfassungsgesetz) and aims at the creation of co-operation between the trade unions and employers’ federations represented at each workplace. As representative organ of the employees under § 1 Works Constitution Act, the works council (Betriebsrat) exercises monitoring and participation rights (co-determination, rights of information and consultation) in social welfare, personnel and economic issues.

---


14 For the German text see http://www.gesetze-im-internet.de/tvg/BJNR700550949.html.


16 A works council can be elected in establishments employing 5 or more employees, if at least three of them are passively eligible.

17 See §§ 74 ff Works Constitution Act.
Contracts of employment

While employment of civil servants is governed by separate legislation, ordinary employment contracts can range from full to part-time, long- to short term, probationary and vocational contracts. All of these, however, have to meet certain minimum requirements.

§ 14 (2) of the Part-Time and Fixed-Term Employment Act allows for time-limited employment without specific justification if the contract covers a term shorter than two years; within this two-year frame, the contract can be extended for up to three times.\(^{18}\)

In any other case, fixed-term employment can be justified by factual reasons (preliminary character of work, seasonal work, employee replacing a regular employee on sick leave) under § 14 (1). Discrimination against part-time and fixed-term employees is unlawful in the absence of justification, § 4 Part-Time and Fixed-Term Employment Act.

Termination of employment

The contract of employment can be terminated in Germany, other than at the employer’s initiative, by\(^{19}\):[19]

- termination with or without severance agreement by mutual consent, §§ 241, 305 CC;
- dissolution of the contract by judgement on the ground of intolerability of continuation of employment, §§ 9, 10, 13 PADA;
- termination at the employee’s initiative pursuant to §§ 622 (1), 626 CC;
- expiry of a fixed-term contract or fulfilment of a resolutory condition;
- contractual retirement age being reached;
- death of the employee;
- refusal to recommence work after a court has ruled the termination to be invalid and the employee has found new employment in the meantime, §§ 12, 16 PADA;
- court refusal to substitute consent to preliminary recruitment without consent of the works councils, §§ 99 (4), 100 (3) Works Constitution Act;

---

\(^{18}\) For newly founded businesses, the time limit is up to four years, see § 14 (2a). While, similarly, § 14 (3) does not require justification if the employee is over 58 years old (52 years from the 31.12.2006 onward), the European Court of Justice has ruled such age barrier as a criterion for justification to be unconstitutional, see EuGH v. 22.11.2005 - Rs C-144/04, ZIP 2005, 2171 - Mangold/Helm on http://curia.eu.int/jurisp/cgi-bin/form.pl?lang =de&Submit =Suchen &alldocs=alldocs&docj =docj&docop=docop&docor =docor&docjo= docjo &numaff=&datef=&nomusue l=&domaine =&mots=mangold+helm&res.max=100.

\(^{19}\) See Hromadka/Machmann, supra note 14, § 10 Note 1-35.
• annulment of the contract at initiative of the employee due to voidability\(^{20}\) (Anfechtbarkeit) for mistake, § 119 CC, menace or fraudulent misrepresentation, § 123 CC of the employment contract;

• unilateral resignation by the employee from of a factual employment relation;

In case of contractual cancellation or termination by the employee, neither the PADA nor the Works Constitution Act are applicable.

**Dismissal\(^{21}\)**

Similarly to the employee, annulment for voidability of the employment contract can be initiated by the employer, e.g. for fraudulent misrepresentation before conclusion of the work contract. The general rules of voidability do however only apply with future effect, i.e. in deviation from § 142 CC (effectiveness ex tunc), it becomes effective ex nunc\(^{22}\). The employer also has the right to resign unilaterally from of a factual employment relation. In this case, the PADA does not apply\(^{23}\).

Additionally, the employment relation can be terminated through lockout with terminating effect (*loesende Aussperrung*) as reaction to a long lasting intensive strike or to an illegal strike\(^{24}\).

Any termination must not infringe §§ 138 CC (immorality), 242 CC (good faith), 611a CC (gender equality), 612a CC (prohibition of sanctioning the legitimate exercise of rights - *Maßregelungsverbot*) or § 9 Maternity Protection Act\(^{25}\).

§ 138 CC is subsidiary where special regulations such as §§ 611a, 612a CC exist and only applies to extreme cases. A dismissal will be considered immoral only if it drastically contravenes the moral values of a just and equitable thinking person\(^{26}\).

§ 242 CC only applies in cases of breach of good faith where the PADA does not contain any more specific regulation, for example in cases of contradictory behaviour on the side of the employer (*venire contra factum proprium*) when the employer has not terminated the contract despite existence of legitimate grounds to do so and has thereby given rise to the legitimate expectation on the employee's side that a dismissal for this specific reason will not take place. A dismissal can also

---

\(^{20}\) See Hromadka/Machmann, supra note 14, § 10 Note 1-35.

\(^{21}\) While there is, inter alia, also dismissal with option of altered conditions of employment (*Aenderungskündigung*), partial termination of certain conditions of employment, mass termination, see Hromadka/Machmann, supra note 14, § 10 Notes 38-41, this overview will focus on full termination.

\(^{22}\) Ibid, § 5 Note 167, 143ff, § 10 Note 23.

\(^{23}\) Ibid, § 10 Note 24.

\(^{24}\) Ibid, § 10 Note 26.

\(^{25}\) Termination of contract is prohibited while the employee is pregnant and until 4 months after childbirth.

\(^{26}\) The German formula used to express this standard is: “Anstandsgefuehl aller billig und gerecht Denkenden.” Examples where this standard is violated are: dismissal for non-acceptance of sexual offers, out of revenge, for homosexuality, see Hromadka/Machmann, supra note 14, § 10 Notes 70-72.
run counter good faith if it is exercised recklessly with regard to time and location or if it is evidently arbitrary\textsuperscript{27}.

The most common reason for termination will however be either “ordinary” or “extraordinary” dismissal which are governed by the PADA/ § 626 CC respectively\textsuperscript{28}. They have to comply with specific requirements which strictly limit the grounds on which termination of contract can be lawfully based.

**Ordinary Dismissal under the PADA (ordentliche Kündigung)**

Ordinary dismissal has to comply with the requirements as prescribed by the PADA, whose main purpose has traditionally been the preservation of employment\textsuperscript{29}.

Its application depends on the number of employees, § 23 PADA: It is not applicable to establishments permanently employing five or less than five full-time employees (not counting vocational trainees), and it is only partially applicable to establishments employing ten or less employees (employees hired after the 31.12.2003 do not count for that purpose). In ascertaining the number of employees, part-time employees with a regular working week of not more than 20 hours shall be counted as 0.5, and with not more than 30 hours as 0.75 employees. Also, the PADA does not apply for employment relations shorter than half a year, § 1 (1) PADA.

Under § 1 PADA, termination with notice is socially justified and legally effective only if it is based on reasons relating to either the employee’s person, conduct, or urgent operational business requirements which render continuation of employment impossible. The employer carries the burden of proof for showing the existence of these grounds.

A justification based on the employee’s person can be derived from any personal feature inherent in the employee which renders the employee inadequate for the job. Moreover, grounds for a negative prognosis, impact on the establishment’s work performance and a lack of possibility to continue employment are necessary conditions. Lastly, the employer’s and the employee’s interests have to be weighed against each other and this has to result in favour of termination\textsuperscript{30}. Examples can be long-term illness or frequent short illnesses. As dismissal is only a means of last resort, it has to be measured from the standpoint of a responsible and sensible employer\textsuperscript{31}.

Conduct-related dismissal has to be based on the employee’s violation of contractual obligations, negative prognosis, negative impact on the employment relation and lack of possibility to continue

\textsuperscript{27}Ibid, Note 73.

\textsuperscript{28}This differentiation is a specific feature of German legal terminology; see also Office for Official Publications of the European Communities, European Employment and Industrial Relations Glossary: Germany, Sweet and Maxwell, London 1992, p. 64 Note 121.

\textsuperscript{29}Hoyningen-Huene/Linck, Kommentar zum Kuendigungsschutzgesetz, 13th edition, C.H. Beck, Munich 2002, § 1 Note 4: Bestandsschutz- und kein Abfindungsgesetz („Preservation, not Compensation Act“).

\textsuperscript{30}BAG (Federal Labour Court) NZA 1997, 761ff.

\textsuperscript{31}For details see v. Hoyningen-Huene/Linck, supra note 27, § 1 Note 175-269.
employment. Again, a balancing exercise between the contrary interests has to result in favour of termination. Additionally, following the principle of proportionality, termination has to be preceded by a warning (Abmahnung) issued within two weeks following misconduct, save in instances where it would be unsuitable in improving the employee’s conduct and/or intolerable for the employer (i.e. in the case of breach of confidence, criminal offences committed against the employer). Generally, a warning will be rather necessary if the employee’s performance is at stake than if there has been a breach of trust\(^{32}\).

Urgent operational requirements can stem from the closing down of the establishment, economisation and rationalisation and are only partially subject to judicial scrutiny, e.g. for arbitrariness. The entrepreneurial decision itself cannot be considered by a court. Thus, judicial review will focus on the criteria of urgency and the question whether there has been a loss/abolition of job which has rendered the employment obsolete\(^{33}\).

Moreover, the employer must undertake a social selection of the relevant employees on the basis of length of employment, age, family support obligations of the employee and severe disability, § 1 (3) PADA. Through this requirement it is intended to protect employees who are less likely to find a new employment or have social obligations to fulfil. Employees whose further employment is crucial for the functioning of the establishment (Funktionsträger) do not have to be considered in the course of this selection process\(^{34}\). Regarding the possible non-compliance with the requirements under § 1 (3) PADA, it is the employee who carries the burden of proof.

No social justification is possible in the case of § 1 (2) Clauses 2 and 3 PADA\(^{35}\).

**Extraordinary dismissal according to § 626 CC (außerordentliche Kündigung)**

Extraordinary dismissal will take place in circumstances amounting to an “important reason” which justifies summary termination, § 626 (2) CC. Such reason will be considered a just cause if the employer cannot be reasonably expected to continue the contractual relationship until its designated end or the end of the regular period of notice.

Said unacceptability is assessed objectively in the light of all circumstances and has to balance the interests of both parties involved, § 626 (1) CC. This involves a two-step test:

(a) Is the reason abstractly appropriate as justification of extraordinary termination and

(b) Does it concretely suffice as justification of extraordinary termination in the specific case\(^{36}\)?

\(^{32}\) See supra, ibid, Notes 271-362a.

\(^{33}\) See supra, ibid, Notes 363-430.

\(^{34}\) See supra, ibid, Notes 431-494c.

\(^{35}\) If termination contravenes a directive under § 95 of the Works Constitution Act, if it is possible to continue employment in the establishment or another establishment belonging to the same enterprise, and if the works council has objected termination in writing within the notice term defined in § 102 Works Constitution. Similar criteria apply to public enterprises.
Extraordinary dismissal will be justified in case of severe breaches of contract, e.g. refusal to perform work, criminal offences and persistent violations of work rules. While each case has to be individually decided, there is extensive case law on the matter.\(^{37}\)

However, despite the provision’s title “termination without notice”, § 626 CC, extraordinary termination may be subject to a period of notice based on social factors (soziale Auslaufbrist). In any case, the employer has to clarify that he or she wishes to terminate the employment relation on extraordinary grounds, i.e. without adherence to §§ 621, 622 CC. An extraordinary dismissal may however be reinterpreted as ordinary dismissal according to § 140 CC if the hypothetical will covers such reinterpretation.\(^{39}\)

While protection against extraordinary dismissal is independent from the PADA as far as the substantive grounds for dismissal are concerned, §§ 4, 7 PADA nevertheless apply. This means that the absence of a challenge to the dismissal within the prescribed time limit of three weeks (Praękclusionsfrist) results in an irrebuttable legal presumption that the dismissal was lawful.

Specific rules apply to disabled persons,\(^{40}\) pregnant women and parental leave,\(^{41}\) members of the works council\(^{42}\) and during compulsory military or civilian service.\(^{43}\)

**Dismissal in general**

Apart from these regulations, i.e. outside of the PADA’s scope of application, and if dismissal is not based on § 626 CC, dismissals will only be considered invalid according to §§ 138, 242 CC for arbitrariness or unreasonable grounds of dismissal, e.g. violation of Art. 3 (3) GC. While certain social

\(^{36}\) Hromadka/Machmann, supra note 14, § 10 Note 10ff.

\(^{37}\) Palandt/Weidenkaff, Kommentar zum Bürgerschaftlichen Gesetzbuch (Commentary on the CC), 65th edition, C.H. Beck, Munich 2006, § 626 Note 42ff; dismissal can also be based on grounds of suspicion and third party pressure.


\(^{39}\) Hoyningen-Huene/Linck, supra note 27, § 13 Note 42ff; BAG (Federal Labour Court) NZA 1988, 129. In such case, however, it is necessary that the works council has also – e.g. alternatively - been consulted on the termination as an ordinary one.

\(^{40}\) Dismissal of severely disabled persons either with or without notice requires prior consent of the integration office (§ 85 Social Code IX [Sozialgesetzbuch IX]).

\(^{41}\) Dismissal during pregnancy and four months thereafter is prohibited by law, § 9 Maternity Protection Act. This also applies if the employer has been unaware of the pregnancy at the time of notice but is informed within two weeks thereafter. The prohibition extends to maternity/paternity leave or parental leave under § 18 Federal Parental Leave Compensation/Benefit (Bundeserziehungsgeldgesetz), see Ni perdey, supra note 3, Text No. 401, unless declared exceptionally valid by the highest state authority or an appointee thereof.

\(^{42}\) Members of work councils cannot be dismissed unless there is a important ground for instant termination and consent has been given according to § 103 works Constitution Act or has been substituted by court ruling, § 15 PADA. This protection extends to one year after end of work council membership.

\(^{43}\) Notwithstanding dismissal due to important reason under § 626 CC, dismissal during military or civilian service is prohibited by § 2 of the Employment Protection Act (Arbeitsplatzschutzgesetz), with protection starting upon receipt of conscription notice.
aspects will have to be taken into account by the employer, this must not lead to an application of the same standards as applicable under the PADA.\textsuperscript{44}

**Notice and prior procedural safeguards**

The termination of an employment relationship by means of an ordinary dismissal (with notice) or an extraordinary dismissal (not necessarily, but mostly without notice) must be made in writing to be effective (§ 623 CC).

**Ordinary dismissal**

Ordinary termination will become effective after a period of notice of at least four weeks elapsing on the fifteenth or the end of the calendar month, § 622 CC. If continuous service in the course of employment amounts to more than two years and the employee is over 25 years old, the period of notice grows proportionally to the duration of employment: the statutory period increases by one month on completion of the 5th, 8th, 10th, 12th and 15th year of employment, with the maximum notice being seven months notice after 20 years of service, § 622 (2) CC.

A collective agreement can extend or shorten the statutory periods of notice for the employees, § 622 (4) CC. Individual contractual agreements can extend the statutory periods of notice. However, the period of notice to be observed by an employee may not be longer than the one which has to be observed by the employer, § 622 (5), (6) CC.

**Extraordinary dismissal**

While extraordinary termination can become effective without a period of notice, it can also be issued with a period of notice. In any case, however, notice has to be given within two weeks after having obtained knowledge of the grounds giving rise to the termination, § 626 (2) CC. As an exception, during a probationary period, which must not be longer than 6 months, employment can be terminated at any time by giving two weeks notice, § 622 (3) CC.

**Hearing of the works council**

Where there is a works council, a special procedure has to be followed in accordance with § 102 Works Constitution Act, i.e. the employer has to inform the works council of the grounds of termination\textsuperscript{45} and the nature of termination (ordinary or extraordinary) intended. A dismissal issued without such consultation is invalid.

\textsuperscript{44} Hromadka/Machmann, supra note 14, § 10 Note 73a: Outside of the PADA, fundamental rights of the employer deriving from Articles 12, 2 German Constitution (Grundgesetz) generally prevail.

\textsuperscript{45} However, these grounds only have to be communicated from the employer’s point of view and reflect his/her subjective determination.
The works council may file an objection against the dismissal within a prescribed time limit, § 102 (2) Works Constitution Act[^46]. However, neither the termination’s effectiveness nor its validity depend on the Council’s approval. Nevertheless, the Council’s objection may give rise to certain rights if the employee challenges the dismissal before a Court, § 102 (5) Works Constitution Act[^47].

**Severance pay**

Entitlement to severance pay can arise from a severance agreement accompanying a mutually agreed upon termination contract, as a consequence of ordinary termination due to urgent operational requirements (§ 1a PADA), or in the context of a court ruling resulting in the dissolution of employment relation due to intolerability of continuation (§§ 9, 10 PADA).

Severance pay according to § 1a PADA has to be paid if the employee abstains from initiating legal procedure. It is due after the 3-weeks time preclusion period from § 4 PADA has ended[^48]. The payment amounts to 0.5 monthly salary per year of employment.

Under §§ 9, 10 PADA, a court can mandate severance payment if termination has been invalid but continuation of employment is nevertheless intolerable for either party involved. In this case, the employment relation can be dissolved if there is a corresponding application by either party. Severance payment generally amounts to 12 months of salary, § 10 (1) PADA. Higher payments will have to be granted depending on the employee’s age and duration of employment, § 10 (2) PADA.

**Avenues for redress**

If the PADA applies and an employee wishes to contest a dismissal on the grounds of lack of social justification, or lack of important reason in case of extraordinary termination, legal action must be brought before the competent local labour court (Arbeitsgericht) within three weeks after receipt of written notice, §§ 4, 7 PADA[^49]. Such action has to seek declaration[^50] that the employment contract has not been terminated, 4 PADA[^51].

[^46]: The time limit for ordinary termination is one week, for extraordinary termination three days.

[^47]: Under operation of this paragraph, the employee is entitled to continuation of employment during the pending of legal procedures.

[^48]: Unlike other time periods, this is no procedural time limit but a matter of substantiation (Begründetheit), i.e. an action will still be admissible, it will however be considered unfounded. The German terminus technicus for this is “materielle Präkussionsfrist.”

[^49]: The labour court has original jurisdiction, § 2 Labour Court Act (Arbeitsgerichtsgesetz) in all legal matters arising from employment relations.

[^50]: Such application for declaratory judgment (Feststellungsklage) has to comply with § 256 Civil Proceedings Act (Zivilprozessordnung).

[^51]: See above. If such notice has not been issued in writing, the preclusion period will not commence.
After expiration of the three weeks preclusion period, the dismissal will irrevocably be deemed valid and unchallengeable unless the legal action will be exceptionally admitted according to § 5 PADA. Where termination falls outside the scope of the PADA, an application may successfully be filed later than within three weeks after receipt of notice. It may however be time-barred according to general provisions, §§ 195 et seqq. CC or estoppel by laches, § 242 CC.

Inspired by a policy of least impact possible on the employment relation, the Court will first strive for an amicable settlement of the case and begin with a conciliatory hearing, § 54 (1) Labour Court Act. If consensus cannot be reached through conciliatory hearing, litigation will follow immediately thereafter, § 54 (4) Labour Court Act. Proceedings for protection against termination are to be prioritised, § 61a Labour Court Act, e.g. conciliatory hearings are supposed to take place within two weeks after the application has been filed.

Also motivated by protection of employees, costs for labour proceedings are relatively low in order not to represent an obstacle to employees’ legal protection, § 42 (4) Court Costs Act (Gerichtskostengesetz).

The Labour Court is composed of one presiding judge and two honorary lay judges with equivalent legal powers. The lay judges are nominated one half each among persons proposed by trade unions and employers’ organisations respectively, §§ 6, 16, 20 Labour Court Act.

The court of appeal is vested in the State Labour Courts, §§ 33 et seqq. Labour Court Act with final appeal to the Federal Labour Court consisting of three judges (one presiding, two assessors) and two honorary lay judges, §§ 40 et seqq. Labour Court Act in conjunction with § 1 Labour Court Act.

If the court finds the dismissal to be invalid due to lack of social justification/important reason, it will declare the dismissal has been invalid from the beginning. If the declaratory application has been filed accordingly, it can also declare the continuation of employment relationship.

While the case is pending, and upon request filed by the employee, it can furthermore recognise the right to entitlement to continuation of employment (Weiterbeschäftigungsanspruch) until the matter has been decided - either according to § 102 (5) Works Constitution Act, if the works council has opposed dismissal in due time and the employee has filed a complaint under the PADA, or in case the dismissal is evidently invalid, or after the dismissal has been declared invalid by the court of

---

52 As indicated above, the time period prescribed by §§ 4,7 PADA is not a procedural time limit. Thus, the action will still be admissible, but will be considered unfounded due to irrebuttable presumption of validity of termination.

53 This will be possible if the employer has been unable to comply with the time limit despite due diligence.

54 Often, 2-3 months will be considered as a time limit; see Becker/ Hillebrecht (co-founders)/Friedrich, supra note 36, § 13 KSchG (PADA) Note 304ff; Becker/ Hillebrecht (co-founders)/Rost, ibid, § 7 KSchG (PADA) Note 35ff.

55 Due to lack of capacities, however, most legal proceedings will not be able to comply with this time frame.

56 With a maximum value in litigation of three months’ salary and severance pay not to be included.

57 See §§ 8, 64, 72 Labour Court Act.

58 Hromadka/Machmann, supra note 14, § 10 Note 312ff and on applications possible (punktuell, allgemein, Schleppnetzanträge) and Becker/ Hillebrecht (co-founders)/Friedrich, supra note 36, § 4 KSchG (PADA) Note 225ff.
first instance\textsuperscript{59}. The legal basis for continuation of employment stems from §§ 611, 613 CC in conjunction with § 242 CC and Art. 1, 2 GC protecting the employee’s individual rights\textsuperscript{60}.

Moreover, if application for dissolution has been filed, the Court may also dissolve the employment relations and mandate severance payment (see above).

**Further information**

- ILO Natlex Germany

---

\textsuperscript{59} Acknowledged firstly in BAG (Federal Labour Court) NZA 1985, 702; see also Hromadka/Machmann, supra note 14, § 10 Note 350ff.

\textsuperscript{60} Hromadka/Machmann, supra note 14, § 10 note 354 referring to the Federal Labour Courts’ jurisdiction but also quoting dissenting opinion in parts of literature.