

## Sources of regulation

In Germany, there is no consolidated labour code. The general rules governing statutory protection against dismissal are in the Civil Code (Bürgerliches Gesetzbuch) (CC) and in the Protection Against Dismissal Act (Kündigungsschutzgesetz) (PADA<sup>2</sup>). In establishments<sup>3</sup> where there is a works council, the protection against dismissal is supplemented by collective law provisions (sec. 102, Works Constitution Act). The statutory protection may also be supplemented by collective agreements. Furthermore, regulations have been enacted to protect certain vulnerable categories of workers. These include the Maternity Protection Act; the Severely Disabled Persons Act; the Vocational Training Relationship Act; the Act on the Payment of Child Raising Benefit and Child Raising Leave; and the Job Protection During Compulsory Military or Community Service Act.

Judicial decisions also play an important role in the development of protection against dismissal, because legal interpretation is to a large extent done by the Regional Labour Courts and the Federal Labour Court. German labour law is influenced also by EU Regulations and Directives, and by case law of the European Court of Justice.

## Scope of legislation

German labour law makes a distinction between *ordinary termination* (with notice), by which the employment relationship is ended when the period of notice expires (sec. 622, CC), and *extraordinary termination* (without notice), which brings about immediate cancellation of the employment relationship (sec. 626, CC).

In both cases, termination at the initiative of the employer is limited by law. Some employees benefit from particular protection against dismissal due to certain individual circumstances (see under Termination of employment at the initiative of the employer).

However, under certain conditions every employee is protected against dismissal. The general protection against extraordinary dismissal derives from sec. 626 CC. The general protection against ordinary dismissal is provided on the basis of the PADA, if this Act is applicable. This is the case, if the employee is employed in an establishment regularly employing more than five full-time employees<sup>4</sup> (not counting vocational trainees and *marginal part-time workers*) and has been working there without interruption for more than six months (secs. 1 para 1 and 23 PADA).

In a case where an employee falls under the scope of the PADA, he or she must take legal action against any ordinary or extraordinary dismissal within 3 weeks of notification in order to claim protection deriving from the PADA and sec. 626 CC (see secs 4 and 7 PADA).

Protection against dismissal may be supplemented by collective labour law provisions (see

<sup>1</sup> Contributed by Liliane Jung; updated 5 December 2000.

<sup>2</sup> As subsequently amended, the most recent occasion being in December 1998

<sup>3</sup> The establishment *Betrieb* is a legal term related to the Works Constitution Act. It is not necessarily identical with a company and is defined as the organisational unit in which the entrepreneur alone or together with his staff pursues particular working objectives.

<sup>4</sup> According to the revised version of Section 23 PADA with effect from 01.01.1999, more than five full-time employees need to be employed in the establishment. Until 31.12.1998 the PADA was applicable only in establishments with more than ten full-time employees.

sec. 102 Works Constitution Act). In this context, the influence of the works council on dismissal proceedings plays an important role. The works council is elected by the employees of the establishment, if they choose to have one.

## **Contracts of employment**

Labour law in Germany applies to employment relationships based on a private law contract. This includes employers and employees in the private as well as in the public sector, but excludes civil servants, whose conditions of service are governed by legislation.

The employment of children is forbidden. This applies not only to children under 15 years but also to those who are older and still obligated to attend full-time schooling (sec.5 para.1 and sec. 2 paras. 1 and 3 Young Workers Protection Act)<sup>5</sup>. Children who are no longer subject to compulsory full-time schooling can conclude a contract for vocational training (sec.7 Young Workers Protection Act). Vocational training contracts are technically speaking not considered contracts of employment. However, sec. 3 para. 2 of the Occupational Training Act states that the rules and principles governing the contract of employment are to be applied, except where the Act expressly states an exception, or when the application of labour law would not be compatible with the nature and aim of the vocational training being undertaken. For example, a trainee can, after the probationary time, only be dismissed extraordinarily (sec. 15 para. 2 Occupational Training Act).

A contract of employment can be concluded for an unlimited period of time or for a specified period (fixed term contract); there can also be contracts for full-time or for part-time employment, the latter being defined as any work less than the weekly hours worked by full-time workers.

As a rule, an employment contract is concluded for an unlimited period of time (see sec. 620 para 2 CC). A fixed term employment contract, which is concluded for longer than 5 months with an enterprise employing more than five full-time employees, in principle needs justification for the limitation<sup>6</sup> (for example for seasonal work or replacement of employees on sick leave). However, under the relatively recent Employment Promotion Act<sup>7</sup>, this required precondition of justification is not necessary for contracts for a limited period of up to two years, as well as for employees over 60 years.

Concerning rights deriving from the contract of employment, full-time and part-time employees must in all cases be treated equally, provided that there are no legally justified reasons for unequal treatment (sec.2 Employment Promotion Act). The prohibition of discrimination was introduced by the Employment Promotion Act in 1985, and confirmed by Federal Labour Court rulings. Part-time and full-time workers are thus protected equally against dismissal.

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<sup>5</sup>In very exceptional cases, children can be employed, for instance for the purpose of occupational therapy (sec.5 para.2 Young Workers Protection Act). However, the work must be suitable for the child.

<sup>6</sup>This is a Federal Labour Court ruling corresponding with the conditions, under which the PADA applies.

<sup>7</sup>This Act has been in force since May 1985 and stays in force until the end of 2000. Its prolongation is likely but not certain yet. According to a research of the Federal Statistics Office in April 1999, 9% of all German employees had a fixed term contract. Mainly young people were affected.

## **Termination of employment**

The contract of employment can be terminated in Germany, other than the employer's initiative, by:

- termination at the employee's initiative;
- expiry of a fixed-term contract;
- contractual retirement age being reached;
- termination by mutual consent<sup>8</sup> and
- contestation of the employment contract

## **Termination of employment at the initiative of the employer**

Termination at the initiative of the employer is allowed only under some strict prerequisites. Any dismissal is invalid if it is in breach of a statutory prohibition, or on public morality grounds (sec. 138 CC). The employer is thus never allowed to dismiss with or without notice on grounds of origin, race, language, religion, participation in trade unions, sex or political beliefs (Arts. 3 para.3, 9 para. 3 Basic Law and sec. 611 para. 1 CC). In fact, the above mentioned reasons are rarely subject of legal proceedings.

The individual is protected against ordinary dismissal, if his or her permanent employment relationship falls within the scope of the PADA<sup>9</sup>. According to sec. 1 para. 1 PADA, any dismissal with notice must be socially justified. For social justification, the dismissal must be based on specific reasons. They must be related to either the employee's person (e.g. frequent sickness) or the employee's conduct (e.g. breach of obligations) or operational reasons (e.g. rationalization or reorganization of the enterprise). The employer's interests on the one hand and the employee's interests on the other hand must always be weighed according to the procedures set out by sec. 1 para. 2 PADA and legal precedent. In the following, a few examples are mentioned.

One requirement established by labour court rulings for a dismissal based on the employee's conduct is that prior warning has to be given to the employee of the inappropriateness of the said conduct.

In the context of urgent operational reasons, a transfer of the employee to another job in the same company is required in place of dismissal unless such an arrangement were not feasible for one of the parties (sec. 1 para.3 PADA). In addition, the employer has to make a legally justified choice as to which employees are being considered for dismissal due to economic reasons.

In cases of collective dismissal, a certain procedure, in which the works council and the labour office are involved, has to be followed (see sec. 17 PADA).

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<sup>8</sup>In case of contractual cancellation, neither the provisions on the protection against dismissal nor the right of the works council to be consulted are applicable. However, often the employer offers the employee a severance pay to make him or her accept the offered contract of cancellation.

<sup>9</sup>Under fixed-term contracts, dismissal with notice is legally permitted, only if contractually foreseen.

Protection against extraordinary dismissal is independent from the application of the PADA and is guaranteed by stringent prerequisites applying to any employment relationship (sec 626 CC). Extraordinary dismissal must be based on valid reasons. Reasons are considered valid, if it would be intolerable for the employer to wait until the expiry of the period of notice. Each case must be judged individually, but extensive case law exists giving examples of valid reasons for extraordinary dismissal. Valid reasons may be employment fraud or insistent refusal to work. However, a refusal to work in the context of a legal strike<sup>10</sup> never entitles the employer who is hit by the strike to dismiss employees. According to Federal Labour Court rulings, this applies as long as the principle of a commensurate strike is taken into account.

Certain groups of employees are protected against dismissal by special provisions, the so called particular protection. Those are severely disabled persons, pregnant employees, employees on parental leave, members of the works councils and individuals performing their military or community service.

- Dismissal of severely disabled persons either with or without notice requires the prior consent of the main social services office (secs. 15 and 21 Severely Disabled Persons Act). A person is severely disabled, if his or her physical, mental or psychological disablement is at least 50% of the average ability (sec. 1 Severely Disabled Persons Act). The protection does not apply in case the employer were not aware of the disability at the moment of giving notice.
- During pregnancy, the employee is absolutely protected from being dismissed either with or without notice (sec. 9 Maternity Protection Act). Even if the employer is not aware of an existing pregnancy when declaring the dismissal, this protection applies, as long as the employee informs the employer during the following two weeks. The period of protection ends 4 months after child birth. Particular protection against dismissal with or without notice also applies to the period of child-care leave and is applicable from the moment when the employee claims right to such leave (sec. 18 Act on the Payment of Child Raising Benefit and Child Raising Leave *Bundeserziehungsgeldgesetz*)<sup>11</sup>. In very exceptional cases, the competent labour protection authority may declare a dismissal as legally permitted. Such a declaration must be in line with administrative provisions issued by the Federal Ministry of Family, Women and Young Persons.
- Members of work councils are absolutely protected from dismissal with notice up to one year after their mandate has come to an end (sec.15 PADA). During this period, the employee can in any case be extraordinarily dismissed, provided that the works council agrees or, in lieu of such an agreement, the employer successfully makes an application before the Labour Court (sec. 102 paras 1 and 2 Works Constitution Act).
- Employees performing military or community service are protected against ordinary dismissal over the period from receiving the call-up paper to the completion of their service (sec. 2 Act on the Job Protection on Call-up to Perform

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<sup>10</sup>A strike is a jointly and deliberately executed cessation of work by a number of employees with the intention that they will resume work once they have successfully forced through their demands in the form of the conclusion of a new collective agreement.

<sup>11</sup>This protection applies, if the employee claims parental leave, but not more than 4 weeks before the child-care leave begins.

Military Service *Arbeitsplatzschutzgesetz*). For reasons not related to the military or community service, the employee can nevertheless be extraordinarily dismissed.

### **Notice and prior procedural safeguards**

Any notice of dismissal must be given in writing (sec. 623 CC). Concerning the period until the notice takes effect, it must be determined, whether a period applies, and if so how long the specific period lasts. In this context, white collar workers and blue collar workers are treated equally.

For an extraordinary dismissal, no period of notice applies, but the notice must be delivered within two weeks after the employer has come to know the reason for dismissal (sec. 626 para. 2 CC).

In cases of ordinary dismissal, a period of notice applies. Its duration is related to the period of service. During the first two years of service, the employee, upon receiving notice, must be given at least four weeks until the termination of the contract takes effect (sec. 622 para. 1 CC). Contracts may furthermore only be terminated on the 15th or the last day of the month. As an exception, during a probationary period, which must not be longer than 6 months, the period of notice may take at least two weeks and can at any time take effect (sec. 622 para. 3CC).

After two years of service, periods of notice are periodically extended (sec. 622 para. 2 CC) From two years of service on, the period of notice is one month to the end of the month, from 5 years of service on, it is two months to the end of the month, from 8 years of service on, it is three months to the end of the month, from 10 years of service on, it is 4 months to the end of the month, from 12 years of service on, it is 5 months to the end of the month, from 15 years of service on, it is 6 months to the end of the month and from 20 years of service on, it is 7 months to the end of the month.

Contractually agreed shorter periods of notice are mainly forbidden<sup>12</sup>. However, collective agreements may shorten the period of notice.

Concerning procedural safeguards, attention must be paid on the works council. The employer has a general duty to cooperate with the works council, if one exists, on a range of staff related issues (sec. 2 para. 1 Works Constitution Act).

Before any dismissal either with or without notice, the works council must be consulted (sec. 102 para. 1 Works Constitution Act). An effective hearing especially requires that the employer inform the works council of the reasons for the particular dismissal. A dismissal without proper hearing is ineffective.

The works council may make objections against the dismissal within a prescribed time limit (sec. 102 para. 2 Works Constitution Act)<sup>13</sup>. Even though these objections do not prevent the dismissal from actually taking place, they may nevertheless strengthen the legal position of the particular employee if he or she intends to challenge the dismissal before a Court.

Legally justified objections, which are made within the prescribed time limit, provoke that the

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<sup>12</sup>Limited exceptions may apply to establishments employing less than 21 persons as well as to temporary staff of up to three months (sec. 622 para. 5 CC).

<sup>13</sup>The time limit is one week in cases of ordinary dismissals and three days in cases of extraordinary dismissals. In practice, it is often difficult for the works council to make a decision within the given time limit.

ordinary dismissal is not socially justified according to the PADA, if the employee takes legal action in time. The works council's objections are legally justified, if they conform to those falling under sec. 102 para. 3 Works Constitution Act. In fact, sec. 102 para. 3 runs parallel to the legally justified operational reasons of sec. 1 paras. 2 and 3 of the PADA.

In case the works council's has objected to the employee's dismissal, the latter can claim that his/her wages continue to be paid until a final decision by the local Labour Court is taken. Otherwise, the employee would need to wait for a Labour Courts judgement, which would order he/she be given back pay in case it understands the dismissal is socially unjustified.

Alterations in establishments may provoke a number of ordinary dismissals or cause other disadvantages for the staff members. In establishments with more than 20 employees, a reconciliation of interests must be reached by the employer and the existing works council - also called social compensation plan (secs. 111 and 112 Works Constitution Act).

### **Severance pay**

Severance pay is normally due where a contract of employment ends by mutual consent, or where an employment relationship is terminated pursuant to a court decision. When the employer and the employee terminate a contract of employment by mutual consent, the latter is often offered severance pay. This compensates for the fact that the protection against dismissal does not apply where a contract is terminated by mutual consent, furthermore it is understood that the employee has not involuntarily lost his or her job, and therefore is not entitled to unemployment benefits for a period of 12 weeks (sec. 144 Social Security Code, Vol. III).

According to secs. 9 and 10 of the PADA, an employment relationship may also be ended by judgement with severance pay mandated by the court. Such a judgement is an alternative decision, in situations where the employee successfully takes legal action against a dismissal with notice, but the court understands that co-operation between the employer and employee is impractical, in which case it will refrain from ordering reinstatement. This judgement, which is only made upon request by one of the parties, also fixes the amount of the severance pay. According to sec. 10 of the PADA, it is an amount of up to 12 month's pay.

Pay compensations may also be one of several measures to be taken in the context of a social compensation plan.

### **Avenues for redress**

Protection against dismissal proceedings can have up to three levels and always begins at the local Labour Court (secs 2 para.3b and 8 para.1 Labour Court Act). Under certain preconditions, a judgement of the local Labour Court may be appealed before the appropriate Regional Labour Court, and the Regional Labour Court's judgement may be appealed on a point of law at the Federal Labour Court.

The local Labour Court is composed of one professional judge, who is chairman, and two honorary non-paid judges with the equivalent legal powers (secs. 20 and 16 paras. 1 and 2 Labour Court Act). Each of the latter are appointed from the ranks of employers and employees. As their office is honorary, they are compensated by the government for their time away from work.

For protection against dismissal, the employee has to take legal action by declaring that the employment relationship is not ended by the dismissal. The written action must be within three weeks of delivery of the notice, only if the employment relationship falls under the scope of the PADA and the employee does not want to claim solely *particular protection* or the right of the works council to be consulted before any dismissal (secs. 4 and 7 PADA). In all other cases, no deadline for taking legal action must be observed.

The first intention of the local Labour Court is an amicable settlement of the case. Therefore, the legal proceedings start with a conciliatory hearing. Only if the conciliatory hearing is not successful, is it as soon as possible followed by the litigant hearing. After its completion, the local Labour Court passes judgement, if possible already the same day (sec. 60 para.1 Labour Court Act).

Proceedings for protection against dismissal are also given priority in the first instance (sec. 61a Labour Court Act). This is shown in the shortening of some procedural periods. In addition, an effort is made to keep the costs of local Labour Court proceeding low and the successful party is not entitled to compensation of lawyer's fees (sec. 12 paras. 2 and 4 and sec.12a para.1 Labour Court Act)<sup>14</sup>.

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<sup>14</sup>This restriction does not apply in the second and in the third instances.