LEGAL OPINION ON

THE PROTECTION OF WORKERS' REPRESENTATIVES

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CONTENTS

EXECUTIVE SUMMARY

This comparative law study has been commissioned by the Federal Department of Economic Affairs and the Federal Department of Justice and Police to supplement a study being conducted by the Centre of Studies for Working Relations at the University of Neuchatel.

The present study specifically examines the legal instruments relied on in seven European States for providing protection of workers' representatives. Country reports are provided for **Austria, France, Germany, Italy, Slovakia, Sweden and the United Kingdom**, and these provide the basis for a Comparative Examination of the approach taken in each jurisdiction towards legal protection of workers' representatives.

Initially examined are the rules in each country according to which ordinary employees may be **dismissed legitimately**. In general, all countries offer some protection for employees against unfair termination of employment. Full protection in States such as the UK, Germany and Italy are only afforded to employees in enterprises with a minimum number of workers, or after a certain probationary period. A diverse range of approaches to substantive reasons for legitimate dismissal can be found across the countries studied: some, such as Sweden and France operate different rules according to whether the dismissal is individually motivated or for operational reasons, while at the other end of the spectrum, domestic legislation sets out an exhaustive list of grounds for fair dismissal on which employers must rely. This can be seen in Slovakia, the UK and Austria for example.

The importance attached to **procedural requirements** also varies considerably, with certain countries, such as France and Slovakia setting out strict rules on the content and timing of notices of termination, whereas others, such as Germany, Austria and Sweden being more concerned with the employee being duly informed and consulted prior to any decision being taken.

In **challenging a dismissal**, employees may share the burden of proof as to the fairness of the dismissal with the employer (Germany and Austria); showing the reason for dismissal lies with the employer in the majority of States, but in Slovakia for example, Civil Procedure rules apply, and it is simply on the employer to prove their case. In France, its *procedure inquisitoire* results in the burden of proof resting neither with the employer nor the employee. Where successful, the relevant sanction on the employer will usually depend on whether the dismissal is unfair on procedural or substantive grounds and whether it was a dismissal for personal or operational reasons. Declaring the dismissal null and void is the main outcome in most countries and so an order for re-instatement follows. Compensation for loss of earnings may accompany an order for re-instatement, but may also be awarded where appropriate, often based on age and length of service and capped at a certain amount.

In **all countries** studied, **special protection for workers' representatives** which goes beyond that available to ordinary employees is provided for. Protection usually extends to candidates to be representatives and in most countries, to ex-representatives for a limited period after the end of their role. Many of the jurisdictions studied demonstrate common characteristics in the methods adopted for protecting workers' representatives:

- "**Pre-dismissal protection"** of workers' representatives is found in all jurisdictions except the UK and Italy, and refers to limits on an employer's freedom to terminate the employment of a workers' representative. In **Germany**, employers are simply prohibited from dismissing employee representatives on a works council except in very limited circumstances; in **Austria**, advance approval from a court is generally needed; permission from a public authority work inspector is needed in France, and the Slovakian Labour Code demands consent from the relevant worker's representative body.

- In conjunction with pre-dismissal protection, or where it does not exist, most States expressly include status as a workers' representative in the list of other **prohibited reasons for which an employee may not be dismissed**, such as race, sex or disability. This can make it easier for such employees to successfully challenge a dismissal, and in the UK for example, the usual requirement to have completed a minimum period of employment to bring a claim is dis-applied.
- Beyond dismissal, workers' representatives are also usually protected in the course of their duties from being subjected to a **detriment, less favourable treatment or other discrimination**. Particular rules can be found in France, the UK, Sweden and Italy.
- Given their importance during redundancy situations, a number of countries expressly provide enhanced protection to workers' representatives from **early dismissal,** and increased sanctions are applied against employers who breach relevant rules.
- **Special rights** are given in most of the studied countries to workers' representatives, which are designed to **support their ability to perform their role**. This is principally the right to time off to carry out their duties, but also, for trade union representatives, to attend union meetings. This is usually a right to reasonable time off, and for work-related representative duties is paid at the rate of their normal employment. In Austria and the UK for example, certain paid time off may also be available for training and education needs.

Where the dismissal of a workers' representative is illegitimate, the usual consequence in most countries studied is that it is deemed null and void. Where re-instatement is not appropriate, countries such as **France**, **Germany** the **UK** and **Slovakia** all make provision for enhanced compensation beyond that which an ordinary employee would be entitled to. Unfavourable treatment is punished in some countries by way of damages corresponding to the loss suffered by the representative, but in **Italy** and **France**, for example, such treatment can amount to anti-union conduct which may constitute a criminal offence punishable by imprisonment.

The **constitutional basis** for the representation of workers is usually rooted in respect for the **Freedom of Association**. The German, French, Italian and Slovakian constitutions all guarantee in some form, protection of this fundamental right. Specific provisions on the protection of workers' representatives are usually found in respective Labour Codes or legislation. In other countries, the collective representation of workers may be said to derive from international and European legal instruments on the freedom to associate and the right to form and join trade unions, such as the European Convention on Human Rights and relevant ILO Conventions. Domestic legislation loosely implements the principles espoused in these accords.

The question of how workers' representatives are protected in different jurisdictions must, for the most part, be considered against the backdrop of a framework of **rules and practices in collective work relations which are rooted in a complex economic and social history** unique to the country concerned. The importance of collective agreements, for example, varies from country to country, and in Sweden, Austria and France, almost all employees are directly covered by at least one such agreement. Trade union membership and industrial action, on the other hand, have all broadly declined in the countries concerned in recent decades. Increasing direct worker engagement, flexibility of the labour market and the introduction of EU information and consultation rules, have all contributed to changes in the way in which workers are represented, and who represents them. How representatives are to be protected and the level of protection to be afforded to them has become an ever more complex issue.

I. BACKGROUND AND QUESTIONS

1. Context

On 21st November 2012, the Federal Council requested the DEFR and DFJP to conduct a study on the protection of workers representatives. A working group was constituted for this purpose. It includes representatives of the OFJ and of SECO.

A mandate was given to the Centre for studies of working relations of the University of Neuchatel (CERT) to conduct this study. The granting of a mandate to the Swiss Institute of Comparative Law for conducting a legal comparative analysis on this subject was reserved.

2. Mandate

The main question posed in the study to be conducted by CERT is as follows:

> *What is the protection accorded to workers' representatives under Swiss law and what assessment can be made of it in view of the interaction between the three following areas: fundamental rights, collective labour relations and individual workers' relations?*

The comparative law study should provide an overview of the protection of workers' representatives in the countries set out below.

3. Questions

1. Provide a **general overview** of the legal protection afforded to workers from being dismissed unfairly. In particular:

    (a) What are the substantive reasons for dismissal recognised by law (e.g, individual/collective redundancy, misconduct/poor performance)?

    (b) What, generally, are the procedural requirements for legitimate dismissals?

    (c) Who must prove that a termination of employment does not conform to substantive and/or procedural requirements (including whether there is any reversal of the burden of proof) and what kinds of sanctions are available?

    (d) What, if any, recent reforms have been made to national laws concerning dismissals from employment in response to the financial crisis?

2. Describe in detail any special protection provided by law for workers' representatives (including trade union representatives and workers formally elected to act on behalf of staff collectively) against being subjected to any unfavourable treatment, including dismissal.

3. What sanctions are available against employers who violate laws protecting workers' representatives and how are these applied in practice (provide details of types of sanctions, maximum compensation awards available, how much is awarded on average, whether re-engagement or re-instatement may be ordered, and in what percentage of cases this takes place)?

4. What, if any, is the constitutional basis for the collective representation of workers?

5. What is the role of collective work relations in the country's employment relations system as a whole? In particular:

    (a) Describe the institutional system prescribed by the law as well as the legally available mechanisms and means of engaging in collective action;

    (b) Describe how the system operates in practice (including the role and importance in practice of trades unions and collective bargaining).

The concept of a worker representative is to be in its broadest sense. It may be a question of representatives elected within a staff representative structure or trade union representatives. Simple union activity is not sufficient. The worker must have a qualified position which gives him the possibility of acting on behalf the workforce collectively.

II. COUNTRY REPORTS

A. AUSTRIA

Das österreichische Individual-Arbeitsrecht ist von grosser **Zersplitterung** geprägt. Die Arbeitnehmerschaft wird für viele Fragen nach mehreren Kriterien unterschieden und unterschiedliche Rechtsquellen sind anwendbar. Zunächst gibt es für **bestimmte Berufsgruppen** Sondergesetze, z.B. für öffentlich Bedienstete als vertragliche Arbeitnehmer[1], Journalisten, Schauspieler, Hausgehilfen- und Hausangestellte, Bäckereiarbeiter, Bauarbeiter, Heimarbeiter und Hausbesorger.[2] Auf die Besonderheiten dieser einzelnen Berufsgruppen und deren Sondergesetzen wird hier in der Folge nicht weiter eingegangen.

Die wichtigste Unterscheidung im individuellen Arbeitsrecht ist jene zwischen **Arbeitern und Angestellten**. Die Unterscheidung ist vor allem für die Rechtsgrundlage von Bedeutung. Für die Rechtsstellung der Angestellten gilt das **Angestelltengesetz** (AngG[3]). Für die Arbeiter gibt es kein selbständiges Gesetz. Je nach konkreter Problemstellung gilt das Dienstvertragsrecht des Allgemeinen Bürgerlichen Gesetzbuchs (ABGB[4] aus dem Jahr 1811), die Gewerbeordnung (GewO 1859[5]), das Entgeltfortzahlungsgesetz (EFZG[6]; bei Dienstverhinderungen wegen Krankheit oder Unglücksfall) oder das Arbeiter-Abfertigungsgesetz[7]. Auch der persönliche Geltungsbereich von ca. 800 in Österreich geltenden Kollektivverträgen differenziert häufig zwischen Arbeitern und Angestellten.

Die Unterscheidung zwischen Arbeitern und Angestellten erfolgt in erster Linie nach dem **Inhalt** der tatsächlich verrichteten **Tätigkeiten**. Demgemäß ist Angestellter, wer kaufmännische Dienste oder höhere, nicht kaufmännische Dienste oder Kanzleiarbeiten leistet.[8] Diese Aufzählung des AngG erklärt sich aus der historischen Entwicklung, auf die hier nicht weiter eingegangen werden soll.

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[1] Sog. Vertragsbedienstete im Gegensatz zu Beamten, die nicht aufgrund eines Vertrages tätig werden, sondern aufgrund einer öffentlich-rechtlichen Einsetzung in den Beamtenstand.

[2] Es gibt folgende Gesetze: Vertragsbedienstetengesetz, Theaterarbeitsgesetz, Journalistengesetz, Gutsangestelltengesetz, Gehaltskassengesetz (für pharmazeutische Fachkräfte in Apotheken) und für Hausangestellte das Hausgehilfen- und Hausangestelltengesetz. Bei Arbeitern wird unterschieden: Bauarbeitern (Bauarbeiter-Schlechtwetterentschädigungsgesetz; Bauarbeiter-Urlaubs- und Abfertigungsgesetz), Bäckereiarbeitern (Bäckereiarbeiter/innengesetz), Heimarbeitern (Heimarbeitsgesetz), Hausgehilfen (Hausgehilfen- und Hausangestelltengesetz), Land- und Forstarbeitern (Landarbeitsgrundsatzgesetz und korrespondierende Landesausführungsgesetze), Bergarbeitern (Allgemeines Berggesetz; Bergarbeitergesetz; Mineralrohstoffgesetz) und Hausbesorgern (Hausbesorgergesetz).

[3] Bundesgesetz vom 11. Mai 1921 über den Dienstvertrag der Privatangestellten (Angestelltengesetz, BGBl. Nr. 292/1921, zuletzt geändert durch BGBl. I Nr. 58/2010 vom 27.7.2010.

[4] Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie, JGS Nr. 946/1811.

[5] Kaiserliches Patent vom 20. December 1859, womit eine Gewerbe-Ordnung für den ganzen Umfang des Reiches, mit Ausnahme des venetianischen Verwaltungsgebietes und der Militärgränze, erlassen,
und vom 1. Mai 1860 angefangen in Wirksamkeit gesetzt wird. RGBl. Nr. 227/1859. Gemäß § 376 Z 47 der Gewerbeordnung 1994 bleiben die §§ 72, 73 und 76 bis 78e, 82 bis 84, 86, 88 und 90 bis 92 der Gewerbeordnung in der bis zum Inkrafttreten der Gewerbeordnung 1973 geltenden Fassung aufrecht.

[6] Bundesgesetz vom 26. Juni 1974 über die Fortzahlung des Entgelts bei Arbeitsverhinderung durch Krankheit (Unglücksfall), Arbeitsunfall oder Berufskrankheit (Entgeltfortzahlungsgesetz - EFZG), BGBl. Nr. 399/1974.

[7] Bundesgesetz vom 23. Feber 1979, mit dem Abfertigungsansprüche für Arbeiter geschaffen sowie das Angestelltengesetz, das Gutsangestelltengesetz, das Vertragsbedienstetengesetz und das Insolvenz-Entgeltsicherungsgesetz geändert werden (Arbeiter-Abfertigungsgesetz), BGBl. Nr. 107/1979.

[8] § 1 AngG und § 2 AngG.

Die Unterscheidung ist heute an sich rechtspolitisch überholt. Sie hat auch im Laufe der Zeit zunehmend an Bedeutung verloren, da der Gesetzgeber die Rechtsstellung von Angestellten und Arbeitern Schritt für Schritt angleicht. Für die hier verfolgten Zwecke hat die Unterscheidung aber nach wie vor für folgende Punkte **Bedeutung**: die Entlassungs- und Austrittsgründe[9], die Kündigungsfristen[10] und eventuell für das Bestehen eigener Arbeiter- und Angestellten-Betriebsräte[11]. Aus diesem Grunde scheint es unumgänglich für dieses Gutachten zu einigen Punkten Angestellte und Arbeiter jeweils getrennt darzustellen.

1. General overview of legal protection against unfair dismissal

Für die hier verfolgten Zwecke kann abgekürzt gesagt werden, dass die Auflösung eines unbefristeten Arbeitsverhältnisses von Seiten des Arbeitgebers entweder durch vorzeitige Beendigung aus wichtigem Grund (sog. **Entlassung**) oder durch **Kündigung** erfolgen kann.[12]

Für die **Entlassung** muss ein **wichtiger Grund** vorliegen. Es handelt sich typischerweise um eher schwere **Dienstvergehen** des Arbeitnehmers (oder andere gravierende Umstände in seiner Sphäre), die eine Fortsetzung des Dienstverhältnisses für den Arbeitgeber unzumutbar machen. Die Gründe sind gesetzlich geregelt (siehe sogleich im Text).

Für die **Kündigung** spielen zwei Prinzipien eine Rolle. Gesetzliche Normen über die Kündigung des Arbeitsverhältnisses sind einerseits von dem Gedanken bestimmt, dass es aufgrund der unbefristeten Dauer des Arbeitsverhältnisses beiden Vertragspartnern freistehen soll, **ohne besondere Gründe** die Zusammenarbeit zu beenden. Dieses Recht wird aus der Privatautonomie der Vertragspartner abgeleitet. Jeder unbefristete Vertrag muss kündbar sein, weil ewige Verträge nicht zulässig sind. Dieses grundsätzliche Recht auf Vertragsbeendigung wird aber für das österreichische Recht durch die zahlreichen arbeitsrechtlichen Sondergesetze eingeschränkt, die dem **Schutz des Arbeitnehmers** dienen. Ein Arbeitnehmer ist häufig von einem aufrechten Arbeitsverhältnis wirtschaftlich abhängig. Deshalb wird er häufig einseitige vor der Auflösung des Arbeitsverhältnisses geschützt (sogenannter **allgemeiner Kündigungsschutz**). Falls dieser Schutz im Einzelfall nicht eingreift, so soll ihm durch die Beachtung von relativ langen Kündigungsfristen genug Zeit eingeräumt werden, sodass er rechtzeitig einen neuen Arbeitsplatz findet.

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[9] Bei Arbeitern taxativ: §§ 82 und 82a GewO 1859. Bei Angestellten demonstrativ: §§ 26 und 27 AngG.

[10] Länge und zeitliche Lage der Kündigungsfristen (bei Arbeitern: § 77 GewO 1859 und § 1159c ABGB; bei Angestellten: grundsätzlich § 20 AngG).

[11] § 40 Abs. 2 Arbeitsverfassungsgesetz (ArbVG).

[12] Hingegen können **befristete Arbeitsverhältnisse** grundsätzlich nicht gekündigt werden. Nach § 19 AngG und § 1158 ABGB endet ein befristetes Arbeitsverhältnis mit Zeitablauf. Nach der Rechtsprechung ist aber eine ausdrückliche Kündigungsvereinbarung in einem befristeten Arbeitsverhältnis zulässig und wirksam. Hingegen sind sog. Kettenarbeitsverträge nach der Rechtsprechung nur sehr eingeschränkt zulässig. Es bedarf einer sachlichen Rechtfertigung für die Befristung. Der gesetzliche Kündigungs- und Entlassungsschutz würde sonst seine Wirksamkeit verfehlen, wenn die Arbeitgeber uneingeschränkt befristete Arbeitsverhältnisse abschließen könnten. In aller Regel sind Stellenangebote in Österreich für unbefristete Stellen (Ausnahmen sind Abwesenheitsvertretungen, z.B. wegen langer Krankheit oder sog. Mutter- oder Vaterkarenz). Aus diesem Grunde werden in der Darstellung die befristeten Dienstverhältnisse nicht weiter untersucht.

1.1. Substantive reasons for legitimate dismissals

1.1.1. Beendigung aus wichtigem Grund (Entlassung)

Ein wichtiges gemeinsames Merkmal der gesetzlichen Entlassungsgründe ist die **Unzumutbarkeit** der Weiterbeschäftigung. Entscheidend ist, ob das Verhalten des Arbeitnehmers eine so schwerwiegende Beeinträchtigung der Interessen des Arbeitgebers bedeutet, dass diesem jede weitere Fortsetzung des Dienstverhältnisses nicht mehr zugemutet werden kann und ihm daher das Recht zur sofortigen Vertragsauflösung zugestanden wird.

Die Entlassung muss unverzüglich, also ohne schuldhaftes Zögern ausgesprochen werden. Die vorzeitige Beendigung aus wichtigem Grund ist nicht an die Einhaltung einer bestimmten Frist oder eines Termins gebunden. Sie löst mit **sofortiger Wirkung** das Dienstverhältnis auf. Ein wichtiger Unterschied zur Kündigung liegt darin, dass der Arbeitgeber gegenüber dem Arbeitnehmer den Willen ausdrückt, aus wichtigem Grund das Arbeitsverhältnis aufzulösen. Eine bestimmte **Form** ist für die vorzeitige Auflösung im Normalfall nicht vorgesehen.[13]

Für die **Folgen** der Entlassung ist zu unterscheiden, ob der Entlassungsgrund zu Recht oder zu Unrecht geltend gemacht wurde. War die Entlassung berechtigt, so besteht kein Anspruch auf die Zahlung einer sog. Kündigungsentschädigung.[14] Ein Anspruch auf Abfertigung (besondere Zahlung zum Ende des Arbeitsverhältnisses je nach Dauer) besteht nur, wenn den Arbeitnehmer kein eigenes Verschulden an der Entlassung trifft. War die Entlassung vom Arbeitnehmer verschuldet, so muss er Urlaubsentgelt für einen über das aliquote Ausmaß hinaus verbrauchten Jahresurlaub zurückzuerstatten. Der berechtigt Entlassene unterliegt einer 4-Wochen Sperrfrist für das sozialrechtliche Arbeitslosengeld. Auch wenn der **Entlassungsgrund zu Unrecht** geltend gemacht wurde, kommt es im Grundsatz (anders als bei erfolgreich angefochtener Kündigung) nicht zur Fortsetzung des Arbeitsverhältnisses.[15] Das Arbeitsverhältnis wird vielmehr zum erklärten, gesetzwidrigen Termin gelöst. Eine unberechtigte Entlassung zieht lediglich Schadenersatzansprüche nach sich (sog. **Schadenersatzprinzip**). Es gebührt jenes Entgelt, das bei Einhaltung der gesetzlichen Kündigungsfrist und gesetzlichem Kündigungstermin bis zum Ende des Dienstverhältnisses zugestanden hätte.

Um negative Folgen dieses Schadenersatzprinzips zu vermeiden, kennt das Gesetz einen **allgemeinen Entlassungsschutz**. Der allgemeine Entlassungsschutz soll vor allem die **Umgehung** des allgemeinen Kündigungsschutzes durch den Arbeitgeber verhindern. Dieser könnte nämlich ansonsten statt der (anfechtbaren) Kündigung einfach eine Entlassung aussprechen, die nach der herrschenden „Schadenersatztheorie“ das Arbeitsverhältnis jedenfalls auflöst und den Arbeitnehmer auf Schadenersatzansprüche verweist. Aus diesem Grund ermöglicht der allgemeine Entlassungsschutz die **Anfechtung** von unbegründeten Entlassungen nach den Regeln des allgemeinen Kündigungsschutzes.[16]

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[13] In Sondergesetzen für bestimmte Berufsgruppen ist aber mitunter vorgesehen, dass die Entlassung vor ihrem Ausspruch **gerichtlich** geltend gemacht werden muss.

[14] Siehe dazu später unten zur Kündigung.

[15] Ausser ein Sondergesetz sieht besonderen Bestandsschutz vor.

[16] § 106 ArbVG: (1) Der Betriebsinhaber hat den Betriebsrat von jeder Entlassung eines Arbeitnehmers unverzüglich zu **verständigen** und innerhalb von drei Arbeitstagen nach erfolgter Verständigung auf Verlangen des Betriebsrates mit diesem die Entlassung zu beraten. (2) Die Entlassung kann beim Gericht **angefochten** werden, wenn ein Anfechtungsgrund im Sinne des § 105 Abs. 3 vorliegt und der betreffende Arbeitnehmer **keinen Entlassungsgrund** gesetzt hat. Die Entlassung kann nicht angefochten werden, wenn (nur) ein Anfechtungsgrund im Sinne des § 105 Abs. 3 Z 2 vorliegt und der Betriebsrat der Entlassung innerhalb der in Abs. 1 genannten Frist ausdrücklich zugestimmt hat.

1.1.1.1. Entlassungsgründe für Arbeiter

Die Entlassungsgründe für Arbeiter sind im Gesetz **taxativ** (abschliessend) geregelt.[17] Es handelt sich um folgende Gründe: Der Arbeiter

a) hat bei Abschluss des Arbeitsvertrages den Gewerbeinhaber durch Vorzeigung falscher oder **verfälschter** Ausweiskarten oder **Zeugnisse** hintergangen oder über das Bestehen eines anderen, den Arbeiter gleichzeitig verpflichtenden Arbeitsverhältnisses in einen Irrtum versetzt (sog. Einstellungsbetrug);

b) ist zu der mit ihm vereinbarten Arbeit **unfähig** befunden worden;

c) der **Trunksucht** verfällt, und wiederholt fruchtlos verwarnt wurde;

d) sich eines Diebstahls, einer Veruntreuung oder einer sonstigen **strafbaren Handlung** schuldig macht, welche ihn des Vertrauens des Gewerbeinhabers unwürdig erscheinen lässt;

e) ein Geschäfts- oder **Betriebsgeheimnis** verrät oder ohne Einwilligung des Gewerbeinhabers ein der Verwendung beim Gewerbe abträgliches **Nebengeschäft** betreibt;

f) die Arbeit unbefugt verlassen hat oder **beharrlich** seine **Pflichten vernachlässigt**, oder die übrigen Hilfsarbeiter oder die Hausgenossen zum **Ungehorsam**, zur Auflehnung gegen den Gewerbeinhaber, zu unordentlichem Lebenswandel oder zu unsittlichen oder gesetzwidrigen Handlungen zu verleiten sucht;

g) sich einer groben **Ehrenbeleidigung**, Körperverletzung oder gefährlichen Drohung gegen den Gewerbeinhaber oder dessen Hausgenossen, oder gegen die übrigen Hilfsarbeiter schuldig macht, oder ungeachtet vorausgegangener Verwarnung mit Feuer und Licht unvorsichtig umgeht;

h) mit einer **abschreckenden Krankheit** behaftet ist, oder durch eigenes Verschulden **arbeitsunfähig** wird;

i) durch länger als vierzehn Tage im **Gefängnis** angehalten wird.

1.1.1.2. Entlassungsgründe für Angestellte

Die Entlassungsgründe für Angestellte sind im Gesetz **demonstrativ** aufgezählt,[18] d.h. Tatbestände, die vor dem Gesichtspunkt der Unzumutbarkeit der Weiterbeschäftigung gleich schwer wiegen, berechtigen den Arbeitgeber ebenso zur Entlassung. Es gibt Abweichungen von den Entlassungsgründen für Arbeiter, was auf eine stärkere Vertrauensstellung des Angestellten zurückzuführen ist. Es handelt sich um folgende Gründe: Wenn der Angestellte

1. im Dienste **untreu** ist, sich in seiner Tätigkeit ohne Wissen oder Willen des Dienstgebers von dritten Personen **unberechtigte Vorteile** zuwenden lässt, insbesondere eine Provision oder eine sonstige Belohnung annimmt (vorsätzliche Treuepflichtverletzungen), oder wenn er sich einer Handlung schuldig macht, die ihn des **Vertrauens** des Dienstgebers **unwürdig** erscheinen lässt (auch fahrlässige Vertrauensverwirkung);

2. vollständig und dauerhaft **unfähig** ist, die versprochenen oder die den Umständen nach angemessenen Dienste zu leisten (unabhängig vom Verhinderungsgrund);

[17] § 82 GewO 1859 (im Gegensatz zur GewO 1994).

[18] § 27 AngG.

3. ohne Einwilligung des Dienstgebers ein **selbständiges kaufmännisches Unternehmen** betreibt oder im Geschäftszweige des Dienstgebers für eigene oder fremde Rechnung Handelsgeschäfte macht;

4. ohne einen rechtmäßigen Hinderungsgrund während einer den Umständen nach erheblichen Zeit die **Dienstleistung unterlässt** oder sich **beharrlich weigert**, seine Dienste zu leisten[19] oder sich den durch den Gegenstand der Dienstleistung gerechtfertigten **Anordnungen** des Dienstgebers zu fügen, oder wenn er andere Bedienstete zum **Ungehorsam** gegen den Dienstgeber zu verleiten sucht (Pflichtverletzungen, inkl. pflichtwidriges Verhalten z.B. im Krankenstand);

5. durch eine längere **Freiheitsstrafe** oder durch Abwesenheit während einer den Umständen nach erheblichen Zeit, ausgenommen wegen Krankheit oder Unglücksfalls, an der Verrichtung seiner Dienste gehindert ist;

6. sich Tätlichkeiten, Verletzungen der Sittlichkeit oder erhebliche **Ehrverletzungen** gegen den Dienstgeber, dessen Stellvertreter, deren Angehörige oder gegen Mitbedienstete zuschulden kommen lässt.

In vielen Bereichen, in denen es dem Arbeitgeber wichtig sein kann, sich von einem bestimmten Mitarbeiter zu trennen, wird ein gesetzlicher Entlassungsgrund eingreifen. Praktische Probleme kann es in der **Beweisbarkeit** des Entlassungsgrundes geben. Beweispflichtig ist der Arbeitgeber. Es gibt keine Beweiserleichterungen. Eine blosse Minderleistung des Arbeitnehmers stellt keinen Entlassungsgrund dar.

1.1.2. Die Kündigungsgründe

Die Kündigung ist von ihrer Natur her von praktischer Relevanz, wenn kein gravierendes Fehlverhalten eines konkreten Arbeitnehmers vorliegt (sonst wäre eher die Entlassung das richtigere rechtliche Instrument). Es gibt aber auch die in der Person des Arbeitnehmers bedingte Kündigung. Dann geht es aber nicht um eine (gravierende) Vertrags- oder Pflichtverletzung, sondern eher um eine Minderleistung.

Die Kündigung ist eine einseitige, empfangsbedürftige Willenserklärung, die das Arbeitsverhältnis in der Zukunft wirksam beendet. Die Kündigung muss vom Arbeitgeber **vorerst nicht gesondert begründet** werden (keine gesetzliche Begründungspflicht bei Abgabe der Kündigungserklärung). Die sog. Kündigungsfreiheit des Arbeitgebers unterliegt aber gewissen Grenzen bzw. Prozeduren, und zwar **auch bezüglich der Gründe**.[20]

Sittenwidrigkeit der Kündigung

[19] Besondere Bedeutung hat die beharrliche Dienstverweigerung im Zusammenhang mit der **Streikteilnahme**, denn die herrschende Meinung in Österreich sieht bei der Teilnahme an einem Streik, unabhängig davon, ob der Streik als Gesamtaktion rechtmässig oder rechtswidrig ist, den Entlassungstatbestand des § 27 Z 4 AngG als verwirklicht an (Marhold/Friedrich, Österreichisches Arbeitsrecht, 2006, 304).

[20] Die Begründungspflicht des Arbeitgebers folgt nicht aus dem Buchstaben des Gesetzes, aber aus dem praktischen Sinn und Zweck des sog. Vorverfahrens vor einer Kündigung. Ohne eine solche Pflicht wäre das Vorverfahren ein blosser Formalismus. Für die Nichterfüllung dieser praktischen Pflicht sieht das ArbVG freilich keine ausdrückliche Sanktion vor, doch wird der Betriebsrat einer Kündigung ohne ausreichende Rechtfertigung praktisch meistens widersprechen. In diesem Fall ist die Kündigung wegen sog. Sozialwidrigkeit voll anfechtbar (siehe dazu später im Text) und spätestens dann muss sie vom Arbeitgeber regelmäßig vor Gericht begründet werden. Der **vernünftige Arbeitgeber** wird folglich die Begründung gleich vorab geben und nicht damit hinter dem Berg halten.

Zunächst ist eine Kündigung nichtig (rechtsunwirksam), die **gegen die guten Sitten**[21] verstößt. Eine Kündigung ist etwa sittenwidrig, wenn sie aus gänzlich unsachlichen und rechtlich missbilligten Motiven ausgesprochen wird. Ein solches Motiv liegt z.B. vor, wenn die Kündigung zu dem ausschließlichen Zweck erfolgt, dem Gekündigten Schaden zuzufügen. Weiters wenn es den klaren Anschein hat, dass die Kündigung nur mit verpönten Motiven begründet werden könnte (z.B. mit der **Religion** oder **politischen Weltanschauung**[22], dem Alter, der **sexuellen Orientierung**, der ethnischen Zugehörigkeit oder dem Geschlecht des Arbeitnehmers). Die Rechtsprechung hat aber auch entschieden, dass eine Kündigung nicht sittenwidrig ist, wenn einem Arbeitnehmer einer katholischen Organisation gekündigt wird, weil von ihm an der katholischen Kirche Kritik geübt wurde. Nach der Rechtsprechung darf der Arbeitgeber von seinem Kündigungsrecht nicht „aus gänzlich **unsachlichen** und aus Gründen des **Persönlichkeitsschutzes** zu missbilligenden Motiven Gebrauch machen. Es spielen hier **grundrechtliche Wertungen** in das Arbeitsrecht hinein. Es werden folgende Beispiele für gesetz- oder sittenwidrige Motive genannt: Rasse, Glaubensbekenntnis, Beitritt oder Zugehörigkeit zu einer politischen Partei, Verteidigung der Ehre, Verweigerung sexueller Kontakte, Heirat oder Scheidung.

Kündigungen, deren Grund der **Betriebsübergang** ist, sind europarechtlich verboten.[23] Das österreichische Recht kennt kein entsprechendes Kündigungsverbot. Die Rechtsprechung hat ein solches anerkannt und dadurch den europarechtlich gebotenen Rechtszustand hergestellt. So sind laut österreichischem OGH Kündigungen, deren tragender Grund der Betriebsübergang ist, wegen Sittenwidrigkeit nichtig.[24]

Anfechtung wegen Kündigung aus unerlaubten Gründen

Davon zu unterscheiden ist der sog. **allgemeine Kündigungsschutz** nach dem Arbeits-Verfassungsgesetz (ArbVG[25]). Nach diesem Gesetz kann eine (sonst wirksame) Kündigung aus bestimmten **gesetzlich nicht akzeptierten Gründen** und/oder **sozial unausgewogenen Motiven** gerichtlich **angefochten** werden. Dabei geht es vor allem darum, dass die vorerst nicht begründungspflichtige Kündigung (siehe oben) letztlich doch **nur aus bestimmten gesetzlich vorgesehenen Gründen** ausgesprochen werden darf. Die Kündigungen unterliegen im Falle der **Anfechtung** durch den Betriebsrat oder durch den Arbeitnehmer einer **gerichtlichen Überprüfung**, bei der der Arbeitgeber letztendlich seine **Kündigungsgründe** darzulegen hat.

Das Gesetz folgt hier einer gewissen negativen Formulierung, was mitunter zu Missverständnissen führt.[26] Es besagt, aus welchen Gründen die Kündigung **nicht** ausgesprochen werden darf. Positiv formuliert und zusammengefasst kann gesagt werden, dass die Kündigung aus einem **sachlichen**

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[21] § 879 ABGB.

[22] Besondere Kündigungsmechanismen bestehen bei der Änderung der politischen Linie eine Zeitungsunternehmens (§ 11 Journalistengesetz). Hier kann z.B. der Erwerber eines Zeitungsunternehmens binnen eines Monats nach dem Erwerb eine Kündigung aussprechen, wenn klar ist, dass ein Journalist mit der neuen politischen Linie der Zeitschrift nicht konform gehen kann.

[23] Art 4 Abs 1 der Richtlinie 2001/23/EG.

[24] So schon OGH 12. 10. 1995, 8 Ob 15/95.

[25] Der Gesetzgeber hat den allgemeinen Kündigungsschutz im sog „Betriebsverfassungsrecht“ verankert und damit seinen Geltungsbereich in sachlicher und persönlicher Hinsicht begrenzt. Der allgemeine Kündigungsschutz gilt z.B. nicht für Kleinstbetriebe (weniger als fünf Arbeitnehmer, daher ohne Betriebsrat) und für leitende Angestellte mit Führungsaufgaben (über welche der Betriebsrat nicht seine schützenden Hände ausbreiten darf).

[26] Auf der ILO homepage heisst es z.B.: “Obligation to provide reasons to the employee: No. Valid grounds (justified dismissal): none”. (http://www.ilo.org/dyn/eplex/termmain.showCountry?p_lang=en&p_country_id=AT.). Erst durch das genaue Studium der “remarks” auf dieser Seite werden die Erklärungen etwas deutlicher.

Grund erfolgen muss und **zusätzlich innerbetrieblich sozial ausgewogen** und unter Berücksichtigung der persönlichen Verhältnisse des gekündigten Arbeitnehmers **verhältnismässig** sein muss.

Die Kündigung kann bei Gericht angefochten werden, wenn die Kündigung aus folgenden gesetzlich **verpönten Gründen** erfolgt ist[27]:

(a) wegen des Beitrittes oder der Mitgliedschaft des Arbeitnehmers zu **Gewerkschaften**;

(b) wegen seiner Tätigkeit in **Gewerkschaften (auch ohne Mitglied zu sein)**;

(c) wegen Einberufung einer **Betriebsversammlung** durch den Arbeitnehmer;

(d) wegen seiner Tätigkeit als Mitglied des Wahlvorstandes, einer Wahlkommission oder als Wahlzeuge zur **Betriebsratswahl**;

(e) wegen seiner **Bewerbung** um eine Mitgliedschaft zum **Betriebsrat** oder wegen einer früheren Tätigkeit im Betriebsrat;

(f) wegen seiner Tätigkeit als Mitglied einer arbeitsrechtlichen **Schlichtungsstelle**;

(g) wegen seiner Tätigkeit als **Sicherheitsvertrauensperson**, Sicherheitsfachkraft oder Arbeitsmediziner oder als Fach- oder Hilfspersonal von Sicherheitsfachkräften oder Arbeitsmedizinern;

(h) wegen der bevorstehenden Einberufung des Arbeitnehmers zum Präsenz- oder Ausbildungsdienst oder Zuweisung zum Zivildienst;

(i) wegen der offenbar nicht unberechtigten **Geltendmachung** vom Arbeitgeber in Frage gestellter **Ansprüche** aus dem Arbeitsverhältnis durch den Arbeitnehmer;

(j) wegen seiner Tätigkeit als Sprecher (des besonderen Verhandlungsgremiums im Rahmen der Europäischen Betriebsverfassung).

Anfechtung wegen Sozialwidrigkeit

Zusätzlich kann die Kündigung aus **sozialen Gründen** angefochten werden, und zwar wenn ihr konkret die soziale Ausgewogenheit fehlt. In diesem Fall spricht man auch vom „**sozialen Kündigungsschutz**“ (neben dem allgemeinen Kündigungsschutz). Eine Kündigung kann bei Gericht angefochten werden, wenn der gekündigte Arbeitnehmer bereits sechs Monate im Betrieb beschäftigt ist und die Kündigung **sozial ungerechtfertigt** ist. Sozial ungerechtfertigt ist zunächst eine Kündigung, die „**wesentliche Interessen des Arbeitnehmers** beeinträchtigt“.[28]

Wann letzteres der Fall ist, muss relativ häufig von der Rechtsprechung entschieden werden. Es kommt auf eine Berücksichtigung der gesamten **Lebensverhältnisse** des gekündigten Arbeitnehmers an. An diesem Grundsatz hält der OGH seit längerem fest.[29] In einem ersten Schritt werden die **Ausgaben** für die Bestreitung des Lebensunterhalts und die regelmäßigen **Einkünfte** des Arbeitnehmers und seiner Familie einander gegenüber gestellt. In einem zweiten Schritt ist die durch den Verlust des Arbeitsplatzes bewirkte **Einkommensminderung** zu ermitteln. Nach der Rechtspraxis liegt nur dann eine Beeinträchtigung „wesentlicher Interessen“ vor, wenn die Kündigung eine „**fühlbare, ins Gewicht fallende Beeinträchtigung der wirtschaftlichen Lage**“ des Arbeitnehmers (und seiner Familie) zur Folge hat[30] (ohne dass aber eine soziale Notlage oder eine Existenzgefährdung entstehen müsste). Der

[27] § 105 Abs. 3 Nr. 1 ArbVG.

[28] § 105 Abs. 3 Nr. 2 ArbVG.

[29] Z.B. OGH, 30.9.2005, 9 Ob A8/05z, ecolex 2006, 144.

[30] Z.B. OGH 12.10.1988,9 Ob A206/88.

soziale Kündigungsschutz soll von seinem Zweck her die **Aufrechterhaltung der Lebensführung** gewährleisten. Es kommt in der Rechtsprechung darauf an, wie viel der Arbeitnehmer in seiner neuen Position verdient oder wie er sonst (z.B. durch eigenes Vermögen oder Pensionen) abgesichert ist. Die Rechtsprechung ist vielfältig. Eine Arbeitnehmerin fand z.B. bereits 3 Monate[31] nach Ablauf der Kündigungsfrist eine neue Stelle, **verdiente** dort aber nur etwa **50 % des früheren Gehalts**. Die Rechtsprechung hat die Beeinträchtigung wesentlicher Interessen bejaht.[32] Bei Erlangung eines neuen Arbeitsplatzes stellen Einkommensverluste von 10% oder weniger im Allgemeinen keine „fühlbare, ins Gewicht fallende Verschlechterung der wirtschaftlichen Lage" dar und beeinträchtigen daher keine wesentlichen Interessen des Arbeitnehmers. Eine Verdiensteinbuße von 20% und mehr deuten hingegen auf „gewichtige soziale Nachteile" hin.

Sollten wesentliche Interessen des Arbeitnehmers beeinträchtigt sein, so hat der Arbeitgeber nach dem Gesetz die Möglichkeit, einen **Rechtfertigungsgrund für die Kündigung** geltend zumachen. Spätestens in diesem Stadium muss er seine Gründe für die Kündigung jedenfalls offen legen. Eine Kündigung ist nach dem Gesetz sozial gerechtfertigt, wenn der Betriebsinhaber den Nachweis erbringt, dass die Kündigung a) durch Umstände, die in der **Person des Arbeitnehmers** gelegen sind und die betrieblichen Interessen nachteilig berühren oder b) durch **betriebliche Erfordernisse**, die einer Weiterbeschäftigung des Arbeitnehmers entgegenstehen, begründet ist.[33] Die Rechtfertigungsgründe für eine Kündigung können also mit einem bestimmten Arbeitnehmer zu tun haben (arbeitnehmerbedingte Kündigung: z.B. Minderleistung[34]) oder allgemeinerer Natur sein (betriebsbedingte Kündigung, Kündigung aus wirtschaftlichen Gründen: z.B. Rationalisierung[35]).

Bei der betriebsbedingten Kündigung (und in manchen Fällen der subjektiv bedingten Kündigung, z.B. ältere Arbeitnehmer) muss der Dienstgeber ferner dem Gericht darlegen, dass er seiner sog. „**sozialen Gestaltungspflicht**" nachgekommen ist (z.B. Versetzung im Betrieb nicht möglich; Abbau von Überstunden einer Abteilung zur Vermeidung einer Kündigung).

Bei einer betriebsbedingten Kündigung ist als eine besondere Ausprägung der sozialen Gestaltungspflicht zusätzlich ein sog. „**Sozialvergleich**" durchzuführen (falls der Betriebsrat der konkreten Kündigung dieses Arbeitnehmers widersprochen hat). Dies bedeutet, dass die Kündigung eines bestimmten Arbeitnehmers ungerechtfertigt ist, wenn ein Vergleich sozialer Gesichtspunkte für den Gekündigten eine **größere soziale Härte** ergibt **als für andere Arbeitnehmer** des gleichen Betriebes und derselben Tätigkeitssparte, deren Arbeit der Gekündigte zu leisten fähig und willens ist.[36] Der Arbeitgeber muss folglich aus sozialen Gesichtspunkten den Richtigen auswählen, der zu kündigen ist. Das **Gericht prüft diese Auswahl** nach.

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[31] Für den Schweizer Leser mögen 3 Monate lang erscheinen. Der Schweizer Arbeitsmarkt ist durchaus lebendiger als der österreichische. In Österreich sind 3 Monate für die Suche einer neuen Stelle eher relativ kurz.

[32] OGH 27.6.1990, 9 Ob A151/90, WBl 1991, 27.

[33] § 105 Abs. 3 Nr. 2 ArbVG. Zusätzlich sehen auch andere Gesetze einen Motivkündigungsschutz vor (z.B. das **Gleichbehandlungsgesetz**, das **Behinderten**-Einstellungsgesetz oder das Arbeitsvertragsrechts-Anpassungsgesetz: wegen der Inanspruchnahme einer **Bildungskarenz** oder **Freistellung**).

[34] Beispiele sind: lang andauernde oder häufige Krankenstände, Minderleistungen im Vergleich zu Kollegen, Unverträglichkeit gegenüber Kollegen oder Vorgesetzten. Ein Verschulden des Arbeitnehmers ist nicht erforderlich.

[35] Z.B. mangelnde Aufträge, Rückgang des Absatzes, veraltete Betriebsanlagen, aber auch Betriebsänderungen wie Verlegung des Betriebes, Zusammenschluss mit anderen Betrieben, etc. Auch Rationalitätssteigerungen. Die Rechtsprechung prüft im Rahmen des Anfechtungsverfahrens den „Grad der betriebswirtschaftlichen Rationalität der unternehmerischen Maßnahme", welche der Kündigung zugrunde liegt.

[36] § 105 Abs. 3c ArbVG.

Schließlich hat der Arbeitgeber das Gericht davon zu überzeugen, dass seine Interessen an der Auflösung des Arbeitsverhältnisses schwerer wiegen als die Interessen des Arbeitnehmers an der Fortsetzung (eigentliche **Interessenabwägung**). An die Rechtfertigung einer Kündigung sind umso höhere Anforderungen zu stellen, je intensiver durch sie in die (schutzwürdigen) Interessen des konkret betroffenen Arbeitnehmers eingegriffen wird. Entscheidend sind häufig familiäre Lage und Aussicht auf einen neuen Arbeitsplatz. Auch das Interesse des Arbeitgebers ist zu gewichten. Diese Interessenabwägung ist bei jeder Art der Kündigung (personen- oder betriebsbezogen) vorzunehmen.

Welche Anfechtungsgründe geltend gemacht werden können, hängt wesentlich vom Verhalten des Betriebsrats im sog. Vorverfahren ab (siehe dazu später zum Verfahren). Bei einem Widerspruch des Betriebsrats zur Kündigung kann die Kündigung in vollem Umfang angefochten werden. Als Anfechtungsgründe kommen ein verpöntes Kündigungsmotiv sowie die Sozialwidrigkeit der Kündigung in Frage. Stimmt der Betriebsrat der geplanten Kündigung hingegen zu, so ist diese nicht wegen Sozialwidrigkeit anfechtbar. In diesem Zusammenhang spricht man vom „Sperrrecht" des Betriebsrats. Es bleiben nur die verpönten Kündigungsgründe. Dem Betriebsrat kommt daher sehr wichtige Rolle bei Kündigungen zu. Auch der Betriebsrat darf aber seine Zustimmung zur Kündigung nicht aus unsachlichen Gründen erteilen.

Eine Kündigung ist nach Ausspruch wirksam. Gibt das Gericht der Anfechtungsklage statt, so ist die Kündigung rechtlich **unwirksam**.[37] Dies bedeutet, dass ein bereits beendetes Arbeitsverhältnis rückwirkend wiederauflebt. Es ist so vorzugehen, als wäre das Dienstverhältnis nie beendet worden. Es gebührt auch zwischenzeitiges Entgelt.

1.2. Procedural requirements for legitimate dismissals

1.2.1. Entlassung

Eine Entlassung hat **unverzüglich** nach Bekanntwerden des Entlassungsgrundes zu erfolgen. Sie basiert auf der unmittelbaren Unzumutbarkeit der Fortsetzung des Dienstverhältnisses und wirkt damit sofort, es bestehen keine Fristen.

Der Betriebsinhaber hat den **Betriebsrat** von jeder Entlassung eines Arbeitnehmers unverzüglich zu **verständigen** und innerhalb von drei Arbeitstagen nach erfolgter Verständigung auf Verlangen des Betriebsrates mit diesem die Entlassung zu **beraten**.[38] Dies erfolgt in erster Linie, damit nicht Entlassungsgründe vorgeschoben werden, um den allgemeinen Kündigungsschutz zu umgehen.

1.2.2. Kündigung

Frühwarnsystem

Wenn ein Arbeitgeber beabsichtigt, eine **größere Anzahl** von Arbeitsverhältnissen innerhalb eines Zeitraumes von 30 Tagen durch Kündigung aufzulösen, so hat er zuvor die zuständige regionale Geschäftsstelle des **Arbeitsmarktservice** (AMS) durch schriftliche Anzeige zu verständigen.[39] Man spricht in diesem Zusammenhang von „Massenkündigung". Die Anzeige beim AMS muss mindestens 30 Tage vor dem Ausspruch der ersten Kündigung erfolgen. Gleichzeitig ist der Betriebsrat zu konsultieren. Unterlässt der Arbeitgeber die Anzeige oder wird sie zu spät erstattet, so hat dies die

[37] § 105 Abs 7 ArbVG.

[38] § 106 Abs 1 ArbVG.

[39] Details finden sich in § 45a Arbeitsmarkt-Förderungs-Gesetz (AMFG).

Unwirksamkeit sämtlicher Kündigungen zur Folge. Unter bestimmten Bedingungen kann der Arbeitgeber von der Einhaltung der Frist befreit werden, wenn wichtige Gründe vorliegen. Es bedarf aber der Zustimmung der Landesgeschäftsstelle des AMS.

Fristen und Termine

Das Kündigungsrecht ist an zeitliche Vorgaben gebunden. Die **Kündigungsfrist** ist jener Mindestzeitraum, der zwischen Zugang der Kündigungserklärung und Ende des Arbeitsverhältnisses einzuhalten ist. Der **Kündigungstermin** ist normalerweise jener Zeitpunkt, zu dem das Arbeitsverhältnis beendet werden muss.

Das Kündigungsrecht ist für Arbeiter und Angestellte gesetzlich unterschiedlich geregelt.

Die gesetzlichen Kündigungsregeln für **Angestellte** gelten, sofern der Angestellte ein Mindest-Beschäftigungsausmass hat.[40] Die **Kündigungsfrist** beträgt für den Arbeitgeber **sechs Wochen** und erhöht sich nach dem vollendeten zweiten Dienstjahr auf zwei, nach dem vollendeten fünften Dienstjahr auf drei, nach dem vollendeten fünfzehnten Dienstjahr auf vier und nach dem vollendeten fünfundzwanzigsten Dienstjahr auf fünf Monate. Das Arbeitsverhältnis kann nur zum Kalenderquartal enden[41] (**Kündigungstermin**).

Arbeiter, deren Arbeitgeber der Gewerbeordnung (GewO 1859) unterliegen, können unter Beachtung einer **Kündigungsfrist** von **zwei Wochen** gekündigt werden. Einen bestimmten **Kündigungstermin** sieht die GewO nicht vor.[42] Da die Bestimmungen der GewO abdingbar sind, kann einzelvertraglich oder durch Kollektivvertrag auch verschlechternd anderes vereinbart werden. Unterliegt der Arbeitgeber nicht der Gewerbeordnung, gelten die Bestimmungen des ABGB.[43]

Die Beteiligung des Betriebsrats

Der Betriebsinhaber hat vor jeder geplanten Kündigung eines Arbeitnehmers den Betriebsrat zu verständigen. Der Betriebsrat kann noch vor Ausspruch der Kündigung **innerhalb einer Woche** hierzu Stellung nehmen.[44] Der Betriebsinhaber hat auf Verlangen des Betriebsrates mit diesem innerhalb der Frist zur Stellungnahme über die Kündigung zu beraten.[45] Eine vor Ablauf dieser Frist ausgesprochene **Kündigung ist rechtsunwirksam**, es sei denn, dass der Betriebsrat eine Stellungnahme bereits abgegeben hat.[46] Nach Ablauf der Frist kann aber gekündigt werden. Der Betriebsrat kann also die Kündigung nicht verhindern.

Der Betriebsinhaber hat den Betriebsrat zusätzlich vom Ausspruch der Kündigung zu verständigen. Der **Betriebsrat** kann, wenn er der Kündigungsabsicht ausdrücklich **widersprochen** hat, (auf Verlangen des gekündigten Arbeitnehmers) binnen einer Woche nach Verständigung vom Ausspruch der Kündigung

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[40] § 20 AngG: sofern der Angestellte mindestens ein Fünftel des 4,3-Fachen der durch Gesetz oder Kollektivvertrag vorgesehenen wöchentlichen Normalarbeitszeit bezogen auf ein Monat beschäftigt ist (bei 38,5 Stunden Normalarbeitszeit wären dies ca. 33 Stunden).

[41] Nur zum 31. 3., 31. 6., 31. 9. und 31. 12.

[42] § 77 GewO 1859.

[43] Die Fristen sind durchweg kürzer bzw. die Termine flexibler (siehe §§ 1159, 1159a, 1159b ABGB).

[44] Wurde in einem betriebsratspflichtigem Betrieb (§ 40 Abs. 1 ArbVG) kein Betriebsrat errichtet, so kann der Arbeitnehmer innerhalb zweier Wochen nach Zugang der Kündigung diese beim Gericht selbst anfechten (§ 107 ArbVG).

[45] Die Beratungspflicht ist eine sanktionslose Norm. Auch die Verhängung einer Verwaltungsstrafe ist nicht vorgesehen. Beratung zwischen Partnern erfordert beiderseitige Freiwilligkeit.

[46] § 105 Abs. 1 und 2 ArbVG.

diese beim Gericht anfechten.[47] Kommt der Betriebsrat dem Verlangen des Arbeitnehmers nicht nach, so kann der **Arbeitnehmer** innerhalb von zwei Wochen nach Ablauf der für den Betriebsrat geltenden Frist die Kündigung selbst beim Gericht anfechten. In diesem Fall ist die sogenannte volle Anfechtung möglich (auch wegen des Sozialvergleichs).

Hat der Betriebsrat innerhalb der Frist von einer Woche gegenüber dem Arbeitgeber **keine Stellungnahme** abgegeben, so kann der Arbeitnehmer innerhalb von zwei Wochen nach Zugang der Kündigung diese beim Gericht selbst anfechten. In diesem Fall ist ein **Sozialvergleich** der Kündigung nicht vorzunehmen. Der Betriebsrat hat somit die Auswahl des konkreten Arbeitnehmers gewissermassen „bestätigt" und der einzelne kann den Sozialvergleich nicht durch das Gericht überprüfen lassen.

Hat der Betriebsrat der beabsichtigten Kündigung innerhalb der Frist gegenüber dem Arbeitgeber **ausdrücklich zugestimmt**, so kann der Arbeitnehmer innerhalb von zwei Wochen nach Zugang der Kündigung diese beim Gericht anfechten. Ausgenommen ist in diesem Fall wiederum der Sozialvergleich.[48] Die Zustimmung des Betriebsrats versperrt nicht die Anfechtung der Kündigung wegen eines verpönten Kündigungsmotivs.

Die Anfechtungsklage

Die Anfechtung muss gerichtlich geltend gemacht werden. Die Anfechtungsklage ist beim örtlich zuständigen Landesgericht einzubringen.[49] In Wien gibt es ein eigenes Arbeits- und Sozialgericht, das zuständig ist. Die örtliche Zuständigkeit richtet sich nach dem Sitz des Betriebs, in welchem der Gekündigte beschäftigt war.[50] Bringt der Arbeitnehmer die Anfechtungsklage innerhalb offener Frist bei einem örtlich unzuständigen Gericht ein, so gilt die Klage damit als rechtzeitig eingebracht.[51]

Die **Vertretung** des Arbeitnehmers vor Gericht kann auch durch Angestellte der sog. „Arbeiterkammer" (Zwangsmitgliedschaft) oder des Gewerkschaftsbundes (freiwillige Mitgliedschaft) erfolgen.[52] Im Anfechtungsverfahren ist eine **Kostenersatzpflicht** nur für das Verfahren vor dem OGH vorgesehen (3. Instanz).[53] Vor der ersten Instanz (Landesgericht) und der zweiten Instanz (dem Oberlandesgericht) kann der klagende Arbeitnehmer das Verfahren folglich führen, ohne eine Kostenersatzpflicht gegenüber dem Arbeitgeber bei Verlieren des Prozesses zu riskieren. Von den **Gerichtsgebühren** sind Arbeitsrechtssachen vielfach befreit, insbesondere wenn keine Geldzahlungen eingeklagt werden (so wie bei der Anfechtung einer Kündigung oder Entlassung).[54] Ein Arbeitnehmer kann daher vielfach eine Kündigung oder Entlassung gerichtlich bekämpfen bzw. überprüfen lassen, ohne dass er damit ein Kosten- oder Gebührenrisiko eingeht.

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[47] Nimmt ein Betriebsrat die Anfechtungsklage ohne Zustimmung des gekündigten Arbeitnehmers zurück, so tritt die Wirkung der Klagsrücknahme erst ein, wenn der vom Gericht hiervon verständigte Arbeitnehmer nicht innerhalb von 14 Tagen ab Verständigung in den Rechtsstreit eintritt.

[48] Zu allem § 105 Abs. 4 und 6 ArbVG.

[49] Das Verfahren vor dem Arbeits- und Sozialgericht weist einige Besonderheiten gegenüber dem Verfahren in „allgemeinen" Zivilrechtssachen auf, die in einem eigenen Gesetz, dem Bundesgesetz über die Arbeits- und Sozialgerichtsbarkeit (**Arbeits- und Sozialgerichtsgesetz – ASGG**), geregelt sind. Besonders sind u.a.: Zuständigkeit, Vertretung, Rechtsmittelvefahren.

[50] § 5 Abs. 2 ASGG.

[51] § 105 Abs. 4a ArbVG.

[52] § 40 Abs 1 ASGG. Die Rechtsvertretung erfolgt als Leistung für Mitglieder meist kostenlos.

[53] § 58 Abs. 1 ASGG.

[54] Näher dazu das Gerichts- und Justizverwaltungsgebührengesetzes (GGG 1984).

1.3 Burden of proof and available sanctions

Es besteht eine besondere gesetzliche Norm für die Beweislastverteilung mit einer Beweiserleichterung für den Kläger der Anfechtungsklage (der Arbeitnehmer). Insoweit sich der Kläger im Zuge des Verfahrens auf eine Anfechtung wegen eines gesetzwidrigen Kündigungsgrundes beruft (nicht bei sozialwidriger Kündigung), hat er diesen lediglich **glaubhaft** zu machen und muss nicht den vollen Beweis antreten.[55] Der Grund für diese Erleichterung ist, dass für den Kläger (Betriebsrat oder Arbeitnehmer) die Beweisführung über die Kündigungsmotive des Arbeitgebers schwierig sein kann.

Gelingt dem Kläger die Glaubhaftmachung des verpönten Motivs, so muss der Arbeitgeber ein anderes (zulässiges) Kündigungsmotiv glaubhafter machen. Die Anfechtungsklage wird abgewiesen, wenn bei Abwägung aller Umstände eine **höhere Wahrscheinlichkeit** dafür spricht, dass ein anderes vom Arbeitgeber glaubhaft gemachtes Motiv für die Kündigung ausschlaggebend war. Sind **beide Motive gleich wahrscheinlich**, so ist der Anfechtungsklage stattzugeben. Das Gericht hat seine Entscheidung unter „Abwägung aller Umstände" zu treffen.[56] Für die Anfechtbarkeit einer Kündigung ist es nicht erforderlich, dass das gesetzwidrige Motiv den ausschließlichen Beweggrund darstellt; es genügt, dass es für die Kündigung auch wesentlich war.[57] Die Sanktion einer erfolgreichen Anfechtung ist die Unwirksamkeit der Kündigung und die Fortsetzung des Arbeitsverhältnisses.

1.4 Recent reforms on concerning unfair dismissal laws

Die entsprechende Norm des Arbeits-Verfassungsgesetzes[58] wurde zuletzt im Jahr 2010 geändert[59] und zur Gänze neu erlassen. Es kann aber eher nicht gesagt werden, dass diese Änderungen durch die Finanzkrise bedingt wären. Teilweise wurde nur versucht, die Normen besser zu strukturieren. Darüber hinaus erfolgten auch einige inhaltliche Änderungen. So wurde die in § 105 Abs. 1 vorgesehene **Frist** für die Verständigung des Betriebsrates von der Kündigungsabsicht von fünf Arbeitstagen auf eine Woche **verlängert**, wobei allerdings der Fristenlauf durch Nichtarbeitstage nicht gehemmt wird. Damit sollten aus der sehr kurzen Frist resultierende Probleme beseitigt und Streitfälle über die Frage, wann ein Arbeitstag im Betrieb vorliegt, vermieden werden.

Bei der Kündigungsanfechtung wegen Sozialwidrigkeit bei solchen Arbeitnehmern, die im Zeitpunkt ihrer Einstellung das **50. Lebensjahr** überschritten hatten, sind nach der Reform die wegen des höheren Lebensalters zu erwartenden Schwierigkeiten bei der Wiedereingliederung in den Arbeitsprozess erst ab Vollendung des zweiten Beschäftigungsjahres zu berücksichtigen.

Die dem Arbeitnehmer für die Anfechtung von Kündigungen offen stehende **Frist** wurde von einer auf zwei Wochen **verlängert**. Dadurch sollte die Chancen für eine außergerichtliche Einigung verbessert und vorbeugende Klageeinbringungen vermieden werden. Auf diesem Weg sollte zu einer Entlastung der Gerichte durch vermeidbare Prozessführungen beigetragen werden. Die Frist für die Anfechtung durch den Betriebsrat hingegen blieb mit einer Woche unverändert.

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[55] § 105 Abs. 5 ArbVG. Auch außerhalb des ArbVG gewähren die Normen des Motivkündigungsschutzes dem Kläger Beweiserleichterungen, (Gleichstellungsrecht, Behinderten-Einstellung). Ein wesentlicher Unterschied zum allgemeinen Kündigungsschutz besteht jedoch darin, dass die Anfechtungsbefugnis ausschließlich dem Arbeitnehmer (und nicht dem Betriebsrat) zukommt.

[56] § 105 Abs 5 Satz 2 ArbVG.

[57] OGH 14. 11. 1996, 8 ObA 2308/96m.

[58] § 105 ArbVG.

[59] BGBl. I Nr. 101/2010 vom 14.12.2010.

In einem neuen § 105 Abs. 4a ArbVG wurde bestimmt, dass die Einbringung der Anfechtungsklage durch den Arbeitnehmer binnen offener Frist auch dann als rechtzeitig gilt, wenn der Arbeitnehmer die Klage bei einem örtlich **unzuständigen Gericht** eingebracht hat. Dadurch sollte vermieden werden, dass der Arbeitnehmer die Möglichkeit zur Anfechtung einer Kündigung wegen eines bloßen Formalfehlers, der aus der Unkenntnis über die betriebliche Struktur resultiert, verliert.

2. Special protection for workers' representatives

Allgemeines

Für alle Tätigkeiten rund um eine Wahl zum Betriebsrat, eine ehemalige Tätigkeit als Betriebsrat, für den Beitritt zu einer Gewerkschaft oder Tätigkeiten im Interesse einer Gewerkschaft, ohne deren Mitglied zu sein, besteht bereits ein sogenannter **allgemeiner Kündigungsschutz**, der allen Arbeitnehmern zusteht. Dieser Schutz greift für alle Arten von Tätigkeiten vor, nach oder rund um Aktivitäten im Interesse der Belegschaft ein. Wird aus solchen Gründen gekündigt, ist die Kündigung bei erfolgreicher Anfechtung unwirksam.[60]

Das österreichische Recht kennt einen besonderen Schutz des aufrechten Bestands des Arbeitsverhältnisses für verschiedene **Gruppen von Arbeitnehmern**. Dazu zählen Belegschaftsvertreter und –funktionäre (sog. Betriebsräte), der besondere Bestandschutz für Eltern[6162], Bestandschutz bei länger währender Sterbebegleitung (sog. Familienhospizkarenz[63]), für Grundwehr- und Zivildiener[64], für behinderte Arbeitnehmer[65], Lehrlinge[66] (Auszubildende) und Hausbesorger[67]. Zusätzlich finden sich Regelungen über besonderen Bestandsschutz in (oft älteren) Kollektiv- oder Individualarbeitsverträgen. Für die hier verfolgten Zwecke wird nur der besondere Bestandsschutz der Belegschaftsvertreter näher untersucht.

In der Folge geht es also noch um den besonderen, zusätzlichen Schutz für die gewählten Belegschaftsvertreter. Die Betriebsratsmitglieder genießen den besonderen Schutz in erster Linie zum **Zweck** der Sicherstellung der ihnen vom Gesetzgeber im Interesse des Betriebsrates und dessen Belegschaft übertragenen Aufgaben.[68] Der Schutz besteht für Entlassungen und Kündigungen.

Grundsätzlich darf ein Mitglied des Betriebsrates (bei sonstiger Rechtsunwirksamkeit) nur nach **vorheriger Zustimmung des Gerichts** gekündigt oder entlassen werden.[69] Das Gericht darf der Kündigung oder Entlassung nur aus gesetzlich taxativ aufgeführten Gründen zustimmen.[70] Das Gericht muss vorab zustimmen, sonst ist die Entlassung/Kündigung **absolut nichtig**.[71] Nur bei Vorliegen besonders schwerer Entlassungsgründe kann die Zustimmung des Gerichts zur Kündigung auch

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[60] § 105 Abs. 3 Nr. 1 ArbVG. Siehe dazu oben zu 1.1.2.

[61] § 120-122 ArbVG.

[62] Nach dem Mutterschutzgesetz und Väterkarenz-Gesetz.

[63] § 15a AVRAG.

[64] APSG (Arbeitsplatz-Sicherungsgesetz).

[65] BEinstG.

[66] BAG (Berufsausbildungs-Gesetz).

[67] HbG (Hausbesorger-Gesetz).

[68] OGH, 8.7.1992, 9ObA117/92, SZ 65/101, RS0053037.

[69] § 120 Abs. 1 ArbVG.

[70] § 121 (Kündigung) und § 122 (Entlassung) ArbVG.

[71] OGH, 29.4.1980, 4 Ob 128/79, SZ 53/67.

nachträglich erfolgen.[72] Bei eher weniger schwer wiegenden gesetzlichen Gründen hat das Gericht die Klage auf Zustimmung zur Kündigung oder Entlassung eines Betriebsratsmitgliedes abzuweisen, wenn sie sich auf ein Verhalten des Betriebsratsmitgliedes stützt, das von diesem in Ausübung des Mandates gesetzt wurde und unter Abwägung aller Umstände **entschuldbar** war (sog. Mandatsschutzklausel).[73]

Der besondere Bestandschutz gilt in erster Linie für die Mitglieder des Betriebsrats. Er beginnt mit der Annahme der Wahl zum Betriebsrat und endet drei Monate nach dem Erlöschen der Mitgliedschaft zum Betriebsrat.[74]

Die Zustimmungsgründe bei Kündigung

Vorerst kann die Zustimmung des Gerichts aus **betrieblichen Gründen** gegeben werden, wenn die Weiterbeschäftigung des Betriebsratsmitgliedes ohne erheblichen Schaden nicht möglich ist. Es handelt sich um nachweisbare, reale und dauernde Einstellungen oder Einschränkungen des Betriebes oder der Stilllegung einzelner Betriebsabteilungen. Die Gründe dafür sind unerheblich und werden vom Gericht nicht nachgeprüft. Allerdings wird aber die Weiterbeschäftigungspflicht in anderen Betriebsteilen in der Rechtsprechung sehr extensiv verstanden.[75]

Die Rechtsprechung hat z.B. wie folgt entschieden: Maßnahmen, die die Betriebsstillegung indizieren, sind in der Regel die Auflösung aller Arbeitsverhältnisse, die Zurücklegung der Gewerbeberechtigung, die Veräußerung der sachlichen Betriebsmittel, der Abverkauf der Produkte und der Verkauf der Rohstoffe sowie der Abbruch der Beziehungen zu Kunden und Lieferanten, also die Liquidierung der Betriebsmittel. Kann trotz Änderung von Elementen des Betriebs nach allgemeinen betriebsverfassungsrechtlichen Grundsätzen angenommen werden, dass der alte Betrieb in seinem wesentlichen Kern fortbesteht, kann von einer Einstellung nicht gesprochen werden. Bei dieser Bewertung ist von den Hauptelementen eines Betriebs auszugehen, also Betriebsinhaber, Beschäftigte, Betriebsmittel, Betriebszweck, Betriebsorganisation und Standort. Eine Veränderung eines oder nur einzelner dieser Elemente beseitigt die Betriebsidentität grundsätzlich nicht. Für die Umstellung eines Musicaltheaters auf ein „Stagione-Opernhaus" wurde z.B. die Betriebsstilllegung verneint.[76]

Der zweite gesetzliche Grund ist die **dauernde Arbeitsunfähigkeit** des Betriebsrates. Auf ein Verschulden des Belegschaftsfunktionärs kommt es nicht an. Auch hier haben gelindere Massnahmen Vorrang (z.B. eine Vertragsänderung mit Tätigkeitsveränderung).[77]

Die Arbeitsunfähigkeit muss nicht in der körperlichen oder geistigen Verfassung des Belegschaftsfunktionärs begründet sein, sondern kann auch in einer tatsächlichen oder rechtlichen

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[72] § 122 Abs. 3 ArbvG: § 122 Abs 1 Z 2 (schwere strafbare Handlungen oder solche gegen den Betriebsinhaber) und Z 5 (Tätlichkeit oder erhebliche Ehrverletzung im Betrieb) ArbVG. Bis zur gerichtlichen Entscheidung ist in diesen Fällen die Entlassung schwebend unwirksam.

[73] § 120 Abs. 1 S. 3 ArbVG.

[74] Das Gesetz erweitert den geschützten Personenkreis um Ersatzmitglieder des Betriebsrates und Mitglieder von Wahlvorständen und Wahlwerber (§ 120 Abs. 4 ArbVG). Erfasst sind auch Mitglieder des Jugendvertrauensrates, Mitglieder des Wahlvorstandes und Wahlwerber zur Wahl des Jugendvertrauensrates aus (§ 130 ArbVG). Er gilt auch für die im Rahmen der Europäischen Betriebsverfassung tätigen Arbeitnehmervertreter (§ 205 ArbVG). Er gilt auch für Europäische Gesellschaften oder Genossenschaften (§ 251, 257 ArbVG).

[75] § 121 Nr. 1 ArbVG.

[76] OGH, 4.8.2009, 9 Ob A83/08h, wbl 2009, 268. Weitere Rechtsprechung findet sich im RIS-Rechtssatz RS0106047.

[77] § 121 Nr. 2 ArbVG.

Unmöglichkeit (z.B. dauerhafter Führerschein-Entzug eines Kraftfahrers[78]) der Arbeitsleistung gelegen sein. Bei einer länger dauernden krankheitsbedingten Arbeitsunfähigkeit ist der Zustimmungsgrund nicht gegeben, wenn die Dauer der Krankheit begrenzt und ihr Ende absehbar ist. Es bedarf dabei der medizinischen Prognose über die Möglichkeit der Wiederherstellung der Arbeitsfähigkeit. Nur wenn die Ursache der Dienstunfähigkeit deren Behebung nicht oder nicht in absehbarer Zeit erwarten lässt, ist dieser Kündigungsgrund gegeben.

Der dritte Grund ist das **Verhalten** des Betriebsrates. Voraussetzung ist, dass das Betriebsratsmitglied die ihm auf Grund des Arbeitsverhältnisses obliegenden Pflichten **beharrlich** verletzt und dem Betriebsinhaber die Weiterbeschäftigung aus Gründen der Arbeitsdisziplin **nicht zugemutet** werden kann.[79] Es muss ein Verschulden vorliegen. Beharrlich bedeutet, dass es in der Regel vorerst zu einer Abmahnung kommen muss. Ohne Abmahnung kann Beharrlichkeit angenommen werden, wenn im Verhalten zum Ausdruck kommt, dass eine Abmahnung zwecklos wäre, oder der Belegschaftsfunktionär gegen ein ausdrückliches Verbot gehandelt hat. Hierher gehören auch Fälle gravierender Minderleistung. Nach der **Rechtsprechung** sind alle gesetzlichen oder vertraglichen Pflichten relevant, insbesondere Treuepflicht und Arbeitspflicht. Wenn aber z.B. die Arbeitsverweigerung gerechtfertigt ist oder die Minderleistung aus der Belegschaftsvertretungstätigkeit resultiert, kommt eine Zustimmung nicht in Betracht. Schließlich muss dem Betriebsinhaber die Weiterbeschäftigung aus Gründen der Arbeitsdisziplin unzumutbar sein. Die Pflichtverletzung des Belegschaftsfunktionärs muss im Betrieb bekannt geworden sein und eine Beispielswirkung befürchten lassen.[80] An die Zumutbarkeit der Weiterbeschäftigung ist ein strenger Maßstab anzulegen; an Belegschaftsfunktionäre dürfen keine strengeren Anforderungen gestellt werden als an andere Arbeitnehmer. Die Beweislast für die Unzumutbarkeit der Weiterbeschäftigung liegt beim Betriebsinhaber. Bei der Beurteilung dieses Zustimmungsgrundes ist die Mandatsschutzklausel (besondere Interessenabwägung zugunsten des Betriebsrates) zu beachten.

Die Zustimmungsgründe bei Entlassung

Das Gesetz zählt fünf Gründe für die gerichtliche Zustimmung taxativ auf.[81] Bei Vorliegen eines Grundes ist in der Regel die Unzumutbarkeit der Weiterbeschäftigung gegeben. Wenn sich aber aus den besonderen Umständen des Einzelfalls ergibt, dass die Weiterbeschäftigung des Belegschaftsfunktionärs trotz Vorliegens eines dieser Gründe zumutbar sein sollte, hat das Gericht die Zustimmung zur Entlassung zu verweigern.[82]

Grund eins liegt vor, wenn der Betriebsrat absichtlich den Betriebsinhaber über Umstände, die für den Vertragsabschluss oder den Vollzug des in Aussicht genommenen Arbeitsverhältnisses wesentlich sind, in Irrtum versetzt hat (sog. **Einstellungs-Betrug**). Grund zwei sind schwere **strafbare Handlungen** oder Straftaten gegen den Betriebsinhaber.[83] Grund drei ist die **Untreue** und Bestechlichkeit; Bei der Untreue geht es nur um schwerwiegende vorsätzliche Verletzungen der Treuepflicht. Grund vier ist der **Verrat** eines Geschäfts- oder Betriebsgeheimnisses oder Betreibung eines dem Betrieb abträglichen **Nebengeschäfts** ohne Einwilligung des Betriebsinhabers. Grund fünf sind **Tätlichkeiten** oder erhebliche **Ehrverletzungen** gegen den Betriebsinhaber, dessen Familienangehörige (soweit sie

[78] VwGH 29. 9. 1955, 1749/54, Arb 6311; EA Salzburg 23. 10. 1978, Re 29/78, ARD 3128/14/79.

[79] § 121 Nr. 3 ArbVG.

[80] OGH 9.2.1992, 9 ObA 150/92.

[81] OGH 21.5.2003, 9 ObA 64/03g.

[82] § 122 Abs 2 ArbVG.

[83] Vorsatztaten mit mehr als einjähriger Freiheitsstrafe; oder Tat mit Bereicherungsvorsatz; sofern die Verfolgung von Amts wegen oder auf Antrag des Betriebsinhabers zu erfolgen hat. Der blosse Verdacht reicht aber freilich nicht aus (OGH 29.6.1994, 9 ObA 101/94).

im Betrieb tätig oder anwesend sind) oder Arbeitnehmer des Betriebes, sofern durch dieses Verhalten eine sinnvolle Zusammenarbeit zwischen Betriebsratsmitglied und Betriebsinhaber nicht mehr zu erwarten ist (Zerrüttungs-Prinzip).

Bewertung

Was **Kritik** am bestehenden System betrifft, so kann wohl vorerst gesagt werden, dass der Bestandsschutz von Betriebsratsmitgliedern nach österreichischem Recht sehr weitgehend ausgebaut ist. Von Seiten der Arbeiterkammern und der Gewerkschaft wird dies als notwendig erachtet. Von Seiten der Industriellenvereinigung und der Handelskammern wird man wohl eher der Meinung sein, dass der Schutz zu umfassend ist. Direkt geäusserte Kritik scheint es aber eher nicht zu geben. In der Arbeitspraxis werden Betriebsräte gelegentlich als „Betriebskaiser" tituliert, was darauf hindeuten könnte, dass ihre Macht und ihr Schutz vielleicht zu weit gehen. In der rechtswissenschaftlichen Literatur beschränkt man sich eher darauf, die Normen deskriptiv zu beschreiben und wertet eher weniger. Sehr schwerwiegende Kritik scheint es gegen das bestehende System des Schutzes eher nicht zu geben. In der breiteren öffentlichen Wahrnehmung in Österreich ist unseres Erachtens die sog. soziale Marktwirtschaft und eine ausgeprägte Sozialpartnerschaft stark verwurzelt und wird eher nicht kritisiert sondern als gemeinsame soziale Errungenschaft betrachtet.

Überblick über besondere Rechte des Betriebsrates

Das österreichische ArbVG verändert die Rechtsstellung von Betriebsratsmitgliedern gegenüber anderen Arbeitnehmern. Einerseits wegen der erhöhten Beendigungsgefahr (besonderer Bestandsschutz), andererseits ist dafür zu sorgen, dass dem Betriebsratsmitglied die Ausübung seines Mandates zu angemessenen Bedingungen möglich ist. Letzteres geschieht vor allem durch Freistellungsansprüche und ein Verbot der Beschränkung der Ausübung der Tätigkeit.

Grundsätzlich ist die Tätigkeit als Betriebsrat ein Ehrenamt, also unentgeltlich und in der Freizeit auszuüben. Nach dem ArbVG ist den Mitgliedern des Betriebsrates aber die zur Erfüllung ihrer Obliegenheiten erforderliche Freizeit unter Fortzahlung des Entgeltes zu gewähren (**Freistellungsanspruch**).[84] Erforderlich ist, dass es sich um eine Betriebsratstätigkeit für einen konkreten Betrieb handelt, die Erforderlichkeit der Wahrnehmung während der Arbeitszeit und eine Interessenabwägung zwischen Vornahme der Betriebsratstätigkeit und der Erfüllung der Arbeitspflicht.

Einer Erlaubnis der Freistellung durch den Betriebsinhaber ist nicht notwendig. Das Betriebsratsmitglied hat den Betriebsinhaber über die Inanspruchnahme der Amtsfreistellung im Voraus zu informieren. Die Information hat in groben Umrissen die Ursache und die voraussichtliche Dauer zu enthalten.

Auf Antrag des Betriebsrates ist in Betrieben mit mehr als 150 Arbeitnehmern ein Betriebsrat vollständig freizustellen (unter Fortzahlung des Entgeltes). In Betrieben mit mehr als 700 Arbeitnehmern sind es zwei und in Betrieben mit mehr als 3 000 Arbeitnehmern drei Mitglieder des Betriebsrates und für je weitere dreitausend Arbeitnehmer ein weiteres Mitglied des Betriebsrates. von der Arbeitsleistung freizustellen.[85]

Jedes Mitglied des Betriebsrates hat Anspruch auf Freistellung von der Arbeitsleistung zur Teilnahme an **Schulungs- und Bildungsveranstaltungen** bis zum Höchstausmaß von drei Wochen innerhalb einer Funktionsperiode unter Fortzahlung des Entgeltes; in Betrieben, in denen dauernd weniger als 20

[84] § 116 ArbVG.
[85] § 117 ArbVG.

Arbeitnehmer beschäftigt sind, hat jedes Mitglied des Betriebsrates Anspruch auf eine solche Freistellung gegen Entfall des Entgeltes. Die Dauer der Freistellung kann in Ausnahmefällen bei Vorliegen eines Interesses an einer besonderen Ausbildung bis zu fünf Wochen ausgedehnt werden.[86]

Die **Verwaltung des Betriebsratsfonds** obliegt dem Betriebsrat.[87] Die Eingänge aus der **Betriebsratsumlage**[88] sowie sonstige bestimmten Vermögenschaften bilden den mit Rechtspersönlichkeit ausgestatteten Betriebsratsfonds. Der Betriebsrat hat Anspruch darauf, dass die Unkosten seiner Geschäftstätigkeit aus dem **Betriebsrats-Fonds** beglichen werden. Der Betriebsratsfonds entsteht kraft Gesetzes dadurch, dass Vermögen für die gesetzlich vorgesehenen Zwecke gewidmet wird. Jede Errichtung eines Betriebsratsfonds ist unverzüglich schriftlich der zuständigen Kammer für Arbeiter und Angestellte bekannt zu geben.[89]

Die Organe der Arbeitnehmerschaft des Betriebes haben die Aufgabe, die wirtschaftlichen, sozialen, gesundheitlichen und kulturellen Interessen der Arbeitnehmer im Betrieb wahrzunehmen und zu fördern. In diesem Rahmen kommen den österreichischen Betriebsräten wohl vergleichsweise sehr weitreichende **Mitwirkungsrechte** im Betrieb zu. Die Mitwirkungsrechte der Belegschaft in den Bestimmungen des ArbVG über die Betriebsverfassung sind abschließend und absolut zwingend geregelt.

Das ArbVG sieht folgende Bereiche der Mitbestimmung[90] vor: die Mitwirkung in **sozialen** Angelegenheiten[91] (welche eine Mehrzahl von Arbeitnehmern betreffen); die Mitwirkung in **personellen** Angelegenheiten[92] (Mitwirkung an personellen Einzelentscheidungen, z.B. Kündigung von Arbeitsverhältnissen, aber auch Einstellung von neuen Arbeitnehmern, Versetzungen, etc.); und schliesslich die sehr umfassende Mitwirkung in **wirtschaftlichen** Angelegenheiten[93] (also die Mitwirkung bei der Führung des Unternehmens sowie in Unternehmensorganen). Die Art der Mitwirkung ist sehr unterschiedlich stark ausgestaltet. Sie reicht von Auskunfts- und Anhörungsrechten bis hin zu echter Zustimmung und Mitgestaltung durch den Betriebsrat. Manche Mitbestimmungsmöglichkeiten sind umfassend geregelt, haben aber in der Praxis eher wenig bis keine praktische Bedeutung erlangt. So z.B. der Einspruch gegen die Wirtschaftsführung. In Betrieben in denen dauernd mehr als 200 Arbeitnehmer beschäftigt sind, kann der Betriebsrat gegen **Betriebsänderungen** oder gegen andere wirtschaftliche Maßnahmen, sofern sie wesentliche Nachteile für alle oder wesentliche Teile der Arbeitnehmer mit sich bringen, binnen drei Tagen ab Kenntnisnahme Einspruch beim Betriebsinhaber erheben.[94] Im Weiteren Anschluss gibt es eine kompliziertes Verfahren, das aber nicht dazu führen würde, dass der Betriebseigner am Ende nicht seine Vorstellungen durchsetzen könnte.

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[86] § 118 ArbVG.

[87] Zu allem § 73, 74 ArbVG.

[88] Ob und in welcher Höhe (maximal 0,5% des Bruttoarbeitsentgelts) von den Arbeitnehmern des Betriebes eine Betriebsratsumlage eingehoben wird, wird auf Antrag des Betriebsrats von der Betriebs- bzw Gruppenversammlung beschlossen.

[89] § 3 Abs 3 Betriebsrats-Fonds-Verordnung (BRF-VO).

[90] Das Gesetz kennt auch „allgemeine Befugnisse" der Belegschaftsorgane vor, die genereller Natur sind (§§ 89-93 ArbVG). Der Betriebsrat hat z.B. nach § 89 ArbVG das Recht, die Einhaltung der die Arbeitnehmer des Betriebes betreffenden Rechtsvorschriften zu überwachen. Der Betriebsinhaber ist nach § 91 ArbVG verpflichtet, dem Betriebsrat über alle Angelegenheiten, welche die wirtschaftlichen, sozialen, gesundheitlichen oder kulturellen Interessen der Arbeitnehmer des Betriebes berühren, (auf Anfrage des Betriebsrats) Auskunft zu erteilen.

[91] § 94-97 ArbVG.

[92] §§ 98-107 ArbVG.

[93] §§ 108-112 ArbVG.

[94] § 109, 111 ArbVG.

Sehr wichtig ist, dass das ArbVG in bestimmten Unternehmensformen (u.a. **GmbH und AG**) eine Mitwirkung von Arbeitnehmervertretern im **Aufsichtsrat**[95] vorsieht, wodurch den Betriebsräten direkter Einfluss auf die Willensbildung des Betriebsinhabers bzw des Unternehmensträgers eingeräumt wird. Z.B.: In Unternehmen, die in der Rechtsform einer Aktiengesellschaft geführt werden, entsendet der Betriebsrat aus dem Kreise der Betriebsratsmitglieder für je zwei bestellte Aufsichtsratsmitglieder der Kapitalvertreter einen Arbeitnehmervertreter in den **Aufsichtsrat**[96] (sog. drittelparitätische Vertretung der Arbeitnehmer). Die Arbeitnehmervertreter im Aufsichtsrat haben grundsätzlich dieselbe Rechtsstellung wie die Vertreter der Anteilseigner. Bestimmte Beschlüsse des Aufsichtsrates bedürfen aber einer doppelten Mehrheit (sog. „Aktionärschutzklausel"), was bedeutet dass die einfache Mehrheit nicht ausreicht, sondern dass auch die Mehrheit der Anteilseignervertreter dem Beschluss zugestimmt haben muss.

3. Sanctions available and application in practice

Verletzung des allgemeinen Kündigungsschutzes

Wird die Kündigung nicht angefochten, ist sie rechtswirksam.[97] Ein Arbeitnehmer kann eine Kündigung vor Gericht anfechten[98], wenn er die Vermutung hegt, dass sie aus gesetzwidrigen Motiven ausgesprochen wurde (**allgemeiner Kündigungsschutz**). Gesetzwidrig wären unter anderem die Motive, des Beitritts zu einer Gewerkschaft oder der Antritt zur **Wahl zum Betriebsrat**.[99] Gibt das Gericht einer Anfechtungsklage statt, so ist die Kündigung rechtlich **unwirksam**.[100] Dies bedeutet, dass ein bereits beendetes Arbeitsverhältnis **rückwirkend wiederauflebt**. Es wäre so vorzugehen, als sei das Dienstverhältnis nie beendet worden. Es gebührt auch zwischenzeitiges Arbeitsentgelt. Der Arbeitnehmer muss sich aber anrechnen lassen, was er in dieser Zeit verdient oder infolge Unterbleibens der Dienstleistung erspart hat.

Besteht Anspruch auf Kündigungsentschädigung für mehr als drei Monate, so ist sie für die über drei Monate hinausgehenden Zeiträume zu kürzen, und zwar um den Betrag, den sich der Arbeitnehmer erspart hat, weil er keine Arbeitsleistung zu erbringen hatte (z.B. Fahrtkosten). Vom Arbeitnehmer anderweitig erzieltes Einkommen (oder absichtlich versäumtes Einkommen) ist von der zustehenden Kündigungsentschädigung abzuziehen. Für den Anspruch auf Kündigungsentschädigung besteht eine gesetzliche Verfallsfrist. Er muss binnen sechs Monaten ab Fälligkeit gerichtlich eingeklagt werden.[101]

Verletzung des besonderen Schutzes

Beim besonderen Kündigungs- und Entlassungsschutz (z.B. für Betriebsräte) ist grundsätzlich die vorherige Zustimmung des Gerichtes zur Kündigung oder Entlassung einzuholen. Spricht der Betriebsinhaber eine Kündigung- oder Entlassung ohne eine vorherige gerichtliche Zustimmung aus,

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[95] Das ist ein Vertretergremium der Eigentümer mit umfassender Aufsichts- und Kontrollfunktion über die Geschäftsführung der GmbH bzw. den Vorstand der AG.

[96] § 110 Abs. 1 ArbVG.

[97] Möglich wäre ein Schadenersatzanspruch aufgrund der Missachtung von Kündigungsterminen und Fristen.

[98] Hingegen liegt absolute Nichtigkeit vor, wenn der Betriebsrat von der auszusprechenden Kündigung nicht vorher verständigt wurde (betriebsverfassungsrechtliches Vorverfahren, § 105 Abs 1 ArbVG).

[99] Dazu oben 1.1.2. § 105 Abs. 3 Nr. 1 lit. e ArbVG: wegen seiner Bewerbung um eine Mitgliedschaft zum Betriebsrat.

[100] § 105 Abs 7 ArbVG.

[101] § 1162d ABGB, § 34 AngG.

ist diese schlichtweg rechtlich nicht existent. Im besonderen Bestandschutz herrscht grundsätzlich das **Unwirksamkeitsprinzip**.[102] Verweigert der Arbeitgeber die Annahme der Arbeitsleistung und stellt er die Lohn- oder Gehaltszahlungen ein, so kann der Arbeitnehmer (Betriebsrat) erfolgreich auf Feststellung des Fortbestandes (und damit implizit auf Zahlung des Lohnes- oder Gehalts) klagen.[103] Der Arbeitgeber läuft also das Risiko, dass er für längere Perioden nachträglich Entgelt begleichen muss. Dieser Feststellungs- bzw. Fortsetzungsanspruch des Arbeitnehmers muss allerdings **zeitnah** gelten gemacht werden.[104]

Ein Arbeitnehmer, der einem besonderen Bestandschutz genießt, muss sich aber nicht unbedingt auf die Unwirksamkeit der rechtswidrigen Auflösung berufen, sondern er kann im Sinne eines **Wahlrechtes** auf die Geltendmachung des **besonderen Schutzes verzichten** (z.B. wenn er kein Interesse mehr an der Tätigkeit in dem betreffenden Betrieb hat). Er kann sich damit auf die für den Fall der ungerechtfertigten Beendigung bestehenden **Ersatzansprüche** beschränken. Grundsätzlich würde dann ein Anspruch auf **Kündigungsentschädigung** bestehen, und zwar bis zu dem Zeitpunkt, an dem das Dienstverhältnis rechtmässig aufgelöst werden kann.[105] Eine unbesehene Übernahme der Kündigungsentschädigung ist aber bei besonderem Bestandsschutz problematisch, weil z.B. bei einem Betriebsrat das Ende des besonderen Bestandschutzes nicht absehbar ist bzw. in weiter Ferne liegt. Es stellt sich die Frage, ob ein besonders geschützter Arbeitnehmer, der eine rechtswidrige Auflösung seines Arbeitsverhältnisses hinnimmt, so zu stellen ist, wie ein nicht-besonders geschützter Arbeitnehmer. Für die Betriebsräte hat die Rechtsprechung entschieden, dass der besondere Bestandschutz gemäß § 120 ArbVG nur ermöglichen soll, die Interessen der Belegschaft zu vertreten, ohne eine Diskriminierung durch den Arbeitgeber auf Grund ihrer Tätigkeit befürchten zu müssen. Dieses Mandat endet aber mit der freiwilligen Aufgabe des Dienstverhältnisses und **Verzicht auf den besonderen Bestandsschutz**. In diesen Fällen stehen dem Betriebsrat nur jene Ersatzansprüche zu, die auch den nicht kündigungs- oder entlassungsgeschützten Dienstnehmern gebühren.[106]

4. Constitutional basis for collective representation of workers

Die Gesetzgebungskompetenz

Die Kompetenz zur Gesetzgebung und Vollziehung in Arbeitsrechtssachen liegt beim Bund.[107] Eine Ausnahme besteht für Arbeiter und Angestellte in der Land- und Forstwirtschaft. Hier hat der Bund

[102] Beim nicht besonders bestandgeschützten Arbeitnehmer löst auch eine unberechtigte Entlassung das Dienstverhältnis auf und zieht lediglich Schadenersatzansprüche (Anspruch auf Kündigungsentschädigung) nach sich (§ 29 AngG: sog. Umdeutung der unberechtigten Entlassung in eine Kündigung).

[103] So z.B. in OGH, 29.04.1980, 4 Ob 128/79.

[104] OGH 26. 1. 2000, 9 ObA 322/99i, RS0028233: Die zeitliche Grenze ist unter Bedachtnahme auf konkludentes Verhalten des Vertragspartners zu ziehen und zu beurteilen, ob das Verhalten des Arbeitnehmers als stillschweigendes Einverständnisses mit der Beendigung bzw als Verzicht auf die Geltendmachung der Unzulässigkeit der Beendigung aufzufassen ist. Die bloße Nichtgeltendmachung durch längere Zeit dokumentiert für sich allein in der Regel noch keinen Verzicht; vielmehr müssen Umstände hinzukommen, die die spätere Geltendmachung als unzulässig erscheinen lassen. Der Anspruch des Arbeitgebers auf alsbaldige Klarstellung der Interessen des Arbeitnehmers, die mit dem Zeitverlauf immer mehr abnehmen, bedingt eine Aufgriffsobliegenheit des Arbeitnehmers, sein Gestaltungsrecht und Interesse an der Aufrechterhaltung des Arbeitsverhältnisses ohne Verzug geltend zu machen. Zur Beurteilung dieser Unverzüglichkeit ist unter Berücksichtigung der Umstände des Einzelfalles ein angemessener zur Erkundung und Meinungsbildung objektiv ausreichender Zeitraum heranzuziehen. Z.B. wurde ein 11-monatiges Zuwarten als zu spät angesehen.

[105] § 29 AngG, § 1162b ABGB und § 84 GewO (1859).

[106] OGH 26.01.1994 9 ObA 280/93, RS0051212.

[107] Art. 10 Abs. 1 Z 11 B-VG.

nur die Grundsatzgesetzgebung, die Ausführungsgesetze und Vollziehung liegt in der Hand der Bundesländer.[108]

Das Grundrecht der Koalitionsfreiheit

Die sog. **Koalitionsfreiheit** betrifft zwar die gewählten Belegschafts-Vertreter nicht direkt, sie soll dennoch hier kurz erwähnt werden, da in Österreich wohl praktisch alle Betriebsräte Mitglieder in der Gewerkschaft sind und eine starke Vernetzung besteht. Die Koalitionsfreiheit ist in Österreich ein Ausdruck der verfassungsrechtlich geschützten, grundrechtlichen **Vereinsfreiheit**.[109] Die Koalition erfolgt auf der Grundlage des Vereinsgesetzes 2002. Geschützt sind insbesondere die Gründung, der Beitritt und die typischen Tätigkeiten von Gewerkschaften zum Schutz der Interessen ihrer Mitglieder. Aus Art. 11 EMRK wird eine Reihe von Schutzpflichten zur Sicherung der Koalitionsfreiheit abgeleitet. Alle vom Gesetzgeber oder der Exekutive gesetzten Akte müssen sich an Art. 11 Abs. 2 MRK[110] messen lassen. Es müssen die dort genannten Zwecke gedeckt sein.[111]

Nach dem Bundes-Verfassungsgesetz (BVG) kann das **Notverordnungsrecht** des Bundespräsidenten keine Massnahmen umfassen, die die Koalitionsfreiheit betreffen.[112] Diese Norm begründet sich durch die Sensibilität der Koalitionsfreiheit in Zeiten politscher Turbulenzen.

Zur Koalitionsfreiheit ist Österreich auch durch den Friedensvertrag von St. Germain[113] und die Europäische Sozialcharta[114] verpflichtet.

Auf einfachgesetzlicher Ebene ist das sog. Koalitionsgesetz[115] zu erwähnen. Es versagt in erster Linie Streik- und Aussperrungsvereinbarungen die Wirksamkeit und stellt deren Durchführung bzw. Erzwingung unter Strafe. Das Antiterror-Gesetz[116] verbietet sog. closed-shop und union-shop Aktivitäten zu verbieten.

Internationale Vorgaben und individueller Schutz

Die **ILO-Abkommen** Nr. 87[117] und 98[118] wurden in österreichisches Recht (als einfache Bundesgesetze) umgesetzt.

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[108] Art. 10 Abs. 1 Z 11 iVm Art. 12 Abs. 1 Z 6 B-VG.

[109] Art. 12 Staats-Grundgesetz, Art. 11 MRK (EMRK im österreichischen Verfassungsrang).

[110] Die Ausübung dieser Rechte darf keinen anderen Einschränkungen unterworfen werden als den vom Gesetz vorgesehenen, die in einer demokratischen Gesellschaft im Interesse der nationalen und öffentlichen Sicherheit, der Aufrechterhaltung der Ordnung und der Verbrechensverhütung, des Schutzes der Gesundheit und der Moral oder des Schutzes der Rechte und Freiheiten anderer notwendig sind. Dieser Artikel verbietet nicht, dass die Ausübung dieser Rechte durch Mitglieder der Streitkräfte, der Polizei oder der Staatsverwaltung gesetzlichen Einschränkungen unterworfen wird.

[111] Verfassungsgerichtshof, 23.6.1977, VfSlg. 8090.

[112] § 18 Abs 5 B-VG.

[113] Art. 372 § 3 Punkt 2 (StGBl. 1920/303).

[114] Art. 5.

[115] RGBl. 1870/43.

[116] BGBl. 1930/113.

[117] 23.12.1950, BGBl. 1950/228. Übereinkommen (Nr. 87) über die Vereinigungsfreiheit und den Schutz des Vereinigungsrechtes.

[118] 11.2.1952, BGBl. Nr. 20/1952. Übereinkommen (Nr. 98) über die Anwendung der Grundsätze des Vereinigungsrechtes und des Rechtes zu Kollektivverhandlungen. Ein gewisses Problem stellt es in Österreich dar, dass nach Art. 4 des Abkommens Einschränkungen im Verwaltungsweg untersagt sind. Diese Norm wird

Der **individuelle Schutz** von Arbeitnehmern (u.a. von Gewerkschaftsmitgliedern und/oder Betriebsräten) erfolgt im bereits oben erläuterten **Arbeits-Verfassungs-Gesetz** (ArbVG). Entgegen dem Wortlaut handelt es sich dabei um **kein Verfassungsgesetz** im formellen oder materiellen Sinne. Der Begriff Verfassung bezieht sich auf die Errichtung einer betrieblichen Verfassung für die Zusammenarbeit zwischen Betriebsinhaber und Belegschaft (und ihrer Vertreter, d.h. Betriebsräten). Dort ist insb. der allgemeine Kündigungs- und Entlassungsschutz bei Beitritt zu einer Gewerkschaft (Anfechtbarkeit) bzw. der besondere Kündigungsschutz der Betriebsräte (vorherige gerichtliche Zustimmung zur Kündigung[119]) geregelt.

Darüber hinaus wird gesagt, dass Entlassungen und Kündigungen aus solchen Motiven auch **nichtig** (und damit auch ohne Anfechtung rechtlich unwirksam) wären, weil Österreich dazu auf internationaler Ebene verpflichtet ist (und zwar aufgrund von Art. 1 Z 2 lit. b des **ILO-Abkommens Nr. 98**).[120] Schutz ist danach insbesondere gegenüber Handlungen zu gewähren, die darauf gerichtet sind, „einen Arbeitnehmer zu entlassen oder auf sonstige Weise zu benachteiligen, weil er einer Gewerkschaft angehört oder weil er sich außerhalb der Arbeitszeit oder mit Zustimmung des Arbeitgebers während der Arbeitszeit gewerkschaftlich betätigt“.

5. Role of collective work relations

Dem kollektiven Arbeitsrecht und den Interessenvertretungen kommt in Österreich wohl vergleichsweise grosse Bedeutung zu. In Österreich gibt es seit langer Zeit ein klares Bekenntnis zu einer stark sozial geprägten Marktwirtschaft. Der Staat nimmt diese Aufgabe aber nicht selbst und direkt wahr. Es kommt in weitem Ausmass zur Übertragung der Rechtssetzungsbefugnis im Arbeitsleben auf Verbände. Dies soll das marktwirtschaftliche Gleichgewicht wiederherstellen. Auf einzelvertraglicher Ebene wäre diese Grundvoraussetzung des liberalen Vertragsmodels nicht gegeben, da der Arbeitgeber regelmässig die Vertragsbedingungen einseitig diktieren könnte. Aus zeitlicher Perspektive ist das kollektive Arbeitsrecht im Vordringen begriffen und verdrängt immer mehr einzelvertragliche Gestaltung.[121]

5.1 Institutions and legal means of collective action

Das klassische Instrument des österreichischen kollektiven Arbeitsrechts sind die **Kollektivverträge**.[122] Dies sind überbetriebliche schriftliche Vereinbarungen, die zwischen kollektivvertragsfähigen Körperschaften der Arbeitnehmer und der Arbeitgeber abgeschlossen werden. Derzeit gibt es ca. 800 verschiedene Kollektivverträge.

Kraft Gesetzes sind kollektivvertragsfähig: **Gesetzliche Interessenvertretungen** der Arbeitgeber und der Arbeitnehmer, denen unmittelbar oder mittelbar die Aufgabe zukommt, die Arbeitsbedingungen ihrer Mitglieder zu regeln und die gegnerfrei sind.[123] Dies sind die Kammern der Arbeitgeber

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durch das österreichische Vereinsgesetz verletzt, das Vereinsauflösung im Verwaltungsweg zulässt. Die beiden Normen sind nicht vereinbar, wobei aber innerstaatlich keine Norm höherer Rang einnimmt oder sonst Vorrang hätte. Es handelt sich um eine Völkerrechtswidrigkeit (Marhold/Friedrich, Arbeitsrecht, 2006, S. 357).

[119] Siehe dazu oben 1.a. und 2.

[120] Marhold/Friedrich, Arbeitsrecht, 2006, S. 359 (mit Verweis auf weitere wichtige Autoren des österr. Arbeitsrechts, u.a. Floretta/Spielbüchler/Strasser, AR II, 4.Aufl., S. 39).

[121] Marhold/Friedrich, Arbeitsrecht, 2006, S. 343 et seqs.

[122] §§ 2 – 17 ArbVG.

[123] § 4 ArbVG.

(Wirtschaftskammer und ihre Teilorganisationen[124]) und der Arbeitnehmer (Arbeiterkammer). Diese sind durch eigenständige Gesetze eingerichtet und sind Körperschaften des öffentlichen Rechts mit Pflichtmitgliedschaft, Umlagenhoheit und dem Recht auf Selbstverwaltung.

Die zweite Möglichkeit zur Erlangung der Kollektivvertragsfähigkeit ist die **Verleihung** durch das Bundeseinigungsamt auf Antrag einer freiwilligen Berufsvereinigung (Koalition). Voraussetzung ist, dass zwei formelle und zwei materielle Bedingungen gegeben sind.[125] Die Zuerkennung durch Bescheid (Verfügung) stellt einen konstitutiven Verwaltungsakt dar.

Auf Seiten der Arbeitnehmer werden Kollektivverträge in der Regel vom Österreichischen Gewerkschaftsbund (ÖGB; Kollektivvertragsfähig kraft Verleihung) und den einzelnen Gewerkschaften[126] (freiwillige Mitgliedschaft) ausverhandelt und abgeschlossen. Auf Seiten der Arbeitgeber erfolgt der Abschluss von der Wirtschaftskammer (gesetzliche Interessenvertretung[127], Pflichtmitgliedschaft). Kollektivverträge gelten für die Arbeitsverhältnisse innerhalb ihres jeweiligen Geltungsbereiches (Branche, Gebiet, Angestellte bzw. Arbeiter).

Der Kollektivvertrag wirkt auf die ihm unterfallenden Arbeitsverhältnisse unabhängig vom Willen der betroffenen Arbeitgeber und Arbeitnehmer wie ein Gesetz. Kollektivverträge gelten in der Regel **unmittelbar** für eine ganze Wirtschaftsbranche.[128] Erst durch diese rechtliche Anerkennung hat sich der Kollektivvertrag zu jenem wesentlichen Ordnungsfaktor entwickeln, der aus dem heutigen österreichischen Arbeitsleben nicht wegzudenken ist. Kollektivverträge gelten in Österreich für **alle Arbeitnehmer**, auch wenn diese nicht Gewerkschaftsmitglieder sind (sogenannte „Außenseiterwirkung“[129]). Nach ständiger Judikatur des OGH sind die Kollektivvertragsparteien bei ihrer Rechtsetzung an die **Grundrechte** gebunden.

Die Inhalte eines Kollektivvertrages werden in zwei große Gruppen eingeteilt. Unterschieden werden Regelungen, die ausschließlich das Verhältnis der vertragsschließenden Parteien untereinander regeln (**schuldrechtlicher Teil**) und Bestimmungen, welche die Arbeitsbedingungen der kollektivvertragsunterworfenen Arbeitgeber und Arbeitnehmer regeln (**normativer Teil**). Die normativ wirksamen Bestimmungen stellen den besonderen, spezifischen Inhalt des Kollektivvertrags dar. Zur Setzung dieser Regelungen bedarf es der vom Gesetzgeber verliehenen Regelungsmacht. Der Gesetzgeber hat die inhaltlichen Grenzen der kollektivvertraglichen Regelungsmacht taxativ

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[124] Auf Arbeitgeberseite ist die Wirtschaftskammer und deren Untergliederungen eine nach fachlichen und regionalen Gegebenheiten stark differenzierte Organisation. Es sind nicht nur die Landeskammern und die Bundeskammer kollektivvertragsfähig, sondern auch die Fachgruppen und die Fachverbände.

[125] Sie müssen 1. sich nach ihren Statuten zur Aufgabe stellen, die **Arbeitsbedingungen** innerhalb ihres Wirkungsbereiches zu regeln; 2. in ihrer auf Vertretung der Arbeitgeber- oder der Arbeitnehmerinteressen gerichteten Zielsetzung in einem größeren fachlichen und räumlichen **Wirkungsbereich** tätig werden; 3. vermöge der Zahl der Mitglieder und des Umfanges der Tätigkeit eine maßgebende **wirtschaftliche Bedeutung** haben; 4. in der Vertretung der Arbeitgeber- oder der Arbeitnehmerinteressen gegenüber der anderen Seite **unabhängig** sein (§ 4 Abs. 2 ArbVG).

[126] GPA-djp, GÖD, GdG-KMSfB, Bau-Holz, PRO-GE, Vida, GPF.

[127] Wirtschaftskammergesetz (WKG).

[128] § 11 ArbVG: „Die Bestimmungen des Kollektivvertrages sind, soweit sie nicht die Rechtsbeziehungen zwischen den Kollektivvertragsparteien regeln, innerhalb seines fachlichen, räumlichen und persönlichen Geltungsbereiches unmittelbar rechtsverbindlich“.

[129] § 12 Abs. 1 ArbVG: „Die Rechtswirkungen des Kollektivvertrages treten auch für Arbeitnehmer eines kollektivvertragsangehörigen Arbeitgebers ein, die nicht kollektivvertragsangehörig sind (Außenseiter)“. Es ist nicht zulässig, dass ein Kollektivvertrag unterschiedliche Regelungen für Mitglieder und Nichtmitglieder der abschließenden Arbeitnehmerkoalition trifft (Differenzierungsverbot).

bestimmt.[130] In Kollektivverträgen sind in der Regel alle wichtigen wechselseitigen Rechte und Pflichten aus einem Arbeitsverhältnis geregelt. Das sind vor allem Regelungen in Bezug auf Entlohnung (insbesondere Mindestgehälter bzw. **Mindestlöhne**[131]), Sonderzahlungen (sog. Urlaubs- und Weihnachtsgeld) und Arbeitszeit. Der Zweck des Kollektivvertrags ist, für eine möglichst große Anzahl von Arbeitnehmern sowie für alle Branchen und Regionen, sachgerechte Lohn- und Arbeitsbedingungen festzulegen. Als die Funktionen der Kollektivverträge werden genannt: Arbeitnehmer-Schutz, Friedenserhaltung, Rechtsfortbildung über die Branchen hinweg, Vereinheitlichung der Arbeitsbedingungen und Kartellfunktion.[132]

Auf der einzelbetrieblichen Ebene wird das Arbeitsrecht kollektiv durch die **Betriebsvereinbarung** geregelt.[133] Die Betriebsvereinbarung ist ein wichtiges Instrument zur Mitbestimmung der Arbeitnehmer im einzelnen Betrieb. Das sind schriftliche Vereinbarungen zwischen dem Betriebsrat und dem Betriebsinhaber, die z. B. Arbeitszeit, akkord-ähnliche Prämien, Entgelte für die Arbeitnehmer oder betriebliche Disziplinarordnungen und Kontrollmassnahmen regeln.[134] Kollektiv ist die Rechtsgestaltung hier nur auf der Arbeitnehmerseite. Der Arbeitgeber handelt individuell. Dennoch handelt es sich um Kollektivarbeitsrecht (sog. Betriebsverfassungsrecht bzw. Konzernverfassung). Regelungen in Kollektivverträgen dürfen durch Betriebsvereinbarungen und Arbeitsverträge nicht verschlechtert werden. Betriebsvereinbarungen sind in jenen Angelegenheiten, in denen sie abgeschlossen werden dürfen unmittelbar rechtsverbindlich und wirken normativ. Abschlussberechtigt ist die Gesamtheit der Arbeitnehmer des Betriebes. Diese wird durch ihre gewählten Organe vertreten (je nach Zuständigkeit Betriebsrat, Betriebsausschuss, Zentralbetriebsrat, Konzernvertretung).

Zwischen den einzelnen Rechtsquellen besteht eine Hierarchie. Arbeitsrechtliche Gesetze, Kollektivverträge und Betriebsvereinbarungen enthalten zumeist sog. einseitig zwingende Bestimmungen. Das bedeutet, dass eine Regelung nicht durch eine Norm der nächstniedrigen Stufe zum Nachteil der Arbeitnehmer abgeändert werden kann. Nur wenn die Bestimmungen für die Arbeitnehmern günstiger sind, bleiben sie bestehen und werden durch die höherrangige Norm nicht verdrängt (**Günstigkeitsprinzip**).[135] Das bedeutet zum Beispiel, dass ein Arbeitsvertrag keine für die Arbeitnehmer schlechteren Regelungen enthalten kann als Gesetz, Kollektivvertrag und Betriebsvereinbarung.

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[130] § 2 Abs. 2 ArbVG: (2) Durch Kollektivverträge können geregelt werden: Die Rechtsbeziehungen zwischen den Kollektivvertragsparteien; die gegenseitigen aus dem Arbeitsverhältnis entspringenden Rechte und Pflichten der Arbeitgeber und der Arbeitnehmer; die Änderung kollektivvertraglicher Rechtsansprüche der aus dem Arbeitsverhältnis ausgeschiedenen Arbeitnehmer; Maßnahmen im Sinne des § 97 Abs. 1 Z 4 ArbVG; Art und Umfang der Mitwirkungsbefugnisse der Arbeitnehmerschaft bei Durchführung von Maßnahmen gemäß Z 4 und von Maßnahmen im Sinne des § 97 Abs. 1 Z 9; gemeinsame Einrichtungen der Kollektivvertragsparteien; sonstige Angelegenheiten, deren Regelung durch Gesetz dem Kollektivvertrag übertragen wird.

[131] Funktional stellt der Kollektivvertrag eine Absage an negativen Lohnwettbewerb dar: Arbeitgeber können keinen Wettbewerbsvorteil dadurch erlangen, dass sie Arbeitnehmer schlechter bezahlen als andere Arbeitgeber der Branche.

[132] Alle Funktionen, mit Ausnahme der letzten, sind u.E. selbsterklärend. Mit Kartellfunktion ist gemeint, dass durch den Zusammenschluss auf Arbeitnehmerseite ein Preiswettbewerb (nach unten) beim Lohn unterbunden wird.

[133] Die §§ 29 bis 32 ArbVG enthalten Bestimmungen über Begriff, Form, Wirksamkeitsbeginn, Rechtswirkungen und Geltungsdauer von Betriebsvereinbarungen. Vorschriften über den Inhalt finden sich im II. Teil über die Betriebsverfassung (§§ 96, 96a und 97 ArbVG) sowie vereinzelt in anderen arbeitsrechtlichen Gesetzen.

[134] Das ArbVG sieht vor (§ 29), dass Betriebsvereinbarungen nur in jenen Angelegenheiten abgeschlossen werden können, in denen ein Gesetz oder ein Kollektivvertrag eine entsprechende Ermächtigung vorsieht.

[135] § 3 ArbVG.

5.2 Collective work relations in practice

In Österreich gibt es derzeit ca. 800 Kollektivverträge. Jährlich verhandeln die Gewerkschaften über 450 Kollektivverträge. Nach Informationen der OECD zur Tarifbindung von Arbeitnehmern hat Österreich eine Spitzenposition im internationalen Vergleich. Fast alle österreichischen Arbeitnehmer (ca. **98 %**) sind durch Kollektivverträge abgedeckt.[136] Die Bedeutung der Arbeiterkammer (Pflichtmitgliedschaft) und Gewerkschaften (freiwillige Mitgliedschaft) kann als hoch eingestuft werden. Auch die rechtlichen Möglichkeiten der Mitwirkung im Betrieb durch die Betriebsräte gehen wohl vergleichsweise weit.[137]

Da der Kollektivvertrag eine Vereinbarung ist, müssen **Verhandlungen** geführt werden, um eine Einigung zu erreichen. Die Lohnverhandlungen werden traditionell durch die Metallergewerkschaft eingeleitet und der Abschluss in der Metallbranche hat Beispielswirkungen für andere Branchen. Damit es überhaupt zu Verhandlungen kommt, stellen in der Regel die Gewerkschaften Forderungen auf und verlangen Verhandlungen darüber. Beide Seiten müssen jedoch bereit sein zu verhandeln, andernfalls kann kein Kollektivvertrag bzw. Änderung eines Kollektivvertrags zustande kommen. Kollektivverträge werden für gewöhnlich auf bestimmte Zeit abgeschlossen. Damit ein neuer Kollektivvertrag abgeschlossen bzw. ein bestehender abgeändert werden kann, müssen die Verhandlungspartner inhaltlich zu einer Einigung kommen. Häufig gibt es mehrere Verhandlungsrunden, die bis zu Streikmaßnahmen führen können. Wird keine Lösung gefunden, gelten die alten Verträge weiter.[138]

B. FRANCE

1. General overview of legal protection against unfair dismissal

1.1. Substantive reasons for legitimate dismissals

Le licenciement se définit, de manière classique, comme étant la rupture unilatérale du contrat de travail par l'employeur. Il se distingue d'autres modes de rupture du contrat que ce soit par la partie qui rompt l'engagement[139], contractuel ou par les circonstances particulières dans lesquelles intervient la rupture[140].

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[136] Im Vergleich dazu sind z. B. 62 Prozent der deutschen und 14 Prozent der ArbeitnehmerInnen in den USA durch Kollektivverträge abgesichert. Quelle: http://www.kollektivvertrag.at/cms/KV/KV_3.2/der-kollektivvertrag/warum-kollektivvertraege (Stand Mai 2014).

[137] Das ArbVG unterteilt für die Mitwirkung drei verschiedenen Sachbereiche: 1. Mitwirkung in sozialen Angelegenheiten (§ 94-97 ArbVG): Angelegenheiten, die eine Mehrzahl von Arbeitnehmern, oder die gesamte Betriebsbelegschaft, betreffen. Es handelt sich dabei um generelle Maßnahmen, wobei das Mitbestimmungsinstrument die Betriebsvereinbarung ist. 2. Mitwirkung in personellen Angelegenheiten (§§ 98-107 ArbVG): Mitwirkung an personellen Einzelentscheidungen (z.B. Aufnahme von Arbeitnehmern, Versetzungen, Beendigung von Arbeitsverhältnissen); 3. Mitwirkung in wirtschaftlichen Angelegenheiten (§§ 108-112 ArbVG): Mitwirkung bei der Führung des Unternehmens sowie in Unternehmensorganen. Vor allem letzterer Mitwirkungskreis führt in der Praxis relativ häufig zu Konflikten zwischen Unternehmern und Betriebsräten.

[138] § 13 ArbVG.

[139] La démission correspond ainsi, de manière classique, à la rupture unilatérale par l'employé.

[140] La mise à la retraite constitue un exemple de rupture du contrat de travail intervenant dans des circonstances particulières qui empêchent d'être qualifié de licenciement.

Le Code du travail prévoit deux types de licenciement : le **licenciement pour motif personnel** et le **licenciement pour motif économique**. Un motif est personnel quand il est inhérent à la personne du salarié. À l'inverse, un licenciement est prononcé pour des motifs économiques lorsque la raison qui motive le licenciement est externe au salarié et est consécutive notamment à des difficultés économiques ou à des mutations technologiques.

C'est l'employeur qui choisit la qualification du licenciement. En cas d'erreur, le licenciement risque d'être reconnu comme dépourvu de cause sérieuse et réelle et l'employeur sera sanctionné pour ce défaut[141].

1.1.1. Le licenciement pour motif personnel

Le licenciement pour motif personnel peut être prononcé à la suite d'un comportement fautif ou non fautif. Si le comportement est fautif, il s'agira alors d'un licenciement disciplinaire. À l'inverse, si le comportement du salarié n'est pas fautif, le licenciement, non disciplinaire, peut être motivé âr diverses raisons : inaptitude physique suite à une maladie et révélée par un examen médical, absences répétées, insuffisance professionnelle,…etc.

Que le licenciement soit disciplinaire ou non, le motif justifiant le licenciement doit réunir certaines conditions pour être considéré comme valable. Il doit être **réel** (a) **et sérieux** (b).

a. La cause réelle

Le **caractère réel** s'apprécie grâce à, d'une part, **l'objectivité** des raisons motivant le licenciement et, d'autre part, par **l'existence et l'exactitude** de la cause du licenciement.

Ainsi, le motif doit être **objectif** et « doit se traduire par des manifestations extérieures susceptibles de vérification »[142]. Le licenciement ne peut pas reposer sur des arguments subjectifs tels que la mésentente entre des employés ou la perte de confiance[143]. Il ne peut s'agir que d'un **comportement personnellement imputable à l'employé**[144]. Des faits commis par l'entourage du salarié ne permettent pas de le licencier[145].

Pour être réelle, la cause du licenciement doit également **exister et être exacte**. L'existence du motif à la base du licenciement est évidente : un salarié ne peut pas être licencié pour une fausse raison[146]. En outre, le motif doit être exact, c'est-à-dire que le motif évoqué doit être vraiment la raison du licenciement. L'employeur ne peut pas déguiser les vraies raisons du licenciement derrière de fausses justifications.

b. La cause sérieuse

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141 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, n° 468.

142 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, n° 445. Par exemple, des soupçons à l'égard de l'employé ne suffisent pas pour constituer une cause objective, Cass. soc., 25.06.1991, n° 88-42.737.

143 Cass. soc., 29.11.1990, n° 87-40.184.

144 Cass. soc., 13.10.1993, n° 92-40.726.

145 Par exemple, le fait, pour une salariée, d'être mariée à un ancien employé qui attaque l'entreprise en justice ne permet pas de demander son licenciement, Cass. soc., 29.11.1990, n° 87-40.184. De la même façon, une salariée ne peut être licenciée en raison des propos injurieux de sa sœur : Cass. soc., 21.03.2000, n° 98-40.130.

146 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, n° 447.

La cause est **sérieuse** quand elle a un **lien avec le travail** et quand elle **rend impossible la continuation des rapports de travail**.

En principe, le motif doit être **professionnel** mais un fait relevant de la vie personnelle d'un employé peut également avoir des conséquences professionnelles et constituer ainsi une cause sérieuse au sens visé ici. Par exemple, si un salarié utilise le camion de l'entreprise pour commettre un vol, cela constitue un motif professionnel. En revanche, si le chauffeur circule hors de son temps de travail, avec sa voiture personnelle, et est sanctionné par un retrait de permis à cause d'un état d'ivresse, son comportement personnel pourra conduire à un licenciement étant donné qu'il est désormais dans l'impossibilité d'exercer son métier[147].

La raison motivant le licenciement doit être tellement importante qu'elle **rend impossible la continuation des rapports de travail**. La Cour de cassation[148] a précisé la portée de cette condition à trois égards.

Tout d'abord, quant au moment auquel il convient de se placer pour apprécier la caractère sérieux de la cause du licenciement, il découle de la jurisprudence que « la réalité et le sérieux du motif de licenciement s'apprécient au jour où la décision de rompre le contrat de travail est prise par l'employeur »[149]. Ainsi, par exemple, les absences prolongées ne peuvent pas constituer une cause de sérieuse de licenciement lorsque la décision de licencier est prise alors que le salarié a repris son travail.

Ensuite, quant au contenu de la notion de cause sérieuse, la Cour de cassation a déterminé qu'une **faute légère** ne pouvait pas suffire à constituer une cause réelle et sérieuse[150]. En revanche, elle a aussi estimé que la faute ne devait pas nécessairement être grave pour que la qualification de cause réelle et sérieuse soit remplie[151]. La notion de faute est graduée et respecte ainsi une certaine **proportionnalité**[152]. Ainsi, une **faute sérieuse** provoque une rupture nécessaire du contrat de travail mais ne permet pas de priver le salarié du préavis de licenciement et des indemnités. À l'inverse, une **faute grave** entraîne une rupture immédiate du contrat assortie de la perte, pour l'employé, de la durée du préavis et des indemnités de licenciement[153]. Il existe aussi une **faute lourde** caractérisée par la volonté de l'employé de nuire à l'employeur[154].

Enfin, quant à l'autorité chargée d'évaluer le caractère sérieux de la cause de licenciement, il ressort de l'article 1235-1 alinéa 3 CT que c'est au juge d'apprécier le caractère réel et sérieux du licenciement. Le contrat individuel de travail[155] ou une convention collective[156] ne peuvent qualifier des faits déterminés de cause réelle et sérieuse entraînant un licenciement de manière automatique. En revanche, ces deux accords peuvent limiter les causes valables de licenciement[157]. À ce moment-là, le juge est lié par ces prévisions[158].

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147 Memento pratique Francis Lefebvre, Social 2013, n° 47140.

148 J. PÉLISSIER ET AL., *Les grands arrêts du droit du travail*, 4ème éd., Paris 2008, p. 466.

149 Cass. soc., 05.01.1999, n° 96-44.356.

150 Cass. Soc., 13.12.1967.

151 J. PÉLISSIER ET AL., *Les grands arrêts du droit du travail*, 4ème éd., Paris 2008, p. 466.

152 J. PÉLISSIER ET AL., *Les grands arrêts du droit du travail*, 4ème éd., Paris 2008, p. 467 et 468.

153 J. PÉLISSIER ET AL., *Les grands arrêts du droit du travail*, 4ème éd., Paris 2008, p. 467.

154 Cass. soc., 29.04.2009, n° 07-44.798.

155 Cass. soc., 02.03.2005, n° 02-46.534.

156 Cass. Soc., 06.05.1998, n° 96-40.951.

157 Cass. soc., 14.10.1997, n° 97-40.033.

158 J. PÉLISSIER ET AL., *Les grands arrêts du droit du travail*, 4ème éd., Paris 2008, p. 468.

1.1.2. Le licenciement pour motif économique

D'après le Code du travail, Constitue un licenciement pour motif économique « le licenciement effectué par un employeur pour un ou plusieurs motifs non inhérents à la personne du salarié résultant d'une suppression ou transformation d'emploi ou d'une modification, refusée par le salarié, d'un élément essentiel du contrat de travail, consécutives notamment à des difficultés économiques ou à des mutations technologiques »[159].

Plusieurs éléments sont nécessaires pour qualifier un licenciement d'économique. En premier lieu, le licenciement économique est prononcé pour des **motifs qui ne sont pas inhérents au salarié**.. En second lieu, le licenciement doit avoir lieu dans un contexte particulier. Il doit être consécutif à des **difficultés économiques** rencontrées par l'entreprise (par exemple, cessation totale[160] et définitive[161] de l'activité de l'entreprise), des **mutations technologiques** (notamment, mécanisation des tâches) ou d'**autres situations** comme la réorganisation de l'entreprise à des fins de compétitivité[162]. Le contexte économique difficile ne doit pas résulter d'un manquement de l'employeur[163]. Enfin, le licenciement doit être la conséquence d'une **suppression**, **transformation** ou une **modification** de l'emploi.

La cause du licenciement doit être **réelle et sérieuse**. Le **caractère réel** s'apprécie conformément aux principes du droit commun du licenciement[164]. La cause est **sérieuse** quand elle justifie un licenciement. A cet égard, la Cour de cassation a reconnu que la simple baisse du chiffre d'affaire d'une entreprise, bien qu'étant réelle, n'était pas suffisante pour justifier des licenciements pour motif économique[165].

De plus, dans un contexte de licenciement pour motif économique, deux obligations supplémentaires pèsent sur l'employeur. Celui-ci est en effet tenu d'une **obligation de reclassement** selon laquelle il doit tenter de trouver un poste similaire aux employés qu'il est contraint de licencier pour des raisons économiques. Le reclassement doit se faire à un poste équivalent, rémunéré de manière similaire[166], au sein du même groupe ou à l'international[167]. En outre, l'employeur doit satisfaire à une **obligation d'adaptabilité** qui consiste à former les employés concernés afin de leur permettre d'occuper le nouveau poste. ces deux obligations sont toutefois desobligations de moyens[168].

Les choix des employés qui vont subir les conséquences d'un licenciement économique n'est pas laissé à la libre appréciation de l'employeur. Ce dernier est tenu de respecter **l'ordre des licenciements** prévu par la loi. Il s'agit de critères d'ordre professionnel, contractuel et social[169]. Cet ordre doit être mis en place conventionnellement, par un accord collectif ou fixé par l'employeur après consultation des représentants du personnel[170]. L'employeur est tenu de les communiquer à l'employé qui en fait la

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159 Art. L1233-3 CT.

160 Cass. soc., 10.10.2006, n° 04-43.453.

161 Cass. soc., 15.10.2002, n° 01-46.240.

162 Cass. soc., 11.01.2006, n° 04-46.201.

163 Cass. soc., 10.07.2002, n° 00-41.491.

164 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, n° 498.

165 Cass. soc., 06.07.1999, n° 97-41.036.

166 Art. L1233-4 II CT.

167 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, n° 471-1 et 471-2.

168 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, n° 471.

169 A. MAZEAUD, *Droit du travail*, 7ème éd., Paris 2010, n° 924.

170 Art. L1233-5 CT.

demande[171]. Un licenciement prononcé en violation de l'ordre des licenciements donne lieu à la réparation du préjudice causé par le paiement d'une indemnité, sans pour autant être un licenciement sans cause réelle et sérieuse[172].

Il existe plusieurs types de licenciement pour motif économique, en fonction du nombre de salariés concernés par le licenciement. Si un seul des employés est licencié, il s'agit d'un **licenciement économique pour motif individuel**. Si les mesures de licenciement concernent plusieurs salariés, il s'agira plutôt d'un **licenciement économique collectif**. Enfin, le Code du travail distingue, au sein des licenciements économiques collectifs, ceux qui concernent moins de dix salariés dans une période de trente jours[173] de ceux qui concernent dix salariés ou plus dans un période des trente jours[174].

1.1.3. Les licenciements prohibés

Outre le fait de définir un cadre strict dans lequel le licenciement est permis, le législateur français prévoit que certains types de **licenciement sont prohibés et ce, quelles que soient les circonstances**. Il est ainsi interdit à l'employeur de licencier un salarié pour un motif discriminatoire[175], de licencier des employés qui ont refusé de céder à un harcèlement sexuel[176] ou moral[177] ou encore qui ont exercé leur droit de grève de manière normale[178]. Enfin, il est prohibé de licencier un employé au motif qu'il aurait témoigné dans une affaire de harcèlement[179] ou agi en justice pour faire respecter l'égalité femme-homme[180].

En outre, le code du travail dispose également que certains **licenciements sont en principe prohibés à moins que des circonstances particulières ne les permettent**. Les licenciements pendant ou dans la période qui suit la grossesse de la salariée[181] ainsi que les licenciements suite à un accident ou une maladie professionnelle[182] sont en principe prohibés. Ces licenciements demeurent toutefois possibles en cas de faute grave de l'employé ou si l'employeur est dans l'impossibilité de maintenir le rapport de travail pour un motif étranger à la grossesse, l'accident ou maladie de l'employé(e)[183].

Enfin, il convient de noter que l'interdiction de licenciement peut être prévue conventionnellement[184] par les parties au contrat de travail.

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171 Art. 1233-43 CT.

172 Cass. soc., 14 .01.1997, n° 95-44.366.

173 Art. L1233-8 ss CT.

174 Art. L1233-21 ss CT.

175 Art. L1132-1 CT.

176 Art. L1153-2 CT.

177 Art. L1152-2 CT.

178 Art. L1132-2 CT.

179 Art. L1153-3 CT.

180 Art. L1144-3 CT.

181 Art. L1226-9 CT.

182 Art. L1225-4 CT.

183 Art. L1226-9 et L1225-4 CT.

184 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, n° 457.

Un licenciement prononcé en violation d'une telle interdiction est sanctionné par la nullité[185], par la réintégration du salarié[186] et/ou par des indemnités[187].

1.2. Procedural requirements for legitimate dismissals

1.2.1. La procédure de licenciement pour motif personnel

La procédure doit respecter certaines phases.

Avant de prononcer le licenciement, l'employeur doit adresser à l'employé une **lettre de convocation** à un **entretien préalable** et individuel[188]. Cet entretien permet de prévenir le salarié qu'un licenciement est envisagé à son égard. La lettre de convocation peut être **remise en mains propres** à l'employé ou lui être adressée par **courrier recommandé**[189]. L'entretien ne peut avoir lieu moins de cinq jours après la présentation de la lettre[190]. L'employé ne peut pas renoncer à ce délai[191].

La lettre de convocation doit contenir certaines mentions : les **raisons de l'entretien**, la **possibilité pour l'employé d'être assisté** par un membre du personnel ou, à défaut de structure de représentation, par un **conseiller choisi**[192] ainsi que la liste dressée par le préfet des conseillers potentiels[193]. L'employé peut être représenté[194] et son absence n'est pas un obstacle à la poursuite de la procédure. L'employeur peut notifier le licenciement dans le respect des délais légaux[195].

L'employeur peut également être assisté[196] et représenté[197] lors de l'entretien préalable. Seule une personne appartenant à l'entreprise pourra être désignée pour ce rôle[198].

Une fois l'entretien préalable effectué et si le licenciement est décidé, il faut que l'employeur **notifie** le licenciement à l'employé par une **lettre de licenciement**. Ce courrier doit mentionner les raisons qui ont décidé la mesure de licenciement prise contre le salarié[199] sous peine d'être contraire à l'exigence d'existence d'une cause réelle et sérieuse[200]. La loi dispose que l'employeur doit attendre au moins **deux jours ouvrables** à compter de la date prévue de l'entretien préalable au licenciement pour procéder à l'envoi de la lettre de licenciement[201]. Il n'est **pas prévu de délai maximum** pour envoyer cette lettre sauf en matière de **licenciement disciplinaire**. En effet, la lettre annonçant un licenciement

185 Cass. soc., 28.04.1988, n° 87-41.804.
186 Cass. soc., 30.04.2003, n° 00-44.811.
187 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, n° 461 ss.
188 A. MAZEAUD, *Droit du travail*, 7ème éd., Paris 2010, n° 737.
189 Art. L1232-2 al. 2 CT.
190 Art. L1232-2 al. 3 CT.
191 Cass. soc., 28.06.2005, n° 02-47.128.
192 Art. L1232-4 al. 2 CT.
193 Art. L1232-4 al. 3 CT.
194 A. MAZEAUD, *Droit du travail*, 7ème éd., Paris 2010, n° 737, n. 14.
195 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, n° 429.
196 Cass. soc., 12.03.1986, n° 83-41.908.
197 Cass. soc., 14.06.1994, n° 92-45.072.
198 Cass. soc., 26.03.2002, n° 99-43.155.
199 Art. L1232-6, al. 2 CT.
200 Cass. soc., 29.11.1990, n° 88-44.308.
201 Art. L1232-6, al. 3 CT.

disciplinaire doit être envoyée dans un délai maximum d'un mois après l'entretien préalable. Même s'il n'existe pas de principe général quant à l'envoi de la lettre dans un délai maximum, il semble qu'un licenciement notifié trop tardivement perd son caractère réel et sérieux[202].

1.2.2. La procédure de licenciement pour motif économique

La procédure varie en fonction du nombre d'employés concernés par le licenciement économique.

a. La procédure de licenciement économique pour motif individuel

Lorsque le licenciement économique concerne un seul employé, celui-ci doit être convoqué pour un **entretien préalable** par une lettre de convocation contenant les mêmes informations qu'en cas de licenciement pour motif personnel[203]. L'entretien ne peut avoir lieu moins de cinq jours après la présentation de la lettre[204].

La **notification** du licenciement ne doit intervenir qu'après un délai de sept jours ouvrables après la date de l'entretien et de quinze jours ouvrables lorsque l'employé est un cadre[205]. La notification doit contenir le motif de licenciement[206] ainsi que la priorité de réembauche[207] et l'éventuel congé de reclassement si l'entreprise emploie plus de 1 000 employés[208]. À la demande de l'employé, l'article 1233-43 CT prévoit que l'employeur est tenu de communiquer les critères retenus pour déterminer l'ordre des licenciements.

Dans le cadre d'un licenciement économique, l'employeur est tenu en outre de prendre à l'égard des employés concernés, des **mesures de reclassement et d'adaptation** afin de leur permettre, dans la mesure du possible, de continuer à travailler dans des conditions similaires.[209]

Le Code du travail prévoit différentes protections du salarié licencié pour des raisons économiques : le contrat de sécurisation professionnelle[210], le congé de reclassement[211], le congé de mobilité[212]. Il s'agit de conventions qui aménagent la transition entre l'ancien emploi et la recherche d'un nouvel emploi. Ce sont des accords conclus avec l'ancien employeur. Pendant ces procédures, les employés continuent de percevoir une rémunération et bénéficient de formation, d'assistance à la recherche d'un emploi, d'assistance psychologique… etc.

b. La procédure de licenciement économique collectif

La loi prévoit des dispositions particulières en fonction du nombre de salariés menacés de licenciement. Plus le nombre de salariés concernés augmente, plus les acteurs sociaux comme les

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202 A. MAZEAUD, *Droit du travail*, 7ème éd., Paris 2010, n° 738.

203 Art. L1233-11 CT.

204 Art. L1233-11, al. 3 CT.

205 Art. L1233-15, al. 2 et 3 CT.

206 Art. L1233-16, al. 1er CT.

207 Art. L1233-16, al. 2 CT.

208 Art. R1233-1 CT.

209 Art. L1233-4 et L1233-4-1 CT.

210 Art. L1233-65 ss CT.

211 Art. L1233-71 ss CT.

212 Art. L1233-77 ss CT.

représentants du personnel, les syndicats et l'administration sont appelés à intervenir dans la procédure.

Il existe plusieurs formes de représentation du personnel dont les délégués du personnel et le comité d'entreprise. Les délégués du personnel sont obligatoires à partir de 11 salariés[213] et le comité d'entreprise à partir de 50 salariés[214]. Ces deux institutions peuvent être mises en place en présence d'un nombre inférieur de salarié par une convention ou un accord collectif de travail[215].

i. Les licenciements économiques collectifs concernant de 2 à 9 salariés : « petit licenciement collectif »

Une procédure simplifiée est applicable aux petits licenciements collectifs[216].

L'employeur doit **convoquer les représentants du personnel** si l'entreprise emploie moins de cinquante travailleurs ou **le comité d'entreprise** dans les entreprises de plus de cinquante salariés[217]. Il doit alors leur communiquer certaines informations notamment les raisons économiques, financières ou techniques du projet de licenciement, le nombre de licenciements envisagés, les catégories professionnelles concernées, les critères proposés pour l'ordre des licenciements, le nombre de salariés employés dans l'établissement, qu'ils soient permanents ou non, le calendrier prévisionnel des licenciements et les mesures de nature économique envisagées[218].

En outre, l'employeur est tenu de convoquer les salariés à un **entretien préalable**. Les modalités de l'entretien et de la notification[219] sont les mêmes que celles énoncées plus haut en matière de licenciement économique pour motif individuel[220].

L'article L1233-19 CT exige enfin que l'employeur **communique à l'administration** les licenciements qu'il a effectués.

ii. Les licenciements économiques collectifs concernant 10 ou plus salariés « grand licenciement collectif »

C'est lors des grands licenciements collectifs que l'intervention des organes sociaux est la plus marquée.

- **dans les entreprises comprenant moins de 50 salariés**

Selon l'article L1233-29 CT, l'employeur d'une société comprenant moins de 50 salariés doit convoquer les **délégués du personnel** à **deux réunions** séparées d'au maximum 14 jours. Il doit leur communiquer les **informations** relatives au projet de licenciement ainsi que les mesures envisagées pour limiter le nombre de licenciement et pour reclasser le personnel[221].

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213 Art. L2322-1 CT.

214 Art. L2312-4 CT.

215 Art. L2312-4 et L2322-3 CT.

216 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, nº 478.

217 Art. L1233-8 CT.

218 L1233-10 al. 2 CT.

219 Art. L1233-15 al. 2 et 3 CT.

220 Art. L1233-11 ss CT.

221 Art. L1233-31 et L1233-32 al. 1er CT.

L'article L1233-46 CT exige enfin que l'employeur **communique à l'administration** les licenciements qu'il a effectué. L'administration vérifie que la procédure suivie est correcte[222].

L'article L1233-38 CT dispense l'employeur de mettre en place des **entretiens préalables** pour chaque employé dès lors qu'il existe un comité d'entreprise ou des représentants du personnel.

Le licenciement est **notifié** par lettre recommandée avec avis de réception. Elle mentionne les raisons du licenciement et les priorités de réembauche[223]. L'employeur ne peut pas licencier un salarié avant l'expiration d'un délai d'au moins trente jours suivant la notification du projet de licenciement à l'autorité administrative[224].

- **dans les entreprises comprenant plus de 50 salariés**

Selon l'article L1233-30 CT, l'employeur d'une société comprenant plus de 50 salariés doit convoquer le **comité d'entreprise** à **deux réunions** séparées d'au moins 15 jours. Au cours de ces réunions, l'employeur consulte le comité d'entreprise à propos du projet de licenciement collectif. Le comité d'entreprise est tenu de **rendre un avis** sur les licenciements envisagés. Lors de ces réunions, le comité d'entreprise peut se faire aider d'un **expert-comptable** à qui seront communiquées les informations nécessaires à sa mission[225].

En vue de la première réunion du comité du personnel, l'employeur doit communiquer aux représentants du personnel toutes les informations utiles relatives au projet de licenciement ainsi que le **plan de sauvegarde de l'emploi**[226] explicitant l'ensemble des mesures prises pour éviter les licenciements et pour limiter l'impact social de ceux qui ne pourront être écartés[227].

Dès lors qu'il existe un comité d'entreprise, l'article L1233-38 CT dispense l'employeur de mettre en place des **entretiens préalables** pour chaque employé.

La **notification des licenciements** suit les mêmes règles que dans le cas d'une entreprise de moins de cinquante salariés[228]. Elle mentionne les motifs du licenciement, la priorité de réembauche ainsi que les mesures de reclassement interne envisageables. La notification doit être effectuée après la validation de l'accord collectif ou de la décision d'homologation du plan de sauvegarde d'emploi.

L'employeur est tenu d'informer l'autorité administrative[229] qui vérifiera le respect de la procédure[230].

1.3 Burden of proof and available sanctions

1.3.1. Preuve et sanctions en matière de licenciement pour motif personnel

222 Art. L1233-53 CT.
223 Art. L1233-42 CT.
224 Art. L1233-39 al. 3 CT.
225 Art. L1233-34 CT.
226 Art. L1233-31 et L1233-32 al. 2 CT.
227 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, nº 489 ; art. L1233-61 CT
228 Art. L1233-39 V CT.
229 Art. L1233-46 CT.
230 Art. L1233-57 ss CT.

L'employeur peut être sanctionné pour violation des règles de forme ainsi que pour violation des règles de fond.

Le Code du travail met en place une procédure de **conciliation** préalable à l'action en justice[231]. Les contestations relatives au licenciement doivent d'abord être portées devant le conseil des prud'hommes agissant en tant qu'organe de conciliation avant d'être jugées par ce même conseil agissant en qualité de juge[232].

Si le licenciement est prononcé pour une cause réelle et sérieuse mais en **violation des exigences procédurales**, l'employeur encourt, en application de l'article L1235-2 CT, **d'effectuer la procédure prévue** par la loi et de verser une **indemnité au salarié**. Cette indemnité ne peut être supérieure à un mois de salaire.

Ces sanctions ne peuvent être prononcées qu'à certaines conditions. Tout d'abord, elles ne sont pas applicables aux licenciements des employés ayant **moins de deux ans d'ancienneté** ou et aux entreprises employant **moins de onze personnes[233]**. Dans ces deux dernières situations, l'employé victime peut demander une indemnité couvrant le **préjudice effectivement subi[234]**. Les restrictions concernant l'ancienneté des employés ou la taille des entreprises ne s'appliquent pas si la violation se rapporte au **droit d'assistance reconnu à l'employé** pendant l'entretien préalable[235].

La preuve de **l'existence et de l'exactitude d'une cause réelle et sérieuse** de licenciement doit être **recherchée par le juge**. La charge de la preuve ne repose ni sur l'employé, ni sur l'employeur. En effet, l'article L1235-1 du Code du travail prévoit : « le juge, à qui il appartient d'apprécier la régularité de la procédure suivie et le caractère réel et sérieux des motifs invoqués par l'employeur, forme sa conviction au vu des éléments fournis par les parties après avoir ordonné, au besoin, toutes les mesures d'instruction qu'il estime utiles ». C'est la **procédure inquisitoire** qui s'applique : les parties doivent fournir des moyens de preuve au juge et s'ils ne permettent pas à ce dernier de se forger une opinion, le juge doit alors mettre en place les moyens d'instruction nécessaires[236]. Le risque de la preuve repose sur l'employeur. En effet, l'article 1235-1 al. 4 CT dispose expressément : « Si un doute subsiste, il profite au salarié ».

Le juge doit, non seulement, rechercher la cause réelle et sérieuse, mais encore déterminer si cette cause est vraiment la raison du licenciement.

Si la cause réelle et sérieuse à l'origine du licenciement fait défaut, l'employeur peut être sanctionné : en application de l'article L1235-3 CT, il encourt trois sanctions. Le juge peut, tout d'abord, **proposer de réintégrer** l'employé dans l'entreprise en maintenant les avantages que ce dernier avait acquis[237]. Cette proposition du tribunal n'est obligatoire ni pour l'employeur, ni pour l'employé et si une partie refuse, l'employeur peut être condamné à verser une **indemnité au salarié**. Cette indemnité équivaut, au minimum, au salaire des six derniers mois et se cumule à l'indemnité de licenciement prévues à l'article L1234-9 CT[238]. Finalement, l'employeur peut être condamné à **rembourser les indemnités**

231 Art. L1235-1 CT.

232 Art. L1411-1 CT.

233 Art. L1235-5 ,al. 1er, 1° CT.

234 Art. L1235-5 al. 2 CT.

235 Art. L1235-5 al. 3 CT.

236 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, nº 451.

237 Art. L1235-3 al. 1er CT.

238 Art. L1235-3 al. 2 CT.

chômage versées par les caisses de chômage[239]. Le remboursement ne peut excéder six mois d'indemnité.

Les restrictions concernant les employés ne justifiant pas d'une **ancienneté de deux** ans ou concernant les **entreprises qui embauchent moins de onze personnes** sont applicables[240] et les personnes licenciées ne peuvent demander qu'une indemnité couvrant le **préjudice effectivement subi**. Ces restrictions ne s'appliquent pas si la violation se rapporte au **droit d'assistance de l'employé** pendant l'entretien préalable[241].

1.3.2. Preuve et sanctions en matière de licenciement pour motif économique

Les règles en matière de charge de la preuve, décrites au paragraphe précédent et contenues à l'art. 1235-1 CT, sont également applicables en cas de licenciement pour motif économique. . Toutefois, la loi prévoit que, dans le cadre d'un licenciement collectif pour motif économique, lors de la procédure de conciliation, l'employeur doit fournir au juge **tous les documents** qu'il a fournis aux représentants du personnels et qui sont nécessaires à l'appréciation, par le juge, de la régularité de la procédure[242]. Cette obligation ne s'étend toutefois pas aux licenciements économiques pour motif individuel[243].

Les **sanctions** en cas de défaut de cause réelle et sérieuse sont les mêmes que celles encourues pour le licenciement pour motifs personnels[244].

Les **sanctions** quant aux manquements aux conditions de procédure dans le licenciement collectif sont diverses. Le Code du travail prévoit ainsi des sanctions pénales, des indemnités à la charge de l'employeur, la nullité du licenciement ainsi que la réintégration du salarié.

Si le licenciement est notifié avant que l'administration ait validé ou homologué le plan de sauvegarde de l'emploi ou alors que la validation ou l'homologation du plan de sauvegarde de l'emploi a été annulée **le licenciement sera nul**[245]. De même, si le licenciement est intervenu alors que, **le licenciement est également nul**.

Lorsque le juge déclare un licenciement nul, il peut ordonner la **réintégration** du salarié. Si cette réintégration est impossible, par exemple, en cas de fermeture de l'entreprise ou si l'employé ne la souhaite pas, le juge peut alors ordonner une **indemnité** équivalant au moins à douze mois de salaire[246].

Le juge peut également octroyer au salarié des **indemnités** si l'employeur ne respecte pas certaines exigences de procédure. Ainsi, selon l'article L1235-12 CT, l'employeur qui ne respecte pas les procédures de consultation des représentants du personnel peut être tenu d'indemniser le **préjudice subi** par le salarié[247]. De la même façon, l'employeur qui viole la priorité de réembauche risque de payer une indemnité d'au moins deux mois de salaire à son ancien employé[248]. Les employés ayant

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239 Art. L1235-4 CT.

240 Art. 1235-5 al 1er, 2° CT.

241 Art. L1235-5 al. 3 CT.

242 Art. L1235-9 CT.

243 Cass. soc., 10.10.2000, n° 99-40.040.

244 Art. L1235-3 CT.

245 Art. L1235-10 CT; G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, n° 508.

246 Art. L1235-11 CT.

247 Art. 1235-12 CT.

248 Art. L1235-13 CT.

moins de deux ans d'ancienneté ou appartenant à une entreprise engageant moins de onze salariés ne peuvent demander ces indemnités. Ils ne reçoivent qu'une indemnisation correspondant au préjudice qu'ils ont subi[249].

Des **sanctions pénales** sont également prévues. L'employeur qui se rend coupable de non-respect de la consultation des représentants du personnel[250], de manquements aux délais d'envoi des lettres de licenciement[251] ou de défaut de notification à l'autorité administrative[252] encourt une **amende de 3750 euros par salarié licencié**.

1.4 Recent reforms on concerning unfair dismissal laws

Le législateur français n'a pas pris de mesures particulières relatives au licenciement dus à la crise financière.

Les entreprises qui rencontrent des difficultés consécutives à la crise financière et qui doivent licencier du personnel doivent appliquer les dispositions relatives aux licenciements pour motif économique.

2. Special protection for workers' representatives

En France, la protection des intérêts des travailleurs au sein de l'entreprise suit un double canal : **les syndicats professionnels**, qui défendent les intérêts des travailleurs en dehors de l'entreprise, bénéficient aussi, en fonction de leur importance au sein d'une entreprise, d'une représentativité au sein de cette entreprise par le biais de délégués syndicaux. De plus, le droit français assure une représentation élue des salariés **au sein de l'entreprise.**

L'ensemble de ces représentants des travailleurs bénéficient d'un mécanisme légal de protection contre des mesures discriminatoires prises par l'employeur en raison de leurs activités de représentants de travailleurs, mais aussi contre toute entrave à l'exercice de leurs activités, ainsi qu'une protection particulière en cas de licenciement.

2.1. Interdiction de discrimination

Le code du travail interdit tout comportement discriminatoire à l'égard des salariés qui ont des activités syndicales ou qui exercent normalement leur droit de grève. L'article L1132-1 CT dispose qu' « aucun salarié ne peut être sanctionné, licencié ou faire l'objet d'une mesure discriminatoire, directe ou indirecte (…), notamment en matière de rémunération (…), de mesures d'intéressement ou de distribution d'actions, de formation, de reclassement, d'affectation, de qualification, de classification, de promotion professionnelle, de mutation ou de renouvellement de contrat, en raison notamment de « ses **activités syndicales** ou mutualistes ». De plus, « aucun salarié ne peut être sanctionné, licencié ou faire l'objet d'une [telle] mesure discriminatoire en raison de **l'exercice normal**

249 Art. L1235-14 CT.

250 Art. L1238-2 CT.

251 Art. 1238-3 CT.

252 Art. 1238-4 CT.

du droit de grève »[253] ni « pour avoir témoigné des agissements [discriminatoires susmentionnés] ou pour les avoir relatés »[254].

De même, l'article L2141-5 CT prévoit qu'il « interdit à l'employeur de prendre en considération l'appartenance à un syndicat ou l'exercice d'une activité syndicale pour arrêter ses décisions en matière notamment de recrutement, de conduite et de répartition du travail, de formation professionnelle, d'avancement, de rémunération et d'octroi d'avantages sociaux, de mesures de discipline et de rupture du contrat de travail. » Cet article commande en outre de prendre des mesures concrètes pour permettre l'exercice effectif des activités syndicales puisqu'il dispose qu' « un accord détermine les mesures à mettre en œuvre pour concilier la vie professionnelle avec la carrière syndicale et pour prendre en compte l'expérience acquise, dans le cadre de l'exercice de mandats, par les représentants du personnel désignés ou élus dans leur évolution professionnelle».

2.2. Interdiction d'entraver l'exercice des activités de représentant des travailleurs

Le code du travail interdit aussi toute mesure de nature à entraver l'exercice des activités de représentant des travailleurs.

Ainsi, le code du travail prévoit que **l'entrave à l'exercice d'un droit syndical** est constitutive d'un délit pénal. L'employeur entrave l'exercice d'un droit syndical s'il empêche ou porte atteinte à la désignation des délégués syndicaux, à l'élection des délégués du personnel ou à la constitution du comité d'entreprise ainsi qu'en empêchant ou portant atteinte à l'exercice régulier des fonctions de ces organes de représentation.[255] L'infraction peut être commise au stade de la mise en place des institutions représentatives (élections, désignation), dans le traitement des salariés exerçant ces fonctions et notamment en cas de licenciement ou en rapport avec l'exercice des fonctions. De jurisprudence constante, l'élément intentionnel du délit réside dans le simple fait que l'acte est volontaire, les raisons d'agir restant indifférentes.

En outre, le code du travail dispose aussi qu'il est interdit à l'employeur de prélever les cotisations syndicales sur les salaires de ses employés et de les payer en lieu et place de celui-ci tout comme il lui est interdit d'employer un quelconque moyen de pression à l'encontre ou en faveur d'une organisation syndicale. L'article 2141-8 CT précise que ces règles ainsi que celle, susmentionnée, qui interdit toute discrimination (art. 2141-5 CT) sont d'ordre public et que toute violation de celles-ci donne lieu au paiement de dommages et intérêts.

De même, en ce qui concerne la représentation élue des travailleurs au sein de l'entreprise, le fait de porter ou de tenter de **porter atteinte à la constitution du comité d'entreprise**, à la libre désignation des **délégués du personnel** ou des membres du comité d'entreprise, ou à **l'exercice régulier de leurs fonctions** est constitutif d'un délit pénal, puni d'un emprisonnement d'un an et d'une amende de 3750 euros.[256]

2.3. Protection spéciale en cas de licenciement

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253 Art. 1132-2 CT.

254 Art. L1132-3 CT.

255 Art. L2146-1 CT (droit syndical dans l'entreprise) ; art. L2316-1 CT (délégués du personnel) ; art. L2328-1 CT (comité d'entreprise) ; art. L2335-1 (comité de groupe) ; art. L2346-1 (groupe spécial de négociation, comité d'entreprise européen ou procédure spéciale de dialogue) ; art. L2342-2 CT (groupe spécial de négociation ou comité de la société européenne).

256 Art. L2316-1 et 2328-1 CT.

Les salariés assumant des activités de représentation des travailleurs au sein de l'entreprise, bénéficient d'une **protection supplémentaire** face aux licenciements. Cette protection couvre tant les salariés qui exercent des activités syndicales que ceux qui représentent le personnel de l'entreprise en son sein. En effet, le législateur a ainsi voulu protéger ces personnes des éventuelles représailles mises en place par leur employeur. Les dispositions protectrices sont prévues au Livre IV de la deuxième partie du Code du travail.

L'article L2411-1 du Code du travail énonce une **liste des salariés** bénéficiant des mesures de protection accordées en cas de licenciement. Cet article vise les représentants élus (délégué syndical, délégué du personnel, membre du comité d'entreprise,…), les membres appartenant à certaines institutions particulières (comité d'hygiène, de sécurité et des conditions de travail, membre du conseil d'administration d'une mutuelle, membre du conseil ou administrateur d'une caisse de sécurité sociale, représentant des salariés dans une chambre d'agriculture,…), les conseillers des salariés présents lors de l'entretien préalable, les salariés mandatés et les conseillers aux prud'hommes.[257]

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[257] L'art. L2411-1 CT dispose comme suit: « Bénéficie de la protection contre le licenciement prévue par le présent chapitre, y compris lors d'une procédure de sauvegarde, de redressement ou de liquidation judiciaire, le salarié investi de l'un des mandats suivants :
1° Délégué syndical ;
2° Délégué du personnel ;
3° Membre élu du comité d'entreprise ;
4° Représentant syndical au comité d'entreprise ;
5° Membre du groupe spécial de négociation et membre du comité d'entreprise européen ;
6° Membre du groupe spécial de négociation et représentant au comité de la société européenne ;
6° bis Membre du groupe spécial de négociation et représentant au comité de la société coopérative européenne ;
6° ter Membre du groupe spécial de négociation et représentant au comité de la société issue de la fusion transfrontalière ;
7° Représentant du personnel au comité d'hygiène, de sécurité et des conditions de travail ;
8° Représentant du personnel d'une entreprise extérieure, désigné au comité d'hygiène, de sécurité et des conditions de travail d'un établissement comprenant au moins une installation classée figurant sur la liste prévue au IV de l'article L. 515-8 du code de l'environnement ou mentionnée à l'article L. 211-2 du code minier;
9° Membre d'une commission paritaire d'hygiène, de sécurité et des conditions de travail en agriculture prévue à l'article L. 717-7 du code rural et de la pêche maritime ;
10° Salarié mandaté, dans les conditions prévues à l'article L. 2232-24, dans les entreprises dépourvues de délégué syndical ;
11° Représentant des salariés mentionné à l'article L. 662-4 du code de commerce lors d'un redressement ou d'une liquidation judiciaire ;
12° Représentant des salariés au conseil d'administration ou de surveillance des entreprises du secteur public, des sociétés anonymes et des sociétés en commandite par actions ;
13° Membre du conseil ou administrateur d'une caisse de sécurité sociale mentionné à l'article L. 231-11 du code de la sécurité sociale ;
14° Membre du conseil d'administration d'une mutuelle, union ou fédération mentionné à l'article L. 114-24 du code de la mutualité ;
15° Représentant des salariés dans une chambre d'agriculture, mentionné à l'article L. 515-1 du code rural et de la pêche maritime ;
16° Conseiller du salarié inscrit sur une liste dressée par l'autorité administrative et chargé d'assister les salariés convoqués par leur employeur en vue d'un licenciement ;
17° Conseiller prud'homme. »

Le Code du travail prévoit des régimes particuliers en fonction des différentes fonctions occupées par les représentants du personnel susmentionnés. Toutefois, là où elle s'applique, la procédure spéciale de licenciement des salariés protégés doit être **cumulée aux règles ordinaires** de licenciement[258].

Dans tous les cas où un salarié exerce une fonction de représentation du personnel, l'employeur doit demander **l'autorisation à l'inspecteur du travail dont dépend l'intéressé[259]** avant de pouvoir procéder au licenciement. L'essence de la procédure ainsi imposée à l'employeur, qui se voit donc privé du droit de rompre librement le contrat de travail le liant aux salariés bénéficiant de la protection, est de permettre à l'autorité publique de s'assurer de l'absence de détournement de pouvoir, c'est-à-dire de l'absence de tout lien entre la mesure de gestion décidée par l'employeur et l'exercice normal des fonctions représentatives.[260]

L'autorisation doit être demandée quelles que soient les circonstances qui motivent le licenciement[261].Elle doit ainsi être obtenue aussi bien pour un licenciement consécutif à l'inaptitude du salarié[262] que pour faute lourde commise pendant une grève[263]. Elle doit même être demandée en cas de licenciement économique[264].

Lorsque le licenciement concerne un salarié membre d'un organe de resprésentation au sein de l'entreprise, comme un délégué du personnel ou un membre du comité d'entreprise, y compris un représentant syndical, l'employeur est tenu, en plus de l'autorisation de l'inspecteur du travail et préalablement à celle-ci, de consulter le comité d'entreprise ou l'organe auquel appartient le représentant du personnel. Le comité d'entreprise ou l'organe saisi rend un avis après avoir auditionné le représentant visé par la mesure de licenciement[265].

La demande d'autorisation doit être adressée à l'inspecteur du travail par une lettre recommandée avec avis de réception à laquelle est jointe, le cas échéant, le procès-verbal d'avis du comité[266]. Dans ce dernier cas, l'autorisation doit être demandée quinze jours après émission dudit avis[267]. L'employeur est tenu d'indiquer dans la lettre les motifs pour lesquels le licenciement est envisagé[268].

L'inspecteur procède alors à une enquête et entend le salarié concerné qui peut être assisté lors de l'entretien dans le but notamment de vérifier que la mesure de licenciement n'a pas de rapport avec le mandat détenu par le salarié concerné[269]. Il rend une décision motivée[270] dans un délai de quinze jours ou de huit jours dans le cas d'une mise à pied[271]. La décision est notifiée à l'employeur, au salarié et à l'organisation syndicale dont il dépend lorsqu'il s'agit du licenciement d'un représentant

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258 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, nº 1075 ; A. MAZEAUD, *Droit du travail*, 7ème éd., Paris 2010, nº 298.

259 Art. R2421-1 CT.

260 L. Pécaut-Rivolier, H. Rose ,Y. Struillou, Représentants du personnel (Statut protecteur), Rép. Droit du travail, Dalloz, juin 2013 (dernière mise à jour:janvier 2014), n° 348.

261 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, nº 1073.

262 Cass. crim., 02.08.1951.

263 Cass. soc., 04.05.1994, nº 92-40.738,

264 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, nº 1073.

265 Art. R2421-9 CT.

266 Art. R2421-10 al. 2 et 4 CT.

267 Art. R2421-10 al. 3 CT.

268 Art. R2421-10 al. 4 CT.

269 Art. RR2421-11 CT.

270 Art. R2421-12 al. 1er CT.

271 Art. R2421-7 et R2421-11 al. 2 CT.

syndical[272]. La décision de l'inspecteur du travail peut faire l'objet d'un recours hiérarchique devant le Ministre chargé du travail[273] puis d'un recours contentieux[274].

L'autorisation doit être demandée à l'inspecteur du travail **lorsque l'employé exerce des fonctions de représentation** mais également pendant un **laps de temps suivant la fin de l'exercice**. La durée de la protection est variable selon les postes et peut dépendre de la durée pendant laquelle le salarié a exercé son mandat. Ainsi, un ancien délégué syndical est protégé pendant douze mois suivant la fin de son mandat à condition d'avoir occupé ce poste pendant au moins un an[275]. Un délégué du personnel, titulaire ou suppléant, est protégé six mois après l'expiration de ses fonctions[276]. Un ancien candidat à un poste de représentant au conseil d'administration d'une entreprise est protégé pendant trois mois suivant le dépôt des candidatures[277].

Le législateur a également entendu protéger le salarié dans des **situations particulières** où l'employé, sans exercer de fonctions représentatives, a pris part au processus de représentation. C'est notamment le cas lorsqu'un employé a demandé la tenue des élections des représentants du personnel ou encore lorsqu'il s'est porté candidat à ces élections. Ainsi, l'employé ayant demandé l'organisation des élections du comité d'entreprise est protégé pendant les six mois qui suivent l'envoi de la lettre demandant l'organisation des élections[278]. De la même façon, le statut protecteur est octroyé au salarié convoqué à un entretien préalable de licenciement alors que l'employeur avait connaissance de l'imminence de sa candidature à un poste de représentant[279].

Dans ces cas particuliers, l'inspecteur du travail –et le Ministre compétent en cas de recours – sont tenus d'examiner, dans le cadre de la procédure d'autorisation, si la mesure de licenciement envisagée a un rapport avec le mandat sollicité ou antérieurement exercé par ces salariés.

En cas de **faute grave de l'employé**, le Code du travail prévoit que l'employeur peut prononcer une mesure de **mise à pied immédiate** à l'égard du représentant[280]. Celle-ci est provisoire et ne vaut que jusqu'à la décision de l'Inspecteur du travail. Cette mesure doit être soumise dans de courts délais à l'inspecteur du travail : quarante-huit heures dans le cas de la mise à pied d'un délégué syndical[281]. Si l'inspecteur du travail, ou le ministre saisit sur recours hiérarchique[282], refuse le licenciement, la mise à pied est alors **annulée** ainsi que ses effets[283].

Si le licenciement est prononcé en l'absence de l'autorisation administrative, le licenciement est nul[284]. Le travailleur peut alors demander sa réintégration. S'il ne le souhaite pas, le salarié peut demander une indemnisation fondée sur le non-respect, par l'employeur, des dispositions spéciales

272 Art. R2421-12 CT.
273 Art. R2422-1 CT.
274 A. MAZEAUD, *Droit du travail*, 7ème éd., Paris 2010, n° 307.
275 Art. L2411-3 CT.
276 Art. L2411-5 CT.
277 Art. L2411-17 CT.
278 Art. L2411-9 CT.
279 Art. L2411-3, L2411-4, L2411-7, L2411-10, L2411-22 CT.
280 Art. L2421-1, L2421-3, L2421-5 CT.
281 Art. L2421-1 CT.
282 Art. R2421-14 CT.
283 Art. L2421-1, L2421-3, L2421-5 CT.
284 Cass. soc., 03.06.1948.

protégeant les représentants des salariés ainsi que des dommages et intérêts couvrant le préjudice effectivement subi[285].

Si le licenciement est prononcé après l'annulation de l'autorisation administrative, l'employé peut demander sa réintégration dans son emploi[286] ou, de manière alternative, une indemnisation compensant l'entier du préjudice subi[287]. Il doit demander sa réintégration dans un délai de deux mois après la notification de la décision.

En cas de **transfert d'entreprise**, la demande d'autorisation doit être transmise dans les quinze jours avant le transfert. La suite de la procédure est similaire à celle prévue en matière de licenciement[288].

La protection des représentants des salariés ne **concerne pas seulement les licenciements** mais elle est étendue à d'**autres modes de cessation** des rapports de travail comme, par exemple, la rupture de contrats de durée déterminée[289], l'interruption ou le non-renouvellement d'une mission de travail temporaire[290] ainsi que le transfert partiel d'entreprise ou d'établissement[291]. Comme c'est le cas pour les licenciements, il est nécessaire d'obtenir l'autorisation de l'inspecteur du travail.

3. Sanctions available and application in practice

Comme préalablement indiqué, lorsque le licenciement d'un salarié protégé est prononcé en l'absence de l'autorisation administrative, le travailleur peut demander sa **réintégration** au sein de l'entreprise.

De manière alternative, s'il en souhaite pas réintégrer l'entreprise de son employeur, le salarié protégé a le droit d'exiger le paiement des indemnités suivantes : (i) au titre de la méconnaissance de son statut de salarié protégé, une **indemnité d'un montant égal à la rémunération qu'il aurait dû percevoir entre son éviction et la fin de la période de protection**, (ii) les **indemnités de rupture** compensatrices de préavis et de licenciement, et (iii) une **indemnité réparant l'intégralité du préjudice résultant du caractère illicite du licenciement**, au moins égale à l'indemnité de licenciement versée pour tout salarié dont le licenciement intervient sans qu'une cause réelle et sérieuse soit établie, c'est-à-dire une indemnité correspondant au moins au salaire des six derniers mois (art. L1235-3 CT).

Mais le Code du travail prévoit encore des **sanctions pénales** contre les employeurs qui ne respectent pas les prescriptions légales en matière de licenciement de salariés protégés. Les articles L2431-1 à L2437-1 CT prévoient ainsi que l'employeur qui ne respecte pas la procédure d'autorisation préalable au licenciement d'un salarié protégé, encourt un emprisonnement d'un an et une amende de 3750 euros. Les salariés protégés visés par ces dispositions sont : les délégués syndicaux, les délégués du personnel, les membres du comité d'entreprise ou représentants syndical au comité d'entreprise, les membres du groupe spécial de négociation, du comité d'entreprise européen, du comité de la société européenne, du comité de la société coopérative européenne ou du comité de la société issue de la fusion transfrontalière, les salariés membre du conseil d'administration ou de surveillance d'une entreprise, les conseillers du salarié et enfin les conseillers prud'homme.

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285 A. MAZEAUD, *Droit du travail*, 7ème éd., Paris 2010, n° 317.

286 Art. L2422-1 CT.

287 G. AUZERO & E. DOCKÈS, *Droit du travail*, 28ème éd., Paris 2013, n° 1084.

288 Art. R2421-17 CT.

289 Art. L2412-1 à L2412-13 CT.

290 Art. L2413-1 CT.

291 Art. L2414-1 CT.

L'article L2435-1 al. 2 CT prévoit que la récidive dans le licenciement d'un salarié membre du conseil d'administration ou de surveillance d'une entreprise est sanctionnée par deux ans d'emprisonnement et 6000 euros d'amende.

On relève que les sanction pénale s'applique en cas de manquement dans la procédure applicable non seulement dans le cadre d'un licenciement mais également dans celui d'un transfert partiel d'entreprise ou d'établissement.

Enfin, il convient de rappeler que l'infraction d'entrave à l'exercice d'un droit syndical ou à la désignation des représentants des travailleurs au sein de l'entreprise ainsi qu'à l'exercice de leurs fonctions est punie d'un emprisonnement d'un an et d'une amende de 3750 euros. En cas de récidive, l'emprisonnement peut être porté à deux ans et l'amende à 7500 euros.

4. Constitutional basis for collective representation of workers

La liberté syndicale est affirmée dans le Préambule de la Constitution de 1946. Ce texte fait partie du bloc de constitutionnalité grâce au renvoi effectué par le Préambule de la Constitution de 1958. Il acquiert ainsi une valeur constitutionnelle[292]. L'article 6 du préambule de la Constitution de 1946 prévoit ainsi que : « Tout homme peut défendre ses droits et ses intérêts par l'action syndicale et adhérer au syndicat de son choix ».

La liberté d'adhérer à un syndicat est également affirmée dans divers instruments internationaux ratifiés par la France dont l'article 11 de la Convention européenne des droits de l'homme , l'article 2 de la Convention n° 87 de l'O.I.T. et l'article 5 de la Charte sociale européenne.

5. Role of collective work relations

5.1 Institutions and legal means of collective action

Il existe deux types de représentants des employés au sein d'une entreprise : les délégués syndicaux (A) et les représentants du personnel (B).

Les **délégués syndicaux** représentent **les intérêts des salariés** dans certaines branches d'activités. Ils ne représentent pas les salariés individuellement mais plutôt les intérêts de ceux-ci dans les rapports avec l'employeur. Leur rôle majeur est de participer aux négociations des accords collectifs et à l'apaisement des conflits sociaux.

En revanche, les **représentants du personnel** sont élus par tous les salariés sans autre considération que l'appartenance à l'entreprise. Il s'agit d'une représentation plus personnelle des travailleurs.

5.1.1. Les délégués syndicaux

a. Fonction

Les délégués syndicaux sont des représentants d'une organisation syndicale au sein de l'entreprise. Ceux-ci sont désignés par leurs organisation syndicale au sein des entreprises. Pour cela, les entreprises ainsi que les syndicats concernés doivent remplir certains critères.

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292 CConstit., 16 juillet 1971, n° **71-44,** *Liberté d'association.*

Les syndicats doivent satisfaire à certains critères cumulatifs afin d'être qualifié de représentatifs. A ce titre, l'article L2142-1 CT énonce les critères requis, dont certains sont appréciés au sein de l'entreprise concernée :
« 1° Le respect des valeurs républicaines ;
2° L'indépendance ;
3° La transparence financière ;
4° Une ancienneté minimale de deux ans dans le champ professionnel et géographique couvrant le niveau de négociation. Cette ancienneté s'apprécie à compter de la date de dépôt légal des statuts ;
5° L'audience [électorale – cette condition fait référence à un seuil minimal de suffrages remportés lors des élections des titulaires de mandat de représentation des travailleurs au sein de l'entreprise concernée et à d'autres niveaux] ;
6° L'influence, prioritairement caractérisée par l'activité et l'expérience ;
7° Les effectifs d'adhérents et les cotisations ».[293]

De plus, en ce qui concerne l'entreprise au sein de laquelle les délégués syndicaux sont susceptibles d'exercer leurs fonctions, - la loi exige que celle-ci emploie : **au moins cinquante salariés** pour qu'un délégué syndical puisse y être désigné.

Des tempéraments existent toutefois. En premier lieu, il est possible de prévoir des clauses plus favorables c'est-à-dire, un plus petit nombre de salariés, grâce à une convention ou un accord collectif[294]. En second lieu, dans les entreprises employant moins de cinquante salariés, l'article L2143-6 CT prévoit que chaque syndicat représentatif peut proposer un délégué du personnel qui assumera la tâche de délégué syndical. Le représentant cumule alors les deux fonctions de représentation dans un même nombre d'heures[295].

Lorsque l'entreprise comprend plusieurs établissements, il est possible pour le syndicat de désigner des **délégués d'établissement** dans chacun d'eux[296]. Dans les entreprises d'au moins cinq cents salariés les syndicats peuvent désigner des **délégués supplémentaires**. Dans les très grandes entreprises de plus de deux mille salariés, il est possible de prévoir des **délégués syndicaux centraux**[297].

Le délégué syndical n'est pas élu mais désigné par le syndicat lui-même[298]. Le **nombre de délégués syndicaux** varie en fonction du nombre de salariés dans l'entreprise[299]. La loi pose des conditions quant au salarié susceptible d'être nommé à cette fonction. Il doit tout d'abord être salarié de l'entreprise concernée[300]. De plus, l'article L2143-1 CT dispose que l'employé doit avoir au moins dix-huit ans, avoir une ancienneté d'un an[301] et qu'il ne doit pas avoir été interdit, déchu ou déclaré incapable d'exercer ses droits civiques. En outre, la loi prend en compte les résultats électoraux. Les salariés désignés délégués syndicaux doivent avoir recueilli « au moins 10 % des suffrages exprimés au premier tour des dernières élections au comité d'entreprise ou de la délégation unique du personnel ou des délégués

293 Art. 2142-1 CT

294 Art. L2141-10 al. 1erCT.

295 Art. L2143-6 al. 2 CT.

296 Art. L2143-3 CT.

297 Art. L2143-5 CT.

298 F. FAVENNEC-HÉRY & P.-Y. VERKINDT, *Droit du travail*, 2e éd., Paris 2009, no 62.

299 L'article R2143-2 CT prévoit : « 1° De 50 à 999 salariés : 1 délégué ; 2° De 1 000 à 1 999 salariés : 2 délégués ; 3° De 2 000 à 3 999 salariés : 3 délégués ; 4° De 4 000 à 9 999 salariés : 4 délégués ; 5° Au-delà de 9 999 salariés : 5 délégués ».

300 B. TEYSSIÉ, *Droit du travail – relations sociales*, 8e éd., Paris 2012, no 898 et 899.

301 Ce délai est diminué à 4 mois en cas de création d'entreprise ou d'ouverture d'établissement (art. L2143-1 II CT).

du personnel, quel que soit le nombre de votants »[302]. Si aucun candidat n'a remporté un tel score, le syndicat peut désigner un candidat ayant obtenu un score plus petit[303]. S'il n'y a pas de candidat, le syndicat peut désigner un de ses adhérents[304].

L'employeur, l'inspecteur du travail et les salariés doivent être prévenus de la désignation d'un délégué syndical[305].

b. Mission et moyens à disposition

Le code du travail se borne à indiquer que les délégués syndicaus sont désignés par leur syndicat pour le représenter auprès de l'employeur (art. L2143-3 CT). La compétence du délégué syndical est dès lors générale et recouvre essentiellement la négociation et la représentation.

Sa fonction de **représentation** et de défense des syndiqués et de l'ensemble du personnel s'apparente à celle des délégués élus, mais porte sur un domaine plus vaste. Le délégué syndical assure ainsi la défense des intérêts collectifs des salariés, en présentant à l'employeur toute réclamation ou revendication. Le champ d'action de ce droit est relativement large : sécurité, salaires, organisation du travail, congés,…etc. Interlocuteur privilégié du chef d'entreprise, c'est avec le délégué syndical que chaque année, le chef d'entreprise doit engager la **négociation** sur les salaires et la durée du travail. Enfin, le délégué syndical exerce aussi les droits de son syndicat au sein de l'entreprise. Enfin, en cas de conflit, le délégué syndical est très actif avant et pendant une grève ainsi que lors de la reprise du travail.

Au titre des moyens d'action du délégué syndical, la loi reconnaît à celui-ci, outre le crédit d'heures de fonctions qui lui est alloué, la faculté de s'absenter de son poste de travail, celle de se déplacer librement dans l'entreprise pendant les heures de délégation et en dehors de ces heures, avec la possibilité de prendre les contacts nécessaires avec les salariés, et enfin, la faculté de quitter l'établissement pendant les heures de délégation.[306]

Afin de mener leur fonction de représentation, les délégués syndicaux bénéficient de certaines prérogatives et ils ont notamment la possibilité de **s'absenter** de leur poste de travail[307], de **se déplacer** librement hors et dans l'entreprise[308],…etc. Ils bénéficient en outre du **crédit d'heures** pour leurs activités[309], en ce sens que les heures consacrées à l'activité syndicale sont également rémunérées par l'employeur.

5.1.2. Les représentants du personnel

Les délégués du personnel exercent, quant à eux, une mission plus proche des intérêts individuels des salariés.

Il existe **plusieurs formes d'organisation** de la représentation : dans les entreprises employant moins de cinquante salariés, ceux-ci sont représentés par un ou plusieurs délégués du personnel ; dans les entreprises généralement plus importantes, la représentation du personnel est opérée par un comité

302 Art. L2143-3 al. 1er CT.
303 Art. L2143-3 al. 2 CT.
304 Art. L2143-3 al.2 CT.
305 Art. L2143-7 CT.
306 Art. 2143-20 CT.
307 Art. L2143-20 al. 1er CT.
308 Art. L2143-20 al. 2 CT.
309 Art. L2143-17 CT.

d'entreprise. Il existe aussi des formes d'organisation de la représentation des salariés qui sont spécifiques à certains domaines comme le comité d'hygiène, de sécurité et des conditions de travail.

Dans la présente étude, nous examinerons la composition, la mission et les moyens d'action du comité d'entreprise, qui est l'organe de représentation des travailleurs au sein des entreprises les plus importantes et qui, en outre, détient des fonctions généralement dans tous les domaines. Ainsi, le comité d'entreprise est mis en place dans les entreprises occupant **au minimum cinquante salariés**[310]. Dans les entreprises qui n'atteignent pas ce quota, il est toutefois possible de prévoir la création d'un comité d'entreprise par une convention ou un accord collectif de travail[311].

a. Composition

Le comité d'entreprise est une **organisation tripartite** détenant la personnalité juridique, réunissant autour du chef d'entreprise présidant le comité d'entreprise, une délégation élue du personnel (i) et une représentation syndicale (ii)[312].

i. La délégation élue du personnel

Les membres du comité d'entreprise représentant les salariés sont élus. Les articles L2324-14 ss CT prévoient les **dispositions relatives aux élections et à l'éligibilité des membres et des suppléants**. Ils sont élus par les salariés de l'entreprise pour un mandat de quatre ans renouvelable[313]. L'article L2314-15 CT dispose : « **[s]ont électeurs** les salariés des deux sexes âgés de seize ans révolus, ayant travaillé trois mois au moins dans l'entreprise et n'ayant fait l'objet d'aucune interdiction, déchéance ou incapacité relative à leurs droits civiques ». Les conditions d'éligibilité sont prévues à l'article L2324-15 ss CT. Selon l'article L2324-15 CT : « **[s]ont éligibles**, à l'exception des conjoint, partenaire lié par un pacte civil de solidarité, concubin, ascendants, descendants, frères, sœurs ou alliés au même degré de l'employeur, les électeurs âgés de dix-huit ans révolus et travaillant dans l'entreprise depuis un an au moins ».

Les représentants du personnel sont élus parmi des **collèges électoraux**[314]. La loi définit les catégories de profession qui forment un collège. Deux collèges sont expressément prévus : les ouvriers et les employés forment le premier et les ingénieurs, chefs de service, techniciens, agents de maîtrise et assimilés forment le second. Un troisième collège peut être créé lorsque le nombre d'ingénieurs, de chefs de service et cadres administratifs, de commerciaux ou techniques assimilés est égal à vingt-cinq. Des **suppléants** sont également élus en nombre égal à celui des délégués du personnel[315].

ii. La représentation syndicale

Dans les entreprises de moins de trois cents salariés, la représentation syndicale est endossée par le **délégué syndical**[316]. À l'inverse, dans les entreprises de plus de trois cents salariés, elle est assumée par un **représentant syndical désigné par chaque syndicat représentatif**[317]. Dans ce dernier cas, il peut s'agir soit d'un délégué syndical, soit d'un autre salarié remplissant les conditions d'éligibilité au comité.

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310 Art. L2322-1 CT.

311 Art. L2322-3 CT.

312 Art. L2324-1 et L2324-2 CT.

313 Art. L2324-24 CT.

314 Art. L2324-11 ss CT.

315 Art. L2324-1 al. 2 CT.

316 Art. L2143-22 CT.

317 Art. L2324-2 CT.

b. Mission et moyens d'actions

Le comité d'entreprise exerce des attributions tant économiques qu'en matière d'activités sociales et culturelles.

En ce qui concerne ses attributions économiques, l'intervention du comité d'entreprise a pour objet d'assurer une expression collective des salariés permettant la prise en compte permanente de leurs intérêts dans les décisions relatives à la gestion et à l'évolution économique et financière de l'entreprise, à l'organisation du travail, à la formation professionnelle et aux techniques de production. Il a essentiellement une mission d'information et de consultation. Il formule, à son initiative, et examine, à la demande de l'employeur, toute proposition de nature à améliorer les conditions de travail, d'emploi et de formation professionnelle des salariés, leurs conditions de vie dans l'entreprise ainsi que les conditions dans lesquelles ils bénéficient de certaines garanties collectives complémentaires. Il participe aux conseils d'administration et aux conseils de surveillance avec une voix consultative[318].

Le code du travail prévoit que le comité d'entreprise est **consulté et informé** sur une large série de questions économiques en ce compris « sur les questions intéressant l'organisation, la gestion et la marche générale de l'entreprise et, notamment, sur les mesures de nature à affecter le volume ou la structure des effectifs, la durée du travail, les conditions d'emploi, de travail et de formation professionnelle »[319]. , le comité d'entreprise est ainsi consulté en matière de licenciement économique ou dans d'autres domaines tels que la formation professionnelle et l'apprentissage[320], les procédures de sauvegarde ou de redressement judiciaire[321], ou encore la politique de recherche et de développement menée par l'entreprise[322]. Afin que le comité d'entreprise puisse mener à bien sa mission, l'employeur est tenu de lui **communiquer** certains documents notamment les documents comptables[323], les documents communiqués aux assemblées générales[324] ou encore le bilan social[325]. Dans l'exercice de ses tâches, le comité d'entreprise peut faire appel à des experts comptables[326] et des experts en nouvelles technologies[327].

A côté de ses attributions en matière économique, le comité d'entreprise exerce également des attributions relatives à **des activités sociales et culturelles**[328]. Les activités concernées sont « toute activité non obligatoire légalement, quels que soient sa dénomination, la date de sa création et son mode de financement, exercée principalement au bénéfice du personnel de l'entreprise, sans discrimination, en vue d'améliorer les conditions collectives d'emploi, de travail et de vie du personnel au sein de l'entreprise ».[329]

Aux fins de l'exercice de ses attributions, le comité d'entreprise se réunit au moins une fois par mois lorsque l'entreprise compte au moins 150 salariés, et une fois tous les deux mois si l'effectif est inférieur (art. L2325-14 CT). En outre, le code du travail prévoit que l'employeur met à disposition du

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318 Art. L2323-62 CT.

319 Art. L2323-6 CT.

320 Art. L2323-33 ss CT.

321 Art. 2323-44 ss CT.

322 Art. L2323-12 al. 1er CT.

323 Art. L2323-8 CT.

324 Art. L2323-63 CT.

325 Art. L2323-68 ss CT.

326 Art. L2325-35 ss CT.

327 Art. L2325-38 CT.

328 Art. L2323-83 CT.

329 Cass., Soc., 13 nov. 1975, Bull. civ., V., n°533; Grands arrêts du droit du travail, 2008, n°146.

comité un local aménagé et le matériel nécessaire à l'exercice de ses fonctions. Il reçoit une subvention de fonctionnement d'un montant annuel de 0,2% de la masse salariale brute, l'objectif étant de permettre au comité d'entreprise de disposer de ressources destinées à financer des activités autres que celles consistant à gérer les activités sociales. La Cour de Cassation considère en effet que la subvention de fonctionnement doit servir à assumer les dépenses du comité dans le cadre du fonctionnement du comité et de ses missions économiques.[330]

5.2 Collective work relations in practice

Le ministère du travail de l'emploi et du dialogue social publie des statistiques sur l'activité syndicale en France[331]. Depuis une quinzaine d'années, **le taux de syndicalisation en France s'est stabilisé autour de 8% des travailleurs**. En effet, alors qu'en 1949, 30,1% des salariés étaient syndiqués, ce pourcentage n'a fait que décroître pour atteindre 7,6% en 2005. En 2003, sur 8% de salariés syndiqués, 7,5% sont des femmes et 9% sont des hommes[332].

Sur la période 2001-2005, le taux de syndicalisation est plus important dans la fonction publique et les entreprises publiques que dans les entreprises privées[333]. Toutefois la plus forte syndicalisation du public s'explique en partie parce que les établissements dans ce secteur sont importants en taille, ce qui implique une plus forte présence des syndicats que dans les établissements de petite taille.

Dans le secteur privé, toujours sur la période 2001-2005, les travailleurs syndiqués sont majoritairement des professions intermédiaires et des ouvriers. Toutefois, cela ne signifie pas nécessairement que ce sont dans ces deux catégories de travailleurs que la syndicalisation est la plus forte. En effet, dans le secteur privé, c'est dans la catégorie des cadres que l'on trouve une plus grande proportion de syndiqués. Enfin, toujours sur la période 2001-2005, parmi les salariés dont le diplôme le plus élevé est un diplôme universitaire, 14,7% déclaraient adhérer à un syndicat[334].
Par ailleurs, en 2004-2005, les établissements du secteur privé ayant le plus de délégués syndicaux se trouvent dans les secteurs des activités financières et immobilières (63%), de l'industrie (49%) et de l'éducation et la santé-action sociale (49%).[335]

En ce qui concerne la participation à des grèves, les statistiques publiées par le Ministère du travail, de l'emploi et du dialogue social font état du fait qu' « un salarié sur dix en moyenne déclare en 2005 avoir participé à une grève sur son lieu de travail au cours de l'année écoulée. Dans le public, les salariés sont plus nombreux que dans le privé à se mobiliser collectivement sur le lieu de travail : que ce soit parmi les cadres, les professions intermédiaires ou les ouvriers, un salarié sur quatre déclare avoir participé à une grève au cours de l'année écoulée dans le secteur public».[336]

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330 Cass. Soc., 27 mars 2012, n°11-10825.

331 Ministère du travail, de l'emploi et du dialogue social : http://travail-emploi.gouv.fr/etudes-recherches-statistiques-de,76/statistiques,78/relations-professionnelles,85/organisations-syndicales,240/presence-syndicale-et,1960.html

332 Ministère du travail, de l'emploi et du dialogue social : http://travail-emploi.gouv.fr/IMG/pdf/2004.10-44.2.pdf, p. 1 (consulté le 16.05.2014).

333 Ministère du travail, de l'emploi et du dialogue social : http://travail-emploi.gouv.fr/IMG/pdf/2008.04-16.1-2.pdf, p.2 (consulté le 16.05.2014).

334 Ministère du travail, de l'emploi et du dialogue social : http://travail-emploi.gouv.fr/IMG/pdf/2008.04-16.1-2.pdf, p.6 (consulté le 16.05.2014).

335 Ministère du travail, de l'emploi et du dialogue social : http://travail-emploi.gouv.fr/IMG/pdf/synd4.pdf (consulté le 16.05.2014).

336 Ministère du travail, de l'emploi et du dialogue social : http://travail-emploi.gouv.fr/IMG/pdf/synd4.pdf (consulté le 16.05.2014).

Malgré la faible proportion de travailleurs syndiqués, la France n'est pas le pays dans lequel les salariés sont le moins en contact avec les syndicats, bien au contraire : la part de salariés travaillant dans une entreprise ou une administration dans laquelle un syndicat est présent est très importante. Ainsi, en 2005, 56 % des salariés déclarent qu'un ou plusieurs syndicats sont présents dans leur entreprise ou leur administration. De plus, la couverture des conventions collectives négociées entre les syndicats d'une part et les employeurs d'autre part, est très forte. En effet, d'après une étude réalisée par la Direction de l'animation de la recherche, des études et des statistiques (Dares), « la couverture conventionnelle globale a fortement progressé entre 1997 et 2004, le taux de couverture passant de 93,7 % à 97,7 % des salariés du secteur concurrentiel non agricole », à la suite de la signature de nouvelles conventions et accords. Cette même étude souligne que « quelques vides conventionnels demeurent dans des activités aux effectifs salariés peu nombreux, comme par exemple les associations intermédiaires »[337]. Le syndicalisme français est donc un **syndicalisme avec peu d'adhérents, mais largement représenté** sur le terrain des entreprises et des administrations.

Enfin, on relève que pour l'année 2004, 12 100 salariés protégés ont fait l'objet d'une demande d'autorisation de licenciement, pour motif économique. Ils étaient 13 400 en 2003[338].

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337 Direction de l'animation de la recherche, des études et des statistiques, « La couverture conventionnelle et les conventions collectives de branche dans le secteur concurrentiel non agricole », disponible sur : http://travail-emploi.gouv.fr/IMG/pdf/Dossierno1_CouvertureConventionnelle_2004.pdf (dernière consultation le 16.05.2014).

338 Ministère du travail, de l'emploi et du dialogue social : http://travail-emploi.gouv.fr/IMG/pdf/2006.07-28.1-2-2.pdf, p. 1 (consulté le 16.05.2014).

C. GERMANY

1. General overview of legal protection against unfair dismissal

Within the scope of application of the German Protection against Dismissal Act, it is possible to dismiss an employee on grounds of personal capability, on grounds of conduct or for operational reasons. It is important to note that dismissals are no sanctions towards the worker, but the employer's means to protect her-/himself from future infringements by the worker. Hence, a negative forecast is necessary.

Especially when making workers redundant for operational reasons, the employer is not free to choose which worker she/he wants to dismiss. Instead, she/he has to take into account certain social criteria such as age and duration of employment.

In order to be legitimate, the dismissal has to be in written form and a notice period for routine dismissals or a preclusive period for extraordinary dismissals has to be respected. Additionally, the employer has to consult the works council (*Betriebsrat*) before giving someone notice, if such a council exists in the respective company.

In case the worker takes legal action against the dismissal, she/he bears the burden of proof for the main constituting facts. Still, it is up to the employer to prove the preconditions for the dismissal and especially for the fact that she/he respected the relevant social criteria when choosing whom to let go.

1.1. Substantive reasons for legitimate dismissals

According to German law, routinely dismissing an employee after at least six months of consecutive employment is only legitimate if the dismissal is socially justified.[339] Under certain preconditions, it is socially justified to dismiss a person on grounds of personal capability, on grounds of conduct or to make the person redundant for operational reasons.[340] Yet, even in these cases is a routine dismissal socially unjustified, if, generally speaking,[341] the employee could work in another position of the company or public authority.[342]
The three possible reasons for dismissal are set out in more detail below under paragraphs 1.1.1.-1.1.3.

In order to do justice to small businesses and their respective needs, these rules do not apply to companies with up to ten[343] employees.[344] This exception is due to the fact that small businesses are

339 § 1 para. 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

340 § 1 para. 2 s. 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

341 The dismissal is only then illegitimate for reasons of social injustice, if the works council (private company) or the employee representation (public authority) objects to the dismissal on this ground, § 1 para. 2 s. 2 Nos. 1, 2 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

342 § 1 para. 2 s. 2 Nos. 1, 2 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG); von Hoyningen-Huene/Linck, *Kündigungsschutzgesetz: Kommentar*, 14th edn., Munich 2007, § 1, paras. 214 f.; Oetker, in: Müller-Glöge/Preis/Schmidt (eds.), *Erfurter Kommentar zum Arbeitsrecht*, 14th edn., Munich 2014, § 1 KschG, para. 245.

343 Trainees are not included in this number. The rules about socially unjustified dismissals do not apply to businesses with up to five employees; if up to ten employees are working at the company, the rules do not apply to those employees, who started working there after 31.12.2003. Part-time workers are counted as 0.5 if they work up to 20 hours per week and as 0.75 if they work up to 30 hours per week.

344 § 23 para. 1, ss. 2, 3, 4 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

often in a more delicate financial situation than larger companies and that in a small team, it is more important to have a healthy team spirit.[345]
Furthermore, these protective regulations in favour of employees do not apply to executive staff.[346]

Applicable to both small and larger businesses[347] is the possibility of extraordinary dismissal. It is possible to dismiss a worker without complying with a notice period for a compelling reason, if the employer cannot reasonably be expected to continue the contract until the end of the notice period. All circumstances of the individual case have to be considered and the interests of both employer and employee have to be weighed.[348]
Extraordinarily dismissing a worker constitutes a last resort and may only be done if neither warning nor relocation nor routine dismissal are an option.[349] The right to extraordinarily dismissing workers is unalienable.[350]

At the same time and also applicable to both small and larger businesses, some groups of persons enjoy special protection against dismissal. This includes in particular expectant mothers up to four months after giving birth,[351] trainees after passing their probation period[352] as well as persons on parental[353] or care leave.[354] Moreover, employers are not allowed to disadvantage and thus to dismiss workers for exercising their rights,[355] particularly their constitutional rights such as collective action.[356]

Routinely dismissing a worker in a company with at least eleven employees is hence possible on the following grounds and conditions:

1.1.1. Dismissal on grounds of personal capability

Dismissals on grounds of personal capability[357] refer to the worker's sphere.[358]
The reason why the worker will not be able to fulfil her/his tasks in the future can relate to her/his personal skills, performance or to non-reproachable opinions such as moral conflicts.[359] These conditions have to interfere with the person's ability to accomplish her/his work[360] and are irrelevant,

345 Volkening, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 23 KSchG, para. 1.

346 § 14 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

347 § 13 para. 1 s. 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

348 § 626 para. 1 Civil Code (Bürgerliches Gesetzbuch, BGB).

349 Weidenkaff, in: Palandt (ed.), *Bürgerliches Gesetzbuch mit Nebengesetzen*, 72nd edn., Munich 2013, § 626, para. 37.

350 Mansel, in: Jauernig/Stürner (eds.), *Bürgerliches Gesetzbuch mit Allgemeinem Gleichstellungsgesetz (Auszug): Kommentar*, 15th edn., Munich 2014, § 626, para. 5.

351 § 9 Maternity Protection Act (Mutterschutzgesetz, MuSchG).

352 § 22 Vocational Training Law (Berufsbildungsgesetz, BBiG).

353 § 18 Parent's Money and Parental Leave Act (Bundeselterngeld- und Elternzeitgesetz, BEEG).

354 § 5 Care Leave Act (Pflegezeitgesetz, PflegeZG).

355 § 612a Civil Code (Bürgerliches Gesetzbuch, BGB).

356 Art. 9 Constitution (Grundgesetz, GG).

357 § 1 para. 2 s. 1 case 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

358 Schwarze/Eylert/Schrader, *Kündigungsschutzgesetz: Kommentar*, Munich 2011, § 1, para. 78; Von Hoyningen-Huene/Linck, *Kündigungsschutzgesetz: Kommentar*, 14th edn., Munich 2007, § 1, para. 273.

359 Oetker, in: Müller-Glöge/Preis/Schmidt (eds.), *Erfurter Kommentar zum Arbeitsrecht*, 14th edn., Munich 2014, § 1 KSchG, para. 99.

360 Rolfs, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 1 KSchG, paras. 104 f.; von Hoyningen-Huene/Linck, *Kündigungsschutzgesetz: Kommentar*, 14th edn., Munich 2007, § 1, para. 275.

if they do not affect the worker's performance.[361] They are also irrelevant, if they will compromise the worker's performance only for a period that is shorter than the period of notice.[362]

Finally, if the worker takes action against the dismissal, the court will balance the interests of both worker and employer. Regarding the worker, it may be relevant for how long she/he worked there and whether working conditions caused her/his lack of aptitude. In favour of the employer, on the other hand, one has to take into account the operational and economic impairment she/he has to endure, such as organisational and financial costs.[363]

1.1.2. Dismissal on grounds of conduct

In contrast to dismissals on grounds of personal capability, those on grounds of conduct[364] require the worker to breach her/his contractual duties at least through negligence.[365]
This comprises in particular persistent refusal to work, unauthorised absenteeism and constant late arrival.[366] Again, the forecast has to be negative, in particular since dismissal is no sanction towards the worker, but the employer's means to protect her-/himself from further infringements. With regard to the worker's bad conduct, this means that there has to be a risk of recurrence. This is the case, when the breach of contractual duties was so severe that she/he must have known that the employer will not tolerate the behaviour. Minor infractions are likely to recur, if the worker did not change her/his conduct even after the employer called her/him to order.[367]

As for dismissals on grounds of personal capability, a balancing of interests will take place if the worker challenges the dismissal before court. Since the worker cannot influence her/his abilities as much as she/he can influence her/his conduct, when weighing the worker's and the employer's interests, the latter will be considered more important.[368]

1.1.3. Redundancy for operational reasons

As it is the employer's constitutional right as a business manager[369] to freely decide upon her/his strategy for and organisation of the company, she/he can also dismiss a worker for operational

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361 Federal Labour Court (Bundesarbeitsgericht, BAG), decision dated 18.1.2007 – 2 AZR 731/05; Rolfs, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 1 KSchG, para. 104.

362 Rolfs, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 1 KSchG, para. 107.

363 Schwarze/Eylert/Schrader, *Kündigungsschutzgesetz: Kommentar*, Munich 2011, § 1, para. 88 ff.; Rolfs, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 1 KSchG, paras. 118 ff.

364 § 1 para. 2 s. 1 case 2 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

365 Von Hoyningen-Huene/Linck, *Kündigungsschutzgesetz: Kommentar*, 14th edn., Munich 2007, § 1, para. 461; Rolfs, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 1 KSchG, paras. 212 f.

366 Rolfs, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 1 KSchG, para. 217.

367 Von Hoyningen-Huene/Linck, *Kündigungsschutzgesetz: Kommentar*, 14th edn., Munich 2007, § 1, paras. 484 ff.; Rolfs, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 1 KSchG, para. 229.

368 Schwarze/Eylert/Schrader, *Kündigungsschutzgesetz: Kommentar*, Munich 2011, § 1, para. 222; Rolfs, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 1 KSchG, para. 231.

369 The freedom to chose and exercise a profession is protected by Art. 12 Constitution (Grundgesetz, GG).

reasons.[370] The court is not allowed to review whether this decision is wise, but merely whether such a business decision exists and whether this decision is not obviously abusive.[371] However, the law forbids dismissing employees solely on the grounds of transfer of business from one owner to another.[372]

Yet, in order to protect the worker, the conditions for a dismissal for operational reasons are quite strict. The employer has to take a business decision, which has as a consequence that certain positions no longer exist. It is important that this job loss actually is a real consequence and that it does not constitute the decision itself. The employer must not cut jobs merely in order to reduce personnel expenses.[373]
Furthermore, the worker's job has to cease to exist for good and that latest by the end of the notice period. This means that it is not important whether the specific position is cut, but that on an overall count, there will be fewer positions after having implemented the business decision[374] and that there is no free position left for which the respective employee is qualified and which is still covered by the respective employment contract.[375]

In conjunction with this principle, specific social criteria defined by the law will determine which worker has to be dismissed. Hence, when deciding which employee to dismiss, the employer has to take into account seniority, age, obligations to maintenance as well as severe disability of the different workers.[376]

Because of these strict preconditions, a court will not additionally weigh the interests of employer and employee.[377]

1.2. Procedural requirements for legitimate dismissals

Under German national law, there are a few procedural requirements for legitimate dismissals.
The employer always has to respect the written form as well as the notice period for routine dismissals or the preclusive period for extraordinary dismissals.
The works council on the other hand does not exist in small companies and thus only has to participate in companies where there actually is a works council. Furthermore, a preliminary warning is essential in larger companies before making an employee redundant for operational reasons. As to severely disabled persons, employers may dismiss them only with the Equal Employment Opportunity Commission's consent.[378]

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370 § 1 para. 2 s. 1 case 3 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

371 Federal Labour Court (Bundesarbeitsgericht, BAG), decision dated 4.5.2006 – 8 AZR 299/05.

372 § 613a para. 4 Civil Code (Bürgerliches Gesetzbuch, BGB).

373 Federal Labour Court (Bundesarbeitsgericht, BAG), decision dated 20.3.1986 – 2 AZR 294/85; Schwarze/Eylert/Schrader, *Kündigungsschutzgesetz: Kommentar*, Munich 2011, § 1, para. 288.

374 Federal Labour Court (Bundesarbeitsgericht, BAG), decision dated 23.2.2012 – 2 AZR 548/10.

375 Von Hoyningen-Huene/Linck, *Kündigungsschutzgesetz: Kommentar*, 14th edn., Munich 2007, § 1, paras. 713 f.; Rolfs, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 1 KSchG, para. 368.

376 § 1 para. 3 s. 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG) applied by analogy.

377 Rolfs, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 1 KSchG, para. 395.

378 § 85 Social Law Code Book Nine (Sozialgesetzbuch Neuntes Buch, SGB IX).

Dismissing a worker routinely is only then legitimate, if it is done in written form, meaning written and signed,[379] and if the employer complies with the notice period.[380] The latter's duration rises according to how long the employment relationship lasted. While during the first two years, the contract can be terminated with a notice period of four weeks to the 15th or to the last day of a calendar month,[381] after a duration of 20 years, the employer can dismiss the worker only with a seven months' notice period to the end of a calendar month.[382] Agreeing to a shorter notice period in the contract is only possible under specific circumstances.[383] Other notice periods can however be negotiated in collective labour agreements.[384] In case the employer does not comply with the respective notice period, the dismissal itself is valid, but the lawful notice period will apply.[385]

Extraordinary dismissals also have to be written and signed.[386] Due to their nature as being extraordinary, no notice period applies. Instead, the employer has to respect a two weeks' preclusive period, meaning that she/he can dismiss the worker only within two weeks after the incident causing the extraordinary dismissal occurred.[387] Through this rule, the employer cannot use incidents from the past when she/he wishes to dispose of an employee.[388]

In case a works council exists in the respective company, the employer has to consult with it in order to legitimately dismiss a worker.
As a rule, the employer has to hear the works council; otherwise, the dismissal is null and void.[389] For routine dismissals, the works council can react in three different ways, for extraordinary dismissals in two different ways: In both cases, it can either consent explicitly and tacitly or it can raise concern. If the dismissal in question is a routine one, the works council can also oppose it.

The works council can raise its concerns within one week[390] or within three days,[391] depending upon whether it is about a routine or an extraordinary dismissal.
Also within a weeks' delay, the works council can oppose a routine dismissal on certain grounds enumerated by law. These reasons basically correspond with the preconditions for dismissal under the

379 § 623 in conjunction with § 126 para. 1 Civil Code (Bürgerliches Gesetzbuch, BGB).

380 § 622 paras. 1, 2 Civil Code (Bürgerliches Gesetzbuch, BGB).

381 § 622 para. 1 Civil Code (Bürgerliches Gesetzbuch, BGB).

382 § 622 para. 2 No. 7 Civil Code (Bürgerliches Gesetzbuch, BGB). The notice periods in between are the following: one month to the end of a calendar month after a duration of two years, two months after five years, three months after eight years, four months after ten years, five months after twelve years, six months after 15 years.

383 This is possible, if the worker is merely employed to help out on a temporary basis for less than three months or if less than 20 employees work at the company, trainees not counted, § 622 para. 5 s. 1 Nos. 1, 2 Civil Code (Bürgerliches Gesetzbuch, BGB).

384 § 622 para. 4 Civil Code (Bürgerliches Gesetzbuch, BGB).

385 Mansel, in: Jauernig/Stürner (eds.), *Bürgerliches Gesetzbuch mit Allgemeinem Gleichstellungsgesetz (Auszug): Kommentar*, 15th edn., Munich 2014, § 622, para. 2; Weidenkaff, in: Palandt (ed.), *Bürgerliches Gesetzbuch mit Nebengesetzen*, 72nd edn., Munich 2013, § 622, para. 6.

386 § 623 in conjunction with § 126 para. 1 Civil Code (Bürgerliches Gesetzbuch, BGB).

387 § 626 paras. 1, 2 Civil Code (Bürgerliches Gesetzbuch, BGB).

388 Mansel, in: Jauernig/Stürner (eds.), *Bürgerliches Gesetzbuch mit Allgemeinem Gleichstellungsgesetz (Auszug): Kommentar*, 15th edn., Munich 2014, § 626, para. 19.

389 § 102 para. 1 s. 3 Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

390 § 102 para. 2 ss. 1, 2 Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

391 § 102 para. 2 s. 3 Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

Protection against Dismissal Act, as presented under paragraph 1.1., such as taking sufficient account of social aspects or keeping the employee at another position within the same company.[392]
Yet, even if the works council opposes the dismissal, the employer can nevertheless give notice to the worker. The employer merely has to deliver the works council's written opinion to the dismissed worker.[393]

In addition to these general rules for legitimate dismissals, dismissals on grounds of conduct and thus within the scope of the Protection against Dismissal Act[394] have one further precondition. Depending on how severe the infringement was, the employer has to warn the worker first before she/he is allowed to dismiss her/him. Otherwise dismissing the employee would rather serve as a sanction and not as a protection from further infringements based on a negative forecast.[395]

1.3. Burden of proof and available sanctions

1.3.1. Burden of proof

In general, the burden of proof lies with the party profiting of the respective fact. As a consequence, the claimant has to prove the preconditions for the right she/he claims, whereas the defendant has to prove the preconditions for objections.

So if the dismissed worker takes legal action against the dismissal, she/he is the claimant and has thus to prove most of the constituting facts. The worker bears the burden of proof for the fact that the Protection against Dismissal Act is applicable, i.e. that the employment lasted for at least six months[396] and that the company is no small company to which the Protection against Dismissal Act would not apply.[397] Furthermore, the worker has to prove on the one hand that she/he has been dismissed[398] and on the other hand that this dismissal was socially unjustified.[399]

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392 § 102 para. 3 Nos. 1-5 Works Constitution Act (Betriebsverfassungsgesetz, BetrVG); Mauer, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 102 BetrVG, para. 11.

393 § 102 para. 4 Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

394 See paragraph 1.

395 Dörner/Vossen, in: Ascheid/Preis/Schmidt (eds.), *Kündigungsrecht: Großkommentar zum gesamten Recht der Beendigung von Schuldverhältnissen*, 4th edn., Munich 2012, § 1 KSchG, para. 343.

396 Schmitt, in: Däubler/Hjort/Schubert/Wolmerath (eds.), *Arbeitsrecht: Individualarbeitsrecht mit kollektivrechtlichen Bezügen – Kommentar*, 3rd edn., Baden-Baden 2013, § 1, para. 62; Oetker, in: Müller-Glöge/Preis/Schmidt (eds.), *Erfurter Kommentar zum Arbeitsrecht*, 14th edn., Munich 2014, § 1, paras. 58, 60; Hergenröder, in: Säcker/Rixecker (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 4: Schuldrecht Besonderer Teil II, §§ 6011-704, EFZG, TzBfG, KSchG*, 6th edn., Munich 2012, § 1, para. 62.

397 Hergenröder, in: Säcker/Rixecker (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 4: Schuldrecht Besonderer Teil II, §§ 6011-704, EFZG, TzBfG, KSchG*, 6th edn., Munich 2012, § 1, para. 62; Oetker, in: Müller-Glöge/Preis/Schmidt (eds.), *Erfurter Kommentar zum Arbeitsrecht*, 14th edn., Munich 2014, § 1, para. 59.

398 Schmitt, in: Däubler/Hjort/Schubert/Wolmerath (eds.), *Arbeitsrecht: Individualarbeitsrecht mit kollektivrechtlichen Bezügen – Kommentar*, 3rd edn., Baden-Baden 2013, § 1, para. 62; Hergenröder, in: Säcker/Rixecker (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 4: Schuldrecht Besonderer Teil II, §§ 6011-704, EFZG, TzBfG, KSchG*, 6th edn., Munich 2012, § 1, para. 63.

399 Oetker, in: Müller-Glöge/Preis/Schmidt (eds.), *Erfurter Kommentar zum Arbeitsrecht*, 14th edn., Munich 2014, § 1, para. 57.

In contrast, the employer as the defendant bears the burden of proof for her/his objections, such as that the employment did not last for six consecutive months but was interrupted.[400] The Protection against Dismissal Act also contains a reversal of the burden of proof in stating that it is up to the employer to prove the grounds on which she/he based the dismissal and which thus socially justify it.[401] The same is true for the specific social criteria the employer has to respect when making a worker redundant for operational reasons.[402]

1.3.2. Sanctions

German law does not provide for sanctions as such for unlawful dismissals. Yet, it obliges the employer to compensate the worker under certain circumstances.

In case the employer makes the worker redundant for operational reasons and the latter does not take legal action against the dismissal itself, the employer has to compensate the worker.[403] This compensation amounts to half a month's salary for every year the employment lasted, whereat durations of more than six months count as one year.[404] These agreements shall motivate both parties to refrain from going to court and find legal peace.[405]

The employer also has to compensate the worker if the court finds the dismissal illegitimate and thus void, but still considers it unreasonable for the worker to continue the employment.[406] The same rule applies in case it is unreasonable for the employer to continue the employment due to operational reasons.[407] Here, the compensation can amount to up to either a twelve months' salary,[408] a 15 months' salary[409] or an 18 months' salary,[410] depending on both the worker's age and the duration of the employment.

1.4. Recent reforms concerning unfair dismissal laws

According to our research, no reforms concerning unfair dismissal laws as such have taken place as a response to the financial crisis.

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400 Hergenröder, in: Säcker/Rixecker (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 4: Schuldrecht Besonderer Teil II, §§ 6011-704, EFZG, TzBfG, KSchG*, 6th edn., Munich 2012, § 1, para. 62; Oetker, in: Müller-Glöge/Preis/Schmidt (eds.), *Erfurter Kommentar zum Arbeitsrecht*, 14th edn., Munich 2014, § 1, para. 60.

401 § 1 para. 2 s. 4 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG); Schmitt, in: Däubler/Hjort/Schubert/Wolmerath (eds.), *Arbeitsrecht: Individualarbeitsrecht mit kollektivrechtlichen Bezügen – Kommentar*, 3rd edn., Baden-Baden 2013, § 1, para. 62; Hergenröder, in: Säcker/Rixecker (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 4: Schuldrecht Besonderer Teil II, §§ 6011-704, EFZG, TzBfG, KSchG*, 6th edn., Munich 2012, § 1, para. 62.

402 § 1 para. 3 s. 3 Protections against Dismissal Act (Kündigungsschutzgesetz, KSchG).

403 § 1a para. 1 s. 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

404 § 1a para. 2 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

405 Schwarze/Eylert/Schrader, *Kündigungsschutzgesetz: Kommentar*, Munich 2011, § 1a, para. 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

406 § 9 para. 1 s. 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

407 § 9 para. 1 s. 2 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

408 General rule and also applicable to workers who already reached retirement age, § 10 para. 1 in conjunction with para. 2 s. 2 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

409 Applicable to workers who are older than 50 and whose employment in the company lasted longer than 15 years, § 10 para. 2 s. 1 case 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KschG).

410 Applicable to workers who are older than 55 and whose employment in the company lasted longer than 20 years, § 10 para. 2 s. 1 case 2 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

Notwithstanding, the German legislator introduced a sentence in the already existing regulation on compulsory economic affairs committees in companies with more than 100 employees.[411]
The economic affairs committee's task is to discuss economic affairs with the owner of the company and to inform the works council accordingly.[412] Since 2008, this also applies to the take-over of a company, if this implies also a take-over of control. In this case, the owner has to inform the economic affairs committee about the identity and the plans concerning new business activities of the potential new owner and of possible implications for the employees. The same rule shall apply to tendering procedures in preparation of the take-over. Since the present owner often does not know the details of the buyer's plans, her/his duty goes only so far as her/his knowledge goes.[413]

2. Special protection for workers' representatives

Workers' representatives, i.e. members of the works council, enjoy special protection against dismissal under German law. The employer cannot routinely dismiss workers' representatives,[414] although she/he is allowed to extraordinarily dismiss them under certain circumstances and with the works council's or a tribunal's approval. The legal basis for these regulations is § 15 Protection against Dismissal Act, which is available online in German.[415]
Additionally, German law stipulates further rights of workers' representatives. In order to carry out her/his duties as a member of the works council, she/he may use as much of her/his paid working time as necessary to do so properly.[416] If she/he needs to carry out these duties during free time, the employer will remunerate the accordingly.[417] During the office and for one year after the office of the workers' representative ended, the employer has to pay the workers' representative equally and give her/him equal tasks compared to workers who were not part of the works council.[418]
Finally, it is also possible to include protective regulations into collective labour agreements, which can apply to either single companies, all companies represented in the respective trade union or employers' associations or to all companies within a certain industry sector. However, our random check of collective labour agreements available online showed no specific regulation on protection against dismissal for workers' representatives. We found only two other protective rules regarding members of works councils. According to these, workers' representatives may take unpaid leave of up

411 § 106 para. 2 s. 2 in conjunction with para. 3 No. 9a Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

412 § 106 para. 1 s. 2 Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

413 Kania, in: Müller-Glöge/Preis/Schmidt (eds.), *Erfurter Kommentar zum Arbeitsrecht*, 14th edn., Munich 2014, § 106 BetrVG, para. 6a; Annuß, in: Richardi (ed.), *Betriebsverfassungsgesetz mit Wahlordnung: Kommentar*, 14th edn., Munich 2014, § 106, para. 26c.

414 Including works councils of the merchant fleet, ship's committees, representations of youths and apprentices as well as public service staff representation, § 15 para. 1 s. 1, para. 2 s. 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG). Not included are public service staff representatives that are still in training, § 47 para. 3 s. 1 Public Service Staff Representation Act (Bundespersonalvertretungsgesetz, BPersVG).

415 Federal Ministry of Justice and Consumer Protection, *Kündigungsschutzgesetz*, http://www.gesetze-im-internet.de/kschg/index.html (20.5.2014).

416 § 37 para. 1 Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

417 § 37 para. 2 s. 1 Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

418 § 37 para. 4 s. 1, para. 5 Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

to three weeks per year in order to participate in further training[419] as well as single days of unpaid leave for collective bargaining.[420]

In order to guarantee that workers' representatives can independently carry out their duties, they are protected by the Protection against Dismissal Act. The same protection applies to members of the works council electoral committee as well as to candidates running for works council until the end of the election.[421]
According to this law, the employer may not dismiss a workers' representative routinely, but only extraordinarily within a two weeks' preclusive period and for a compelling reason.[422] These reasons do not differ from those compelling reasons on which extraordinary dismissals of other workers can be based.[423] Hence, the employer has to consider all circumstances of the individual case and she/he has to weigh the interests of both employer and employee.[424] Extraordinarily dismissing a worker may only be done as a last resort if neither warning nor relocation nor routine dismissal are an option.[425]

The law also stipulates that in case the company shuts down, the employer may dismiss workers' representatives to take effect at the earliest at the moment of the shutdown. For an earlier dismissal, imperative management requirements are necessary.[426] If only individual departments shut down, the employer has to transfer workers' representatives to other departments, unless operational reasons conflict.[427]

Additionally, the works council has to consent to the dismissal explicitly, regarding public service staff representatives the staff council has to do so within three days. In case the works council objects or does not answer at all, the employer can request the labour court or, for public service staff representatives, the administrative court to approve the dismissal.[428]

Workers' representatives enjoy this protection also after their term of office has expired for the duration of one year,[429] except if it expired due to a respective court decision.[430] Through this

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419 § 9 No. 5 Framework Collective Agreement 2013 of the Industriegewerkschaft Metall Bezirk Baden-Württemberg regarding employees in the carpentry industry; § 9 No. 7 Framework Collective Agreement 2009 of the Industriegewerkschaft Metall Bezirk Baden-Württemberg regarding employees in the woods- and plastics-processing industry.

420 § 9 No. 6 para. 2 Framework Collective Agreement 2009 of the Industriegewerkschaft Metall Bezirk Baden-Württemberg regarding employees in the woods- and plastics-processing industry.

421 § 15 para. 3 s. 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

422 § 15 para. 1 s. 1, para. 2 s. 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG) in conjunction with § 626 paras. 1, 2 Civil Code (Bürgerliches Gesetzbuch, BGB).

423 Volkening, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 15 KSchG, para. 62.

424 § 626 para. 1 Civil Code (Bürgerliches Gesetzbuch, BGB).

425 Weidenkaff, in: Palandt (ed.), *Bürgerliches Gesetzbuch mit Nebengesetzen*, 72nd edn., Munich 2013, § 626, para. 37.

426 § 15 para. 4 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG)

427 § 15 para. 5 ss. 1, 2 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

428 § 15 para. 1 s. 1, para. 2 s. 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG)in conjunction with § 103 para. 1 Works Constitution Act (Betriebsverfassungsgesetz, BetrVG) and § 47 para. 1 ss. 1, 2, § 108 para. 1 ss. 1, 2 Public Service Staff Representation Act (Bundespersonalvertretungsgesetz, BPersVG).

429 Exception: only six months for members of ship's committees, for members of works council electoral committees and for candidates running for works council, § 15 para. 1 s. 2, para. 3 s. 2 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

430 § 15 para. 1 s. 2, para. 2 s. 2 Protection against Dimissal Act (Kündigungsschutzgesetz, KSchG).

continued protection, the German legislator gave potential conflicts between the employer and the workers' representative time to settle down before a dismissal is even possible.[431]

The works council moreover has to consent in case the employer transfers a workers' representative to another post within the company and the latter will lose her/his office or eligibility. The works council's consent is not necessary if the employee agrees her-/himself.[432]
The same is true for transfers and delegations of public service staff representatives. Yet, the employer may transfer or delegate public service staff representatives against their own will, if this is necessary for official reasons. The staff council still has to approve.[433]

3. Sanctions available and application in practice

As regards consequences after being unlawfully dismissed, the law puts workers' representatives on a par with other workers.

If the dismissal is illegitimate, the court will find it void, but the court still can consider it unreasonable for the workers' representative to continue the employment. The court will thus dissolve the employment and order the employer to compensate the workers' representative, if the latter requests so.[434] As is also the case for workers after an illegitimate routine dismissal, the court is free to choose the amount of the compensation up to a certain limit, depending on both the worker's age and the duration of the employment. Generally and also applicable to workers who already reached retirement age, the compensation can amount up to a twelve months' salary.[435] For workers' representatives who are older than 50 and whose employment in the company lasted longer than 15 years, the limit of compensation is a 15 months' salary,[436] for those who are older than 55 and whose employment in the company lasted longer than 20 years, the compensation is limited to an 18 months' salary.[437]

In case they already found a new employment, workers' representatives can choose whether they want to keep the new employment and quit the old one or vice versa. However, they have to take this decision within one week after the respective court's final judgment on the unlawful dismissal.[438]

According to our knowledge, there is no statistical data about dismissals of workers' representatives. Furthermore, only few relevant court decisions have been published; our research showed 16 decisions. Out of these, the respective courts dismissed seven complaints of wrongful dismissal.[439] In

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431 Deutscher Bundestag, Drucksache 6/1786 vom 29.1.1971, S. 60; Kiel, in: Müller-Glöge/Preis/Schmidt (eds.), *Erfurter Kommentar zum Arbeitsrecht*, 14th edn., Munich 2014, § 15, para. 31; Volkening, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, § 15 KSchG, para. 76.

432 § 103 para. 3 s. 1 Works Constitution Act (Betriebsverfassungsgesetz, BetrVG).

433 § 47 para. 2 ss. 1, 2, 3 Public Service Staff Representation Act (Bundespersonalvertretungsgesetz, BPersVG).

434 § 13 para. 1 s. 3 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

435 § 10 para. 1, 2 s. 2 in conjunction with § 13 para. 1 ss. 3, 5 Dismissal against Protection Act (Kündigungsschutzgesetz, KSchG).

436 § 10 para. 2 s. 1 case 1 in conjunction with § 13 para. 1 ss. 3, 5 Dismissal against Protection Act (Kündigungsschutzgesetz, KSchG).

437 § 10 para. 2 s. 1 case 2 in conjunction with § 13 para. 1 ss. 3, 5 Dismissal against Protection Act.

438 § 16 s. 1 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG).

439 Federal Labour Court (Bundesarbeitsgericht, BAG), judgment dated 13.8.1992 – 2 AZR 22/92; BAG, judgment dated 21.6.2001 – 2 AZR 137/00; BAG, judgment dated 21.5.2008 – 8 AZR 623/07; Regional Labour Court (Landesarbeitsgericht, LAG) Munich, judgment dated 31.7.2007 – 6 Sa 66/07; LAG Hamm,

the other nine cases, the courts found the respective dismissals to be void and the employment thus still valid. They did not award any compensation, since the claimants did not request any.[440] Only in one of these cases did the local labour court award compensation amounting to 18'406 EUR upon the claimant's request, but the regional labour court overrode this judgment and ruled instead that the employment contract shall endure.[441] The local labour court's decision has not been published, so there is no information available about the court's reasoning of why it decided to award exactly this amount.

4. Constitutional basis for collective representation of workers

The German Constitution guarantees the right to form collective representations of workers in its Art. 9 para. 3. It guarantees every individual and for every occupation the right to form associations to safeguard and improve working and economic conditions.[442] Law must not abridge this freedom of association,[443] but it can be restricted in case it conflicts with other fundamental rights.[444]

5. Role of collective work relations

Trade unions exist for the different industry sectors in Germany and are united in a leading association. Although this association comprises over 6 million workers and although there are about 70'000 collective labour agreements registered to date out of which 498 are generally binding,[445] collective action does not play an important role in Germany compared to other European countries. This also reflects in the fact that no specific law exists regarding trade unions or collective action, but merely case law.

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judgment dated 28.11.2008 – 10 Sa 1921/07; LAG Düsseldorf, judgment dated 18.9.2013 – 4 Sa 495/13; Local Labour Court (Arbeitsgericht, ArbG) Karlsruhe, judgment dated 23.11.2007 – 1 Ca 551/06.

440 Federal Labour Court (Bundesarbeitsgericht, BAG), judgment dated 14.9.1994 – 2 AZR 75/94; Regional Labour Court (Landesarbeitsgericht, LAG) Hamm, judgment dated 16.3.2000 – 4 (19) Sa 746/99; LAG Rostock, judgment dated 12.5.2004 – 2 Sa 424/03; LAG Düsseldorf, judgment dated 25.11.1997 – 8 Sa 1358/97; LAG Munich, judgment dated 5.8.2010 – 2 Sa 634/09; Local Labour Court (Arbeitsgericht, ArbG) Bielefeld, judgment dated 21.5.2003 – 3 Ca 3568/02; ArbG Cottbus, judgment dated 18.7.2006 – 6 Ca 209/06; ArbG Kaiserslautern, judgment dated 9.4.2009 – 2 Ca 1811/08; ArbG Hamburg, judgment dated 19.12.2012 – 26 Ca 255/12.

441 Regional Labour Court (Landesarbeitsgericht, LAG) Rostock, judgment dated 12.5.2004 – 2 Sa 424/03, overruling Local Labour Court (Arbeitsgericht, ArbG) Stralsund, judgment dated 29.7.2003 – 4 Ca 535/02.

442 "The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91 may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions.", Art. 9 para. 3 GG.

443 Art. 9 para. 3 ss. 2, 3 Constitution (Grundgesetz, GG).

444 Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), ruling dated 26.6.1991 – 1 BvR 779/85.

445 Federal Ministry of Labour and Social Affairs, *Verzeichnis der für allgemeinverbindlich erklärten Tarifverträge, Stand: 1. April 2014*, http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen-DinA4/arbeitsrecht-verzeichnis-allgemeinverbindlicher-tarifvertraege.pdf?__blob=publicationFile (21.5.2014).

5.1. Institutions and legal means of collective action

Apart from the already mentioned Art. 9 para. 3 of the German Constitution and very few occasional regulations,[446] collective work relations are not governed by statutes in Germany. Even the Law on Collective Agreements[447] regulates formal aspects of collective labour agreements and not collective action as such.
There is however relevant case law, notably by the Federal Labour Court and the Federal Constitutional Court.[448]

According to these court rulings, the freedom of association protected by the Constitution applies to both employers and workers and at the same time protects trade unions themselves.[449] One of the article's main aims is to protect the autonomy in collective bargaining, meaning that wages and specific working conditions shall not be governed by the state, but shall be negotiated and agreed to in collective labour agreements by the employers and trade unions representing the workers.[450] As a consequence, the scope of protection does not include public servants, judges and soldiers.[451]

In order to have fair negotiations, both parties have the choice which practices they want to use in collective action, as long as these practices aim at negotiating a collective labour agreement in the end. Collective action is not allowed for other means than the reaching a collective labour agreement. Hence, workers must not take collective action by themselves, but leave this decision to the trade union,[452] since only the trade union can be party to a collective labour agreement.[453] While trade unions generally declare a strike as a means of collective action, employers choose to impose a lockout.[454]

There are several limitations to the freedom of collective action, developed by case law.
First, the parties may take collective action only as a last resort after peaceful negotiations did not lead to an agreement. According to case law, also arbitration proceedings have to take place before reverting to collective action.[455]

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446 E.g. § 74 para. 2 Works Constitution Act (Betriebsverfassungsgesetz, BetrVG), stating that practices of collective action are prohibited between the employer and the works council, and § 25 Protection against Dismissal Act (Kündigungsschutzgesetz, KSchG), stating that the Protection against Dismissal Act does not apply to dismissals taking place as part of collective action.

447 Tarifvertragsgesetz, TVG.

448 Waas, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, Art. 9, paras. 22, 28.

449 Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), judgment dated 18.11.1954 – 1 BvR 629/52; BVerfG, judgment dated 1.3.1979 – 1 BvR 532/77, 1 BvR 533/77, 1 BvR 419/78, 1 BvL 21/78; BVerfG, ruling dated 26.6.1991 – 1 BvR 779/85.

450 Krause, *Arbeitsrecht*, 2nd edn., Baden-Baden 2011, pp. 39 f.

451 Waas, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, Art. 9, para. 68; regarding public servants see also Art. 33 para. 5 Constitution (Grundgesetz, GG).

452 Waas, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, Art. 9, para. 35.

453 § 2 para. 1 Law on Collective Agreements (Tarifvertragsgesetz, TVG).

454 Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), ruling dated 26.6.1991 – 1 BvR 779/85; Krause, *Arbeitsrecht*, 2nd edn., Baden-Baden 2011, p. 40; Kortstock, *Nipperdey: Lexikon Arbeitsrecht – Sonderausgabe aus Anlass der 100. Ergänzungslieferung*, Munich 2012, p. 44.

455 Federal Labour Court (Bundesarbeitsgericht, BAG), judgment dated 21.4.1971 – GS 1/68; Waas, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, Art. 9, paras. 51, 54.

Second, as part of the duty of the parties to maintain industrial peace, collective action is prohibited as long as the current collective labour agreement is still valid, if the respective matter is already treated in this agreement.[456]
And third, in case a practice is disproportionate to the other party's method and thus leads to unfair bargaining advantage, the court will rule this practice illegitimate upon request. The Federal Labour Court did so, affirmed by the Federal Constitutional Court,[457] in a case where an employer imposed a lockout on 130'000 employees, as a reaction to 4'300 workers on strike.[458] On the other hand, it would constitute a punishable act of duress on the part of the striking workers to block the company in a way that persons willing to work cannot do so.[459]

5.2. Collective work relations in practice

In Germany, the most important trade unions are those[460] united in the leading association Federation of Germany Trade Unions (Deutscher Gewerkschaftsbund, DGB) with more than 6.1 million members in 2013.[461] The different trade unions are organised by industry sectors and not by political aims,[462] whereat the Industrial Trade Union for Metal Workers (Industriegewerkschaft Metall, IG Metall) has the most members with more than 2.2 million members in 2013.
The trade unions struggle with a steady decrease in members. The Federation of Germany Trade Unions lost about 1 million members in the last ten years in absolute numbers,[463] especially women and youths are underrepresented in the trade unions.[464] However, trade unions still have enough members to legitimately represent the workers of the respective industry sectors.

Still, in comparison to other countries, not many strikes take place in Germany. Since 1975, the most important collective action took place in 1978 with 4.3 million working days lost, 1984 with 5.6 million

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456 Federal Labour Court (Bundesarbeitsgericht, BAG), judgment dated 10.12.2002 – 1 AZR 96/02; Waas, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, Art. 9, para. 45.

457 Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), ruling dated 26.6.1991 – 1 BvR 779/85.

458 Federal Labour Court (Bundesarbeitsgericht, BAG), judgment dated 12.3.1985 – 1 AZR 636/82.

459 Waas, in: Rolfs/Giesen/Kreikebohm/Udsching, *Beck'scher Online-Kommentar Arbeitsrecht*, 31st edn., Munich 2014, Art. 9, para. 67.

460 Industriegewerkschaft Metall (2'265'859 members in 2013), ver.di (2'064'541 members), Industriegewerkschaft Bergbau Chemie Energie (663'756 members), Industriegewerkschaft Bauen Agrar Umwelt (288'423 members), Gewerkschaft Erziehung und Wissenschaft (270'073 members), EVG (209'036 members), Gewerkschaft Nahrung Genuss Gaststätten (206'930 members); Deutscher Gewerkschaftsbund, *Mitgliederzahlen 2013*, http://www.dgb.de/uber-uns/dgb-heute/mitgliederzahlen/2010 (16.5.2014).

461 Deutscher Gewerkschaftsbund, *Mitgliederzahlen 2013*, http://www.dgb.de/uber-uns/dgb-heute/mitgliederzahlen/2010 (16.5.2014).

462 Statistisches Bundesamt (ed.), *Datenreport 2006: Zahlen und Fakten über die Bundesrepublik Deutschland, Auszug aus Teil I*, https://www.destatis.de/DE/Publikationen/Datenreport/Downloads/1GesellschMitwirkung.pdf?__blob=publicationFile, p. 168 (16.5.2014).

463 Deutscher Gewerkschaftsbund, *Mitgliederzahlen 2013*, http://www.dgb.de/uber-uns/dgb-heute/mitgliederzahlen/2010 (16.5.2014); Deutscher Gewerkschaftsbund, Mitgliederzahlen 2003, http://www.dgb.de/uber-uns/dgb-heute/mitgliederzahlen/2000-2009/?tab=tab_0_12#tabnav (16.5.2014).

464 Statistisches Bundesamt (ed.), *Datenreport 2006: Zahlen und Fakten über die Bundesrepublik Deutschland, Auszug aus Teil I*, https://www.destatis.de/DE/Publikationen/Datenreport/Downloads/1GesellschMitwirkung.pdf?__blob=publicationFile, p. 169 (16.5.2014).

working days lost and 1992 with 1.5 million working days lost.[465] In 2012, only about 86'000 working days were lost due to collective action,[466] whereat 22'200 workers were involved.[467]

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465 Statistisches Bundesamt (ed.), *Datenreport 2006: Zahlen und Fakten über die Bundesrepublik Deutschland, Auszug aus Teil I*, https://www.destatis.de/DE/Publikationen/Datenreport/Downloads/1GesellschMitwirkung.pdf?__blob=publicationFile, p. 172 (16.5.2014).

466 International Labour Organization, *Days not worked due to strikes and lockouts by economic activity: Germany*, http://www.ilo.org/ilostat/faces/home/statisticaldata/data_by_country/country-details/indicator-details?country=DEU&subject=STR&indicator=STR_DAYS_ECO_NB&datasetCode=YI&collectionCode=YI&_afrLoop=695482067785221#%40%3Findicator%3DSTR_DAYS_ECO_NB%26subject%3DSTR%26_afrLoop%3D695482067785221%26datasetCode%3DYI%26collectionCode%3DYI%26country%3DDEU%26_adf.ctrl-state%3Dco8nj0wd4_251 (20.5.2014).

467 International Labour Organization, *Workers involved in strikes and lockouts by economic activity (Thousands): Germany*, http://www.ilo.org/ilostat/faces/home/statisticaldata/data_by_country/country-details/indicator-details?country=DEU&subject=STR&indicator=STR_WORK_ECO_NB&datasetCode=YI&collectionCode=YI&_afrLoop=695326988998692#%40%3Findicator%3DSTR_WORK_ECO_NB%26subject%3DSTR%26_afrLoop%3D695326988998692%26datasetCode%3DYI%26collectionCode%3DYI%26country%3DDEU%26_adf.ctrl-state%3Dco8nj0wd4_209 (20.5.2014).

D. ITALY

1. General overview of legal protection against unfair dismissal

La materia dei licenziamenti individuali è disciplinata da un complesso molto articolato di disposizioni del codice civile e di leggi speciali. In particolare, la disciplina è data dagli artt. 2110, comma 2,[468] 2118[469] e 2119[470] c.c., dalla legge 15.7.1966, n. 604, dalla legge 20.5.1970, n. 300, dalla legge 11.5.1990, n. 108, dalla legge 4.11.2010, n. 183 (Collegato Lavoro) nonché da talune leggi speciali e, da ultimo, dalla legge 28 giugno 2012 n. 92.

Questa disciplina prevede che il lavoratore può recedere dal contratto di lavoro a tempo indeterminato senza fornire alcuna motivazione, ma con l'unico vincolo del **preavviso.** D'altra parte il datore di lavoro può licenziare unicamente talune categorie di prestatori di lavoro senza comunicare la decisione per iscritto e senza motivarla (*ad nutum*). Si tratta, in particolare, delle seguenti categorie: **i dirigenti**, i **lavoratori domestici**, gli **atleti professionisti**, i **lavoratori assunti in prova**; i **lavoratori che hanno raggiunto l'età pensionabile**.

1.1. Substantive reasons for legitimate dismissals

La L. 604/1966 ha stabilito che l'atto giuridico di licenziamento individuale deve essere espressamente motivato, a pena di nullità e che deve essere giustificato da **ragioni soggettive e oggettive tassative**: l'art. 1 della legge enuncia esplicitamente che: "il licenziamento del prestatore di lavoro non può avvenire che per giusta causa […] o per giustificato motivo". Queste ipotesi integrano tre fattispecie distinte – il licenziamento per giusta causa (1.1.1.), il licenziamento per giustificato motivo soggettivo (1.1.2.) e il licenziamento per giustificato motivo oggettivo (1.1.3.) – alle quali la giurisprudenza ha affiancato una quarta fattispecie, totalmente autonoma rispetto alle precedenti, che consiste nel c.d. superamento del periodo di comporto, ex art. 2110 c.c. (1.1.4.).

1.1.1. Il licenziamento per giusta causa

La definizione di giusta causa è contenuta nell'art. 2119 del codice civile: «ciascuno dei contraenti può recedere dal contratto prima della scadenza del termine, se il contratto è a tempo determinato, o

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[468] Art. 2110, comma 2 c.c., "[In caso di infortunio, di malattia, di gravidanza o di puerperio] l'imprenditore ha diritto di recedere dal contratto a norma dell'articolo 2118, decorso il periodo stabilito dalla legge dagli usi o secondo equità."

[469] Art. 2118 c.c., Recesso dal contratto a tempo indeterminato: «Ciascuno dei contraenti può recedere dal contratto di lavoro a tempo indeterminato, dando il preavviso nel termine e nei modi stabiliti [dalle norme corporative], dagli usi o secondo equità.

In mancanza di preavviso, il recedente è tenuto verso l'altra parte a un'indennità equivalente all'importo della retribuzione che sarebbe spettata per il periodo di preavviso.

La stessa indennità è dovuta dal datore di lavoro nel caso di cessazione del rapporto per morte del prestatore di lavoro».

[470] Art. 2119 c.c., Recesso per giusta causa: «Ciascuno dei contraenti può recedere dal contratto prima della scadenza del termine, se il contratto è a tempo determinato, o senza preavviso, se il contratto è a tempo indeterminato, qualora si verifichi una causa che non consenta la prosecuzione anche provvisoria, del rapporto. Se il contratto è a tempo indeterminato, al prestatore di lavoro che recede, per giusta causa compete l'indennità indicata nel secondo comma dell'articolo precedente. Non costituisce giusta causa di risoluzione del contratto il fallimento dell'imprenditore o la liquidazione coatta amministrativa dell'azienda».

senza preavviso, se il contratto è tempo indeterminato, qualora si verifichi una causa che non consenta la prosecuzione anche provvisoria del rapporto».

In concreto, il concetto di giusta causa, come elaborato dalla giurisprudenza, comprende ogni comportamento del lavoratore, anche non direttamente correlato al contratto di lavoro, capace di incidere negativamente sulla **fiducia** sulla quale il rapporto è fondato e che costituisce il presupposto essenziale della collaborazione.[471]

È necessario che il licenziamento per giusta causa sia direttamente correlato a un presupposto oggettivo, rivelatore della mancanza di idoneità del lavoratore all'adempimento delle proprie mansioni e tale da compromettere la fiducia del datore di lavoro nella sua capacità e/o volontà di adempiere correttamente nel futuro il contratto di lavoro.[472]

Il licenziamento per giusta causa si caratterizza per l'immediatezza del provvedimento in quanto, al di là dell'eventuale margine di tempo necessario per accertare e contestare i fatti costitutivi della giusta causa di licenziamento al lavoratore, questo avviene **senza preavviso**.[473]

Come evidenziato dalla giurisprudenza, i comportamenti che integrano un licenziamento soggettivamente giustificato sono "gravi violazioni dei doveri fondamentali del lavoratore - come quelli della fedeltà e del rispetto del patrimonio e della reputazione del datore di lavoro".[474]

I fatti che legittimano il licenziamento senza preavviso sono talvolta esemplificati – senza tuttavia che si possa dare alcun valore giuridico a tale esemplificazione – nei contratti collettivi. Questi indicano, ad esempio: la c.d. insubordinazione del lavoratore, quale **rifiuto ingiustificato e reiterato** di eseguire la prestazione; l'assenza per **malattia non supportata da documentazione** medica o contrastante con essa; il **lavoro** prestato **a favore di terzi durante l'assenza** per malattia; la **sottrazione di beni** aziendali; ogni **condotta penalmente rilevante** – anche nella sfera privata – se idonea a far venir meno la fiducia del datore di lavoro;[475] l'atteggiamento rissoso, aggressivo e/o **violento** nei locali lavorativi o nei confronti di colleghi (mobbing).[476]

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[471] M.V. BALLESTRERO, [Annali V, 2012], Licenziamento individuale, pag. 802 .

[472] Si veda ad esempio Cass. 28 agosto 2003, n. 12634, in Riv. dir. lav., 2004, II, pag.618 secondo la quale: "Per stabilire in concreto l'esistenza di una giusta causa di licenziamento, che deve rivestire il carattere di grave negazione degli elementi essenziali del rapporto di lavoro ed in particolare di quello fiduciario, occorre valutare da un lato la gravità dei fatti addebitati al lavoratore, in relazione alla portata oggettiva e soggettiva dei medesimi, alle circostanze nelle quali sono stati commessi ed all'intensità dell'elemento intenzionale, dall'altro la proporzionalità fra tali fatti e la sanzione inflitta, stabilendo se la lesione dell'elemento fiduciario su cui si basa la collaborazione del prestatore di lavoro sia in concreto tale da giustificare o meno la massima sanzione disciplinare; la valutazione della gravità dell'infrazione e della sua idoneità ad integrare giusta causa di licenziamento si risolve in un apprezzamento di fatto riservato al giudice di merito ed incensurabile in sede di legittimità, se congruamente motivato."

[473] Cass. 1° luglio 2010, n. 15649, in Mass. giur. lav., 2011, 89. L'immediatezza della contestazione è peraltro funzionale a garantire al lavoratore il diritto alla difesa, se si pensa alla difficoltà di ricostruire i fatti e portare prove a discolpa, a distanza di tempo: così Cass. 28 settembre 2002, n. 14074, in Riv. dir. lav., 2003, II, 394 .

[474] Cass. 9 settembre 2003, n. 13194, in Riv. dir. lav., 2004, II, pag. 368, p.to IVa. Si veda la nota di Nannipieri, ivi, Imperizia, scarso rendimento, oneri di prova e di repêchage a carico del datore di lavoro.

[475] Cass. 28 agosto 2003, n. 12634, cit. ha riconosciuto la giusta causa di licenziamento con riferimento ad un lavoratore riconosciuto colpevole di aver partecipato alla commissione di brogli elettorali durante il servizio extra-lavorativo in una commissione elettorale.

[476] *Amplius* Ghezzi e Romagnoli, Il rapporto di lavoro, Bologna, 1987, pag.298 .

Non è necessario dimostrare l'esistenza di un danno cagionato al datore di lavoro in conseguenza del comportamento del lavoratore.[477]

1.1.2. Il giustificato motivo soggettivo.

Il licenziamento è giustificato quando il lavoratore viene meno agli obblighi contrattuali derivanti, tra l'altro, dagli art. 2104, 2105, 2106 c.c.

Deve trattarsi di un notevole inadempimento degli obblighi contrattuali per esempio nelle ipotesi di **abbandono ingiustificato** del posto di lavoro, **negligenza**, **minacce**, **atteggiamento violento**, **assenza per malattia** oltre il periodo consentito, **uso a fini privati** delle attrezzature messe a sua disposizione dal datore di lavoro.

Il licenziamento è inoltre giustificato dallo "**scarso rendimento**" del lavoratore ma in questo caso il datore di lavoro che intenda far valere l'insufficienza della prestazione lavorativa deve dimostrare la colpevolezza nell'inadempimento degli obblighi contrattuali del lavoratore: secondo la giurisprudenza si tratta di valutare "gli aspetti concreti del fatto addebitato, tra cui il grado di diligenza richiesto dalla prestazione e quello usato dal lavoratore, nonché l'incidenza dell'organizzazione d'impresa e di fattori socio – ambientali". In altre parole, poiché il lavoratore non è obbligato al raggiungimento di un risultato ma all'esplicazione delle proprie energie occorre prendere in considerazione determinati parametri per accertare se la prestazione è stata eseguita con quella diligenza e quella professionalità medie proprie delle mansioni svolte.[478]

Il datore di lavoro che abbia intimato al lavoratore il licenziamento per giusta causa può legittimamente intimargli un secondo licenziamento per giustificato motivo (e viceversa), restando quest'ultimo un atto autonomo e distinto rispetto al primo. In questo caso i due atti di recesso sono idonei a raggiungere lo scopo della risoluzione del rapporto.[479]

Del resto, il giudice davanti a cui sia stato impugnato un licenziamento per giusta causa **può convertire il licenziamento**, ogni volta che valuti il fatto addebitato al lavoratore insufficiente ad integrare una giusta causa di licenziamento ma sufficiente ad integrare il giustificato motivo soggettivo.[480]

In questo caso si attribuirà al lavoratore l'indennità sostitutiva di preavviso.

1.1.3. Il giustificato motivo oggettivo.

Il licenziamento può inoltre essere giustificato "da ragioni inerenti all'attività produttiva, all'organizzazione del lavoro e al regolare funzionamento di essa" ex art. 3 l. 604/1966.

Non si tratta di tre ipotesi distinte in quanto la fattispecie intende abbracciare ogni ragione di licenziamento che sia giustificabile per **ragioni economiche totalmente estranee alla sfera di controllo del lavoratore**.[481]

Al di là della definizione legale di giustificato motivo oggettivo la sua valutazione nel caso concreto spetta al giudice, chiamato ad operare un bilanciamento tra i contrapposti interessi del datore di lavoro

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[477] M.V. BALLESTRERO, [Annali V, 2012], Licenziamento individuale, pag. 804 .

[478] Cass. 9 settembre 2003, n. 13194, cit., punto IVb.

[479] Cass., sez. lav., 20 gennaio 2011, n. 1244.

[480] Così Cass., sez. lav., 6 marzo 2008. n. 6055 e, in precedenza, Cass. 6 giugno 2000, n. 7617, in Riv. dir. lav., 2001, II, pag.79, con nota di Corti, Conversione ex officio del licenziamento per giusta causa e fattispecie previste dalla contrattazione collettiva.

[481] Si veda in argomento Ichino, Sulla nozione di giustificato motivo oggettivo di licenziamento, in Riv. dir. lav., 2002, I, 473 ss.

a dirigere un'impresa produttiva e quello del lavoratore a prestare il proprio lavoro. Solitamente, tale valutazione è circoscritta alla verifica della **reale sussistenza del motivo oggettivo** addotto dall'imprenditore.

Risulta controverso stabilire la soluzione di quei casi che non hanno ad oggetto le vicende dell'azienda, quali, ad esempio, scelte produttive ed organizzative o l'andamento del mercato, ma piuttosto che riguardano **inadempimenti del debitore non imputabili a lui per colpa**.

In questo caso, il giustificato motivo oggettivo comporta il c.d. **onere di *repêchage,*** in virtù del quale è ritenuto legittimo il licenziamento nel solo caso in cui il datore di lavoro provi che non era possibile adibire il lavoratore a mansioni equivalenti e compatibili con la sua qualifica.[482]

Secondo un consolidato orientamento "il datore di lavoro, che adduca a fondamento del licenziamento la soppressione del posto di lavoro cui era addetto il lavoratore licenziato, ha l'onere di provare che al momento del licenziamento non sussisteva alcuna posizione di lavoro analoga a quella soppressa alla quale avrebbe potuto essere assegnato il lavoratore licenziato per l'espletamento di mansioni equivalenti a quelle svolte, tenuto conto della professionalità raggiunta dal lavoratore medesimo, e deve inoltre dimostrare di non avere effettuato per un congruo periodo di tempo successivo al recesso alcuna nuova assunzione in qualifica analoga a quella del lavoratore licenziato".[483]

1.1.4. Il superamento del periodo di comporto:

La giurisprudenza ha di fatto creato un'autonoma fattispecie di recesso a partire dall'interpretazione dell'art. 2110 comma 2 c.c., a mente del quale la **sospensione del rapporto di lavoro in conseguenza dello stato di salute del lavoratore** non può eccedere un periodo stabilito dalla legge e denominato "periodo di comporto".

Durante tale periodo il lavoratore ha diritto alla sospensione e non può essergli intimato un licenziamento con preavviso. Il superamento di questo periodo da parte del lavoratore costituisce un'autonoma fattispecie di recesso, regolata interamente dall'art. 2110 comma 2 c.c. ,[484] norma che conferisce all'imprenditore il diritto di recedere dal contratto di lavoro «*a norma dell'art. 2118 c.c.*».

La risoluzione del rapporto non è automatica ma richiede la comunicazione scritta del recesso del datore di lavoro[485] e consente al giudice di indagare sulle ragioni del licenziamento onde escludere ipotesi di licenziamento illegittimo.[486]

Quando l'effettiva ragione del licenziamento risiede nell'infermità del lavoratore causata dall'attività lavorativa svolta, oppure nella violazione dell'obbligo di sicurezza di cui all'art. 2087 c.c.[487] da parte del datore di lavoro, il licenziamento per superamento del periodo di comporto è escluso ed il licenziamento può essere disposto "**per inidoneità lavorativa**".

L'inidoneità lavorativa configura un'ipotesi di giustificato motivo oggettivo di licenziamento. In questo caso il licenziamento è determinato da **ragioni tecniche, organizzative e produttive.** Il giudice non può

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[482] Cass. 15 luglio 2010, n. 16579, in Lav. giur., 2010, pag.1044 .

[483] Cass. 11 giugno 2014, n. 13112, Cass. Sez. Lav. 22 agosto 2003 n. 12367 e 13 agosto 2008 n. 21579.

[484] Cassazione a sezioni unite 29 marzo 1980, n. 2072, n. 2073 e n. 2074

[485] Come evidenziato da Cass. 13 luglio 2010, n. 16421, in Lav. giur., 2010, 944 il lavoratore ha la facoltà di chiedere la specificazione del computo effettuato dal datore di lavoro per calcolare il superamento del periodo di comporto.

[486] Cass. 13 dicembre 1999, n. 13992.

[487] Cass. 6 settembre 2005, n. 17780 stabilisce che grava sul lavoratore l'onere della prova circa il collegamento causale tra malattia e mansioni espletate.

sindacare la scelta dei criteri di gestione dell'impresa – essendo essa espressione della libertà di iniziativa economica tutelata dall'art. 41 Cost. Ciononostante, il giudice ha l'onere di verificare l'effettiva sussistenza del motivo addotto dal datore di lavoro nonché il raggiungimento della prova, che deve essere data dal datore di lavoro, circa l'impossibilità di una differente utilizzazione del lavoratore in mansioni diverse da quelle precedentemente svolte.[488]

1.2. Procedural requirements for legitimate dismissals

1.2.1. Obbligo della forma scritta.

L'art. 2 della l.604/1966 sancisce il requisito formale **dell'intimazione del recesso in forma scritta**. La forma scritta è elemento costitutivo del licenziamento e la data della sua comunicazione costituisce il *dies a quo* per la proposizione tempestiva del ricorso, che deve avvenire entro il termine di 60 giorni a pena di decadenza.

La legge non prevede specifiche modalità di comunicazione: qualsiasi mezzo idoneo al raggiungimento dello scopo che raggiunga effettivamente il lavoratore che ne è destinatario è sufficiente a integrare il requisito della forma scritta.

1.2.2. Obbligo di indicazione dei motivi.

L'art. 2, comma 2 (come novellato dall'art. 1 comma 37 della l. 92/2012), prevede la specificazione dei motivi che hanno determinato il licenziamento. In altre parole, la nuova disciplina sancisce un **onere di motivazione contestuale alla comunicazione del licenziamento**. La motivazione deve essere idonea a far comprendere al lavoratore le ragioni effettive del licenziamento, in modo che quest'ultimo possa tutelarsi.

Non è possibile per il datore di lavoro mutare in un momento successivo i motivi del licenziamento. Il datore di lavoro che intenda far valere ragioni diverse da quelle già addotte per il licenziamento dovrà procedere ad un nuovo atto di licenziamento (cf. sopra par. 1.1.2. e nota 12).

1.2.3. Procedura preventiva di conciliazione.

Nei casi di licenziamento per **giustificato motivo oggettivo**, il datore di lavoro che impieghi **più di 15 dipendenti** nella singola unità produttiva o nell'ambito comunale, più di **5 se imprenditore agricolo**, e in ogni caso **più di 60** nell'ambito nazionale **non può procedere al licenziamento** prima di aver esperito una **procedura di conciliazione** che consenta a tutte le parti interessate di esaminare i motivi del licenziamento (cf. art. 7 della legge n. 604/1966).

Tale procedura inizia con l'invio di una comunicazione – da parte del datore di lavoro – dell'intenzione di procedere al licenziamento, dei motivi alla base di esso e delle eventuali misure di assistenza alla ricollocazione del lavoratore. La comunicazione è diretta alla Direzione Territoriale del Lavoro del luogo dove il lavoratore presta la sua opera ma deve essere trasmessa per conoscenza anche al lavoratore.

Entro 7 giorni dalla ricezione di tale comunicazione, la Direzione territoriale del lavoro convoca il datore di lavoro e il lavoratore, affinché si incontrino dinnanzi alla Commissione provinciale di conciliazione (art.7 c.3), nel tentativo di trovare un accordo relativo alla prosecuzione del rapporto di lavoro.

Si considera validamente effettuata la comunicazione che sia recapitata al domicilio indicato nel contratto dal lavoratore oppure ad altro domicilio formalmente comunicato dal lavoratore al datore di lavoro oppure ancora nel caso in cui sia consegnata al lavoratore, il quale deve sottoscriverne copia per ricevuta (art.7 c.4).

[488] Cass. sez. lav., 03 marzo 2014 n. 4920, Cass., sez. lav., 23 gennaio 2008 n. 1438.

La convocazione può essere rinviata ad una data successiva (al massimo di 15 giorni) nel caso in cui il lavoratore dimostri il suo legittimo impedimento a presenziare (art.7 c.9).

Davanti alla Commissione di Conciliazione le parti possono farsi assistere da rappresentanti sindacali, avvocati o consulenti del lavoro (art.7 c.5).

La procedura deve concludersi entro 20 giorni dal momento in cui la Direzione territoriale del lavoro ha trasmesso la convocazione dell'incontro, fatta salva l'ipotesi in cui le parti ritengano di comune avviso di non proseguire la discussione.

Fallito il tentativo di conciliazione o decorso il termine, il datore di lavoro può comunicare il licenziamento al lavoratore (art.7 c.6).

Il licenziamento intimato all'esito della procedura descritta produce effetto dal giorno della comunicazione con cui il procedimento è stato avviato, fatto salvo l'eventuale diritto del lavoratore al preavviso o alla relativa indennità sostitutiva (il periodo di eventuale lavoro svolto in costanza della procedura si considera come preavviso lavorato).

1.3. Burden of proof and available sanctions

1.3.1. L'onere della prova

Il licenziamento illegittimo si contesta attraverso un ricorso davanti al giudice del lavoro. Si tratta di un processo civile speciale, denominato rito del lavoro, che inizia con il tentativo di conciliazione (ex art. 31 della L. 183/2010) di fronte alla Commissione di conciliazione della Direzione territoriale del lavoro. Se il tentativo di conciliazione fallisce il processo prosegue davanti al giudice del lavoro (tribunale in composizione monocratica).

Il lavoratore ha soltanto **l'onere di allegare e provare l'esistenza del rapporto di lavoro** e **l'evento di un licenziamento con determinate modalità**, mentre spetta esclusivamente al datore di lavoro comprovare i fatti che hanno determinato il suo potere di estinguere unilateralmente il rapporto di lavoro.[489]

L'art. 5 della legge n. 604/1966[490] attribuisce l'onere di provare la sussistenza della **legittimità del licenziamento** al datore di lavoro. Questa disposizione rappresenta un'eccezione alla regola generale di cui all'art. 2697 c.c.[491], in quanto comporta una parziale inversione dell'onere della prova.

1.3.2. Le sanzioni contro il licenziamento illegittimo

L'illegittimità del licenziamento comporta **due tipologie di sanzioni** che corrispondono a due regimi di tutela concorrenti: la **tutela obbligatoria** e la **tutela reale**.

La tutela obbligatoria è stabilita dal combinato disposto degli art. 8 della L. 604/1966 e 18 dello Statuto dei lavoratori.[492] La prima di queste norme stabilisce che «quando risulti accertato che non ricorrono

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[489] Cass. civ. sez. lav., 27 giugno 1994, n. 6172.

[490] Art. 5 l.604/1966: **«**L'onere della prova della sussistenza della giusta causa o del giustificato motivo di licenziamento spetta al datore di lavoro».

[491] Art. 2697 c.c.: «Chi vuol far valere un diritto in giudizio deve provare i fatti che ne costituiscono il fondamento. Chi eccepisce l'inefficacia di tali fatti ovvero eccepisce che il diritto si è modificato o estinto deve provare i fatti su cui l'eccezione si fonda».

[492] Art. 18 Statuto dei lavoratori come modificato dalla legge 28 giugno 2012, n.92: Reintegrazione nel posto di lavoro: "Il giudice, con la sentenza con la quale dichiara la nullità del licenziamento perché discriminatorio ai sensi dell'articolo 3 della legge 11 maggio 1990, n. 108, ovvero intimato in

gli estremi del licenziamento per giusta causa o giustificato motivo, il datore di lavoro è tenuto a riassumere il prestatore di lavoro entro il termine di tre giorni o, in mancanza, a **risarcire il danno** versandogli un'indennità di importo compreso tra un minimo di 2,5 ed un massimo di 6 mensilità dell'ultima retribuzione globale di fatto, avuto riguardo al numero dei dipendenti occupati, alle dimensioni dell'impresa, all'anzianità di servizio del prestatore di lavoro, al comportamento e alle condizioni delle parti. La misura massima della predetta indennità può essere maggiorata fino a 10 mensilità per il prestatore di lavoro con anzianità superiore ai dieci anni e fino a 14 mensilità per il prestatore di lavoro con anzianità superiore ai venti anni, se dipendenti da datore di lavoro che occupa più di quindici prestatori di lavoro».[493]

Il diritto al risarcimento del danno spetta ad ogni lavoratore che dimostri di essere stato licenziato illegittimamente. Diversamente, non tutti i lavoratori hanno diritto ad essere reintegrati nel posto di lavoro, in particolare a seguito della riforma n. 92 del 2012.

Il **diritto alla reintegrazione** è disciplinato dall'art. 18 L. 300/1970 (Statuto dei Lavoratori) che, nel testo originario, prevedeva che il datore di lavoro procedesse alla reintegrazione del lavoratore corrispondendogli contestualmente **tutte le retribuzioni spettanti dalla data del licenziamento a quella dell'effettiva riabilitazione**. In seguito alla riforma dell'art. 18, la tutela reale si applica

concomitanza col matrimonio ai sensi dell'articolo 35 del codice delle pari opportunità tra uomo e donna, di cui al decreto legislativo 11 aprile 2006, n. 198, o in violazione dei divieti di licenziamento di cui all'articolo 54, commi 1, 6, 7 e 9, del testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità, di cui al decreto legislativo 26 marzo 2001, n. 151, e successive modificazioni, ovvero perché riconducibile ad altri casi di nullità previsti dalla legge o determinato da un motivo illecito determinante ai sensi dell'articolo 1345 del codice civile, ordina al datore di lavoro, imprenditore o non imprenditore, la reintegrazione del lavoratore nel posto di lavoro, indipendentemente dal motivo formalmente addotto e quale che sia il numero dei dipendenti occupati dal datore di lavoro. La presente disposizione si applica anche ai dirigenti. […] Il giudice, con la sentenza di cui al primo comma, condanna altresì il datore di lavoro al risarcimento del danno subito dal lavoratore per il licenziamento di cui sia stata accertata la nullità, stabilendo a tal fine un'indennità commisurata all'ultima retribuzione globale di fatto maturata dal giorno del licenziamento sino a quello dell'effettiva reintegrazione, dedotto quanto percepito, nel periodo di estromissione, per lo svolgimento di altre attività lavorative. In ogni caso la misura del risarcimento non potrà essere inferiore a cinque mensilità della retribuzione globale di fatto. Il datore di lavoro è condannato inoltre, per il medesimo periodo, al versamento dei contributi previdenziali e assistenziali. Fermo restando il diritto al risarcimento del danno come previsto al secondo comma, al lavoratore è data la facoltà di chiedere al datore di lavoro, in sostituzione della reintegrazione nel posto di lavoro, un'indennità pari a quindici mensilità dell'ultima retribuzione globale di fatto, la cui richiesta determina la risoluzione del rapporto di lavoro, e che non è assoggettata a contribuzione previdenziale. […] Il giudice, nelle ipotesi in cui accerta che non ricorrono gli estremi del giustificato motivo soggettivo o della giusta causa addotti dal datore di lavoro, per insussistenza del fatto contestato ovvero perché il fatto rientra tra le condotte punibili con una sanzione conservativa sulla base delle previsioni dei contratti collettivi ovvero dei codici disciplinari applicabili, annulla il licenziamento e condanna il datore di lavoro alla reintegrazione nel posto di lavoro di cui al primo comma e al pagamento di un'indennità risarcitoria commisurata all'ultima retribuzione globale di fatto dal giorno del licenziamento sino a quello dell'effettiva reintegrazione, dedotto quanto il lavoratore ha percepito, nel periodo di estromissione, per lo svolgimento di altre attività lavorative, nonché quanto avrebbe potuto percepire dedicandosi con diligenza alla ricerca di una nuova occupazione.[…].

[493] Articolo così sostituito dall'art. 2, comma 3 della Legge 11 maggio 1990, n. 108.

unicamente nel caso di talune fattispecie di licenziamento illegittimo tipiche: si tratta del licenziamento **discriminatorio**[494] o **intimato in concomitanza col matrimonio.**

Per quanto riguarda le ipotesi di licenziamento **disciplinare** – per giusta causa o giustificato motivo soggettivo - o **economico** – giustificato motivo oggettivo – **nulli**, **la sanzione della reintegrazione** nel posto di lavoro si applica **solo "al datore di lavoro**, imprenditore o non imprenditore, che in ciascuna sede, stabilimento, filiale, ufficio o reparto autonomo nel quale ha avuto luogo il licenziamento occupa alle sue dipendenze più di **quindici lavoratori** o più di **cinque se si tratta di imprenditore agricolo**, nonché al datore di lavoro, imprenditore o non imprenditore, che nell'ambito **dello stesso comune** occupa più di quindici dipendenti e all'impresa agricola che nel medesimo ambito territoriale occupa più di cinque dipendenti, anche se ciascuna unità produttiva, singolarmente considerata, non raggiunge tali limiti, e in ogni caso al datore di lavoro, imprenditore e non imprenditore, che occupa più di **sessanta dipendenti**".

1.4. Recent reforms on concerning unfair dismissal laws

La principale riforma recente in materia di illegittimità dei licenziamenti è denominata "riforma Fornero" ed è stata emanata con la legge 28 giugno 2012 n. 92.

La riforma è stata approvata nel 2012 dopo una stagione di lotte sindacali accese sulla possibilità o meno di riformare *in peius* l'art. 18 dello Statuto dei lavoratori. L'obiettivo della riforma è stato quello di aumentare la c.d. flessibilità in uscita con lo scopo di ridurre la c.d. flessibilità in entrata: in effetti le difficoltà incontrate dai datori di lavoro nel licenziamento dei lavoratori a tempo indeterminato aveva comportato una **notevole riduzione delle assunzioni a tempo indeterminato**, amplificando il fenomeno del c.d. "precariato" che ha inciso profondamente e in senso fortemente negativo nel tessuto sociale italiano.[495]

Il **12 marzo 2014** il Consiglio dei ministri di Matteo Renzi ha approvato la prima parte del c.d. **Jobs act**, una nuova riforma del diritto del lavoro che mira al **rilancio dell'occupazione**.

2. Special protection for workers' representatives

Lo statuto dei lavoratori contiene all'art. 19 una disciplina particolare per i rappresentanti dei lavoratori nelle aziende.

L'art. 19 recita: "**Rappresentanze sindacali aziendali** possono essere costituite ad iniziativa dei lavoratori in ogni unità produttiva, nell'ambito […] delle associazioni sindacali che siano firmatarie di contratti collettivi di lavoro applicati nell'unità produttiva. Nell'ambito di aziende con più unità produttive le rappresentanze sindacali possono istituire organi di coordinamento."

La Corte costituzionale ha precisato che la rappresentanza sindacale aziendale può essere costituita anche nell'ambito di associazioni sindacali che, pur non firmatarie dei contratti collettivi applicati nell'unità produttiva, abbiano comunque partecipato alla negoziazione relativa agli stessi contratti quali rappresentanti dei lavoratori dell'azienda.[496]

In seguito all'accordo interconfederale del **23 luglio 1993, "Protocollo interconfederale siglato tra Governo e Parti Sociali"** concluso tra il Governo e i sindacati italiani maggiormente rappresentativi, le

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[494] Si definisce discriminatorio il licenziamento intimato per **ragioni relative alla sfera privata del lavoratore**, - al suo credo politico, religioso, alla sua **appartenenza sindacale** – e che non abbiano alcuna attinenza con le modalità e le competenze con le quali il lavoratore svolge la sua prestazione lavorativa.

[495] Si veda in argomento L. Gallino, Vite rinviate. Lo scandalo del lavoro precario, Laterza 2014.

[496] Si veda la decisione 3-23 luglio 2013, n. 231 (Gazz. Uff. 31 luglio 2013, n. 31 - Prima serie speciale).

RSA sono state progressivamente sostituite dalle **RSU**. Queste ultime sono **elette da tutti i lavoratori**, indipendentemente dalla loro iscrizione ad un sindacato, e non solo dagli iscritti ad un particolare sindacato (come le RSA). Come previsto dal protocollo, la sostituzione progressiva delle RSU è avvenuta secondo il criterio della **parità di trattamento legislativo e contrattuale tra RSU e RSA**.

I rappresentanti sindacali – così individuati – ricevono una **tutela particolare** in conseguenza della loro qualità di portatori di interessi potenzialmente confliggenti con quelli del datore di lavoro. La discriminazione di questi soggetti integra una condotta **plurioffensiva** in quanto lesiva, da una parte, dei **diritti del lavoratore** e, dall'altra, **della libertà sindacale che è un bene costituzionalmente protetto.**

2.1. Protezione dell'attività sindacale delle RSU

L'art. 15 dello Statuto dei Lavoratori pone il principio della non discriminazione per ragioni politiche, religiose, sindacali**,** di razza, lingua e di sesso e sancisce la nullità di qualsiasi atto discriminatorio e in particolare di «qualsiasi patto od atto diretto a: a) subordinare l'occupazione di un lavoratore alla condizione che aderisca o non aderisca ad una associazione sindacale ovvero cessi di farne parte; b) licenziare un lavoratore, discriminarlo nella assegnazione di qualifiche o mansioni, nei trasferimenti, nei provvedimenti disciplinari, o recargli altrimenti pregiudizio a causa della sua affiliazione o attività sindacale ovvero della sua partecipazione ad uno sciopero».[497]

L'art. 23 dello Statuto dei lavoratori attribuisce ai dirigenti delle rappresentanze sindacali il **diritto a permessi retribuiti per l'espletamento del loro mandato**.

In particolare, ai sensi dell'art. 23: «Salvo clausole più favorevoli dei contratti collettivi di lavoro hanno diritto ai permessi di cui al primo comma almeno: a) un dirigente per ciascuna rappresentanza sindacale aziendale nelle unità produttive che occupano fino a 200 dipendenti della categoria per cui la stessa è organizzata; b) un dirigente ogni 300 o frazione di 300 dipendenti per ciascuna rappresentanza sindacale aziendale nelle unità produttive che occupano fino a 3.000 dipendenti della categoria per cui la stessa è organizzata; c) un dirigente ogni 500 o frazione di 500 dipendenti della categoria per cui è organizzata la rappresentanza sindacale aziendale nelle unità produttive di maggiori dimensioni, in aggiunta al numero minimo di cui alla precedente lettera b). I permessi retribuiti […] non potranno essere inferiori a otto ore mensili nelle aziende di cui alle lettere b) e c) del comma precedente; nelle aziende di cui alla lettera a) i permessi retribuiti non potranno essere inferiori ad un'ora all'anno per ciascun dipendente. Il lavoratore che intende esercitare il diritto [al permesso retribuito] deve darne comunicazione scritta al datore di lavoro di regola 24 ore prima, tramite le rappresentanze sindacali aziendali».

L'art. 24 dello Statuto dei lavoratori attribuisce inoltre alle RSU il **diritto ad ottenere permessi *non* retribuiti per l'espletamento del loro mandato**.[498]

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[497] Si veda il Rapporto del Governo italiano sull'applicazione della Convenzione n.135/1971 concernente "Rappresentanti dei lavoratori", http://www.lavoro.gov.it/AreaLavoro/Tutela/Documents/rapporto2009conv135_1971rappresentantideilavoratori.pdf .

[498] Art. 22 l. 300/1970: «i dirigenti sindacali aziendali di cui all'articolo 23 hanno diritto a permessi non retribuiti per la partecipazione a trattative sindacali o a congressi e convegni di natura sindacale, in misura non inferiore a otto giorni all'anno.I lavoratori che intendano esercitare il diritto di cui al comma precedente devono darne comunicazione scritta al datore di lavoro di regola tre giorni prima, tramite le rappresentanze sindacali aziendali».

Ulteriori permessi sono attribuiti ai componenti degli **organi direttivi, provinciali e nazionali**, delle RSU dagli art. 30 e 31 dello Statuto per permettere loro di adempiere agli incarichi connessi alle cariche che rivestono.

2.2. Diritto del dirigente della RSU a non essere trasferito

L'art. 22 dello Statuto dei lavoratori prevede che i dirigenti delle RSA **non possano essere trasferiti** in altra unità dell'azienda **se non previo nulla osta delle associazioni sindacali di appartenenza**.[499]

Secondo una giurisprudenza consolidata deve includersi nella nozione di "trasferimento" qualsiasi ipotesi «spostamento […] all'esterno o all'interno dell'unità produttiva per la quale è stata costituita la rappresentanza sindacale aziendale, […] effettuato in circostanze di tempo e con modalità tali da pregiudicare il corretto esercizio della funzione di cui essi (i lavoratori) sono investiti, in seno a tali organismi sindacali o la limitata stabilità del posto di lavoro nell'ambito della ripetuta unità produttiva».[500]

Il datore di lavoro può tuttavia provare che il trasferimento della RSA risponde a un interesse oggettivo dell'unità produttiva, al fine di vincere il *fumus* che sia stato deciso a scopo di ritorsione o, comunque, al fine di contrastare lo svolgimento dell'attività sindacale.

In ogni caso, il lavoratore è adeguatamente tutelato dalla previsione legislativa circa la totale **libertà del sindacato di rifiutare la concessione del nullaosta** per il trasferimento del proprio rappresentante.

2.3. Speciale protezione contro il licenziamento dei dirigenti delle RSU

A mente dell'art. 18, comma 11 e ss.: "Nell'ipotesi di **licenziamento** [dei dirigenti delle RSU], su **istanza congiunta del lavoratore e del sindacato** cui questi aderisce o conferisca mandato, il giudice, in ogni stato e grado del giudizio di merito, può disporre con ordinanza, quando ritenga irrilevanti o insufficienti gli elementi di prova forniti dal datore di lavoro, la reintegrazione del lavoratore nel posto di lavoro. L'ordinanza […] può essere impugnata con **reclamo immediato** al giudice medesimo che l'ha pronunciata. […] L'ordinanza può essere revocata con la sentenza che decide la causa. Nell'ipotesi di licenziamento [dei dirigenti delle RSU], il datore di lavoro che non ottempera alla sentenza […] ovvero all'ordinanza […], non impugnata o confermata dal giudice che l'ha pronunciata, è tenuto anche, per ogni giorno di ritardo, al **pagamento a favore del Fondo adeguamento pensioni** di una somma pari all'importo della retribuzione dovuta al lavoratore.

3. Sanctions available and application in practice

Il licenziamento illegittimo del dirigente delle RSU integra – inoltre – **una condotta antisindacale** in violazione dell'art. 28 dello Statuto dei lavoratori.[501]

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[499] Art. 22 l. 300/1970: «Il trasferimento dall'unità produttiva dei dirigenti delle rappresentanze sindacali aziendali di cui al precedente articolo 19, dei candidati e dei membri di commissione interna può essere disposto solo previo nulla osta delle associazioni sindacali di appartenenza. Le disposizioni di cui al comma precedente ed ai commi quarto, quinto, sesto e settimo dell'articolo 18 si applicano sino alla fine del terzo mese successivo a quello in cui è stata eletta la commissione interna per i candidati nelle elezioni della commissione stessa e sino alla fine dell'anno successivo a quello in cui è cessato l'incarico per tutti gli altri.»

[500] Si veda già Cass. 18 novembre 1975, n.3875, in Mass. Giur. Lav., 1976, pag.28 .

[501] G. Zangari, Licenziamento, Enciclopedia del Diritto, XXIV, 1974, n° 17.

Il sindacato ha una propria legittimazione ad agire per censurare il licenziamento discriminatorio del suo rappresentante in quanto qualificabile "**condotta antisindacale**".

In particolare, l'art. **28** dello Statuto dei lavoratori sancisce che: "Qualora il datore di lavoro ponga in essere comportamenti diretti ad impedire o limitare l'esercizio della libertà e della attività sindacale nonché del diritto di sciopero, su ricorso degli organismi locali delle associazioni sindacali nazionali che vi abbiano interesse, il [Tribunale in composizione monocratica] del luogo ove è posto in essere il comportamento denunziato, nei due giorni successivi, convocate le parti ed assunte sommarie informazioni, qualora ritenga sussistente la violazione di cui al presente comma, **ordina al datore di lavoro, con decreto motivato ed immediatamente esecutivo, la cessazione del comportamento illegittimo e la rimozione degli effetti. L'efficacia esecutiva del decreto non può essere revocata** fino alla sentenza con cui il [Tribunale in composizione monocratica] in funzione di giudice del lavoro definisce il giudizio instaurato a norma del comma successivo. Contro il decreto che decide sul ricorso è ammessa, entro 15 giorni dalla comunicazione del decreto alle parti, **opposizione** davanti al [Tribunale in composizione monocratica] in funzione di giudice del lavoro che decide con sentenza immediatamente esecutiva. […] Il datore di lavoro che non ottempera al decreto, di cui al primo comma, o alla sentenza pronunciata nel giudizio di opposizione **è punito ai sensi dell'articolo 650 del codice penale**. L'autorità giudiziaria ordina la **pubblicazione della sentenza penale di condanna** nei modi stabiliti dall'articolo 36 del codice penale.

L'art.28 Statuto mira a garantire una tutela effettiva sotto un duplice aspetto: anzitutto attraverso la **brevità temporale del procedimento**, inoltre stabilendo **l'immediata esecutività** dei provvedimenti, e inoltre prevedendo **sanzioni fortemente stigmatizzanti** in caso di inottemperanza del datore di lavoro alle pronunce del giudice.

La tutela contro la condotta antisindacale avviene pertanto su diversi piani e comprende una tutela inibitoria – la cessazione immediata della condotta – e una tutela ripristinatoria – il ritorno allo *status quo ante*. Queste tutele sono state inoltre rafforzate dalla previsione di una misura coercitiva indiretta, la quale, pur essendo di carattere generale, è esplicitamente richiamata dalla disciplina giuslavoristica: si tratta dell'art. 650 del codice penale che punisce: «chiunque non osserva un provvedimento legalmente dato dall'Autorità per ragione di giustizia o di sicurezza pubblica, o di ordine pubblico o d'igiene» stabilendo la pena dell'**arresto fino a tre mesi** «se il fatto non costituisce un più grave reato» o una **sanzione penale pecuniaria** - l'ammenda – fino ad un massimo di 206 euro.

4. Constitutional basis for collective representation of workers

La libertà sindacale si fonda principalmente sull'art. 39 della Costituzione italiana, che sancisce che «**l'organizzazione sindacale è libera**». La libertà sindacale postula, da un lato, l'astensione dello Stato da ogni ingerenza nei confronti dell'attività sindacale e, dall'altro, la non ingerenza del datore di lavoro.

La libertà sindacale deve essere intesa come un **diritto soggettivo assoluto**, che incontra un unico limite nell'art. 17 dello Statuto dei lavoratori[502] che vieta di costituire sindacati di comodo, evidenziando il distacco dal modello corporativo del precedente Stato fascista.[503]

[502] Art. 17 l.300/1970, Sindacati di comodo: «È fatto divieto ai datori di lavoro e alle associazioni di datori di lavoro di costituire o sostenere, con mezzi finanziari o altrimenti, associazioni sindacali di lavoratori».

[503] L'ordinamento corporativo fu istituito dal regime fascista con la legge 3 aprile 1926 n.563, la quale prevedeva il *sindacato unico* (art. 6 c.3: *«non può essere riconosciuta legalmente, per ciascuna categoria di datori di lavoro, lavoratori artisti o professionisti, che una sola associazione»)*; questo sindacato era riconosciuto come persona giuridica di diritto pubblico, e ciò consentiva un penetrante controllo da parte dello Stato.

L'art. 39 rappresenta un corollario dell'art. 18 della Costituzione, che tutela le formazioni sociali: «I cittadini hanno diritto di associarsi liberamente, senza autorizzazione, per fini che non sono vietati ai singoli dalla legge penale. Sono proibite le associazioni segrete e quelle che perseguono, anche indirettamente, scopi politici mediante organizzazioni di carattere militare».

L'art. 39 va oltre il fenomeno associativo, in quanto, da una parte, garantisce **al singolo soggetto** la **libertà di appartenere al sindacato** e **di concorrere,** direttamente o indirettamente, alla sua formazione e, dall'altra, **all'organizzazione sindacale** di esercitare la propria attività, senza trovare ostacoli per il raggiungimento dei suoi fini e per l'efficacia della disciplina collettiva dei rapporti di lavoro.

Sull'art. 39 si fonda anche il principio del **pluralismo sindacale**.

L'art. 39 garantisce anche la **libertà sindacale negativa**, e cioè il diritto del lavoratore di non aderire ad alcuna organizzazione sindacale o alle attività da essa promosse.

A questo proposito l'art.15, lett. a, dello Statuto dei lavoratori, stabilisce la nullità di «qualsiasi patto od atto diretto a subordinare l'occupazione di un lavoratore alla condizione che aderisca o non aderisca ad una associazione sindacale ovvero cessi di farne parte».[504]

L'art. 39 contiene inoltre, al secondo comma, una norma programmatica che non ha mai trovato attuazione: «Ai sindacati non può essere imposto altro obbligo se non la loro registrazione presso uffici locali o centrali, secondo le norme di legge. E` condizione per la registrazione che gli statuti dei sindacati sanciscano un ordinamento interno a base democratica. I sindacati registrati hanno personalità giuridica. **Possono**, rappresentati unitariamente in proporzione dei loro iscritti, **stipulare contratti collettivi di lavoro con efficacia obbligatoria per tutti gli appartenenti alle categorie alle quali il contratto si riferisce**».

La norma è diventata lettera morta, per cause sia di carattere politico che tecnico, nella parte in cui prevede l'obbligo di registrazione, mentre è "viva" l'ultima parte della norma che prevede la validità erga omnes dei contratti collettivi.[505]

Si è infatti voluto **evitare qualsiasi controllo da parte di istanze pubbliche sul sindacato**. La mancata attuazione della seconda parte dell'art. 39 Cost. ha consentito alle organizzazioni sindacali di agire secondo modelli via via diversi, influenzati dall'evoluzione del contesto politico, economico e sociale nel quale le relazioni industriali si svolgono.

Questo stato di cose si riflette nella disciplina della contrattazione collettiva che trova fondamento essenzialmente sulla **prassi**, dal momento che il sindacato **non ha personalità giuridica** ed è quindi qualificato semplicemente quale **parte sociale**.

A coronamento del sistema vi fu l'istituzione, con legge 5 febbraio 1934, n.163, delle *corporazioni* , enti di diritto pubblico di rango superiore, che, riunendo al proprio interno le associazioni sindacali contrapposte, avrebbero dovuto realizzare l'armonica composizione dei conflitti tra fattori della produzione. L'ordinamento corporativo fu infine soppresso con r.d.l. 9 agosto 1943, n.72. Cf. G. Giugni, Diritto sindacale, 2007, pag.23.

[504] Giugni, Diritto sindacale, Cacucci, 2007, pag. 34.

[505] Giugni, op. cit., pag.50 .

5. Role of collective work relations

5.1 Institutions and legal means of collective action

L'art. 40 della Costituzione italiana garantisce **il diritto di sciopero** entro i limiti previsti dalla legge italiana. Il diritto di sciopero incontra diversi tipi di limiti il più importante dei quali deriva dalla necessità di programmare lo sciopero in modo da **garantire i servizi pubblici essenziali** ai cittadini.

Il contratto collettivo è il contratto con cui le c.d. **parti sociali** - organizzazioni sindacali dei lavoratori e dei datori di lavoro o singolo datore di lavoro - predeterminano la disciplina dei rapporti individuali di lavoro e regolano taluni tratti dei loro rapporti reciproci. Il contratto collettivo è valido **erga omnes** e non soltanto a favore degli iscritti al sindacato, come stabilito dall'art. 39, comma 2, della Costituzione italiana. La regola esprime un principio fondamentale in tema di libertà sindacale.

L'ordinamento italiano ha visto avvicendarsi vari tipi di contratto collettivo: il contratto collettivo corporativo, il contratto collettivo previsto all'art. 39, comma 2 ss. Cost., il contratto collettivo recepito nel decreto legislativo emanato ai sensi della legge n. 741/1959 (c.d. legge Vigorelli) e il contratto collettivo di diritto comune.

Nessun quadro normativo specifico di riferimento esiste con riferimento alla **contrattazione collettiva di diritto comune**, che è l'unica oggi utilizzata.

Una legge *ad hoc* in materia esiste solo per il settore pubblico: si tratta del D. Lgs. 30 marzo 2001, n. 165 rubricato "**Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche**".[506]

Il sistema sindacale italiano si regge quindi sul combinato disposto delle seguenti norme: l'art. 39, c. 1, Cost.; le norme del **codice civile** (libro IV, tit. II e alcune norme del libro V, tit. I, capo III sul contratto collettivo corporativo); l'art. 19 dello **Statuto dei lavoratori** (sulla rappresentanza e la rappresentatività nei luoghi di lavoro ai fini del godimento dei diritti sindacali); e persino su vari **accordi sindacali**, che siano Protocolli triangolari, Accordi interconfederali stipulati dalle maggiori confederazioni e associazioni sindacali unitariamente. Tra questi ultimi vanno ricordati il Protocollo del 23 luglio 1993; l'Accordo interconfederale del 20 dicembre 1993; l'Accordo quadro del 22 gennaio 2009; Accordo interconfederale del 15 aprile 2009; l'Accordo interconfederale del 28 giugno 2011; l'Accordo 21 settembre 2011.

La legge 30 dicembre 1986 n. 936 ha istituito **l'Archivio Nazionale dei contratti collettivi di lavoro** presso il CNEL – Consiglio Nazionale Economia e Lavoro – della Repubblica Italiana.[507]

In particolare, è stato per primo il Protocollo del 23 luglio 1993 a prevedere specifiche procedure di contrattazione collettiva e il **modello di contrattazione** è stato ridefinito da due accordi del 2009 (22 gennaio 2009 e 30 Aprile 2009).

La struttura contrattuale viene sviluppata su due livelli: l'uno **nazionale di categoria** e l'altro alternativamente **aziendale o territoriale**. La durata dei contratti è quadriennale, salvo che per la parte retributiva del contratto nazionale che ha, invece, durata biennale.[508]

Il 28 giugno 2011 è stato stipulato un accordo interconfederale unitario, in cui si prevede espressamente che i contratti collettivi aziendali possono modificare le "regolamentazioni contenute

[506] GU n.106 del 9-5-2001 - Suppl. Ordinario n. 112.

[507] L'archivio è contenuto nel sito del CNEL http://www.cnel.it/347?contrattazione_testo=37.

[508] Giugni, Diritto Sindacale, 2007, pag.162 .

nei contratti collettivi nazionali di lavoro", sebbene "nei limiti e con le procedure previste dagli stessi contratti collettivi nazionali di lavoro", al fine di "assicurare la capacità dei contratti di aderire alle esigenze degli specifici contesti produttivi". Si sono poste così le basi per una crescente diversificazione della disciplina del contratto di lavoro nelle singole imprese, a seconda degli interessi delle parti e dei reciproci rapporti di forza.[509]

Per quanto riguarda la stipulazione di contratti in deroga **peggiorativa**, si conferma il modello della **derogabilità controllata**, ossia subordinata al rispetto di tre condizioni: la sussistenza di **obiettivi economici ragionevoli** - quali la gestione di situazioni di crisi, la promozione dello sviluppo economico e/o occupazionale dell'impresa ecc.; la limitazione delle deroghe alle norme che "disciplinano la **prestazione lavorativa, gli orari e l'organizzazione del lavoro**"; l'attribuzione della legittimazione a stipulare accordi aziendali derogatori alle sole **rappresentanze sindacali (RSA o RSU) d'intesa con le organizzazioni sindacali territoriali** firmatarie del nuovo AL.[510]

Il **21 novembre 2012**, un ulteriore accordo sulle *Linee programmatiche per la crescita della produttività e della competitività in Italia* non è stato sottoscritto dalla principale organizzazione sindacale italiana, la **CGIL.** L'accordo conferma il sistema precedente fondato sulla distinzione tra contrattazione di primo e di secondo livello ma rafforza questo secondo tipo di contrattazione [511].

Secondo **l'ISTAT**, alla fine di gennaio 2014 i contratti collettivi nazionali di lavoro in vigore per la parte economica riguardano il **33,8% degli occupati** dipendenti.

5.2 Collective work relations in practice

In Italia, il sindacato si è storicamente organizzato su base **ideologica**: sono tre le maggiori organizzazioni sindacali italiane: la CGIL, di ispirazione comunista, la UIL, di ispirazione socialista, la CISL, di ispirazione cattolica. Vi è, tuttavia, un altro modello organizzativo, quello della c.d. ***craft union*** – in italiano sindacato di mestiere - che associa i lavoratori svolgenti la stessa attività e, inoltre, il ***sindacato per ramo d'industria***, fondato sul tipo di attività esercitata dal datore di lavoro.

Tra questi ultimi, in Italia ha un ruolo importante la FIOM-CGIL il sindacato del settore metalmeccanico che fa capo alla CGIL.

Oltre ai sindacati confederati, esistono sindacati autonomi, i quali esprimono interessi riferiti a particolari categorie di lavoratori. Essi sono pur sempre organizzati in confederazioni nazionali tra cui la CISAL (Confederazione Italiana Sindacati Autonomi Lavoratori) e la CONFSAL (Confederazione Italiana Sindacati Autonomi Lavoratori).

Gli iscritti che le principali confederazioni dichiaravano di avere nel 2010 sono: CGIL: 5.748.269, CISL: 4.542.354, UIL: 2.184.911.

Questi dati sono però contestati dalle altre parti sociali e, per le ragioni storiche già evocate, non è possibile avere a disposizione dati certi.

In definitiva, le relazioni industriali italiane sono caratterizzate da un **dialogo costante** tra parti sociali contrapposte e governo, anche se si può registrare una **tendenza recente alla decentralizzazione della contrattazione**.

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[509] Giugni, Diritto sindacale, Cacucci, Bari, 2010, Appendice di aggiornamento 2013, pag.7 .

[510] Giugni, op. cit., pag.8 .

[511] Giugni, op. cit., pag.19 .

E. SLOVAKIA

1. General overview of legal protection against unfair dismissal

The constitutional framework

The constitutional framework for labour relations issues, including the termination of employment relationships, is represented by the Constitution of the Slovak Republic, Act No. 460/1992 Coll. as amended,[512] where **Article 35** paragraph 3 enshrines the right to work and lays down the obligation of the state to provide adequate material support to those citizens who are unable to exercise that right without a fault of their own. **Article 36** of the Constitution lays down the right of workers to be protected against arbitrary dismissal[513] and discrimination in employment:

> "Article 35
> (1) Everyone has the right to a free choice of profession and to training for it, as well as the right to engage in entrepreneurial or other gainful activity.
> (2) Conditions and restrictions with regard to the execution of certain professions or activities may be laid down by law.
> (3) Citizens have the right to work. The state shall materially and to an appropriate extent provide for citizens who are unable to exercise this right through no fault of their own. The conditions shall be laid down by law.
> (4) A different regulation of rights listed under paragraphs 1 to 3 may be laid down by law for foreign nationals."
>
> "Article 36
> Employees have the right to just and satisfying working conditions. The law guarantees, above all
> a) the right to remuneration for work done, sufficient to ensure them a dignified standard of living,
> b) protection against arbitrary dismissal and discrimination at the work place,
> c) labor safety and the protection of health at work,
> d) the longest admissible working time,
> e) adequate rest after work,
> f) the shortest admissible period of paid leave,
> g) the right to collective bargaining."

Key sources

The principal source of labour law is the **Labour Code**[514] which, along with the **Civil Code,**[515]regulates, in a comprehensive manner, labour relationships. The Civil Code which has a subsidiary validity in relation to the general part of the Labour Code. The Labour Code applies to business activities in general and, in a subsidiary manner, to public servants (e.g. teachers). The domain of public service is regulated under Public Service Act[516] No. 313/2001 Coll. and that of civil service by Civil Service Act[517] No. 312/2001 Coll. All three laws of 2001 governing labour relations have one feature in common – they have been frequently amended. This legal situation continues today. An updated version of the Laws can be found on the home page JASPI (*Jednotný automatizovaný systém právnych informácií*) of the Slovak Ministry of Justice.[518]

Besides the above-mentioned laws, the following normative legal acts have **significance for labour relations**: Act No. 2/1991 Coll. on Collective Bargaining, Act No. 461/2003 Coll. on Social Insurance, Act

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[512] Constitution of the Slovak Republic No. 460/1992 Coll.

[513] Čič M a kolektiv, Komentár k Ustave Slovenskej Republiky, Matica slovenská 1997 pp. 179 – 191.

[514] Slovak Labour Code No. 311/2001 Coll.

[515] Civil Code No. 40/1964 Coll.

[516] Public Service Act No. 313/2001 Coll.

[517] Civil Service Act No. 312/2001 Coll.

[518] http://jaspi.justice.gov.sk/jaspiw1/jaspiw_mini_fr0.htm

No. 5/2004 Coll. on Employment Services, Act No. 552/2003 Coll. on the Performance of Work in the Public Interest, Act No. 553/2003 Coll. on Compensation for Certain Employees in the Performance of Work in the Public Interest, amending and supplementing certain other laws, Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, amending and supplementing certain other laws (non-discrimination law), Act No. 420/2004 Coll. on Mediation, Act No. 125/2006 Coll. on Labour Inspection, Act No. 124/2006 Coll. on Safety and Hygiene at Work and Code of Civil Procedure – Act No. 99/1963 Coll.

Some aspects of termination of employment are addressed, in particular, in Directive 75/129/EEC on collective redundancies.

In the Slovak legal system, the **case law of courts** does not have the character of a source of law, although it is generally adhered to by lower courts. Regarding termination of employment relationships, the most extensive case law concerns **termination at the initiative of the employer** on structural grounds and on disciplinary grounds related to the conduct of the employee.

Terminology

As regards the terminology used in connection with termination of employment, the Slovak Labour Code does not make any distinction between a notice given by the employer ("dismissal") and a notice given by the employee ("resignation"). The Slovak Labour Code uses only one term for the termination of the employment relationship after the lapse of the period of notice – i.e. **the notice**. Besides giving notice, the Slovak Labour Code enables the employer or the employee to unilaterally terminate their employment relationship with immediate effect. Reference to this way of terminating an employment relationship is, under the Slovak Labour Code, known as the "immediate termination of the employment relationship".

An employer must make the immediate termination of an employment relationship in writing, wherein he must define the reason in terms of deed in such a way that no confusion with another reason can be possible, this to be delivered to the employee within the determined term, or it will otherwise be deemed invalid. The stated reason may not be subsequently amended. The provisions of the Slovak labour law governing termination of employment have **a cogent character**.[519] According to § 59 of Labour Code, an employment relationship may be terminated by agreement, by notice, by immediate termination or by termination within a probationary period.[520] In certain cases, the employment relationship is terminated on the basis of a legal event, in which case there is no need for a legal act to effect termination. Such legal events may include the lapse of a certain time period, or completion of a certain task. An important legal event is also the death of the employee. By analogy with other legal acts, the giving of notice - as the most important unilateral legal act under labour law - is invalid if it does not meet all the requisites of a legal act, i.e. when it is in conflict with the law, it circumvents the law, or it is in conflict with good morals.[521]

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[519] Barancová H., Zákonník práce, Komentár, 2.ed., C.H.Beck 2010, pp. 422 et sequentia

[520] These are cogent provisions of the Labour Code and, as such, must be complied with in collective agreements and employment contracts. Thus, a collective agreement or an employment contract may not extend the grounds for termination over and above those laid down in the Labour Code.

[521] § 59 of Labour Law "Termination of employment relationship:
"(1) An employment relationship may be terminated
a) by agreement,
b) by notice,
c) by immediate termination,
d) by termination within a probationary period.
(2) An employment relationship concluded for a fixed period shall terminate upon expiry of the agreed period.

1.1. Substantive reasons for legitimate dismissals

1.1.1. Individual dismissals for non-economic reasons

The employer may give notice to an employee **only on the grounds explicitly set** out in § 63 Section 1 of the Labour Code.[522] This is a **cogent provision of the Labour Code,** which does not allow narrowing down or expanding the range of grounds for the notice. The employer must substantively **define the grounds** for the notice in the notice itself, clearly distinguishing them from other grounds. According to § 61 paragraph 2 of the Labour Code, the reason for giving **notice must be formulated in a sufficiently concrete manner** so that it may not be confused with a different reason; otherwise the notice is invalid.[523] **No additional alteration** of the grounds for the notice is allowed. An employer may, according to § 63 of the Labour Code, give notice to an employee only for the following reasons: if the employer or part thereof, is wound-up or relocated, if an employee becomes redundant by virtue of the employer or competent body issuing a written resolution on change in duties, technical equipment or reduction in the number of employees with the aim of securing work efficiency, or due to other organisational changes.[524]

An employer may further give notice if a **medical opinion** states that the employee's health condition has caused the long term loss of his/her ability to perform his/her previous work or if he/she can no longer perform such work as a result of an occupational disease or the risk of such a disease, or if he/she has already received the maximum permitted level of exposure in the work place as determined by a decision of a competent public health body. According to the same provision of the Labour Code, an employer may give notice to an employee if an employee **does not meets the preconditions set by legal regulations** for the performance of the agreed work, or does not fulfil due to no fault of the employer, the requirements for the proper performance of the agreed work determined by special regulation or by the employer in internal regulations, or does not satisfactorily fulfil the work tasks, and the employer has in the preceding two months challenged him in writing to rectify the insufficiencies, and the employee failed to do so within a reasonable period of time, and if there are reasons on the part of the employee, for which the employer might immediately terminate the employment relationship with him/her, or by virtue of less grave breaches of labour discipline; **for less**

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(3) An employment relationship of an alien or stateless person shall terminate, unless terminated by other means, upon the day
a) his residency within the territory of the Slovak Republic is due to terminate pursuant to an executable ruling on the forfeiture of residence permit,
b) a verdict imposing the sentence of expulsion from the territory of the Slovak Republic on such person entered into force,
c) of expiration of the period for which the residence permit on the territory of the Slovak Republic was issued.
(4) An employment relationship shall terminate upon the death of the employee."

[522] Barancová H., Zákonník práce, Komentár, 2.ed., C.H.Beck 2010, pp. 443 et sequentia.

[523] § 62 of the Labour Code lays down the minimum length of notice. In case of notice, employment relationship is terminated after the lapse of the notice period which is identical for the employee and the employer and may not be shorter than two months. The period of notice starts running on the first day of the month following the date of the notice.
In case the notice is given at the initiative of the employer, the employee who has worked no less than five years for the employer is entitled to an at least three-month notice.
By setting out only a minimum notice period without defining its maximum length the Labour Code creates a real space for collective bargaining and for enacting a more favourable exercise of such rights under the labour law in a collective agreement. Since most business entities in the Slovak Republic have no social partner, they are not able of making real use of this possibility offered by the Labour Code through a collective agreement. Grounds for the notice have no influence on the length of the notice.

[524] Barancová H., Zákonník práce, Komentár, 2.ed., C.H.Beck 2010, pp. 443 et sequentia

grave breaches of labour discipline, the employee may be given a notice if, with respect to a breach of labour discipline, he/she has been warned in writing within the previous six months as to the possibility of dismissal.

An employer may give an employee notice, unless given on grounds of unsatisfactory fulfilment of working tasks, for less serious breaches of labour discipline or for reasons for which immediate termination of employment relationship is applicable, only in such case where the employer does not have **the possibility to further employ the employee** (not even for a reduced working time) in the place which was agreed as the place of work performance, or the employee is not willing to shift to other work appropriate to him offered to him/her by the employer at the place of work agreed as the place of work performance or undertake the necessary training for this other work.[525]

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[525] Notice given by employer according to § 63 of the Labour Code:
"(1) An employer may give notice to an employee only for the following reasons:
a) if the employer or part thereof, is wound-up or relocated,
b) if an employee becomes redundant by virtue of the employer or competent body issuing a written resolution on change in duties, technical equipment or reduction in the number of employees with the aim of securing work efficiency, or on other organisational changes,
c) a medical opinion states that the employee's health condition has caused the long term loss of his/her ability to perform his/her previous work or if he/she can no longer perform such work as a result of an occupational disease or the risk of such an disease, or if he/she has already received the maximum permitted level of exposure in the work place as determined by a decision of a competent public health body,
d) an employee:
1. does not meets the preconditions set by legal regulations for the performance of the agreed work,
2. ceases to fulfil the requirements pursuant to § 42 paragraph (2),
3. does not fulfil due to no fault of the employer, the requirements for the proper performance of the agreed work determined by special regulation or by the employer in internal regulations, or
4. does not satisfactorily fulfil the work tasks, and the employer has in the preceding two months challenged him in writing to rectify the insufficiencies, and the employee failed to do so within a reasonable period of time,
e) if there are reasons on the part of the employee, for which the employer might immediately terminate the employment relationship with him/her, or by virtue of less grave breaches of labour discipline; for less grave breaches of labour discipline, the employee may be given a notice if, with respect to breach of labour discipline, he/she has been cautioned in writing within the previous six months as to the possibility of notice.
(2) An employer may give an employee notice, unless given on grounds of unsatisfactory fulfilment of working tasks, for less serious breach of labour discipline or for reasons for which immediate termination of employment relationship is applicable, only in such case where
a) the employer does not have the possibility to further employ the employee, not even for a reduced working time, in the place which was agreed as the place of work performance,
b) the employee is not willing to shift to other work appropriate to him offered to him/her by the employer at the place of work agreed as the place of work performance or undertake the necessary training for this other work.
(3) Conditions may be agreed in a collective agreement for the performance of the employer's duty under paragraph (2) or excluding the performance of this duty.
(4) An employer, due to breach of labour discipline or for reason immediate termination of employment relationship, may only give notice to an employee within a period of two months from the day the employer became acquainted with the reason for notice, and breaching of labour discipline in abroad, within two months from the employee's return from abroad, this always within one year from the day when the reason for notice occurred.
(5) Where, within the period of two months stipulated in paragraph (4), the employee's conduct in which breach of labour discipline may be witnessed becomes the subject of proceedings of another body, notice may still be given within two months from the day when the employer became acquainted with the outcome of such proceedings.
(6) If the employer intends to give a notice to an employee on grounds of breach of labour discipline, he/she shall be obliged to acquaint the employee with the reason for such and enable him to give his/her statement on this."

An employer may also, according to § 68 of the Labour Code, terminate an employment relationship exceptionally, **only in cases** where the employee was lawfully sentenced for committing a wilful offence, or was in serious breach of labour discipline.[526]

1.1.2. Two categories of economic reasons for a notice

The Slovak Labour Code recognises two categories of economic reasons for a notice on the part of the employer:

- reason for a notice pursuant to § 63 paragraph 1(a) of the Labour Code (winding up or relocation of the employer)
- reason for a notice pursuant to § 63 paragraph 1(b) of the Labour Code (redundancy).[527]

An **employer may give notice** pursuant to Section 63 paragraph 1 (a) of the Labour Code for the following four categories of reasons: (1) **winding** up of the employer without legal succession,(2) winding up of a part of the employer, (3) **relocation** of the employer as a whole, and (4) relocation of a part of the employer.

In the case of a winding up of the entire employing entity (i.e. its dissolution as a legal entity), the employer **no longer has an objective possibility** to continue employing his employees. Since the winding up of the employing entity does not automatically lead to the termination of employment relationships, the employer is obliged to terminate employment relationships of his employees before the dissolution becomes final and ensure that their **notice periods come to term before the dissolution date**.[528]

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[526] Immediate termination of employment relationship according to § 68 of the Labour Code
"(1) An employer may terminate an employment relationship exceptionally, only in cases where the employee
a) was lawfully sentenced for committing a wilful offence,
b) was in serious breach of labour discipline.
(2) An employer may, pursuant to paragraph (1) immediately terminate the employment relationship only within a term of two months from the day that he/she became acquainted with the reason for immediate termination, however by the maximum of one year from the day such reason occurred. The provisions of § 63, paragraphs (4) and (5) shall equally apply to the commencement and lapse of this term.
(3) An employer cannot immediately terminate the employment relationship of a pregnant employee, a female employee on maternity leave, or a female or male employee on parental leave, with a lone female or male employee caring for a child younger than three years of age, or with an employee who personally cares for a close person who is a person with severe disability. An employer may however, terminate an employment relationship with them by giving notice, except for an female employee on maternity leave and male employee on parental leave (§ 166, paragraph (1)), for reasons stipulated in paragraph (1)."

[527] Notice given by employer for economic reasons according to § 63 of the Labour Code:
"(1) An employer may give notice to an employee only for the following reasons:
a) if the employer or part thereof, is wound-up or relocated,
b) if an employee becomes redundant by virtue of the employer or competent body issuing a written resolution on change in duties, technical equipment or reduction in the number of employees with the aim of securing work efficiency, or on other organizational changes…"

[528] According to the § 29 of the Labour Code an employer is obliged, no later than one month prior to the transfer of rights and obligations arising from labour-law relations, to inform the employees' representatives, and if no employees' representatives operate at the employer, the employees directly in writing on a) the date or proposed date of transfer, b) reasons thereof, c) labour-law, economic and social implications of the transfer with respect to employees, d) projected measures of the transfer affecting employees. With a view to achieving consensus, an employer is obliged, at the latest one month prior to implementation of measures affecting employees, to negotiate such measures with the employees' representatives.

In the case of winding up of the entire employing entity, the employer has no objective possibility to offer his employees other suitable work (§ 63 Section 2 of the Labour Code). **No protective period** pursuant to § 64 of the Labour Code (prohibition of termination for workers' categories enjoying special protection) or to § 66 of the Labour Code (concerning prior consent by the competent office of labour, social affairs and family in the case of notice given to an employee with a disability) are applicable to the termination of employment relationship by a notice given by the employer for the above mentioned reason.

In the case of a winding up of only a part of the employing entity, the employer has the right to give notice to an employee **only where he can offer no other suitable work** pursuant to § 63 Section 2 of the Labour Code, or if the latter has refused to accept that work. Prohibition of notice pursuant to § 64 of the Labour Code does not apply to the use of this ground for termination either. **The employer has a duty to effectively help the employee find alternative adequate employment.**

The relocation of the employer or part thereof constitutes another economic reason for notice given by the employer to which the prohibition of notice pursuant to § 64 of the Labour Code does not apply. In the case of the relocation of the entire employing entity or part thereof, the employer loses the possibility of fulfilling one of his basic duties under the employment contract, i.e. **the duty to employ the employee at the agreed-upon place** of the performance of work. Notice is obviously an option only after the employer has failed to reach an agreement with the employee on changing the place of the performance of work agreed in the employment contract. If the employee is not willing to work at a place other than that agreed upon in the employment contract, the employer has the right to give notice to the employee concerned.

An employer may further give notice pursuant to § 63 Section 1(b) of the Labour code if an employee becomes redundant by virtue of the employer or competent body issuing a written resolution on change in duties, technical equipment or reduction in the number of employees with the aim of securing work efficiency, or on other organizational changes.

1.4.2. The Concept of collective redundancy

According to § 73 of the Labour Code, collective redundancy means the termination of employment contracts of at least 20 employees at the employer's initiative over a period of 90 days by notice given on the grounds set out in § 63 paragraph 1(a) and (b) of the Labour Code (economic reasons) or by agreement on the same grounds.[529] Besides general substantive law requirements that the employer must meet in every instance of individual notice being given, labour law provisions governing collective redundancies also lay down other obligations vis-à-vis employees' representatives and the competent office of labour, social affairs and family.[530]

Consultation obligations of employers – enterprises – vis-à-vis their social partners are aimed at reaching agreement, especially on measures to prevent collective redundancies or reduce the number of affected workers. The purpose of consultations on collective redundancies are also to look for the possibilities of finding suitable jobs for employees at other workplaces, and to discuss measures to mitigate unfavourable consequences of collective redundancies.

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[529] Slovak labour law provisions on collective redundancies are, in essence, in conformity with Directive 75/129/EEC codified by Directive 98/59/EC whose purpose is to mitigate the social consequences of collective redundancies.

[530] Jouza L., Ochrana zaměstnanců před hromadným propouštěním, Bulletin advokacie 2009, No. 1-2, pp. 51 et sequentia Barancová H., K novej právnej úprave hromadného propůšťania. In: Práca a mzdy 1996, No. 13, pp. 9-13.

The purpose of consultation procedures involving employers and employees' representatives is to reach an agreement relating to consequences of collective redundancies.

Under the current legislation, the employer is also obliged to provide information about collective redundancy and about the result of consultations with employees' representatives to the competent office of labour, social affairs and family. Termination of the employment relationship by notice or by mutual agreement may not take place earlier than one month from the date of service of a written notification on planned collective redundancies.[531]

§ 73 Section 7 of the Labour Code lays down the duty of the employer to consult the office of labour, social affairs and family about the ways and means of avoiding collective redundancies or reducing the number of workers affected, mainly about necessary steps for safeguarding jobs, possibilities of employing workers made redundant with other employers, or possibilities of finding new jobs for workers made redundant who underwent retraining.[532] Consultation and information obligations laid down in the Labour Code need not be fulfilled in case of contracts of employment concluded for limited periods of time that have expired, in the case of termination of employment contracts of the crews of sea-going vessels and where employers have filed for bankruptcy.[533]

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[531] Fetter R.W., Prodloužení výpovědní doby při hromadném propouštění, Právní rádce, 2010/12, pp. 31-35

[532] Bukovjan P., Skončení pracovního poměru při hromadném propouštění, Práce a mzda, 2008, No. 9, pp. 31-36.

[533] § 73 of the Labour Code regulating collective redundancies:
"(1) Collective redundancy shall occur if an employer or a part of an employer terminates employment relationship by notice for the reasons stipulated in § 63 paragraph (1) letter (a) and (b), or if employment relationship is terminated by another method on reason not relating to the person of the employee within 30 days
a) of at least ten employees of an employer who employs more than 20 and less than 100 employees,
b) of at least 10% of total up expenses of employees of an employer who employs more than 100 and less than 300 employees,
c) of at least 30 employees of an employer who employs more than 300 employees.
(2) With a view to reaching an agreement, the employer shall be obliged, at least one month prior to commencement of collective redundancies, to negotiate with the employees' representatives, and if there are no employees' representatives in the workplace directly with the affected employees, measures enabling avoidance of collective redundancies of employees, or reduction thereof, mainly negotiate the possibility of placing them in appropriate employment at the employer's other workplaces, also subsequent to preceding preparation, and measures for mitigating the adverse consequences of collective redundancies of employees. To this end, the employer shall be obliged to provide the employees´ representatives with all necessary information and to inform him in writing, in particular as to
a) the reasons for collective redundancies,
b) the number and structure of employees to be subject to termination of employment,
c) the overall number and structure of employees employed by the employer,
d) the period over which collective redundancies shall be effected,
e) the criteria for the selection of employees to be subject to termination of employment.
(3) The employer shall concurrently deliver the transcript of written information pursuant to paragraph (2) to the Labour Office.
(4) Subsequent to negotiations on collective redundancies with the employees´ representatives, the employer shall be obliged to submit written information on the outcome of negotiations to
a) the Labour Office,
b) the employees´ representatives.
(5) The employees´ representatives may submit comments relating to collective redundancies to the Labour Office.
(6) With regard to collective redundancies, the employer may give notice to employees for reasons as stipulated in § 63, Section (1), letters a) and b), or propose termination of employment relationship by agreement for the same reasons, at the earliest upon expiry of one month from the day of delivery of written information pursuant to paragraph (4).

1.2. Procedural requirements for legitimate dismissals

A common prerequisite for notice being given by employers or notice of resignation by employees is that they must be issued **in writing**; otherwise the notice is invalid. The documents issued by the employer in connection with termination of the employment relationship must **be personally served** on the employee.[534] The employer serves the documents on the employee at the workplace, at the employee's domicile or wherever they can be reached. If this is not possible, the document may be served by registered mail bearing the note "personal service required" to the last address known to the employer. The documents drawn up by the employee in connection with the creation, change or termination of the employment relationship are served by the employee at the workplace or as a registered delivery. The document is deemed to have been served when the employee or the employer accept the delivery, but also when they refuse to accept the document or when the postal service returns the delivery as undeliverable.[535]

The effect of the notice of termination is geared towards the future, i.e. the termination of an employment relationship does not coincide with the date on which this unilateral legal act becomes binding, i.e. the moment of its service, but the notice becomes effective only upon the lapse of the statutory notice period which starts running on the first day of the month following its service.[536]

The employer may **immediately terminate an employment** relationship for the qualified reasons (see above § 68 of the Labour Code), at the latest, **within one month** from the date on which the reason for immediate termination of employment relationship came to his knowledge, but **no later than within one year** from the date on which the event in question occurred. Both time limits have a preclusive character.[537] Upon their expiry, the employer no longer has the right to immediate termination of the employment relationship.

1.3. Burden of proof and available sanctions

In the case of an **invalid termination of the employment** relationship, both parties, i.e. the employer and the employee, have the right pursuant to §§ 77 – 80 of the Labour Code to file a **court action**

(7) The period as stipulated in paragraph (6) shall be used by the Labour Office to seek solutions to the problems raised by the projected collective redundancies. The Office of Labour, Social Affairs and Family may make a reasonable reduction in the period pursuant to paragraph (6); if so it shall inform the employer of the reduction in writing immediately.
(8) If an employer violates the obligations stipulated in paragraphs 2 to 4 and 6, an employee subject to termination of an employment relationship within the scope of collective redundancies shall be entitled to wage compensation at the minimal amount of a twofold of his/her average monthly earnings pursuant to § 134.
(9) The provisions of paragraphs (1) to (8) shall not apply to
a) termination of an employment relationship concluded for limited period of time, upon expiry of such period,
b) crew members of vessels flying the flag of the Slovak Republic.
(10) The provisions of paragraphs (6) and (7) shall not apply to an employer who was declared bankrupt by court.
(11) If there are no employees" representatives in the workplace, the employer shall carry out the obligations given in paragraphs 2 to 4 directly in relation to the affected employees.
(12) The employer must also comply with the obligations stipulated in paragraphs 2 to 4 if the decision for collective redundancy is taken by a managing employer as defined in § 241a paragraph (3).

[534] Barancová H., Zákonník práce, Komentár, 2.ed., C.H.Beck 2010, pp. 430 -438.

[535] Bukovjan P., Volba práva a výpověď z pracovního poměru. Práce a mzda, 2009, č. 3, pp. 36-38

[536] Jouza L., Skončení pracovního poměru ve světle soudních rozhodnutí, Právo pro podnikání a zaměstnání, 2009, č. 9, pp. 3 - 7

[537] Kalenská M., Okamžité zrušení pracovního pomšru, Právní rádce, 1995/6, p. 44

within a **two-month preclusive period** claiming invalidity of termination of the employment relationship.[538] The **basic precondition** for enforcing a claim arising from an invalid termination of employment by the employer is the notification whereby the employee notifies his employer that he insists on his continued employment.[539] An employee and an employer may claim in court the invalidity of termination of an employment relationship by notice, immediate termination, termination within a probationary period or by agreement, **at the latest within a period of two months** from the due day of employment relationship termination (the Labour Code § 77).[540]

If the employee fails to perform work in connection with invalid termination of employment relationship, the employer may demand from him/her **reparation of consequent damages** arising thereof from the day the employer notified the employee of his/her insistence that the employee keep performing work.

If an employee has terminated the employment relationship in an invalid manner and the employer does not insist that the employee keep performing work for him/her, unless the employee and employer agree in writing otherwise, it is deemed that the employment relationship was **terminated by agreement.** This is only if an invalid notice has been given upon expiry of the term of notice, if the employment relationship was terminated with immediate effect in an invalid manner on the day when the employment relationship was due to terminate, or if the employment relationship was terminated in an invalid manner within a probationary period on the day when the employment relationship was due to terminate (the Labour Code § 78).[541]

Decisions of courts

The § 7 section 1 of the Slovak Code of Civil Procedure[542] provides that the courts in civil proceedings hear and decide, inter alia, disputes and other legal matters arising from employment relationships. **Disputes concerning invalidity of employment relationships** are heard and decided by ordinary courts that have territorial jurisdiction over the place of residence or the seat of the defendant. In case of a court dispute, the participants are pursuant to § 120 of the Code of Civil Procedure **obliged to identify evidence to prove their claims**.[543] The court decides which of the proposed evidence to adduce.

If it is proven that an employment relationship was terminated unlawfully, **the court determines** in its decision – judgment – that the termination of the employment relationship is invalid and that the employment relationship continues. The court that hears the subsequent action either awards **wage compensation to the employee** (if a ruling on invalidity of termination is sought by the employee) or **awards damages to the employer** (if a ruling on invalidity of termination is sought by the employer).[544] If the court determines that the termination of the employment relationship by the employer is invalid, it imposes a fine on the employer in the form of wage compensation (for the period starting on the date of notification by the employee until the date when the employer enables the employee to

[538] Barancová H., Zákonník práce, Komentár, 2.ed., C.H.Beck 2010, S. 530 - 547. The Slovak labour law provides that a notice applies to the employment relationship in its entirety and not only to a part thereof. The Slovak legislation therefore makes no provision for a partial notice of termination.

[539] Notice is a legal act – a unilateral targeted expression of the will to terminate an employment relationship irrespective of the will of the other party.

[540] David L., Některé procesní aspekty žalob podle § 64 ZP, Právní rozhledy 1999/4, pp. 38 et sequentia

[541] Barancová H., Zákonník práce, Komentár, 2.ed., C.H.Beck 2010, pp. 532 – 534.

[542] The Code of Civil Procedure No. 99/1963 Coll.

[543] Števček/Ficová a kolektív, Občiansky súdny poriadok, Komentár – I. diel, 2. ed. C.H. Beck, Praha 2012, pp.426-439.

[544] Bukovjan P., Promlčení nároku na náhradu mzdy při neplatném skončení pracovního poměru, Práce a mzda, 2009/2, pp. 46 – 47.

continue working; if this period is longer than 9 months, the court – on a request from the employer – may adequately reduce or completely waive wage compensation) and, if the employee demands to be placed back to his former work team, the court may also rule on his return to work.[545]

Courts may examine the legality of legal acts, including the manner of terminating an employment relationship, not only from the aspect of termination requirements under substantive law set out in the Labour Code (for instance, necessity of a written form of notice, service of notice, offer of other suitable work, etc.),[546] but also from the aspect of the essential requirements of legal acts set out in the Civil Code, namely the will, manifestation of the will by the party, and conformity of the legal act with the law, with good morals, or from the aspect of avoiding the law.[547]

Invalidity of the termination of the employment relationship must **consequently be sought in court**. A different situation arises when, although the termination of employment relationship was invalid, the employee does not insist on his continued employment, or the employer does not insist that the employee continues performing his work. Should the termination of employment relationship by the employer be invalid, but the employee does not insist on his continued employment, **application of a "fiction" in conformity** with § 79 Section 3 the Labour Code means that the employment **relationship has terminated by mutual agreement**.[548] In the case of an invalid notice having been given, employment will be deemed to have terminated upon the lapse of the notice period or, in case of an invalid notice given during the probationary period, from the date on which employment was to end. The same fiction applies in case of an invalid termination of the employment relationship at the employee's initiative provided the employer does not insist that the employee continues performing his work (§ 80 of the Labour Code). [549]

These fictions apply only where the parties to the employment relationship do not agree otherwise. If, in the case of an invalid notice given by the employer or in the case of an invalid termination of the employment relationship by the employer with immediate effect or during the probationary period, the employee notifies the employer that he is determined to continue being employed by him, his employment relationship continues and the employer is obliged to grant him **wage compensation** if he does not assign work to the employee in accordance with his employment contract. He is entitled to such compensation corresponding to the **average wage from the date on which he notified the**

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[545] David L., Konkludentní jednání a nároky z neplatného rozvázání pracovního poměru, Právní rozhledy, 1996/6, pp. 251. et sequentia

[546] § 17 Section 1 of the Labour Code stipulates e.g. invalidity of legal action whereby an employee disclaims his/her rights in advance. A legal action for which the prescribed consent of the employees' representatives was not granted, a legal action that was not negotiated with the employees' representatives beforehand, or a legal action not executed in the expression as stipulated by the Labour Code is also void if so expressly stipulated by the Labour Code. Invalidity of a legal action may not be to the detriment of an employee, unless the invalidity was caused by himself/herself alone. If an employee sustains damage as a result of an invalid legal action, the employer is obliged to provide indemnification for it.

[547] Article 2 of Basic Principles of the Labour Code provides that any abuse of a right, including the employer's right to give notice, entails the legal sanction of absolute invalidity of legal acts concerned, using legal and procedural means that are applicable to any other form of discrimination. See further Barancová H., K problému zneužitia práva v pracovněprávnych vzťahoch, Právny obzor, vol. 66, 1983/4, pp. 340-352 and Barancová H., Zmluvná svoboda v pracovnom práve, Právník, Právník, 1996/2, pp. 144-152.

[548] Bukovjan P., Promlčení nároku na náhradu mzdy při neplatném skončení pracovního poměru, Práce a mzda, 2009/2, pp. 46 – 47.

[549] § 80 of the Labour Code:

"In case of an invalid agreement on termination of employment relationship, the procedure in assessing the employee's claims to compensation for lost wages shall be similar to that of invalid notice given to the employee by the employer. The employer may not enforce a claim to compensation for damages on grounds of invalidity of agreement."

employer that he is determined to continue being employed by him until the time when the employer enables him to continue performing his work or until the time when the court rules on the termination of employment pursuant to § 79 of the Labour Code.[550]

1.4. Recent reforms on concerning unfair dismissal laws

No changes and no reforms were proposed in response to the financial or economic crisis. From its adoption in 2001, § 63 Section 1 of the Slovak Labour Code sets out, exhaustively, the grounds for giving notice. The range of the **grounds for the notice cannot be extended**, even by agreement between the parties. Slovakia applies the principle that notice given by the employer without a justified substantive reason is invalid. In practice, **all grounds for the notice can be divided into economic reasons, reasons related to the individual workers concerned, and disciplinary reasons**. Economic reasons on the part of the employer are considered as a social risk in relation to the employee not caused by the former.

2. Special protection for workers' representatives

According to § 239 of the Labour Code, **representatives of employees**[551] may inspect compliance with labour-law regulations, including wage regulations and obligations resulting from a collective agreement; for this purpose they are authorized in particular to (a) enter the employer's workplace in a time agreed with the employer, and if they do not reach an agreement with the employer within three working days of informing the employer of the entry to the workplace, (b) request necessary information and documentation from executive employees, (c) submit proposals for the improvement of working conditions, (d) request that the employer remove discovered faults, (e) propose to the employer or to another body empowered with control of the maintenance of labour-law regulations that appropriate measures as regards the executive employees who breach labour-law regulations or the duties resulting for them from the collective agreement be applied, (f) request from the employer information on what measures have been executed for the removal of faults discovered during the performance of inspection.

Involvement of employees' representatives in the termination of the employment relationships is required.[552] According to § 74 of the Labour Code, the employer is obliged to discuss planned dismissals with employees' representatives; otherwise the notice is invalid. The representative of employees is **obliged to discuss the notice** given by the employer within seven working days from the date of service of a written request from the employer. If no such discussion takes place within this time limit, an irrefutable legal presumption applies according to which the discussion is deemed to have taken place.[553]

Validity of notice given by the employer to an employees' representative is subject to prior consent by employees' representatives (§ 240 (7) of the Labour Code); otherwise the notice is invalid. Prior consent of employees' representatives is required if the notice is given to a representative of employees during his term of office and for a period of six months upon its termination (§ 240 (7) of

[550] Barancová H., Zákonník práce, Komentár, 2.ed., C.H.Beck 2010, p. 537

[551] Employees' representatives mean the relevant trade union body, works council or workers' steward. Employees' representatives for safety and hygiene at work are also considered as employees' representatives under separate legislation.

[552] Barancová H., Zákonník práce, Komentár, 2.ed., C.H.Beck 2010, pp. 945 – 946.

[553] Hochman J., K účasti příslušného odborového orgánu při rozvázání pracovního poměru, Práca a mzda, 1991/12, p. 42.

the Labour Code). If employees' representatives refuse to give their consent, the notice is invalid.[554] The failure of employees' representatives to give their written consent with the notice within 15 days of the employer's request thereof is also considered as prior consent. If employees' representatives refuse to give their consent to the termination of employment relationship by notice, but other notice conditions have been fulfilled and the court, upon hearing the claim on invalidity of termination filed pursuant to § 77 of the Labour Code (see above), establishes that it may not rightfully demand the employer to continue employing the employee, the notice is valid.[555]

3. Sanctions available and application in practice

Termination of the employment relationship may be accompanied by violations of labour law regulations and/or non-fulfilment of preconditions for validity of various ways of terminating

[554] Conditions of activity of employees' representatives and their protection according to § 240 of the Slovak Labour Code:

"(1) An activity of the employees' representatives, which is in direct relation to performance of tasks of employer, shall be deemed performance of work for which the employee shall be entitled to wages.

(2) An employer shall provide time off from work pursuant to § 136, paragraph (1) for performance of the position of employees' representatives or for their participation in education as secured by the body of the competent trade union body, works council and employer provided such shall not be prevented by substantive operational reasons.

(3) The employer shall provide the employee time off from work with wage compensation or without wage compensation in order to perform a function in a trade union body for a period agreed between the employer and the competent trade union body and to perform the function of a member of a works council or a works trustee for a time agreed between the employer and the works council or works trustee. An employer has the right to inspect whether an employee uses the provided time off for the purpose for which it was provided.

(4) Pursuant to its operational possibilities, an employer shall provide employees' representatives, for necessary operational activities, free of charge and to the adequate extent, facilities with the necessary equipment, and settle expenses connected with their maintenance and technical operation.

(5) Employees' representatives and experts fulfilling tasks for the employees' representatives shall be obligated to maintain secrecy on events which they discovered in the performance of their position and which were designated by the employer as confidential. This duty shall also apply during one year following the termination of the performance of their position, unless special regulation stipulates otherwise.

(6) Employees' representatives may not be, in the fulfilment of tasks resulting from their position, disadvantaged or otherwise sanctioned by the employer.

(7) Employees' representatives, during their term in office and for six months after its termination, shall be protected against measures which could damage them, including the termination of the employment relationship and which could be motivated by their position or activity.

(8) The employer may give notice to or terminate immediately the employment of a member of the relevant trade union body, a member of a works council or a works trustee only with the prior consent of these employees' representatives. As previous agreement shall be considered as also failure by the employees' representatives to grant consent in writing to the employer within 15 days of receiving the employer's request. The employer may only make use of this previous consent within a period of two months from its being granted.

(9) If the employees' representatives refuse to grant consent pursuant to paragraph 8, the notice or immediate termination of the employment relationship from the side of the employer shall be, for this reason, invalid; if the other conditions for the notice or immediate termination of the employment relationship fulfilled, and the court in the conflict finds pursuant to § 77 that it cannot be justly requested of the employer that it continue to employ the employee, the notice or immediate termination of the employment relationship shall be valid.

(10) Equal conditions of activity and protection pursuant to paragraphs 1, 2, and 4 to 9 shall apply to the employees' representatives for safety and health protection at work pursuant to special regulation."

[555] Barancová H., Zákonník práce, Komentár, 2.ed., C.H.Beck 2010, p. 949.

employment relationships. These situations may be dealt with by both **judicial and extrajudicial means, and through administrative proceedings** (e.g. labour inspection).

3.1. Court decision

If an employer gave invalid notice to an employee, or terminated the employment relationship in an invalid manner with the employee immediately or during a probationary period, and if the employee informed the employer that he/she insists on remaining in employment with the employer, his/her employment relationship will not terminate, except in circumstances where a court decides that it cannot be justly required of the employer to further employ the employee. The employer will be obliged to provide the employee with **wage compensation**. The employee is entitled to such compensation based on the **average earnings** from the day he/she announced to the employer that he/she insists on keeping employment, to such time for which the employer enables him/her to keep working, or until a court rules on termination of the employment relationship.[556]

If the overall time for which an employee should be paid wage compensation is greater than nine months, the employee is entitled to **wage compensation for a period of nine months** (§ 79 of the Labour Code).[557]

3.2. Mediation

The number of claims related to invalidity of termination in the application practice of Slovak courts is not high. One of the reasons for this is the marked imbalance on the Slovak labour market and the fact that the enforcement of law is a lengthy and difficult process. The Act on mediation[558] also provides for the execution, principles, organisation and effects of mediation. Mediation represents an alternative approach to dispute resolution, also in the area of labour relations.

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[556] Bukovjan P., Promlčení nároku na náhradu mzdy při neplatném skončení pracovního poměru, Práce a mzda, 2009/2, pp. 46 – 47 and David L., Konkludentní jednání a nároky z neplatného rozvázání pracovního poměru, Právní rozhledy, 1996/6, pp. 251. et sequentia

[557] § 79 of the Labour Code:

"(1) If an employer gave invalid notice to an employee, or terminated the employment relationship in an invalid manner with the employee immediately or within a probationary period, and if the employee informed the employer that he/she insists on keeping employment with the employer, his/her employment relationship shall not terminate, with the exception of a court decision that it cannot be justly required of the employer to further employ the employee. The employer shall be obliged to provide the employee with wage compensation. The employee shall be entitled to such compensation in the amount of average earnings from the day he/she announced to the employer that he/she insists on keeping employment, to such time for which the employer enables him/her to keep working, or until a court rules on termination of the employment relationship.

(2) If the overall time for which an employee should be paid wage compensation is greater than nine months, the employee shall be entitled to wage compensation for a period of nine months.

(3) Where an employer terminated employment relationship in an invalid manner and the employee does not insist on keeping employment with the employer, unless the employee and employer agree in writing otherwise, it shall be deemed that the employment relationship was terminated by agreement, if

(a) an invalid notice was given, upon expiration of the period of notice,

(b) the employment relationship was terminated in an invalid manner immediately or, within the probationary period, on the day when the employment relationship was due to terminate.

(4) In cases stipulated in paragraph (3), letter b), an employee shall be entitled to wage compensation in the amount of average monthly earnings according to § 134 for a two month notice period."

[558] Act No. 420/2004 Coll. on mediation

3.3. Obligation towards social partners

If the employer fails to fulfil his obligations towards social partners, i.e. employees' representatives, the employees whose employment relationship has been terminated are entitled to wage compensation equivalent to at least two months' earnings. This represents a special type of satisfaction for employees and a sanction against employers,[559] intended mainly to discourage employers from neglecting to fulfil their legal obligations in cases of collective redundancies.

3.4. Labour inspections

The protection of employees at work is also provided for by labour inspection bodies.[560] Labour inspection ensures, inter alia, supervision over compliance with labour law regulations governing employment relationships, mainly their conclusion, alteration and termination. State administration tasks in the area of inspection are carried out by the Ministry of Labour, Social Affairs and Family of the Slovak Republic. Labour inspection is according to § 2 of the Act on labour inspection supervision *inter alia* over adherence to labour law regulations regulating labour law relations, including, in particular, the establishing, change, and termination thereof, wages conditions and working conditions of employees, collective bargaining, and duties implied by collective agreements. Labour inspection is performed at all workplaces of employers and of natural persons who are entrepreneurs but not employers, including workplaces located on private land and in households of natural persons, and in all premises where homeworking employee performs the agreed work and where employee performs work under agreement on work performed outside employment relationship.

If the employer violates labour law regulations, the labour inspectorate has the right to impose on it various types of penalties depending on the seriousness of the violation of labour law regulations. According to the Article 19 of the Act on labour inspection, the labour inspectorate is authorized to impose a fine up to the amount of EUR 100 000, and if the violation resulted in a work accident causing death or severe damage to one's health, at least EUR 33 000. The labour inspectorate is authorized to impose a fine equivalent to up to four times their average monthly salary on managers of employees who violate the obligations imposed by the labour legislation or duties implied by collective agreements, where they have ordered such violations or concealed facts relevant to the labour inspection.

The labour inspectorate may also impose a fine from EUR 2000 to EUR 200 000 on an employer or a natural person for a breach of a ban on illegal employment, and in the range from EUR 300 to EUR 33 000, for performance of activities without authorization, certificate, card or permit, if, according to the authorization, certificate, card or permit issued by the National Labour Inspectorate, the labour inspectorate, a natural person or a legal entity is required to perform the activity. A fine of EUR 1000 to EUR 200 000 also applies to an employer or a natural person who is an entrepreneur but not an employer, for serious violations of such obligations.

4. Constitutional basis for collective representation of workers

The constitutional basis for the collective representation of workers is found in Article 37 of the Slovak constitution. According to its wording, everyone has the right to freely associate with others in order to protect his economic and social interests. Trade union organizations are established independently

[559] Bělina M., Vybrané problémy postavení zástupců zaměstnanců v pracovněprávních vztazích, and Pichrt J., Některé aspekty působení rady zaměstnanců a odborové organizace na pracovišti a problematiky representativnosti zástupců zaměstnanců, both in: Acta Universitatis Brunensis, Iuridica, Nr. 323, MU Brno, 2007.

[560] The law governing labour inspection is Act No. 125/2006 Coll.

of the state.[561] It is inadmissible to limit the number of trade union organizations, as well as to give some of them a preferential status in an enterprise or a branch of the economy. The activity of trade union organizations and the founding and operation of other associations protecting economic and social interests can be restricted by law, if such measure is necessary in a democratic society to protect the security of the state, public order, or the rights and freedoms of others. The right to strike is guaranteed.[562]

5. Role of collective work relations

A general phenomenon in the Slovak Republic is its **low unionisation rate**[563] and the rather rare creation and functioning of works councils.[564] **Union membership has declined** since the creation of the Slovak Republic in 1993. In that year, a single dominant union confederation, KOZ SR had 1,540,000 members, well over a million more than today. The confederation and individual unions have for many years taken a range of initiatives to improve the membership situation, but there is **no indication yet that membership is effectively growing**. Between 2007 and 2010, figures in the statistical yearbook show that the membership of KOZ SR fell by 21% over three years, from 394,162 in 2007 to 310, 649 in 2010.

5.1 Institutions and legal means of collective action

With a view to **securing just and satisfactory working conditions**, employees according to the provisions of the Slovak Labour Code participate in decision-making of the employer **concerning their economic and social interests**, **either directly or by means of competent trade union body**, of the works council or the works trustee; employees' representatives mutually cooperate closely. Employees have the right to the provision of information on the economic and financial situation of the employer and on the presumed development of its activities, and this in an understandable manner and in a suitable time. Employees have the **right to voice their comments** on such information and to **projected decisions**, to which they may submit their **suggestions**.[565]

5.1.1. Creation of working conditions

Employees participate by means of a competent **trade union** body, **works council** or the **works trustee** in the creation of just and satisfactory working conditions by a) joint decision-making, b) negotiation,

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[561] Čič M. a kolektiv, Komentár k Ustave Slovenskej Republiky, Matica slovenská 1997 S. 192 – 196.

[562] Article 37 of the Slovak Constitution:
„(1)Everyone has the right to freely associate with others in order to protect his economic and social interests.
(2)Trade union organizations are established independently of the state. It is inadmissible to limit the number of trade union organizations, as well as to give some of them a preferential status in an enterprise or a branch of the economy.
(3)The activity of trade union organizations and the founding and operation of other associations protecting economic and social interests can be restricted by law, if such measure is necessary in a democratic society to protect the security of the state, public order, or the rights and freedoms of others.
(4)The right to strike is guaranteed. The conditions shall be laid down by law. Judges, prosecutors, members of the armed forces and armed corps, and members and employees of the fire and rescue brigades do not have this right."

[563] We do not have our own reliable statistical data. All following information on statistical data and their evaluation are taken from information website http://www.worker-participation.eu.

[564] The Labour Code of the Slovak Republic makes a provision for legal dualism in the representation of rights and interests of workers – not only through trade unions but also through works councils.

[565] § 229 Sections 1 and 2 of the Labour Code

c) right to information and d) inspection activities.[566] Employees are entitled through employees' representatives to apply their right following from labour law relations or similar labour relations, unless the law stipulates otherwise.

Employees have the **right to collective bargaining** only **through** the competent **trade union** body. If a trade union organization and works council function alongside each other in an employer's workplace, the trade union organization is entitled to collective bargaining, to inspect the performance of obligations resulting from collective agreements, control activity and to information, and the works council is entitled to participate in decision-making, to negotiation, to information and to perform control activity. If at an employer, a trade union body and a works council both exist, a representative of the trade union body may participate at meetings of the works council if an absolute majority of the members of the works council agree to this.[567]

5.1.2. Trade union

According to § 230 of the Labour Code a trade union organisation is a civil association governed by separate regulations. An employer **is obliged to allow** the operation of trade union organisations at the workplace. A trade union organization that begins activities in an employer's workplaces and wants to represent the employer's employees must demonstrate that at least 30% of the employer's employees are members of the trade union organization if the employer so requires within 30 days of the date when the trade union organization informed the employer in writing of the start of its activities.

A trade union body concludes a **collective agreement with an employer**, which regulates **working conditions** including **wage conditions** and **conditions of employment**, relations between employers and employees, relations between employers or their organizations and one or more employees' organizations on more favourable terms than those stipulated in the Labour Code or other labour-law regulation, **except** where the Labour Code or other labour-law regulation does not expressly prohibit such terms or where deviation from such terms is not impossible.[568] If there are **several trade unions** in the company or organisation, they have to act in absolute agreement if they are negotiating for the whole workforce, unless some other arrangements have been agreed. If they cannot agree, the employer has the right to negotiate with **the union with the largest number of members at the workplace**, or with a group of unions, if together they have more members than the union with the highest number of members. **The collective agreement reached covers the whole workforce**.[569]

5.1.3. Works council and works trustee

A works council is a body, which represents all the employees of an employer. A works council may act at an employer which employs at least 50 employees. At an employer which employs less than 50 employees but more than three employees, a works trustee may operate. The rights and duties of a works trustee are equal to the rights and duties of a works council. A works council or a works trustee has the right to negotiate in the form of an agreement or in the form of granting previous consent pursuant to the Labour Code only if the working conditions or conditions of employment by which

[566] Bělina M., Vybrané problémy postavení zástupců zaměstnanců v pracovněprávních vztazích. Acta Universitatis Brunensis, Iuridica, No. 323, Brno, MU, 2007 and Pichrt J. Některé aspekty působení rady zaměstnanců a odborové organizace na pracovišti a probleematikyreprezentativnosti zástupců zaměstnanců. Acta Universitatis Brunensis, Iuridicaq No.323, Brno MU 2007

[567] § 229 Sections 3-8 of the Labour Code

[568] § 231 Section 1 of the Labour Code

[569] §232 of the Labour Code

negotiations with the works council or a works trustee are not arranged by a collective agreement.[570] A works council or works trustee may conclude an agreement with an employer regulating working conditions including wage conditions and conditions of employment in the same scope as is permitted for a collective agreement. This agreement can be concluded **only** if no trade union organization operates in the employer's workplaces.[571]

5.1.4. Negotiations

Negotiations in compliance with § 237 of the Labour Code are an **exchange of opinions and dialogue** between the employees' representatives and the employer. The employer negotiates in advance with employees' representatives mainly on the **following items**: (1) the state, structure and **presumed development of employment** and planned measures, mainly if employment is threatened, (2) issues such the employer's **social policy**, measures for the improvement of **hygiene at work** and the work environment, (3) decisions which may lead to **basic changes in the organization of labour** or in contractual conditions, (4) organizational changes which could be considered the limiting or cessation of the activities of the employer or its part, amalgamation, incorporation, splitting or **change to the legal form of the employer**, (5) measures for the avoidance of the occurrence of injuries and occupational disease, and for the **health protection** of employees.[572]

In conformity with the provision of Section 231 of the Labour Code and with the Collective Bargaining Act,[573] a **collective agreement may, in essence, regulate all working conditions** provided this is more favourable for the workers and is in conformity with the cogent provisions of the Labour Code. However, the termination of the employment relationship is regulated, for the most part, by cogent provisions, which also narrow down the space for collective bargaining in this sphere. Collective agreements may lay down mainly the following conditions: a longer **notice period**, a higher **severance allowance**, discharge benefit and **severance allowance that the employer** pledges to provide **over and above the amount stipulated in the Labour Code**.

5.1.5. The Act on Collective Bargaining

The Act on Collective Bargaining regulates **collective bargaining between the respective trade union bodies of trade union organizations and employers**, in an effort to conclude collective agreements.[574]

Collective agreements regulate **individual and collective relations** between the employers and the employees and the rights and duties of the contractual parties. Collective agreements can be concluded by the respective trade union bodies and employers, alternatively their organizations.

The collective agreement is (a) a company **collective agreement**, concluded between the respective trade union body and the employer which is also a service office, (b) a **collective agreement of a higher degree**, concluded for a major number of employers between the respective higher trade union body and the organisation or organisations of employers, (c) a **collective agreement of a higher degree**, concluded between the respective higher trade union body and the employer who is the state, (d) collective agreement of a higher degree, concluded for employers who, as regards remuneration, proceed in compliance with separate regulation between the respective higher trade union body, representatives authorised by the government and representative employers' proxies.[575]

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[570] § 233 of the Labour Code

[571] § 233a of the Labour Code

[572] Barancová H., Zákonník práce, Komentár, 2.ed., C.H.Beck 2010, p. 939

[573] Act on Collective Bargaining No. 2/1991 Coll.

[574] § 1 of the Act on Collective Bargaining

[575] § 2 of the Act on Collective Bargaining

The collective agreement is **concluded for a period** explicitly specified therein. In case the period has not been specified, it is assumed that the collective agreement covers a period **of one year**.[576]

At the joint written proposal of the contracting parties to a collective agreement of a higher degree or at the **written proposal of one contracting party** to a collective agreement of a higher degree and under the conditions stipulated by the Act on Collective Bargaining, the Ministry may, by a generally binding legal regulation, extend the binding effect of a collective agreement of a higher degree to all employers in a sector in which the collective agreement of a higher degree is concluded; a subject-matter of proposal to extend the binding effect of a collective agreement of a higher degree may concern only some of the sectors for which the collective agreement of a higher degree has been concluded. A **generally binding legal regulation** pursuant to the first sentence is declared through the **publication of its complete wording in the Collection of Laws of the Slovak Republic**.

5.1.6. Tripartite Meetings

As well as industry and company-level collective bargaining, there are also tripartite meetings between unions, the employers and the government in what is now known as the **Economic and Social Council** (HSR).[577] It has clear powers to agree social pacts between the government, unions and employers. For discussing a proposal to **extend the binding effect** of a collective agreement of a higher degree and for assessing objections raised by employers regarding a proposal to extend the binding effect of a collective agreement on a higher degree, the Ministry establishes a tripartite advisory committee for extending the binding effect of a collective agreement of a higher degree, in which representatives of trade union organisations and representatives of employers organisations are represented in equal number.[578]

Collective bargaining is initiated by submitting a written proposal to conclude a collective agreement by one of the contractual parties to the other contractual party. It is the duty of the contractual party to respond in writing **within 30 days at latest**, unless agreed otherwise, to the other contractual party's proposal and to comment, in its response, on those parts of the proposal that have not been accepted. **It is the duty of the contractual parties to bargain and provide further requested collaboration**, unless this goes counter to their legitimate interests. It is the duty of the contractual parties to initiate bargaining aimed at concluding a **new collective agreement at least 60 days before expiry of the current collective agreement**. The contractual parties may agree in the collective agreement on the possibility to amend the collective agreement and its extent; the procedure taken to amend it is identical to that adopted when concluding a collective agreement.

5.2 Collective work relations in practice

Collective bargaining in the Slovak Republic takes place at both industry and company level, and the main union confederation KOZ SR estimates that between 35% and 40% of employees are covered. EIRO's estimate for 2010 was that around 35% of all employees were covered by collective bargaining.[579] Negotiations at industry level take place between the industry unions and the appropriate employers' associations. At a local level, the two sides are the employer and the workplace union group.

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[576] § 6 of the Act on Collective Bargaining

[577] Vladárová, M.: Tripartizmus ako forma sociálneho dialógu na Slovensku, Bratislava, Nadácia Friedricha Eberta,1995

[578] § 7 Section 10 of the Act on Collective Bargaining

[579] Slovakia: Industrial relations profile, EIRO, 2011 http://www.eurofound.europa.eu/eiro/country/slovakia.htm <04.06.2014>

Industry level collective agreements (known as high level agreements in Slovakia) must be registered with the ministry of labour, and in 2014, there were 17 such agreements with several supplements to agreements. They cover a range of different industries[580].

Between 2008 and 2011, the proportion of organisations with a company level collective agreement fell from 35.8% to 34.1%. However, this is well down on the figure for 2004, when 50.3% of organisations were covered by a company level collective agreement.[581] For more detailed information, see the online publication available at http://www.worker-participation.eu/National-Industrial-Relations.[582] Collective work relations in practice correspond to the unionisation rate in the Slovak Republic.

[580] See website of the Ministry of Labour, Social Affairs and Family http://www.employment.gov.sk/sk/praca-zamestnanost/vztah-zamestnanca-zamestnavatela/kolektivne-pracovnopravne-vztahy/kolektivne-zmluvy/ <04.06.2014>

[581] See Survey charts fall in union representation, bargaining and member benefits; Eurofound, 2012 http://www.eurofound.europa.eu/eiro/surveyreports/sk1111019d/sk1111019d.htm <04.06.2014>

[582] http://www.worker-participation.eu/National-Industrial-Relations/Countries/Slovak-Republic <04.06.2014>

F. SWEDEN

1. General overview of legal protection against unfair dismissal

Swedish labour law consists of a rather complex normative structure. There is no single "labour code", but merely a set of different statutes on disparate issues along with numerous collective agreements. It is due to the intricate interaction between the rules laid down in legislation and in collective agreements. Various forms of labour agreements provide considerable scope for deviations from the legislation depending on the matter in question. Hence, except for certain core areas, the legislation contains a large number of detailed provisions that can be replaced by collective agreements. Thus, when examining Swedish labour law, it is important to have in mind the essential role the major employer organizations and trade unions have on the labour market (see section 5 for a description of the role of collective work relations).

Termination of employment is regulated in the Employment Protection Act (*lag (1982:80) om anställningsskydd)*).[583] The Act applies to all employees, i.e. both in private and public sector. Section 7 of the Employment Act provides that an employer must have just cause/objective grounds (saklig grund) for dismissal of an employee. It is a mandatory principle, which may not be overridden or modified in collective agreements. The term "objective grounds" has not been defined in the Employment Protection Act and despite a comprehensive amount of case law, there are no general rules on what is to be regarded as objective grounds for dismissal. In the legislative documentation appended to the 1974 Act it is stated that what is considered a just cause for dismissal must depend on evaluations prevalent in society at a given time and must therefore be subject to change.[584] The requirement of objective grounds is important especially with regard to the dismissal due to the employee's personal condition. Termination of employment because of shortage of work is always regarded as objective grounds for dismissal. As will be described below in section 1.1 there are also rules on immediate (summary) dismissal in cases of more severe breaches of contract.

The policy underlying the Employment Protection Act is that the employer has a social responsibility for employees in so far that the social costs for the less productive part of the population should not be borne solely by the state but also by the employers. Employees are considered to have a certain right to remain employed if they have once been accepted. Thus, employers have to learn to put up with employees, even if they are not first-rate workers either as to ability or as to conduct. However, each case must be considered with regard to its special circumstances. For example, a more far-reaching responsibility is expected from big enterprises than from small ones, which have fewer possibilities to provide an alternative job within the firm for an employee who does not cope with his tasks. Moreover, an employment that have lasted a longer time is likely to be more secure than an employment that have lasted only a shorter period. The reason behind this principle is that the longer the employment has lasted the more difficult it is for the employee to adapt to a new job.[585]

Many judgments of the Labour Court (*Arbetsdomstolen),* where the Court applied the former Employment Protection Act from 1974, have been heavily criticized by employers for being too rigid. Employers argued that it was almost impossible to get rid of undesirable employees. The current Act of 1982 is founded on the same principles as the old one, but in certain respects more consideration for the employer's point of view was recommended in the *travaux préparatoires*, which has had some

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583 Lag (1982:80) om anställningsskydd, available in English at http://www.government.se/content/1/c6/07/65/36/9b9ee182.pdf (09.04.2014).

584 A. Adlercreutz & B. Nyström, *Labour Law in Sweden*, Alphen aan den Rijn: Kluwer Law International 2010, p. 119.

585 A. Adlercreutz & B. Nyström, *Labour Law in Sweden*, Alphen aan den Rijn: Kluwer Law International 2010, p. 119.

effect on subsequent cases. The recommendations concerned drunkenness at work, chronic alcoholism, cases of criminal offences committed by the employee, and difficulties in cooperating with the employer or other employees.[586]

Upon ordinary dismissal by the employer, the statutory notice period with right to pay is one to six months, depending on the period of service. However, the rule on notice period is semi-mandatory and collective agreements frequently provide longer periods of notice.

1.1. Substantive reasons for legitimate dismissals

Valid causes are generally divided into two groups, (1) **redundancy** (shortage of work), which is a circumstance related to the enterprise, and (2) circumstances relating to the employee, so-called **personal reasons**. However, it should first be pointed out that section 7 of the Employment Protection Act makes a general reservation stating that there is no just cause if it can reasonably be required that the employer transfers the employee to another position. This is usually far more feasible in large than in small firms. Immediate (summary) dismissal may be carried out in cases of serious neglect of duties and/or serious misconduct.

1.1.1 Redundancy

Shortage of work constitutes valid grounds for dismissal. Shortage of work is any situation where the dismissal is based on reasons of business activity and not concerning the performance of a particular employee. It does not apply only to situations where it is necessary to cease production for compelling financial reasons, but also in cases of reorganization and restructuring.

It is ultimately up to the employer to decide whether he or she has to, or chooses to, reduce the work force. However, the employees and their union may dispute that there is a real shortage of work. In such cases, it is for the Labour Court to decide whether other reasons have in fact been decisive. Abuse on behalf of the employer of this ground for dismissal is to some extent prevented by the priority right to be re-employed, which is granted to those dismissed because of redundancy. The Labour Court does not generally examine the case from the viewpoint of business economics. It is sufficient that the employer prove that the change involving the dismissal is real and not fictitious (see for example cases AD 1976 nr 26, AD 1985 nr 79 and AD 1996 nr 20). If the employer submits that shortage of work is the cause, whereas the employee asserts that personal reasons have in reality been decisive, the employee must prove the probability that his claim is true. If the employee can prove such probability, the burden of proof is transferred to the employer, and the Labour Court may have to examine the economic reasons more thoroughly than is otherwise common.[587]

In redundancy cases, employment protection lies mainly within the so-called seniority rules and in the rules on right of priority to re-employment once dismissed (sections 22-27 of the Employment Protection Act). The seniority rules provide that the order in which employees are dismissed shall be determined according to a “last-in-first-out-principle”. Thus, decisive for the order of dismissals is the employee’s total period of employment in the company. In the event of equal periods of employment senior age priority applies. A condition for priority is that the employee is sufficiently qualified to continue the work. Employers with a maximum of ten employees may, when applying the seniority rules, exempt two employees considered to be of particular importance for the future activities. Where the employer has several operational/production units, the order of dismissals shall be determined

[586] A. Adlercreutz & B. Nyström, *Labour Law in Sweden*, Alphen aan den Rijn: Kluwer Law International 2010, p. 120.

[587] A. Adlercreutz & B. Nyström, *Labour Law in Sweden*, Alphen aan den Rijn: Kluwer Law International 2010, p. 120.

separately within each unit. The rules on priority for dismissals are merely semi-mandatory and a local collective agreement is a frequent means to come to terms of the order of dismissals in a redundancy situation.[588] Further, if the employer is bound by a collective agreement, the order of dismissals shall be established for each sector of the agreement (section 22 of the Employment Protection Act).

Section 29 of the Employment Protection Act provides that the employer shall negotiate the priority of dismissals with the affected trade unions according to the rules on primary negotiation in section 11 to 14 in the Co-determination Act (*lag (1976:580) om medbestämmande i arbetslivet*).[589] The so-called "primary duty of negotiation" regulated in those provisions requires that an employer must request negotiations before making important changes in his or hers activities and/or making changes affecting the employment conditions of employees belonging to a trade union to which the employer is bound by a collective agreement.

Section 25 to 27 of the Employment Protection Act contain rules on rights of priority for re-employment. The right to re-employment entails that any employment opening (regardless of the category of employment) within nine months from the expiry of the former employment shall be offered to employees dismissed for redundancy reasons, in accordance with the seniority rule.

1.1.2 Circumstances relating to the employee (personal grounds)

Dismissal on personal grounds includes cases of misconduct, neglect etc. as well as reasons for which the employee is not responsible, such as illness or reduced working capacity because of age. The grounds for dismissal must be objective. Despite a considerate number of cases, there are no general rules on what is to be regarded as an objective ground for dismissal. The general principle to be respected, however, is that dismissal is "the last resort". Moreover, there are some elements of general importance when deciding whether the grounds for dismissal are objective such as the size of the workplace, the position of the employee in question, the length of the employment and the immediate cause for the dismissal. The size of the workplace is of significant importance with regard to the possibilities to provide other work in case the employee is not apt for the work he or she is actually performing. Further, the position of the employee is important; the employer can demand more from an employee in a chief position or in a position of trust than from an "ordinary" employee. Misconduct by a recently contracted employee may soon lead to objective grounds for dismissal while an employer has to be more considerate with long-term employees. [590]

Reduced working capacity due to age or illness, including alcoholism, is generally not regarded as a just cause for dismissal. During illness, the employee may be replaced by a substitute and after recovery, the employer has far-reaching obligations as regards rehabilitation and adaptation in order to help the employee to carry out the work. Rehabilitation can consist of a large number of different measures and it is the responsibility of the employer to investigate the possibilities of rehabilitation and communicate with the Social Insurance Agency (*Försäkringskassan*). For a dismissal to be justified, the employer's responsibility is not confined merely to rehabilitation measure within the context of the existing contract of employment; the investigation must also include the feasibility of transferring the employee to an alternative type of work. The Labour Court has stated that the employer can dismiss an employee only if the employer fulfills the extensive rehabilitation obligations but still not can use

[588] A. Numhauser-Henning, *Labour Law*, in M. Bogdan, Swedish legal system, Stockholm: Norstedts Juridik AB 2010, p. 366.

[589] Lag (1976:580) om medbestämmande i arbetslivet, available in English at http://www.government.se/content/1/c6/17/41/31/59b8df50.pdf (09.04.2012).

[590] A. Numhauser-Henning, *Labour Law*, in M. Bogdan, Swedish legal system, Stockholm: Norstedts Juridik AB 2010, p. 365.

the employer in the company (See e.g. case AD 1997 nr 73 and AD 1998 nr 57). However, if sufficient requirements for early retirements or disability pension can be demonstrated, such a measure is usually chosen.

An employee's lack of earning capacity and efficiency may be a valid cause for dismissal in certain situations. For example, in case AD 1986 nr 13, the Labour Court ruled that a physiotherapist's insufficient professional skill and refusal to submit to being trained under supervision was a valid cause for dismissal. Difficulties in cooperating with the employer or other employees can generally be considered as a valid cause in smaller companies, but not in larger companies. Dismissal following undisciplined behavior in general is only possible in cases where the employee's behavior shows that he or she is unsuitable for the job in question. Refusal to obey orders, late arrival and / or absence from work without due reason have to be of a serious nature to be considered sufficient grounds for dismissal. Participation in illegal strikes may in certain cases be a valid reason for dismissal. In serious cases, particularly if employees have refused to comply with an order of the Labour Court to resume work, even summary dismissal may be justified. If an illegal strike has been ordered or arranged by a trade union, either a national union or any other union bound by a collective agreement, individual employees can probably not be dismissed for taking part in it and according to section 59 the Co-determination Act, the employees are not liable to pay damages in such cases.[591]

Section 7 of the Employment Protection Act provides that an employer may not base a dismissal on personal grounds on circumstances that were known to the employer for more than two month before notice was given However, earlier incidents may be referred to in combination with a recent event. Various statutes provide a right for an employee to a leave of absence, e.g. the Parental Leave Act. Such rules imply that the employee cannot be dismissed for taking advantage of the right to time off, and generally the employee shall, upon his or her return to work, enjoy conditions no less favorable than if he or she had been working throughout the period of leave.[592]

Disputes concerning the valid cause for dismissal is ultimately decided by the Labour Court (Arbetsdomstolen) and pending the Court's decision, the employment shall continue. If not based on objective grounds, the dismissal may be declared null and void. Furthermore, the employer may be liable to pay damages, both compensatory and punitive. There is a possibility for an employer to deny an employee re-entry to the workplace following a dismissal on the grounds of, for instance, misconduct, despite the fact that a court has declared the dismissal invalid. In such a case, the employer shall pay damages in accordance with section 39 of the Employment Protection Act. The provision provides that the employer shall pay damages according to the period of former employment with a maximum of 32 months of wages following at least 10 years of employment.

1.1.2.1 Summary dismissals

An employer may dismiss an employee summarily without observing a period of notice (discharge) in case of serious neglect of the employee's duties towards the employer (section 18 of the Employment Protection Act). For example, serious incidents of violence or threats of violence at the workplace are considered sufficient grounds for discharge. Discharge has also been approved in a case of sexual harassment of pupils in a school (case AD 1996 nr 85) and in cases of the employee's disloyal activity (see for example case AD 1999 nr 144). In case AD 1975 nr 31, the Labour Court found that extended participation in an illegal collective action despite the Labour Court's order that the workers shall

[591] A. Adlercreutz & B. Nyström, *Labour Law in Sweden*, Alphen aan den Rijn: Kluwer Law International 2010, p. 122.

[592] A. Adlercreutz & B. Nyström, *Labour Law in Sweden*, Alphen aan den Rijn: Kluwer Law International 2010, p. 123.

resume the work, was sufficient reason for discharge. Activity as a strike leader in the early stage of an illegal strike was not a sufficient reason for discharge.

1.2. Procedural requirements for legitimate dismissals

The employer must observe certain formal requirements and follow a rather complicated procedure when dismissal with or without notice period is to be carried out. There are both general rules applicable to all kinds of dismissal and specific rules depending on whether the dismissal is based on redundancy or on personal grounds. The general rules are laid down in section 8 to 14 of the Employment Protection Act. Section 8 of the Act provides that the notice of termination of employment shall be in writing and contain information about the procedure to be followed in the event the employee wishes to claim that the notice of termination is invalid and / or claim damages. Further, the notice shall state whether the employee has right of priority concerning re-employment. Section 9 of the Employment Protection Act provides that the employer shall, upon request from the employee, state in writing the circumstances on which the dismissal are based. Generally, non-compliance with those formalities is sanctioned by damages, not by nullifying the act itself.

Section 11 of the Employment Protection Act lays down rules concerning the period of notice of termination. The minimum period for notice of termination is one month. This minimum period for notice increases progressively depending on the years of employment. For example, the notice period is two months for an employment of two to four years and increases with one month for each additional two years of employment until a maximum of six months is reached, which corresponds to an employment exceeding ten years. The rules on notice period is semi-mandatory and collective agreements frequently provide longer periods of notice. The employee has the right to pay and other employment benefits during the period of notice, notwithstanding that the employee is not assigned any duties or is assigned duties different from those he or she previously performed. If the employer has stated that the employee does not need to be available, fully or partly, for work during the period of notice, any income earned by the employee from other employment during the same period may be deducted from the pay (section 12 and 13 of the Employment Protection Act). Further, section 14 of the Employment Protection Act provides that an employee may not be transferred to another locality during the period of notice if it impairs to an extent that is not insignificant the employee's opportunities of seeking new employment.

In case of dismissal on **personal grounds**, the employer must, prior to the implementation of notice of termination, inform the employee, and in case he or she is a union member, notify the union. The information must be given two weeks before the employee receives the notice. In case of summary dismissal, information must be given and notification made one week in advance (section 30 of the Employment Protection Act). The employee or the union may, within one week of the notice from the employer, request consultations with the employer concerning the termination of employment. If such consultations have been requested, the employer may not give notice of dismissal before the consultations have been concluded (section 30 of the Employment Protection Act).

With the exception of serious cases of misconduct, the employer always has an obligation to try to relocate the employee to a vacancy before giving notice of dismissal. There is no obligation to establish new positions in order to avoid a dismissal, but the employer may be obliged to investigate whether it is possible to reallocate certain assignments, for example as part of a rehabilitation process. Notice of termination based on circumstances relating to the employee personally may not be based solely on circumstances known to the employer more than two month prior to the notice (section 7 of the Employment Protection Act).

As described above in section 1.1, termination that is not based on personal grounds are regarded as termination due to **redundancy** (shortage of work). In such cases, section 29 of the Employment

Protection Act provides that the employer, before deciding on termination of employment, shall negotiate with the affected trade unions according to the rules on primary negotiation in section 11-14 in the the Co-determination Act ((Lag (1976:580) om medbestämmande i arbetslivet).[593] Further, section 15 of that Act provides that in conjunction with negotiations concerning a decision to terminate employment due to shortage of work, the employer shall in good time notify the other party in writing of the following matters: (1) the reason for the planned termination; (2) the number of employees who will be affected by the termination and the employment categories to which they belong; (3) the number of employees who are normally employed and the employment categories to which they belong; (4) the time period during which it is planned to carry out the termination; and (5) the method of calculation of any compensation to be paid in conjunction with termination in addition to that which is required by to law or applicable collective agreements.

As with the case of termination based on personal grounds, there is an obligation on the employer to investigate whether there are any vacant positions for which the employee is sufficiently qualified. If such vacant position exists, the employee shall be offered that position. The relocation obligation for vacancies extends to vacant positions in other geographical locations and in other collective agreement areas. In redundancy cases, the employer shall apply the so-called seniority rules and the "last-in-first-out-principle" in accordance with the Employment Protection Act (see above section 1.1.1).

1.3 Burden of proof and available sanctions

It is for the employer to prove that there is a valid reason for the disputed dismissal. The employer must prove not only the facts that reveal misconduct or other circumstances referred to as a valid cause, but also the importance for the company of having the employment terminated. Further, the employer shall demonstrate the impossibility of removing the employee to a more suitable job within the firm. The Labour Court has invalidated many dismissals following a finding that the employer has been unable to prove the alleged circumstances on which the dismissal has been based on.[594] The burden of proof for a claim from the employee that the termination of employment is based on other grounds than those indicated by the employer remains with the employee.

Remedies and sanctions available when just cause for dismissal has not been proved are: (i) declaration of invalidity of notice of termination and re-instatement; (ii) pay and other employment benefits for the time between the dismissal and the re-instatement; and (iii) damages. Thus, where notice of termination is given without objective grounds, the notice shall be declared invalid and the employee has the right to be re-instated if he or she so wishes, except in very specific situations such as difficulties in cooperating with the employer in very small firms (section 34 and 35 of the Employment Protection Act). The employee is also entitled to full pay and other employment benefits for the time between the dismissal and the re-instatement, and to damages for the unlawful act (section 38 of the Employment Protection Act). The kind of damages awarded has been referred to as *exemplary damages*.[595] They can be characterized as a hybrid between compensatory and punitive damages. They are similar to compensatory damages in the sense that they are awarded to the injured party and the amount is determined with regard, *inter alia,* to the economic loss of the employee. On the other hand, they are similar to punitive damages in the sense that they can be imposed even if no economic loss occurred or, if such loss has occurred; the damages may be higher than the loss. Exemplary damages cover different kinds of loss or harm, not only such as pain and suffering, but other types of

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[593] Lag (1976:580) om medbestämmande i arbetslivet, available in English at http://www.government.se/content/1/c6/17/41/31/59b8df50.pdf (09.04.2012).

[594] A. Adlercreutz & B. Nyström, *Labour Law in Sweden*, Alphen aan den Rijn: Kluwer Law International 2010, p. 131.

[595] R. Eklund et al., Swedish Labour and Employment Law: Cases and Materials, Uppsala: Iustus Förlag AB 2008, p. 25.

infringements in the labor market. However, they differ from punitive damages in the sense that the awards generally are modest.[596]

The normal amount of exemplary damages to the individual employee in case of dismissal without just cause is 50,000–60,000 SEK and in the case of unjustified summary dismissal about 70,000 SEK; but these amounts may be adjusted in either direction in view of the various circumstances in the particular case.[597] Exemplary damages shall also be paid to the employee's trade union if a dismissal is in violation of a provision in a collective agreement that have replaced the statutory provision. If the dismissal is objected to solely on the grounds that it is contrary to a rule concerning priority, the dismissal is not invalidated. In such case, only damages may be imposed on the employer (section 34 of the Employment Protection Act).

Where an employer refuses to comply with a court order that notice of termination or a summary dismissal is invalid, the employment relationship is considered to have been dissolved. The employer must then pay damages which are to be determined according to the number of years of employment. An employee has the right to 16 months' pay for less than five years of employment, 24 months' pay for five to ten years employment, and 32 months' pay for ten or more years of employment (section 39 of the Employment Protection Act).

Section 40 of the Employment Protection Act provides that an employee who intends to initiate proceedings to have a notice of termination or a summary dismissal declared invalid shall notify the employer of such intention within two weeks after notice of termination was given or the summary dismissal was carried out. An employee intending to claim damages shall notify the employer within four months after the date on which the action giving rise to the damages was taken or after the claim was due (section 41 of the Employment Protection Act).

An employer may be liable to pay additional damages if the dismissal, in addition to the violation of the rules in the Employment Protection Act, also entails a violation of rules laid down in other laws such as the the Co-determination Act and the Trade Union Representatives Status at the Workplace Act.

1.4 Recent reforms concerning unfair dismissal laws

There have been no recent reforms made to national law concerning unfair dismissals. However, as a reaction to the financial crises, local departments of trade unions have in certain cases agreed with major employers to temporary decrease the employees' working time and pay in order to avoid dismissals.[598]

2. Special protection for workers' representatives

Rules on rights and special protection for workers' representatives are laid down in the Trade Union Representatives Status at the Workplace Act (lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen), hereinafter "Act on Trade Union Representatives".[599] The Act on Trade Union

[596] R. Eklund et al., Swedish Labour and Employment Law: Cases and Materials, Uppsala: Iustus Förlag AB 2008, p. 25.

[597] A. Adlercreutz & B. Nyström, *Labour Law in Sweden*, Alphen aan den Rijn: Kluwer Law International 2010, p. 131.

[598] http://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=5304119 (09.04.2014).

[599] Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen, available in English (with amendments up to 1990) at http://www.naturvetarna.se/Global/English/Act1974358_union_representatives.pdf (09.04.2014).

Representatives is universally applicable, but in part only semi compulsory and thus leaves room for regulations in collective agreement. Its aim is to provide special protection to trade union representatives with a view to strengthening their position and thus increasing their capacity and efficiency to improve the conditions for the employees at the work place. An important principle underpinning the Act is that the established unions are considered to fulfil important and necessary functions within the company. For this reason, it is considered fair that the employer shall bear the costs of trade union activities related to the work place.[600]

The trade union representative at the work place is appointed by the established union or unions, which may appoint as many as they think fit.[601] They may only appoint representatives that are employees at the company in question. The Act on Trade Union Representatives provides for protection and benefits in the following respects: (1) the right to time off; (2) the right to keep employment benefits and; (3) extended employment protection. As regards **the right to time off**, the employer may not prevent the trade union representative from carrying out his trade union activities. On the contrary, the trade union representative has the right to time off if it is necessary in order to carry out the trade union duties. Furthermore, the trade union representative shall be offered the use of a room or other space at the work place that is necessary for carrying out the trade union activities (section 3 and 6 of the Act on Trade Union Representatives). Trade union representatives appointed on a regional level shall be guaranteed access to all work places for which they are commissioned.[602] The extent of the time off and its allocation is determined after discussion between the employer and the local trade union. The time off shall not be longer than what is reasonable considering the conditions of the work place, particularly with respect to the number of employees. Further, it must not be fixed in a way that it constitutes basic hindrance to the proper performance of the work. The union representative has the right to time off not merely for trade union activities directly related to the work place, but also - within reasonable limits - for participation in conferences, courses for training in trade union activities, negotiations at national level etc. The trade union representative does not have the right to time off for other kinds of activities that is not directly related to his or her duties, such as political work supported by the trade union. Further details concerning the rights to time off may be decided in collective agreement.[603] Section 3 and 6 of the Act on Trade Union Representatives:

"*SECTION 3: An employer may not prevent a trade union representative from performing his duties.*

> *If the appointment relates to a place of work other than the representative's own place of work, the employer is obliged to allow the representative to perform his duties and to be active to the extent necessary to fulfil his duties. The activities may not, however, result in any significant impediment to the proper performance of work.*
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> *The representative shall be provided with the use of premises or other space at his own place of work as necessary for the performance of the trade union activity carried out there.*[604]

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[600] A. Adlercreutz & B. Nyström, *Labour Law in Sweden*, Alphen aan den Rijn: Kluwer Law International 2010, p. 240.

[601] A. Adlercreutz & B. Nyström, *Labour Law in Sweden*, Alphen aan den Rijn: Kluwer Law International 2010, p. 238.

[602] A. Adlercreutz & B. Nyström, *Labour Law in Sweden*, Alphen aan den Rijn: Kluwer Law International 2010, p. 238.

[603] A. Adlercreutz & B. Nyström, *Labour Law in Sweden*, Alphen aan den Rijn: Kluwer Law International 2010, p. 238.

[604] Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen, available in English (with amendments up to 1990) at http://www.naturvetarna.se/Global/English/Act1974358_union_representatives.pdf (09.04.2014).

"SECTION 6: A trade union representative is entitled to time off, as required, for performance of the trade union duties.

> *The time off may not, however, exceed what is reasonable taking account of circumstances prevailing at the place of work. The time off may not be scheduled in such a manner as to cause any significant impediment to the proper performance of work.*
>
> *The amount of time off and the time at which it is to be taken shall be determined following deliberations between the employer and the local employees' organisation."* [605]

Disputes concerning the rights and protection of union representative are ultimately resolved by the Labour Court; pending a dispute, the union has the priority right of interpretation of the law and relevant rules in the collective agreement (section 9 of the Act on Trade Union Representatives).[606]

A trade union representative has **the right to keep employment benefits** when he or she is absent from work in order to pursue union activities related to the work place. Such activities are considered equivalent to work performed for the employer. The trade union representative is not entitled to employment benefits when carrying out union activities of a more general nature, although he or she has the right to time off for such purposes. If union activities are pursued outside the representative's ordinary working hours and this results from a decision taken by the employer, for example if the employer has decided that negotiations are to take place in the evening, the representative's remuneration shall be the same as if the work had been performed on behalf of the employer. Additional costs incurred shall also be reimbursed if they are attributable to the employer. Section 7 of the Act on Trade Union Representatives states:

> "*The representative shall be entitled to retain his employment benefits in the event that time off is taken for the performance of trade union activities at his own place of work.*
>
> *If trade union activities at his own place of work take place at times outside the representative's normal working hours and this results from a decision taken by the employer, the representative shall be paid compensation as though the work had been performed on behalf of the employer.*
>
> *Additional costs incurred shall also be reimbursed, if they are attributable to the employer.*
>
> *Where, according to law, employment benefits are paid on the basis of the amount of time worked, the time referred to in the first and second paragraphs shall be regarded as equivalent to time worked."* [607]

The trade union representative enjoys an **extended employment protection** compared to regular workers. Thus, in addition to the general protection provided for in the Employment Protection Act and the Co-determination Act, the Act on Trade Union Representatives provides for a priority right to continued employment in the event of redundancy if it is of special importance to trade union activity

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[605] Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen, available in English (with amendments up to 1990) at http://www.naturvetarna.se/Global/English/Act1974358_union_representatives.pdf (09.04.2014).

[606] See also A. Adlercreutz & B. Nyström, *Labour Law in Sweden*, Alphen aan den Rijn: Kluwer Law International 2010, p. 239.

[607] Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen, available in English (with amendments up to 1990) at http://www.naturvetarna.se/Global/English/Act1974358_union_representatives.pdf (09.04.2014).

at the work place (section 8 of the Act on Trade Union Representatives). Moreover, section 4 of the Act on Trade Union Representatives provides that a trade union representative shall not be given less favourable working conditions or terms of employment because of his position and activity as representative. This prohibition against deteriorating conditions applies to the period of office as well as to the time following resignation of office, i.e. when the representative returns to his ordinary work. Thus, the employee is guaranteed the same or an equivalent position with respect to working conditions and terms of employment, as would have been the case if he or she had not had been appointed as trade union representative. Section 4 of the Act on Trade Union Representatives states:

> *"A trade union representative shall not be subjected to worse conditions of work or terms of employment as a result of his appointment. Following the completion of the appointment, the employee shall be ensured the same or an equivalent position, with respect to working conditions and terms of employment, as if he had not received any trade union appointment."*[608]

If an employer wants to change or modify a union representative's working conditions or terms of employment, the employer must normally communicate a pre-warning to the local trade union and notify the union representative concerned at least two weeks in advance. If the union or the representative calls for discussion concerning the planned change within one week following the pre-warning and notification, the employer cannot put the change into effect before the opportunity for discussion has been given. Section 5 of the Act on Trade Union Representatives states:

> *"In the event that an issue arises concerning the alteration of a trade union representative's conditions of work or terms of employment, the employer shall inform the representative and give at least two weeks advance notice to the local employees' organisation. If this is not possible, the representative shall be informed and notice shall be given as soon as possible. The obligation to inform the trade union representative and notify the union shall not arise if the alteration takes place in the normal course of the trade union representative's work and does not detract from his opportunity to perform his trade union duties.*
>
> *The local employees' organisation and the representative shall be entitled to deliberations with the employer concerning measures referred to in the first paragraph. Such deliberations shall be convened not later than one week after the representative has been informed and the union notified. Once the deliberations have been convened, the employer shall not be entitled to implement the anticipated measure until the opportunity for deliberations has been afforded."*[609]

3. Sanctions available and application in practice in case of violation of laws protecting workers' representatives

As described above in section 1.3, the sanctions and remedies available when just cause for dismissal has not been proved are: (i) declaration of invalidity of notice of termination and re-instatement; (ii) pay and other employment benefits for the time between the dismissal and the re-instatement; and (iii) damages. A dismissal of a trade union representative, which is based on his or her function as such

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[608] Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen, available in English (with amendments up to 1990) at http://www.naturvetarna.se/Global/English/Act1974358_union_representatives.pdf (09.04.2014).

[609] Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen, available in English (with amendments up to 1990) at http://www.naturvetarna.se/Global/English/Act1974358_union_representatives.pdf (09.04.2014).

representative, is obviously not a just cause for dismissal. Thus, the general sanctions and remedies for unlawful dismissal shall be applied in such situation.

An employer violating the specific rules laid down in the Act on Trade Union Representatives may be liable to pay damages. Section 10 of the Act provides that an employer who fails to comply with his obligations under the Act, or the provisions of a collective bargaining agreement which may apply instead of the Act, shall, in addition to pay and other employment benefits to which a union representative is entitled, pay compensation for any damage incurred. In assessing whether, and to what extent damage has been inflicted, account shall also be taken of the interests of the employees' organisation that the rules laid down in the Act are respected and to other circumstances that are not purely of an economic significance. Section 10 of the Act on Trade Union Representatives states:

> *"An employer who fails to comply with his obligations pursuant this Act or the provisions of a collective bargaining agreement which apply instead of this Act, shall, in addition to pay and other employment benefits to which a union representative is entitled, pay compensation for any damage incurred. In assessing whether, and to what extent, damage has been incurred, account shall also be taken of the interests of the employees' organisation in compliance with the provisions of this Act in relation to the union's representatives, and also other circumstances which are not purely of a financial significance.*
>
> *An employees' organisation may be ordered to pay damages if it has caused the erroneous application of this Act or a collective bargaining agreement which applies instead of the Act and where such organisation was aware, or clearly should have been aware, of the error. This also applies if the organisation fails to take reasonable measures to stop a trade union representative from similar conduct or if the union fails to endeavour to prevent damage arising as a consequence of an incorrect procedure. A union representative cannot be ordered to pay damages or to repay pay which he has received for union activities which he has conducted with the approval of the organisation.*
>
> *Damages may be adjusted if, taking account of the extent of damage or other circumstances, it is reasonable to do so".*[610]

When a dispute arises concerning the rights of a trade union representative, whether the Act on Trade Union Representatives or a collective agreement superseding the Act is applicable, the trade union has *priority of interpretation.* It means that the trade union's opinion of the proper meaning of the Act or the collective agreement shall apply until the dispute has been finally resolved (section 9 of the Act on Trade Union Representatives). This right may be used when the discussions with the employer have not resulted in an agreement. Should the Labour Court find that the union when exercising this right maintained an incorrect interpretation of the Act or the collective agreement and that it was aware of or should have been aware of it, the union is liable to pay damages to the employer. Section 10 of the Act on Trade Union Representatives provides that the trade union representative cannot be made liable to pay damages or to repay pay received when pursuing trade union activities, provided that he or she has acted with the trade union's approval.

In case AD 2005 nr 68, an employer had dismissed a worker's representative following a statement made by the representative in a news article in which he criticized the company for not being willing to adhere to a collective agreement. The Labour Court found that the company thereby had violated the worker's representative right to association protected under sections 7 and 8 of the Co-

[610] Lag (1974:358) om facklig förtroendemans ställning på arbetsplatsen, available in English (with amendments up to 1990) at http://www.naturvetarna.se/Global/English/Act1974358_union_representatives.pdf (09.04.2014).

determination Act. The court ruled that the company was liable to pay damages amounting to 80,000 SEK to the worker's representative and the same amount to the local union. In case AD 2002 nr 6, the Labour Court found that a company had violated the worker's representative's and the union's right to association by giving notice of termination without having just cause for dismissal. Similar to case AD 2005 nr 68, the court ruled that the company was liable to pay damages to the worker's representative amounting to 80,000 SEK and the same amount in damages to the local union.

4. Constitutional basis for collective representation of workers

Rules on collective representation of workers are laid down in legislation; namely the Act on Trade Union Representatives, the Co-determination Act and to some extent in the Employment Protection Act. The fundamental right of association protected in the Co-determination Act refers to the right of individual employers and employees to belong to an organization of employers or an organization of employees, to take advantage of that membership, and to work for the organization. Obviously, it also entails the right to establish a new organization.

In a more general manner, the right of association, including the right of everyone to form and to join trade unions for the protection of his or her interests, is protected in chapter 2 section of the Instrument of Government (Regeringsformen), which is part of the Swedish Constitution and under Article 12 of the Charter of Fundamental Rights of the European Union. Freedom of association is also protected under Article 11 of the European Convention on Human Rights. It shall also be mentioned that Chapter 2 section 14 of the Instrument of Government provides that a trade union, an employer, or employers' association shall be entitled to take industrial action unless otherwise provided in an act of law or under an agreement.

5. Role of collective work relations

5.1 Institutions and legal means of collective action

Collective labour law, i.e. the law of industrial relations and collective bargaining, is since 1976 regulated in the Co-determination Act ((Lag (1976:580) om medbestämmande i arbetslivet).[611] Section 10 of the Act provides that an employee's organization has the right to negotiate with an employer any matter relating to the relationship between the employer and any member of the organisation who is, or has been, employed by the employer. An employer has an equivalent right to negotiate with an employee's organisation. This general right to negotiation implies a corresponding duty to negotiate for the other party. The duty to negotiate entails the obligation to, personally or through an agent, appear at a negotiation meeting. However, it does not create any obligation on the part of an unwilling party to reach an agreement.

If the parties cannot agree during negotiations to conclude a collective agreement, they are normally free to take collective action. Labour market parties not mutually bound by a collective agreement are entitled to take collective action in the form of a strike, lockout or boycott or any other similar measure against each other, failing any provision to the contrary by law. There are no specific provisions describing which kind of collective actions that may be taken nor provisions prohibiting certain kinds of actions. The fundamental right to take collective action is regulated in the Swedish constitution; chapter 2 section 14 of the Instrument of Government provides that a trade union, an employer, or employers' association shall be entitled to take industrial action unless otherwise provided in an act of law or under an agreement. The right to take collective action has also been recognized in EU law. The

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611 Lag (1976:580) om medbestämmande i arbetslivet, available in English at http://www.government.se/content/1/c6/17/41/31/59b8df50.pdf (09.04.2012).

European Court of Justice has stressed that the right to take collective action, including the right to strike, is a fundamental right which forms an integral part of the general principle of Community law.[612]

When collective agreement is reached, the right of the parties and their members to take collective action ceases according to the limitations in section 41 and 42 of the 1976 Co-determination Act. The so-called **"peace obligation"** (fredsplikt) regulated in those provisions is an important feature of the Swedish rules on collective agreement and a historical explanation to their vast acceptance. The peace obligation entails, in essence, that an employer and employee bound by collective agreement may not initiate or participate in a stoppage of work (lockout or strike), blockade, boycott or other collective action, if the action aims to exert pressure in a dispute over the validity of a collective agreement, its existence or its correct meaning, or in a dispute, as to whether a particular procedure is contrary to the agreement or to the Co-determination Act. The same is true if the action aims to: (i) bring about an alteration of the collective agreement; (ii) affect a provision which it is intended will come into operation when the agreement has ceased to apply or; (iii) support some other party who is not himself permitted to take collective action. There is also a prohibition on collective actions against small companies with no employees or only family-related employees. Thus, when the two parties are bound by a collective agreement - which is usually the case in the Swedish labour market – the peace obligation provides very little room for collective action. However, collective action is always allowed in support of some other party who is permitted to take such action. This right to "sympathy action" is of capital importance in an industrial-relations system such as the Swedish one.[613]

The prohibition on unlawful collective action (peace obligation) applies only to actions induced by employment relations to which the Co-determination Act directly applies (section 42a of the Co-determination Act). This provision was introduced in response to case law[614] and confirmed the practice to combat social dumping by forcing foreign employers to sign a collective agreement meeting the Swedish standards of the branch in question, if needed by means of collective action. In the so-called "Laval-case", collective action was taken in order to oblige a Latvian company to sign the main Swedish collective agreement in the construction sector. The Latvian company performed the job in Sweden with its own workers to whom a Latvian collective agreement already applied. The European Court of Justice found that the provision in section 42a of the Co-determination Act - the legal basis for the Swedish trade union's collective action - was not compatible with the EC Treaty. Following this judgment, section 42a of the Co-determination Act was amended with the effect that if the matter falls within the scope of EU law, the union may take collective action only in order to enforce *minimum pay and other minimum conditions* as provided in the general collective agreement in the sector.

A general requirement is that a collective action must be sanctioned by the relevant organization and in accordance with its rules. It applies irrespective of the existence of a peace obligation. Thus, any collective action without due support of an organization is unlawful.[615] In the event of a breach, individual employees may be liable to pay damages. In case of an unlawful action sanctioned by an organisation, only the organisation may be liable to pay damages, not individual employees (section 59 of the Co-determination Act).

When the parties are not bound by a collective agreement, the right of Swedish unions to take collective action appears extensive in an international comparison. There are no rules on general

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[612] See for example case C-438/05 *Viking Line* and Case C-341/05 *Laval*.

[613] A. Numhauser-Henning, *Labour Law*, in M. Bogdan, Swedish legal system, Stockholm: Norstedts Juridik AB 2010, p. 353.

[614] Case AD 1989:120.

[615] A. Numhauser-Henning, *Labour Law*, in M. Bogdan, Swedish legal system, Stockholm: Norstedts Juridik AB 2010, p. 353.

restriction in Swedish law, for example a proportionality requirement similar to the one applied in Germany concerning the extent and form of conflict measures.[616]

A party wishing to take collective action must give written notice to the other party and inform the National Mediation Office (Medlingsinstitutet) seven working days in advance of the planned action (section 45 of the Co-determination Act). The task of the Office is to monitor conditions on the labour market including yearly wage statistics as well as to appoint a conciliator to mediate whenever there is an industrial dispute that threatens to give rise to or has given rise to collective action. The main task of the conciliators is to bring about an agreement between the parties. Mediation may sometimes be imposed upon the parties and there is a statutory right for the conciliator to postpone an industrial action for a maximum of 14 days (section 49 of the Co-determination Act).

5.2 Collective work relations in practice

Collective bargaining and co-operation between employers, employees and unions has since the beginning of the 20th century played a central role in Swedish labour law. This long tradition of dialogue and collective bargaining between employers' organizations and trade unions (the social partners) was later to become known as **"The Swedish Model"** and it is characterized by a high degree of autonomy for the social partners and by their social responsibility. The principal rules of Swedish labour law were articulated by the social partners themselves, and subsequent legislation was a mere codification of the social practice made generally applicable to important parts of the labour market. In the 1970th, the trade unions turned to the legislator to guarantee both industrial democracy and important labour market conditions. Following the introduction of the Co-determination Act in 1976, the main principle in Swedish labour legislation has been that the same legal rules should apply to the entire labour market, irrespective of whether the employee is in private or public employment.[617]

The above mentioned historical developments are reflected in current Swedish labour law, which is still characterized by the special role assigned to the social partners. It has resulted in that there is no single "labour code", but merely a set of different statutes on disparate issues along with numerous collective agreements. Further, many of the rules laid down in the different statutes are so-called "semi-mandatory rules". It means that they may be overridden by collective agreements. The collective agreement serves as a compulsory law within its scope. The important role played by the social partners in Swedish labour law is reflected by a **high degree of organization density** on the labour market. In 2013, around 70 percent of the employees were members of a union.[618]

National collective agreements covering pay and general conditions of employment are largely negotiated by the social partners, via a central bargaining process. Thus, collective bargaining is relatively centralized and the major part of the employees and employers are organised in a few large unions and employer organisations respectively. The trade union movement consists of trade unions regrouped in three major confederations: the Swedish Trade Union Confederation (LO); the Swedish Confederation for Professional Employees (TCO); and the Swedish Confederation of Professional Associations (Saco). The trade unions of TCO and Saco have formed two negotiating coalitions; one for the public sector (Offentliganställdas förhandlingsråd); and one for the private sector (Privattjänstemannakartellen). Employers in the private sector are represented by the Confederation of Swedish Enterprise, while local municipalities are organised within the Swedish Association of Local Authorities and Regions, and state employers are represented by the Swedish Agency for Government

[616] R. Eklund et al., Swedish Labour and Employment Law: Cases and Materials, Uppsala: Iustus Förlag AB 2008, p. 33.

[617] A. Numhauser-Henning, *Labour Law*, in M. Bogdan, Swedish legal system, Stockholm: Norstedts Juridik AB 2010, p. 346.

[618] http://www.tcotidningen.se/fortsatt-tapp-for-lo-forbunden (23.04.2014).

Employers. In all, there are over a hundred contracting parties in the Swedish labour market, reaching over 650 collective agreements.[619] The collective agreements are concluded on three levels: national level, industry level and local level. Generally, the relationship between employers' organization and the union is firm and long-standing. Orderly and peaceful ways for parties to meet, to bargain and to settle disputes can be said to characterize "the Swedish model" for industrial relations.[620]

Although Swedish law does not provide for exclusive representation and general extension *de jure* of collective agreements, established unions *de facto* often speak for the entire employee community. Due to contractual obligation of the employer towards the contracting trade union, collective agreements affect *de facto* not only the trade union members, but in principle all employees engaged by the employer within its application.[621] The major trade union has estimated that about 90 percent of the workers in Sweden are protected by collective agreements.[622] The important role of the social partners is also reflected by the fact that important issues are still not laid down in law, for example rules on minimum pay. In addition, the many "semi-mandatory rules" laid down in laws may be overridden by collective agreements. A collective agreement has a "normative effect" on any agreement at a lower level. Thus, any provision in a collective agreement at a lower level or in an individual employment contract that is not consistent with the collective agreement is invalid.[623]

By international standards, there are few disputes in the Swedish labour market, whether in terms of notice of industrial action, actual industrial action or work days lost. During the period 2000-2009, the total annual number of working days lost as a result of industrial disputes varied between 272 and 15,000, except in 2003 and 2008 when the figures exceeded 600,000 and 100,000 respectively, due to widespread unrest in the municipal sector. In 2011, there were only 254 working days lost.[624]

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[619] Information from the Swedish National Mediation Office, available at http://www.mi.se/other-languages/in-english/the-swedish-model/ (07.05.2014).

[620] A. Numhauser-Henning, *Labour Law*, in M. Bogdan, Swedish legal system, Stockholm: Norstedts Juridik AB 2010, p. 347.

[621] A. Numhauser-Henning, *Labour Law*, in M. Bogdan, Swedish legal system, Stockholm: Norstedts Juridik AB 2010, p. 353.

[622] https://handels.se/Global/Om%20Handels/English/the_swedish_model.pdf (07.05.2014).

[623] A. Numhauser-Henning, *Labour Law*, in M. Bogdan, Swedish legal system, Stockholm: Norstedts Juridik AB 2010, p. 352.

[624] Information from the Swedish National Mediation Office, available at http://www.mi.se/other-languages/in-english/the-swedish-model/ (07.05.2014).

G. UNITED KINGDOM

1. General overview of legal protection against unfair dismissal

Unfair dismissal under UK law is a **statutory concept**.[625] For unfair dismissal to be invoked, the employee must first satisfy a number of qualifying conditions, the most important of which is that he or she has been dismissed.

The **concept of dismissal** is also defined by legislation. Section 95(1) of the Employment Rights Act 1996 (the "ERA 1996") clarifies that an employee may be treated as "dismissed" where the contract of employment has been terminated (with or without notice), where a fixed term contract is not renewed, or where the employee terminates the contract of employment in circumstances in which he is entitled to do so by reason of the employer's conduct.

In order to complain of unfair dismissal to a court (more particularly, to an employment tribunal), the individual must have been **employed as an employee**[626] and must normally have been **employed for a period of not less than two years** at the time of the dismissal.

Once it has been established that the employee has been dismissed, an unfair dismissal will be decided in two stages: the first consists of **establishing what the reason(s) for dismissal are**; the second stage is **procedural fairness**. Reasons can be divided into two categories:

(1) what are often referred to as **"potentially fair" reasons**; and

(2) reasons, which, subject to certain exceptions make a dismissal **automatically unfair** (such as dismissals for reasons relating to trade union membership or activities, or relating to leave for family reasons).[627]

At the second stage, the employment tribunal must be satisfied that the employer acted reasonably in dismissing for the given reason, *unless the reason is one of those which makes the dismissal automatically unfair*. The "potentially fair" reasons are so called because they can potentially justify dismissal, but they do not necessarily justify dismissal, since section 98(4) of the ERA 1996 obliges the tribunal to decide **whether the employer acted reasonably or unreasonably** in treating the reasons as sufficient for dismissing the employee.[628]

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625 Under the Employment Rights Act 1996, available at http://www.legislation.gov.uk/ukpga/1996/18/contents (21.05.2014).

626 Under the Employment Rights Act 1996, an "employee" is defined as "an individual who has entered into or works under a contract of employment." "Contract of employment" is defined, in turn, to mean, "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing" (ERA 1996, sections 230(1) and (2)). The definition is further interpreted by common law tests developed and applied by courts. The term "employee" is to be distinguished from the term "worker" which is generally accepted as having a wider scope and which is referred to in legislation on topics such as the minimum wage, working time and trade unions.

627 "Automatically unfair reasons" are specifically considered in section 2 below of this country report in the context of trade union activities. Such reasons are specifically provided for by statute as being special cases in which considerations of reasonableness under section 98(4) ERA 1996 are not usually of primary concern because the question is usually not whether the employer behaved reasonably, but simply whether it infringed a particular statutory provision.

628 Robert Upex and Stephen Hardy, *The Law of Termination of Employment*, 8th ed. 2012, Jordans, p.153.

1.1. Substantive reasons for legitimate dismissals

Where an employee brings a complaint of unfair dismissal, the employer must show that the reason for the dismissal falls within one of the specific categories set out in the ERA 1996:

(1) capability or qualifications;
(2) the employee's conduct;
(3) redundancy;
(4) due to a statutory requirement. [629]

There is also a further category which the statute describes as "*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*."[630]

"**Capability**" refers to "*capability assessed by reference to skill, aptitude, health or any other physical or mental quality,*" and "qualifications" means, "*any degree, diploma or other academic, technical or professional qualification relevant to the position which the employee held.*"[631] In practice, this ground is commonly relied on in relation to employees incapable of satisfactory work; an employee who fails to come up to standard through his or her own carelessness, negligence or idleness are more usually dealt with as cases of [mis]conduct.[632]

"**Conduct**" incorporates a wide variety of actions, ranging from incidents of gross misconduct, such as theft, violence and working for a competitor of the employer, to less serious offences such as breaching a company's email policy or persistent lateness.

"**Redundancy**" is specifically defined by the ERA 1996.[633] It can be said to broadly incorporate the following scenarios: where the employer ceases carrying on the business for the purposes for which the employee was employed, where the employer ceases business in the place the employee was employed, and finally, where the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. For the reason of redundancy to be accepted by a tribunal as fair, the dismissal must be wholly or mainly attributable to one or more of the above scenarios.

Dismissal due to a "**statutory requirement**" refers to when an employee cannot continue to work in the position they held without contravening a duty or restriction imposed by statute. One example is where an individual employed as a driver has had their driving licence suspended.

Finally, "**some other substantial reason**" is considered as a residual category, where a clear business reason for dismissal exists which does not fall into one of the statutory categories outlined above. It is most commonly relied on where the employee has refused to agree to change in contractual terms triggered by genuine business needs of the employer[634] or where the employee has refused to agree to a reorganization falling short of redundancy.[635]

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629 ERA 1996, section 98(2).

630 ERA 1996, section 98(1)(b).

631 ERA 1996, section 98(3).

632 Robert Upex and Stephen Hardy, *The Law of Termination of Employment, op. cit.*, p.159.

633 ERA 1996, section 139(1).

634 Such as *Kelman v. Oran* [1983] Industrial Relations Law Reports 432 and *Scottish and Newcastle Retail Ltd v. Stanton and Durrant*, IDS Brief 596.

635 See *Hollister v. National Farmers' Union* [1979] Industrial Cases Reports 542.

1.2. Procedural requirements for legitimate dismissals

After a potentially fair reason under the ERA 1996 has been established, it is then necessary for the employment tribunal to consider whether the employer acted fairly in dismissing the employee for that reason.[636]

1.2.1. Generally applicable requirements

The fairness of a dismissal is to be assessed in light of the reason relied on by the employer for having dismissed the employee. The notion of **"fairness" of process is determined on a case by case basis**, although common principles have been established by case law. These include providing the employee with a right of appeal against any decision to dismiss, and permitting an employee to be accompanied at any meeting to consider their dismissal.

A central overriding principle is that the reasonableness of an employer's conduct in deciding to dismiss an employee is not to be judged in such a way that the tribunal substitutes the decision it would have taken for that of the employer, and that in many cases, there is a **"band of reasonable responses" open to the employer** in dealing with an employee's conduct or situation. Only if the employer acts outside that band is the dismissal unfair.[637]

1.2.2. Requirements for dismissals based on lack of capability

For dismissals based on the employee's perceived lack of **capability**, a "reasonable" process depends on whether the employee was suffering from ill health or was simply performing work unsatisfactorily. Insofar as the latter is concerned, the employer must satisfy the employment tribunal that he or she honestly believed on reasonable grounds that the employee was incapable.[638] A full and careful investigation of the facts should be undertaken; a fair procedure will also likely involve the employee having been warned and to have been given an opportunity to improve. However, there may be rare circumstances in which it may not be necessary to follow a procedure: where, for example, an employee can be shown to be clearly incapable of improving or that they already know what to expect.[639]

In **ill health cases**, including those of prolonged absence, the employer is generally expected to be more patient and to take reasonable steps to understand the true medical position. This is also the position in cases of persistent intermittent absence for minor illness where a poor attendance record means the employee is unable to do their job; it will rarely be appropriate to adopt a disciplinary approach involving warnings.[640]

1.2.3. Requirements for dismissals based on misconduct

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636 Section 98(4) of the ERA 1996 states that: "*Where the employer has fulfilled the requirements [of showing a fair reason for dismissal], the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.*"

637 Judge Browne-Wilkinson in *Iceland Frozen Foods Ltd v. Jones* [1983] Industrial Cases Reports 17 at pp24-25.

638 *Alidair Ltd v Taylor* [1978] Industrial Cases Reports 445.

639 *Cook v Thomas Linnell & Sons Ltd* [1977] Industrial Cases Reports 770.

640 *Lyncock v. Ceral Packaging Ltd* [1988] Industrial Cases Reports 670.

Similarly, in dismissals based on **misconduct**, the tribunal should not seek to substitute its view of how a matter should have been dealt with for that of the employer. It need only satisfy itself that the employer's view of the facts stemmed from an honest belief [that the employee was guilty of misconduct] and that such belief was based on reasonable grounds established as part of a careful investigation into the facts.[641] An employer is nevertheless expected to ensure that the "punishment fits the crime" and to avoid dismissing an employee for minor misconduct in the absence of a prior formal warning or warnings. Apart from in some cases of gross misconduct, any fair process will almost certainly demand that an employee has a hearing before the decision is taken to dismiss for disciplinary reasons. In this regard, the only absolute procedural rule is that under the Employment Relations Act 1999, where it is stated that a worker has the right to be accompanied at a disciplinary or grievance hearing.[642]

1.2.4. Requirements for dismissals due to redundancy

The process to be followed in cases of **redundancy dismissals** depends on whether the dismissal is as a result of individual redundancy or collective redundancy. 'Collective redundancy' refers to when an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. 'Individual redundancy' is where it is proposed that fewer than 20 employees at one establishment be made redundant.

In the case of **collective redundancy**, the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") sets out a procedural framework for informing and consulting with affected employees about the proposed dismissals.[643] The employer has a duty to consult about the dismissals with, "*all the persons who are appropriate representatives of any of the employees who may be affected by measures taken in connection with those dismissals.*"[644] Once the employer is "*proposing to dismiss*," consultation with "*appropriate representatives*" must begin in "*good time*" and in any event at least 45 days before the first dismissal takes effect where the employer plans to dismiss 100 or more employees at one establishment within a period of 90 days or less; otherwise, at least 30 days before the first dismissal takes effect.[645]

"***Appropriate representatives***" may be drawn from three possible sources. First, if the employees are of a description in respect of which an independent trade union is recognized by the employer, the employer must consult representatives of that union, irrespective of whether the affected employees are union members.[646] If there is no independent recognized union, the employer must consult "*employee representatives*". These may be persons elected specifically for the purpose of the consultation exercise in question or persons appointed or elected by the affected employees for another purpose who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information to be consulted about the proposed dismissals on their behalf.[647] Where the employer chooses to consult specifically elected representatives, it must invite affected employees to hold an election. The employer has a duty to, "*make such arrangements as are reasonably practical to ensure that the election is fair.*"[648]

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641 *British Home Stores Ltd v. Burchell* [1980] Industrial Cases Reports 303.

642 Employment Relations Act 1999, section 10(1).

643 This derives from European law, namely the EU Directive 2002/14/EC.

644 Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA 1992"), section 282(1). TULRCA available at http://www.legislation.gov.uk/ukpga/1992/52 (27.05.2014).

645 TULRCA 1992, section 188(1A), as amended by Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013, section 3(2).

646 TULRCA 1992, section 188(1B)(a).

647 TULRCA 1992, section 188(1B)(b).

648 TULRCA 1992, section 188(1A)(a).

Section 188(1A) of TURLCA 1992 sets out a broad framework for the process to elect employee representatives; this provides a certain amount of discretion as to how representatives are ultimately elected.

In order to comply with the **duty to consult**, the employer must disclose in writing to the appropriate representatives a number of prescribed matters, including: the reasons for its proposals, the numbers and descriptions of employees it proposes to dismiss and the proposed method of selecting them.[649] Consultation must include ways of avoiding dismissals, reducing the numbers of employee to be dismissed and mitigating the consequences of dismissals.[650] The employer must undertake the consultation, "*with a view to reaching agreement,*" with the appropriate representatives.[651] A further final procedural requirement is that the employer must notify the relevant Government department in writing of the proposal before giving notice to terminate an employee's contract of employment in respect of any dismissals at least 30 days before the first dismissal takes effect (and at least 45 days before the first dismissal takes effect where 100 or more employees are proposed to be dismissed).[652]

In the case of the more common **'individual redundancy'**, it is case law which has largely established the parameters within which employers must operate to fairly dismiss an employee by reason of redundancy. The two main obligations laying upon an employer proposing to dismiss an employee for redundancy are to make reasonable efforts, where practicable, to find him or her suitable alternative employment in the undertaking, or, where appropriate, with an associated employer and to consult with him or her and give reasonable warning of impending redundancy.[653] Of particular importance is the need to adopt a fair and objective basis on which to select an employee or employees for redundancy.[654]

1.2.5 Requirements for dismissals due to the contravention of a statutory requirement

Although there is no prescribed procedure in relation to a dismissal in circumstances where it is not possible to continue to employ the employee in the particular job he or she does without **contravening a statutory requirement**, this does not mean that there is no need to go through a fair procedure before dismissing the employee.[655] Typical requirements, it may be concluded from existing principles of fairness discussed above, would include giving warning to the employee that dismissal is being considered, and providing a right of appeal against the decision to dismiss.

1.2.6 Requirements for dismissals due to some other substantial reason

Finally, the procedure expected of an employer dismissing an employee for **some other substantial reason** will depend on the reason for which the employer is terminating the employee's employment.

1.3. Burden of proof and available sanctions

1.3.1 Burden of proof

649 TULRCA 1992, section 188(4).

650 TULRCA 1992, section 188(2).

651 *Ibid.*

652 TULRCA 1992, section 193.

653 See Robert Upex and Stephen Hardy, *The Law of Termination of Employment, op. cit.*, p.243.

654 *Polkey v. AE Dayton Services Limited* [1988] Industrial Cases Reports 142.

655 *Sutcliffe and Eaton Ltd v. Pinney* [1977] Industrial Relations Law Reports 349.

The burden of **establishing the reason**, or principal reason, for the dismissal **lies upon the employer**. If the employer fails to do so, the dismissal will be deemed unfair. Where the employer discharges the burden of proving the reason, but the employee wishes to challenge that reason and show a competing reason, the employee need only show, without actually proving, that there is an issue warranting investigation and capable of establishing the competing reason; once the employee, on evidence, establishes the existence of such an issue, the burden of proving which one of the competing reasons is the principal reason remains on the employer.[656]

At the second stage of the enquiry, where the employment tribunal must satisfy itself that the **employer acted reasonably** in dismissing for the given reason (unless the reason is shown to be one of the automatically unfair reasons)[657], the **burden of proof is said to be neutral**, section 98(4) of the ERA 1996 being expressed in neutral terms. In *Boys and Girls Welfare Society v. McDonald*[658] the Employment Appeals Tribunal emphasized that employment tribunals should not fall into the error of placing the burden on employers of satisfying them as to the reasonableness of the dismissal.

1.3.2. Sanctions

It was originally intended by the legislation that the main remedies for unfair dismissal would be reinstatement and re-engagement orders. Statistics indicate, however, that very few re-employment orders are made in practice.[659] The **most common sanction is compensation**.

If the employment tribunal decides to consider making a re-employment order, it must first consider whether to make a reinstatement order;[660] if it decides not to do so, it must then consider whether to make a re-engagement order.[661] If it decides not to make any order, it must make an order of compensation.[662]

A reinstatement order is an order to the employer to treat the applicant as if he or she had not been dismissed. In deciding whether to make an order, the tribunal must comply with the requirements of the ERA 1996, and take into account the following factors: (1) the complainant's wishes, (2) the practicability for the employer of compliance with the order; and (3) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order reinstatement.[663]

A re-engagement order must be considered where the tribunal decides not to order reinstatement. A re-engagement order is an order that the employee should be engaged by the employer in employment comparable to that from which he or she was dismissed. It must broadly apply the factors to be considered for a reinstatement order.[664]

Where a re-employment order is not made, the employment tribunal must award **compensation**. In most cases, compensation usually **consists of a basic award and a compensatory award**. The **basic award** is based on the complainant's age, length of continuous employment at the date of termination,

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656 *Maund v. Penwith District Council* [1984] Industrial Cases Reports 143.

657 See section 1 of this country report, above.

658 [1996] Industrial Relations Law Reports 129.

659 Employment Tribunal and Employment Appeals Tribunal statistics published by the Ministry of Justice and Tribunals Service for 2010-2011 show that re-employment orders were made in 1% of all cases (6 cases in total).

660 ERA 1996, section 116(1).

661 ERA 1996, section 116(2).

662 ERA 1996, section 112(4), as amended.

663 ERA 1996, section 116(1).

664 ERA 1996, section 115(1).

and the amount of gross weekly pay.[665] Gross weekly pay is currently capped at £464, and maximum number of years' service that may be taken into account is 20.[666] The maximum basic award is £13,920.[667]

A **compensatory award** is, "*such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*"[668] This will usually consist of immediate loss of wages, future loss of wages, a figure representing the loss of protection for unfair dismissal and loss of pension rights. It does not include injury to pride or feelings.[669] The maximum compensatory award is capped at the lower of one year's pay or, at present, £76, 574. This does not however apply in cases in which the dismissal is unfair for health and safety reasons,[670] or where an employee has been dismissed for having made a "protected disclosure" (i.e., whistleblowing). Here, there is no limit on the amount of compensation which may be awarded.

In the case of **collective redundancies**, employee representatives and affected employees may complain to an employment tribunal about an employer which fails to fulfil any of the statutory requirements. Where the tribunal upholds such a complaint, it must make a declaration and may also make a '**protective award**' in respect of employees in relation to whose dismissal or proposed dismissal the employer has failed to comply with a statutory requirement.[671] The award entitles employees subject to it to receive their normal pay for the 'protected period'. Such period is at the discretion of the tribunal, but may not exceed 90 days. Furthermore, an employer who fails to notify the relevant Government department in writing of the proposal to make redundancies risk **criminal prosecution and a fine** of up to level 5 on the standard scale (currently £5,000).[672]

1.4. Recent reforms concerning unfair dismissal laws

The principal change introduced by the Coalition Government in the field of unfair dismissal is that as from 6 April 2012, the ERA 1996 was amended to **increase the qualifying period of employment for bringing an unfair dismissal claim** from one year to two years.[673] This means that employees will only be protected from unfair dismissal by their employer once they have secured two years' service.[674]

From 29 July 2013, an additional **[alternative] cap was introduced on the maximum unfair dismissal compensatory award**. The limit was previously an annually revised sum of money (which currently

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665 Calculated in accordance with ERA 1996, sections 220-229.

666 ERA 1996, section 119(3).

667 This is based on a formula of Number of years' service (capped at 20) x Weekly gross salary (capped at £464) x Multiplying age factor [of 0.5 (for employees aged 18-22), 1 (for employees aged 22-41) or 1.5 (for employees aged 41 or more)].

668 ERA 1996, section 123(1).

669 *Dunnachie v. Kingston upon Hull City Council* [2004] Industrial Cases Reports 1052.

670 This refers to where the employee has been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work or was, among other things, a health and safety representative: ERA 1996, section 100.

671 TULRCA 1992, section 189(2) and (3).

672 Criminal Justice Act 1982, section 37(2).

673 ERA 1996, section 108(1), as amended by the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012.

674 The employee must have a minimum two years' service as at their effective date of termination. Note however that for most automatically unfair dismissals (see section 1 of this national report, above), it is still the case that no qualifying minimum period of service will be needed for the employee to have his or her unfair dismissal claim heard by an employment tribunal.

stands at £74,574), which individuals could secure even where their annual salary was less than this amount. The compensatory award is now capped at one year's gross pay where this lower than the monetary cap.[675]

A further change introduced in response to the financial crisis is in the field of **collective redundancies**. Whereas employers were, in proposing to dismiss as redundant 100 employees or more, previously **obliged to consult** with employee representatives for a minimum period of 90 days before dismissals took effect, this has, since 6 April 2013, been **reduced to 45 days**.[676]

2. Special protection for workers' representatives

We have identified five categories[677] of workers' representative as being recognised by UK law, each of which is afforded some form of special protection by the relevant legislation:

- **Employee representatives**[678] (and candidates to be employee representatives) for the purposes of information and consultation relating to **collective redundancies and transfers of undertakings**[679];
- **Employee and worker representatives** (and proposed representatives) in their capacity as **trade union** members engaging in trade union activities;[680]
- **Employee and worker representatives** (and proposed representatives) of the workforce in relation to a **workforce agreement** (an agreement capable of varying or complementing the statutory standards laid down in the Working Time Regulations 1998);[681]

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675 Enterprise and Regulatory Reform Act 2013, section 15.

676 TULRCA 1992, section 188(1A), as amended by section 3 of the TULRCA 1992 (Amendment) Order 2013.

677 Representatives of employee safety (covered by the Health & Safety (Consultation with Employees) Regulations 1996 and pensions representatives (protected under the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006) cover specific fields and are not addressed in detail in this country report. It can be noted, nevertheless, that special treatment for both such types of representative is (1) paid time off to carry out their duties, and (2), protection against dismissal or detriment (and additionally, for employee safety representatives, paid time off for training, and the provision of facilities to help them perform their duties) – see Advisory, Conciliation and Arbitration Service (ACAS) booklet, *Non-Union Representation in the Workplace*, pp.4-6, available at http://www.acas.org.uk/media/pdf/6/r/Non-union-representation-in-the-workplace-advisory-booklet.pdf (30.05.2014).

678 As defined by TULRCA 1992, section 196(1) – see 2.1 of this country report, below.

679 "Transfer of undertakings" refers to those procedures provided for by the Transfer of Undertakings (Protection of Employment) Regulations 2006, part of which refer to the election of employee representatives for the purposes of information and consultation on a transfer of an economic entity (an "undertaking").

680 A category of employees and workers, protection for which is recognised by TULRCA 1992, sections 146 and 152(1).

681 These derive from the EU Working Time Directive 1993 (93/104) and principally regulate minimum standards in relation to working time, including working hours, annual paid leave and rest periods and rest breaks. Schedule 1 of the Working Time Regulations 1998 permits the use of "workforce agreements" made either with specified representatives of the workforce, or, in certain circumstances, with a majority of the workers themselves. Various derogations from these standards can be made on a collective (or individual basis). One of the rights which can be affected is the core right of workers not to be required to work more than 48 hours on average per week. Working Time Regulations 1998 (Statutory Instrument 1998/1833), available at http://www.legislation.gov.uk/uksi/1998/1833/contents/made (28.05.2014).

- **Negotiating and Information & Consultation ("I&C") representatives** (and candidates for such positions) under the Information and Consultation of Employees Regulations 2004[682] (deriving from EU Council Directive 2002/14/EC providing for an EU-wide framework of minimum standards of information and consultation at national level in undertakings where 50 or more employees are employed);
- **Employee representatives at the transnational level**, in particular In European Works Councils and information and consultation procedures ("ICP").[683]

The specific protection afforded to each of the above categories of representative is addressed below.

2.1. Employee representatives for the purpose of information and consultation on collective redundancies and transfers of undertakings

Section 103(1) of the Employment Rights Act 1996 ("ERA 1996") makes the dismissal of employee representatives and those who are candidates to be employee representatives **automatically unfair** where the dismissal is by reason of them holding such a status. In other words, the employment tribunal need not proceed to the second stage of their enquiry (as they would normally) to satisfy itself that the employer acted reasonably in dismissing the employee for that reason.[684]

> "*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee, being-*
> *(a) an employee representative for [collective redundancies] or for [transfers of undertakings], or*
> *(b) a candidate in an election in which any person elected will, on being elected, be such an employee representative,*
> *performed (or proposed to perform) any functions or activities as such an employee representative or candidate.*"

The ERA 1996[685] also clarifies that an employee who is dismissed will have been unfairly dismissed if the reason (or principal reason) for the dismissal is that the **employee took part in an election of employee representatives** in respect of a consultation exercise for collective redundancies or a transfer of undertaking.

Employee Representatives are defined as those who have been elected by employees for the specific purpose of being consulted by the employer about dismissals proposed by him, or who have been elected [or appointed] by employees otherwise than for that specific purpose, but where it is appropriate (having regard to the purposes for which they were elected) for the employer to consult them about dismissals proposed by him.[686]

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682 Statutory Instrument 2004/3426, available at http://www.legislation.gov.uk/uksi/2004/3426/contents/made (28.05.2014).

683 Namely, those recognised as representatives under the Transnational Information and Consultation of Employees Regulations 1999 (Statutory Instrument 1999/3323), available at http://www.legislation.gov.uk/uksi/1999/3323/contents/made (28.05.2014).

684 For the meaning of automatically unfair and its consequences, see section 1 of this country report, above.

685 ERA 1996, section 103(2).

686 TULRCA 1992, section 196(1).

Section 105 of the ERA 1996 provides further that an employee who is **selected for redundancy** will be regarded as [automatically] unfairly dismissed if the reason (or principal reason) was that he was an employee representative of the kind identified in section 103. To avoid a finding of automatic unfair dismissal, it is specified that an employer may show that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held similar positions and who were not dismissed.[687]

Whether the employee is unfairly dismissed for being an employee representative (or as otherwise provided for by section 103, ERA 1996) or was selected for redundancy (or as otherwise provided for by section 105, ERA 1996), in neither case is the employee required to have been employed for the minimum two year period required to bring an ordinary unfair dismissal. In other words, such an individual potentially receives protection against unfair dismissal from the beginning of their employment.[688]

Employee representatives are also **protected from being subjected to any detriment** which falls short of being dismissed. Section 47 of the ERA 1996 states:

> "*An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that, being*
> *(a) an employee representative for [collective redundancies] or for [transfers of undertakings],*
> *(b) a candidate in an election in which any person elected will, on being elected, be such an employee representative,*
> *performed (or proposed to perform) any functions or activities as such an employee representative or candidate.*"

As with protection from dismissal, the protection from being subjected to a detriment also extends to those who have participated in an election of employee representatives.[689]

It should also be noted that employee representatives and candidates for this position are **entitled to be permitted by the employer to take 'reasonable' paid time off** during working hours to perform their functions and to undergo training to perform such functions.[690] As will be seen,[691] the basic structure of this provision is identical, *mutatis mutandis*, to that governing time off for trade union duties. It is a right to time off only with the employer's permission, with recourse to an employment tribunal if time off or payment is unreasonably refused,[692] and payment need be made only for duties performed during working hours.

Employers are furthermore required to allow appropriate representatives (both union and employee representatives) **access to the affected employees** and to afford them such **accommodation and other facilities** as may be appropriate.[693] This would probably include meeting rooms, a telephone and electronic communication media used or permitted in the workplace. The amount and timing of such access is not specified, but would probably be viewed by tribunals as subject to a test of reasonableness.[694]

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687 ERA 1996, section 105(1)(b).

688 ERA 1996, sections 108(3)(f) and (h). See section 1 of this country report above regarding the qualifying period of service.

689 ERA 1996, section 47(1A).

690 ERA 1996, section 61.

691 See section 2.2. of this country report below, for more detail.

692 ERA 1996, section 63.

693 TULRCA 1992, section 188(5A).

694 See Simon Deakin and Gillian S. Morris, *Labour Law*, 6th ed. 2012, Hart Publishing, p.931.

2.2. Employee and worker representatives in their capacity as trade union members engaging in trade union activities

Section 152(1) of TULRCA 1992 provides that a **dismissal will be deemed automatically unfair**[695] if the reason for it is that the employee, among other things:

> "*…(a) was, or proposed to become, a **member of an independent trade union**,*
>
> *(b) had **taken part**, or proposed to take part, **in the activities of an independent trade union** at an appropriate time….,* or,
>
> *(ba) had proposed to **make use, of trade union services** at an appropriate time*…."

As with employee representatives dealt with in section 2.1 of this country report above, **selection of an employee for redundancy** on the same grounds as those set out in section 152(1) TULRCA 1992 will also amount to an automatically unfair dismissal.[696] Also as above, the **qualifying period of employment** needed to bring an ordinary unfair dismissal claim is disapplied. A trade union representative who engages in the activities referred to will therefore potentially receive such protection from the outset of his or her employment.

It can be seen from the wording of the legislation that the **protection** is not generally applicable, but instead **must derive from the particular activity** which the trade union member was engaged in and to which their dismissal can be attributed.

"*Activities*" are not defined in the legislation. They clearly include activities connected with internal union organisation and industrial relations, and should, in theory, extend to any activities which a union may lawfully undertake.[697] As to activities **"*of the union*"**, jurisprudence indicates that it is not enough that a union member is simply taking part in the type of activities which his or her union pursues, but rather that the union must have – whether through custom and practice or otherwise – 'authorised' the individual to act on its behalf. Certainly, union officials (often known as 'shop stewards') will general be authorised to perform a wide range of activities, such as taking up members' grievances with management, calling meetings of the workforce, and any other activities normally associated with officials of their grade, provided that they act in accordance with union practice.[698] This is unlikely however to extend to individual union members who have little or no authority to act on behalf of the union in any dealings with the employer.

In *Chant v. Aquaboats Ltd*,[699] the Employment Appeals Tribunal said that, "*the **activities** of an independent trade union,*" **do not include an individual's independent activities** as a trade unionist and held that the organising of a petition about safety standards, which was vetted by the local branch of the union before being handed to the employers, was not a trade union activity within the meaning of the legislation.

A parallel protection is afforded to 'workers' by virtue of section 146 of TULRCA 1992. Namely, **a 'worker' has the right not to be subjected to any detriment** as an individual by any act, or any deliberate failure to act, by his or her employer if the act or failure takes place for the sole or main

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695 For the meaning of "automatically unfair" see section 1 of this country report, above.

696 TULRCA 1992, section 153.

697 Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* p.823.

698 *Ibid,* p.823-824.

699 [1978] Industrial Case Reports 643.

purpose of preventing or deterring him or her from joining, or participating in the activities of, an independent trade union, or making use of the services of such a union, or penalising him or her for doing so.

Although the **definition of a 'worker'** may incorporate individuals who work under a contract of employment (and who are therefore capable of being dismissed from employment), it also includes individuals who work, or normally work, "*under any other contract whereby [he or she] undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of [his or her]…*"[700] This extended definition can best be understood a reflecting the legislature's view that casual workers (and others who perform work for somebody else, but who are neither their employer nor a professional client) should not be denied basic protections which do not depend, for their effective functioning, upon the employment relationship in question being regular or long-term.[701]

Accordingly, **workers** (including employees) who act as representatives of other workers and employees as part of trade union activities **will be afforded protection against unfavourable treatment** even if this does not take the form of dismissal. "Detriment" can include both acts and omissions, such as failing to award a pay increase or promote a worker, for example.

For the sake of completeness, it should also be noted that **trade union representatives also have a number of statutory rights** concerned with facilitating their ability to conduct various functions on behalf of their members. These rights currently apply only to employees rather than the wider category of 'workers'.

Firstly, union 'officials' (which include any person elected in accordance with the rules of the union to be a representative of its members) are **entitled to paid time off**: (1) to carry out any of their duties, as such an official, concerned with *negotiations* with the employer related to collective bargaining where the union is recognised by the employer; (2) to carry out duties concerned with the *performance* on behalf of its employees of functions related to or connected with collective bargaining matters which the employer has specifically agreed may be performed by the union; and (3) to carry out duties concerned with the receipt of information from and consultation with the employer in relation to collective redundancies and a transfer of an undertaking.[702]

Secondly, an employee who is a member of a recognised independent union and is a '**Union learning representative' is entitled to paid time off** during working hours for specified activities in relation to fellow employees who are members of the same union.[703] A 'Union learning representative' is a relatively new type of union representative whose main function is to advise union members about their training, educational and developmental needs.

Thirdly, an employer must permit employees who are members of an independent trade union which it recognises in respect of that description of employee to take **reasonable time off during their working hours to take part in 'any activities' of the union** and any other activities in relation to which they are acting as a representative of it.[704] Insofar as a representative is concerned, this may include taking part in branch, area or regional meetings of the union, or meetings of official policy-making

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700 TULRCA 1992, section 296(1)(b).

701 See *Cotswold Developments Construction Ltd. v. Williams* [2006] Industrial Relations Law Reports 181, at [53].

702 TULRCA 1992, section 168(1).

703 TULRCA 1992, section 168A(1)(2), (10).

704 TULRCA 1992, section 170.

bodies such as the executive committee or annual conference, or meetings with full-time officials to discuss issues relevant to the workplace.[705]

2.3. Employee and worker representatives (and proposed representatives) of the workforce in relation to a workforce agreement[706]

'Workforce agreements', a statutory vehicle designed to implement the flexibility in the application of standards permitted by the respective EU Directives where the employer does not recognise a union may be made with **elected representatives of the workforce**. Such representatives are elected in accordance with the statutory procedures set out at section 3 of Schedule 1 of the **Working Time Regulations 1998**.[707]

Section 101A of the ERA 1996, inserted by the Working Time Regulations 1998,[708] specifically **protects representatives of members of the workforce and candidates for such positions** in connection with their performance (or proposal to perform), "*any functions or activities as such a representative or candidate.*"[709] In particular, such individuals will have been **automatically unfairly dismissed** where they have been dismissed by reason of their participation in such activities.

As with other worker representatives, 'workers' are **similarly protected from being subjected to any detriment** (by any act or any deliberate failure to act by an employer) by reason of their position as a representative or candidate to be a representative for the purposes of a workforce agreement.[710]

2.4 Negotiating and Information & Consultation ("I&C") representatives

The EU's Information and Consultation Directive[711] was implemented in UK by the Information and Consultation of Employees Regulations 2004 ("ICER 2004").[712] Initially, only undertakings employing at least 150 employees in the UK were covered by the Regulations; those employing at least 100 were subject to them as from 6 April 2007, and those employing at least 50 as from 6 April 2008. The basic framework of ICER 2004 essentially **provides for the establishment of an I&C procedure either at the initiative of the employer or at the request of employees**, a requirement for a 40% majority to trigger the procedure where there is a pre-existing agreement for I&C, the option for a negotiated agreement under the statutory procedure to provide that the employer informs and consults employees directly rather than through their representatives, and the operation of a 'standard' procedure, in the event of a failure to agree.

In order to initiate negotiations to reach an agreement, the employer must, as soon as reasonably practicable, make arrangements for the employees of the undertaking to elect or appoint negotiating representatives.[713] There is **considerable flexibility in the form and content of a 'negotiated**

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705 As indicated in the non-statutory guidance, see the Advisory, Conciliation and Arbitration Service Code of Practice, *Time off for trade union duties and activities*, 2009, para. 38, available at http://www.acas.org.uk/media/pdf/n/k/Acas_Code_of_Practice_Part-3-accessible-version-July-2011.pdf (30.05.2014).

706 For the meaning of 'workforce agreement' see introduction to section 2 above.

707 For further detail, see introduction to section 2 above.

708 Working Time Regulations 1998, Statutory Instrument 1998/1833, regulations 2(1) and 32(1).

709 ERA 1996, section 101A(1)(d).

710 ERA 1996, section 45A(1)(d).

711 2002/14/EC.

712 Statutory Instrument 2004/3426. Available at http://www.legislation.gov.uk/uksi/2004/3426/contents/made (30.05.2014).

713 ICER 2004, regulation 14(1).

agreement'. It must nevertheless set out the circumstances in which the employer must inform and consult the employees to which it relates, and either provide for the appointment or election of I&C representatives or provide that the employer must give information directly to the employees to whom it relates and consult them directly.[714]

Regulation 30 of ICER 2004 provides that the **dismissal** of an employees' representative (including trade union representatives and others elected or appointed for general I&C purposes most likely where there is a pre-existing agreement), negotiating representative, I&C representative or a candidate in an election for such positions will be **automatically unfair** where the reason or principal reason for the dismissals is that:

> "*(a) the employee performed or proposed to perform any functions or activities as such a representative or candidate; or*
>
> *(b) the employee exercised or proposed to exercise an entitlement conferred on the employee by Regulation 27 or 28 (i.e., a request to reasonable time off or to be paid in respect of such time off); or*
>
> *(c) the employee (or a person acting on his behalf) made or proposed to make a request to exercise such an entitlement.*"[715]

An employee who has been **selected for redundancy** will also have been automatically unfairly dismissed where other redundant employees to whom *(a), (b)* and/or *(c)* above did not apply, were not dismissed.[716] The requirement for unfair dismissal claims that an individual must have a **minimum of two years' continuous employment** before being entitled to bring such an action is **removed**.[717]

It should be noted that such protection is subject to a **narrow exception**: such dismissal will not be automatically unfair (although may still be unfair on procedural grounds) if the reason for the dismissal is that in the performance of the employee's functions or activities, he has disclosed any information or document in **breach of a duty of confidentiality**.[718] This will not apply (such that the dismissal may still be automatically unfair) if the employee reasonably believed that the disclosure in question was a 'protected disclosure' within the meaning given to the expression by section 43A of the ERA 1996 (in other words, the employee was 'whistleblowing').[719]

As with other employment legislation, Regulation 32(2) of ICER 2004 also **protects employee representatives and others from being subjected to any detrimental act or omission** not amounting to dismissal in connection with the exercise or attempted exercise of rights under the ICER 2004. The same group of representatives and prospective representatives afforded the extra protection from dismissal also have the right not be subjected to a detriment.

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714 ICER 2004, regulation 16(1).

715 ICER 2004, regulation 30(3).

716 ERA 1996, section 105(7H).

717 ERA 1996, section 108(3)(l).

718 Imposed in accordance with ICER 2004, regulation 25. ICER 2004, regulation 30(4).

719 ERA 1996, sections 43A and 43B define a qualifying "protected disclosure" as: "*a disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following: (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."*

Finally, regulation 27 of ICER 2004 provides negotiating and I&C representatives with the **right to be permitted by his employer to take reasonable time off during working hours** in order to perform functions as such a representative. Representatives under a pre-existing agreement are not however given any right to time off under the ICER 2004. An employee who is permitted to take time off under regulation 27 of ICER 2004 is also entitled to be paid remuneration by his employer for the time taken off at the appropriate hourly rate.[720]

2.5 Employee representatives at the transnational level

The European Works Council Directive[721] was implemented in the UK by the Transnational Information and Consultation of Employees Regulations 1999 ("TICER 1999").[722] **TICER 1999 provides for a European Works Council ("EWC") or information and consultation procedure ("ICP")** to be established, either at the request of employees or their representatives or at the initiative of every 'Community-scale undertaking', defined as any undertaking with at least 1,000 employees across the EU Member States and at least 150 employees in each of at least two Member States, and in every 'Community-scale group of undertakings'.[723]

Negotiations for **establishing a EWC or ICP** may be initiated by central management. Alternatively, they must be initiated if at least 100 employees, or employees' representatives who represent at least that number, in at least two undertakings or establishment in at least two Member States so request.[724]

'Employees' representatives' under TICER 1999 fall into two distinct categories: first, if the employees are of a description for which an independent trade union is recognised, they are representatives of the union who normally take part in the collective bargaining process. Second, the term covers, "*any other employee representatives elected or appointed by employees to positions in which they are expected to receive, on behalf of the employees, information (i) which is reluctant to the terms and conditions of employment of the employees or (ii) about the activities of the undertaking which may significantly affect the interests of the employees*".[725]

The **scope, composition, functions and term of office** of a EWC or the arrangements implementing an ICP are determined by a 'special negotiating body' ("SNB") in conjunction with central management.[726] TICER 1999 contains strict rules governing the composition of the SNB where the central management is situated in the UK. Thereafter, the central management of the undertaking or group of undertakings must convene a meeting with the SNB to reach a written agreement on the detailed arrangements for the information and consultation of employees.[727]

Employees who are members of, or candidates for, an SNB or EWC or who act as an I&C representative (or are a candidate for such role) and who are dismissed by reason of performing (or proposing to perform) any functions or activities as such a member, representative or candidate are treated as having been **automatically unfairly dismissed**.[728] As is the case for ICER 2004, an employee who has

720 ICER 2004, regulation 28(1).

721 2009/38/EC.

722 Available at http://www.legislation.gov.uk/uksi/1999/3323/contents/made.

723 TICER 1999, regulation 2(1).

724 Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* p.971. TICER 1999, regulation 9.

725 TICER 1999, regulation 2.

726 TICER 1999, regulations 16 and 17.

727 TICER 1999, regulation 16(1).

728 TICER 1999, regulations 28 and 29. ERA 1996, section 108(3)(hh).

been **selected for redundancy**[729] will also have been automatically unfairly dismissed where other redundant employee representatives or candidates, were not dismissed. The requirement for unfair dismissal claims that an individual must have a **minimum of two years' continuous employment** before being entitled to bring such an action is **removed**.[730]

Such individuals are also **protected against being subjected to a detriment**.[731]

Also mirroring ICER 2004, protection for the representative (or candidate to be a representative) will be lost where the performance or purported performance of the employee's functions or activities involved him or her **disclosing any confidential information**.[732]

Finally, such individuals are also **entitled by their employer to take reasonable paid time off** during the employer's working hours in order to perform their functions as members, representatives or candidates.[733]

3. Sanctions available and application in practice

The sanctions available (usually known as "remedies" under UK law) against employers who violate laws protecting workers' representatives vary according to the type of worker representative in question, and are provided for in the respective legislative instruments. The categories referred to above are repeated here for ease of reference.

3.1. Employee representatives for the purpose of information and consultation on collective redundancies and transfers of undertakings

As with ordinary unfair dismissals, representatives who are found to have been dismissed for a reason relating to their status or activities as a representative (or candidate for such a role) **may also be re-instated or re-engaged** where the employment tribunal considers it appropriate to make such a re-employment order. As discussed in section 1.3. above however, **compensation is the usual sanction** in almost all cases. Employment Tribunal and Employment Appeals Tribunal statistics published by the Ministry of Justice and Tribunals Service for 2010-2011 show that re-employment orders were made in only 1% of all unfair dismissal cases (6 cases in total).[734]

Nevertheless, the legislation provides for certain **special rules** to apply to a limited number of unfair dismissals which are for particular reasons. These include "employee representative" dismissals.

First, the dismissed employee may apply for '**interim relief**' pending the outcome of the tribunal hearing, provided that the application is presented within seven days of the effective date of termination. Where it appears to the tribunal that it is likely that on determining the complaint, it will find that the reason for dismissal is indeed related to the individual's status as an employee representative, the tribunal has, in the first instance, the power to request that the employer consider re-instating or re-engaging the employee, and failing that, **to order the continuation of the employee's**

729 ERA 1996, section 105(7D) and TICER 1999, regulation 29(1).

730 ERA 1996, section 108(3)(hh).

731 TICER 1999, regulation 31.

732 This is again subject to the disclosure not amounting to a "protected disclosure", in which case the employee concerned would still benefit from the provisions offering protection. See section 2.4 of this country report, above.

733 TICER 1999, regulations 25 and 26.

734 Available at https://www.gov.uk/government/publications/employment-tribunal-and-employment-appeal-tribunal-statistics-gb (04.06.2014).

contract of employment for the purposes of pay or any other benefit derived from the employment from the date of its termination up to the final determination or settlement of the claim for unfair dismissal.[735]

Secondly, the '**basic award**'[736] available where the tribunal has made a finding of automatic unfair dismissal in the case of an employee representative **shall not be less than £5,500**.[737] In ordinary unfair dismissal claims, the basic award is calculated according to the employee's age, years of service and weekly gross salary, and can be considerably less than £5,500.[738] The 'compensatory award', however, is subject to the limitations which apply to ordinary unfair dismissals, and the amount awarded may not exceed the lower of £76,574 or one year's salary.

Where an individual under this category is not dismissed but is found to have been **subjected to a detriment**, the employment tribunal has the power to make a declaration to this effect and to order compensation to be paid by the employer.[739] Such **compensation** will be at a level which the tribunal considers, "***just and equitable in all the circumstances*** *having regard to (a) the infringement to which the complaint relates, and (b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.*"[740] **Loss may include injury to feelings**, as well as any **expenses** reasonably incurred by the employee concerned as a consequence of the detriment suffered and the loss of any benefit.[741] Ironically, unlike the compensatory award for unfair dismissals, there is **potentially no limit to the amount of compensation** which may be awarded for having been subjected to a detriment.

For employees who have either been **unreasonably denied permission to take time off** to perform his functions as an employee representative or who has **not been paid for the time taken off**, a tribunal may, on finding such complaint(s) to be well founded, order the employer to pay to the employee an amount equal to the remuneration to which he would have been entitled had the employer not unreasonably refused permission or to the pay which he should have been paid during the permitted period of time taken off.[742]

3.2. Employee and worker representatives in their capacity as trade union members engaging in trade union activities

Representatives in this category benefit from set of sanctions which mirror those available to employee representatives for the purpose of information and consultation on collective redundancies and transfers of undertakings.

In the context of dismissals, the right to **interim relief** and a **minimum basic compensatory award** are set out in the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA 1992").[743]

Insofar as being **subjected to a detriment** is concerned, the protection in the case of trade union activities is extended beyond employees to **workers**.[744] Compensation is assessed in the same way as

735 ERA 1996, sections 128 and 129.
736 See section 1.3. of this country report, above.
737 ERA 1996, section 120(1).
738 See section 1.3. of this country report, above.
739 ERA 1996, section 49(1).
740 ERA 1996, section 49(2).
741 ERA 1996, section 49(3).
742 ERA 1996, sections 63(3)-(5).
743 TULRCA 1992, sections 152(1) and 156.
744 See section 2.2. of this country report, above.

that which applies to employee representatives for the purpose of information and consultation on collective redundancies and transfers of undertakings. Namely, the tribunal may award such compensation as it considers "**just and equitable**". This includes non-pecuniary loss such as injury to feelings.[745]

If an employee is **refused permission to take time off to carry out union activities**, the sole remedy is to complain to an employment tribunal. A representative may also complain if he or she was **not paid** in accordance with the legislation for the time off which was granted. If a tribunal upholds such a complaint, it may award **compensation**, having regard to the employer's default and any loss sustained by the employee because of the failure.[746] To establish a right to compensation, an employee must establish, on the balance of probabilities, that a request was made for time off, that it came to the notice of the employer's appropriate representative, and that they either refused it, ignored it or failed to respond to it.[747] By analogy with the provisions relating to subjection to a detriment, it seems likely that **'loss' can include non-pecuniary loss such as injury to health**.[748] Where the complaint concerns a failure to pay the official, the tribunal will order payment by the employer of the amount due.

3.3. Employee and worker representatives (and proposed representatives) of the workforce in relation to a workforce agreement

Insofar as protection against dismissal and being subjected to a detriment is concerned, employee and worker representatives falling into this category are **entitled to the same sanctions as employee representatives (and proposed representatives)** for the purpose of information and consultation on collective redundancies and transfers of undertakings covered under the ERA 1996.[749]

3.4 Negotiating and Information & Consultation ("I&C") representatives

Although representatives covered by this category receive similar protection[750] to that afforded to the categories of representatives discussed above, the **special rules under the ERA 1996 relating to sanctions** (namely, the minimum basic award and the possibility to apply for interim relief) **do not apply**. Usual sanctions for ordinary unfair dismissal will therefore be available.[751]

Provisions under the Information and Consultation of Employees Regulations 2004 ("ICER 2004") nevertheless ensure that the sanction (and assessment thereof) available to representatives who have been **subjected to a detriment is replicated** for I&C representatives.[752]

Regulation 29 of **ICER 2004 similarly adopts the wording of the ERA 1996** regarding the sanctions and method of assessing appropriate compensation which apply to representatives unreasonably refused permission to take **time off to perform their duties**, and to those whose employer has failed to pay salary in respect of the permitted time off.

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745 *Brassington v. Cauldon Wholesale Limited* [1978] Industrial Cases Reports 405.

746 TULRCA 1992, section 172.

747 *Ryford Ltd v. Drinkwater* [1996] Industrial Relations Law Reports 16.

748 Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* p.863.

749 ERA 1996, sections 48(1ZA), 108(3)(dd), 105(4A), and 128(1)(a)(i).

750 Namely, that dismissals will be automatically unfair, that there is no need for a minimum qualifying period of employment and that representatives are protected from being subjected to a detriment.

751 See section 1.3. above of this country report.

752 ICER 2004, regulation 33(2).

3.5 Employee representatives at the transnational level

The **same rules as those which concern I&C representatives apply**. Identical wording to that set out under ICER 2004 is used in the Transnational Information and Consultation of Employees Regulations 1999 ("TICER 1999"),[753] and the paragraphs in 3.4 of this country report should be referred to.

3.6 Application of sanctions in practice

There are **no known published statistics** on the application of remedies which relate to protections afforded to employee and worker representatives.

Statistics published by the UK Employment Tribunal service concern only the main heads of claim for discrimination and dismissal complaints (with no distinction made, for example, between unfair dismissal claims based on automatic unfair dismissal, and those for ordinary unfair dismissal).[754] It is reported that between 1 April 2012 and 31 March 2013, the **median award for successful unfair dismissal claims was £4,832**, the average award was £10,127 and the maximum award was £236,147. Of **10,647 claims for unfair dismissal**, 6051 were unsuccessful, while 4,596 were successful. Of those successful unfair dismissal cases, compensation was awarded in 2,242 cases, the remedy was left to be negotiated between the parties in a further 152, no award was made in 2,197 and **in 5 cases, reinstatement or reengagement was ordered**.

In the field of trade union representation, commentators have pointed to the **inadequacy of existing rules** purporting to protect representatives. Particular criticism is targeted at the low rates of reinstatement and reengagement orders, and the weak enforcement measures where such orders are made. It is noted that there are no enforceable provisions for securing the "status quo" pending a ruling on the justification for a dismissal; the only remedy – that of interim relief – necessitates employees taking the initiative rapidly to seek it following termination, and does not in any event secure continued access to the workplace.[755]

The **remedies for subjection to a detriment**, according to one commentator, are even more **inadequate**: there is no mechanism for inhibiting such action from continuing, and the lack of any 'penal' element in the compensation, combined with the potential difficulties of demonstrating quantifiable loss, mean that it is unlikely to act as a deterrent to a determined anti-union employer who, even when faced with a successful claim against it, may escape with a relatively small financial liability.[756]

4. Constitutional basis for collective representation of workers

In the absence of a written constitution, the principles underpinning UK laws on the collective representation of workers can largely be found in **international and European standards** relating to collective organisation.

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753 TICER 1999, regulations 27 (remedies for breach of time off rules), 29 (remedies for unfair dismissal) and 32 (remedies for being subjected to a detriment).

754 Ministry of Justice, *Tribunal Statistics, Quarterly Tables* (including 2012-2013 statistics), available at https://www.gov.uk/government/publications/tribunal-statistics-quarterly-april-to-june-2013 (04.06.2014).

755 Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* p.843.

756 *Ibid,* p. 843.

The fundamental principle of **freedom of association** is reflected in various international treaties dealing with civil, political, economic, social and cultural rights and is in particular upheld by the **International Labour Organisation** in a number of instruments ratified by the UK from their inception. The most important of these are the Freedom of Association and the Right to Organise Convention 1948 (**No. 87**) and the Right to Organise and Collective Bargaining Convention 1949 (**No. 98**).

Other accords ratified by the UK or to which the UK is a member which also express the fundamental right of the freedom of association include the **European Convention on Human Rights**[757] and the **Charter of Fundamental Rights of the European Union**[758].

At the collective level, the **common law** is also of central importance. During the nineteenth century, the courts found the purposes of most trade unions to be unlawful as being in restraint of trade, and still today, those organising industrial action will usually be committing a common law tort. The lawfulness of trade unions' status and the limited freedom to take industrial action **depend entirely upon statutory immunities from the common law liabilities** which would otherwise apply. Such immunities constitute exceptions to the common law, leaving the courts to tend towards construing them narrowly.[759]

5. Role of collective work relations

Following a period of dramatic growth in the 1970s, un**ion membership in the UK declined rapidly in the 1980s and 1990s**. The proportion of union members in workplaces with more than 25 workers fell from 65% in 1980 to 47% in 1990 and 36% in 1998.[760] The Department for Business Innovation and Skills reports that **in 2012, the membership rate of UK employees remained stable at 26%**, with 3.9 million public sector employees belonging to a union, compared to 2.6 million in the private sector.[761]

Although this can partly be explained by the rapid decline of manufacturing at the start of the 1980s, union density fell in all sectors and not just in manufacturing. Other **factors** appear to be low inflation and the absence of an incomes policy, which produced rising real incomes for most private sector employees, particularly in those areas of the economy where collective bargaining remained strongly embedded.[762] Although the **coverage of collective agreements** is greater than union membership (often applying to both union and non-union members alike), the proportion of employees whose terms and conditions were covered by collective agreements **has also fallen** from around two-thirds at the start of the 1980s to just above 40% by the late 1990s.

It furthermore became common in the 1990s for employers in a wide range of sectors to "derecognise"[763] trade unions. Companies often coupled **derecognition** with offers of enhanced pay and benefits to employees who gave up rights associated with trade union membership.[764] The late 1980s and 1990s also witnessed a significant drop in the strike activity.

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757 Article 11.

758 Article 12.

759 *Ibid,* p. 60.

760 Keith Ewing, *Britain and the ILO*, 2nd ed. 1994 Institute of Employment Rights, London.

761 Department for Business, Innovation and Skills, *Trade Union Membership 2012 – Statistical Bulletin*, May 2013, pp.7-8.

762 Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* p.36.

763 To "derecognise" a union means abandoning the formal recognition of the union. Recognition means "*the recognition of the union by an employer, or two or more associated employers, to any extent, for the purposes of collective bargaining*." TULRCA 1992, s.178(3).

764 Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* p.37.

Following 18 years of government hostility towards collective organisation, the entry into office of a Labour Government in **1997 heralded a more hospitable climate for worker representation** and brought three important changes: the re-introduction of a statutory procedure for the mandatory recognition of trade unions by employers, the implementation of the EC Directive on European Works Councils following the UK "opt-in" to the Agreement on Social Policy and the introduction of information and consultation obligations at national level following agreement to the Information and Consultation Directive.[765]

5.1. Institutions and legal means of collective action

The institutional system applying to collective labour law in the UK is **characterised by an array of legal and extra-legal sources**, with formal (legal) rules and 'voluntary' norms combining to determine parties' legal rights.

5.1.1. Formal sources of law

Insofar as formal sources of labour law are concerned, the **common law** is, as discussed above, of fundamental significance to collective work relations, continuing to touch on the ability of a trade union to take lawful industrial action as well as regulating the relationship between a trade union and its members.

Legislation, over the past 30 years or so, has expanded to cover most areas of labour law, with relevant statutory provisions often to be found scattered among several statutes and statutory instruments. As a general rule, it may be said that legislation will prevail over the common law in the sense that any agreement between the parties specifically to exclude its operation will be void. In the area of collective labour law, the relationship between common law and statute is complex particularly insofar as industrial action is concerned, with statute affording very limited immunity against specific common law torts which may be committed by a trade union in taking industrial action.

Supplementing the legislation are Government and Government agency-issued **Codes of Practice** which provide practical guidance on conduct in particular areas. The Secretary of State for Employment and the Advisory, Conciliation and Arbitration Service ("ACAS"), for example, are empowered by statute to issue Codes of Practice.[766] These are not legally binding, but courts and employment tribunals must take their principles into account in relation to any issue before them, and may adjust compensatory awards where there has been a failure to comply with the provisions of a Code.[767] Examples of Codes of Practice include the Secretary of State-issued Code of Practice on Picketing,[768] the Code of Practice on Industrial Action Ballots and Notice to Employers[769] and ACAS's Code on Time Off for Trade Union Duties and Activities[770].

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765 See *ibid*, p. 869.

766 TULRCA 1992, sections 199 and 203.

767 For example, TULRCA 1992, section 207 and 207A.

768 Department for Business Innovation and Skills ("BIS"), *Code of Practice: picketing* (referred to on list published 12 December 2012) available at http://www.bis.gov.uk/files/file23914.pdf (10.06.2014).

769 Department of Trade and Industry (former name for BIS), *Code of Practice: industrial action ballots and notice to employers PL962 (Rev2),* 2005, available at http://www.bis.gov.uk/files/file18013.pdf (10.06.2014).

770 ACAS, *Time off for trade union duties and activities, including guidance on time off for union learning representatives*, Code of Practice 3, January 2010, available at http://www.acas.org.uk/media/pdf/n/k/Acas_Code_of_Practice_Part-3-accessible-version-July-2011.pdf (10.06.2014).

5.1.2. Voluntary sources of law

The historic lack of legislation regulating employment law allowed employers and employees to develop rules at their own discretion. Notwithstanding the expansion of statutory regulation in the latter part of the twentieth century and into the millennium, **collective agreements continue to be a significant source of labour law**, with around 35% of all employees still covered by the terms of collective agreements. In certain industrial sectors however, this figure is much greater.

Collective agreements may be said to have **two principal functions**.[771] First, they regulate relations between employers (or employers' associations) and trade unions. These are the **procedural or constitutional arrangements** which, for example, may determine the permanent joint machinery for the negotiation of terms and conditions of employment or specify the procedural steps involved in the resolution of disputes. The second purpose is substantive – namely, **to regulate the terms of individual contracts of employment**. Such terms may concern pay scales, working hours, holiday, shift work and overtime etc. It should be noted however, that although there are now statutory procedures allowing unions to gain statutory recognition as well as enforceable collective bargaining 'methods', there is no legal requirement for collective agreements to cover specified matters nor is there any obligation for the parties to reach agreement. There is also no requirement for them to be registered with any administrative authority.

In fact, collective agreements have historically been viewed as operating independently from the law, binding, "in honour only," and enforceable through social rather than legal sanctions. This view was reinforced by the law in 1974,[772] which introduced a **statutory presumption that a collective agreement will not be legally enforceable** unless it contains a statement to the contrary. Evidence suggests that such a stated intention is hardly ever made,[773] leaving both employers and unions free to breach such agreements without legal consequences. This general non-enforceability of collective agreements as between unions and employers is in marked contrast to the position in other jurisdictions. Nevertheless, it is **common practice for workers' individual contracts to expressly incorporate collectively agreed terms**,[774] enabling legally enforceable contractual provisions where the wording is sufficiently clear and precise.

Collective agreements may also be relied on to modify or exclude standards in the area of working time, the use of successive fixed term contracts and the terms on which parental leave is taken. Where the employer does not recognise a union, another voluntary source of law, a '**workforce agreement**', may be used.[775]

Other voluntary sources of regulation include **works rules, notices and policies** issued by an employer to its employees. These may be made to have legal force where expressed to be legally binding, but may also become legally binding through implication by custom and practice where such terms are deemed, "*reasonable, certain and notorious*."[776]

5.1.3. Courts and employment tribunals

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771 See Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* p.68-69.

772 Now express in TULRCA 1992, section 179.

773 See Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* p.71.

774 As well as for collectively-agreed terms to be incorporated through implication in circumstances where such terms have been applied consistently in practice.

775 See section 2.3. of this country report, above.

776 *Sagar v. J. Ridehalgh and Son Limited* [1930] 2 Chancery 117.

There is **no separate labour court system** in England for addressing labour law disputes. Instead, labour law matters are divided between **(1) employment tribunals**, which generally hear claims involving statutory employment rights (such as unfair dismissal and discrimination) as well as low value contractual claims associated with an employee's dismissal and **(2) the common law courts**.[777] Common law courts will most likely deal with high value issues of breach of contract and tort and certain matters of public law. Employers' claims in tort against trade unions in relation to industrial action are heard in the High Court, as well as claims for interim injunctions to halt industrial action.

Appeals from decisions of the employment tribunals can be made to the Employment Appeal Tribunal, and subsequent appeals are made to the Court of Appeal.

5.1.4. Government institutions

A number of government-funded institutions operate independently of government with a range of functions in the field of collective action.

As discussed above, **ACAS**[778] is a statutory body with a staff of almost 1000 which has the broad remit of promoting, "*the improvement of industrial relations.*"[779] It works within a voluntary framework, with no compulsion on industrial relations actors to use its services. It performs conciliation in individual cases and provides facilities for settling existing or anticipated trade disputes by conciliation. It also provides advice on a wide range of industrial relations matters to employers, workers and trade unions, and furthermore issues codes of practice[780] and holding inquiries, at its own discretion, into industrial relations matters.

The **Central Arbitration Committee ("CAC")**[781] is a permanent and independent industrial relations arbitration body, also created by statute with the purpose of resolving certain labour-related disputes.[782] It has responsibility for operating the statutory recognition and derecognition procedures,[783] adjudicating on complaints relating to a failure by employers to disclose information for collective bargaining purposes, and adjudicating on specified matters under other legislation such as TICER 1999 and ICER 2004. It is composed of a chairman, deputy chairmen and other members appointed by the relevant Secretary of State, all of whom are experienced in the field of industrial relations. It encourages

5.1.5. Means of engaging in collective action

The possibility to engage in legally-recognised collective action can, broadly speaking, be said to fall into **three categories**: first, collective action in the context of a recognised trade union; secondly, permanent consultation bodies or arrangements established pursuant to EU-derived legislation; finally, information and consultation rights afforded to employees and workers in particular circumstances.

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777 'Common law courts' in this context broadly refers to those courts which deal with civil law (as opposed to criminal law) claims, from the County Court and High Court to, in the case of appeals, the Court of Appeal and Supreme Court.

778 See http://www.acas.org.uk/index.aspx?articleid=1461 (10.06.2014).

779 TULRCA 1992, section 209.

780 For examples, see section 5.1.1. of this country report, above.

781 See http://www.cac.gov.uk/ (10.06.2014).

782 Now in TULRCA 1992, section 259.

783 See this section of the country report, below.

When a trade union is 'recognised' for the purposes of collective bargaining, a 'method' for conducting collective bargaining must be agreed between the employer and the trade union.[784] The conduct of the parties may allow recognition to be implied, such that information and consultation by the employer must take place with the union before certain matters affecting their terms and conditions of employment can be implemented. Legislation however, provides for a complex statutory recognition procedure overseen by CAC, allowing trade unions to obtain mandatory recognition by employers. Where agreement cannot be reached on the method for conducting collective bargaining, CAC may specify such a 'method' in relation to pay, hours and holidays. Once recognition is agreed or imposed, the employer is not allowed to vary the pay, hours or holidays of workers in the bargaining unit unless it has first discussed its proposals with the union. The consequences of recognition are that the union may claim disclosure of information for collective bargaining purposes, union representatives and members are entitled to time off work for specified activities, and a variety of statutory consultation rights apply.[785]

Other "permanent" arrangements and consultation bodies for workers which are not necessarily formed through a trade union are **those deriving from EU legislation**. The bodies discussed in section 2 of this country report are examples of these, and include Workforce Agreements (under the Working Time Regulations 1998), European Works Councils in transnational companies (pursuant to TICER 1999) and negotiated information and consultation agreements for large companies, regulated by ICER 2004.

The other **particular circumstances in which statutory rights of information and consultation arise** and which are not necessarily reliant on union recognition can largely be deduced from the categories of workers' representatives enjoying special protection rights, discussed in section 2 above. Primarily, these are in relation to dismissals arising from large-scale redundancies and where there is a transfer of undertaking, but other legislation also provides for collective representation mechanisms for health and safety matters and in specified areas relating to pensions.

5.2. Collective work relations in practice

As described above,[786] the collapse of union membership which started in 1980 slowed somewhat in the 1990s, but continued to fall year on year nonetheless, thereafter. There was a corresponding fall in the density of unionisation of employees during this period. It is however reported that active hostility towards unions has largely been confined to workplaces with fewer than 50 employees, mostly being family-owned firms.[787] Significantly, the proportion of workplaces where unions were recognised for negotiation purposes, while continuing to fall overall between 1998 and 2004, remained stable in the public sector and in the private sector workplaces with 25 or more employees. This, it is suggested, can be attributed to 1999 legislation introducing the mandatory recognition of trade unions, where requested of larger employers.

The most recent statistics available show small rises in union membership in the private sector, with the proportion of employees who were trade union members increasing from 14.2% in 2011 to 14.4%

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784 Recognition can only apply to employers with 21 or more workers (TULRCA 1992, Schedule A1, section 7(1)).

785 Principally, those set out below which also apply in the absence of a recognised trade union.

786 See introduction to section 5 of this country report, above.

787 William Brown and David Nash, *What has been happening to collective bargaining under New Labour? Interpreting WERS 2004*, 2008, Industrial Relations Journal 39:2, 91-103, at pp.93-94.

cent in 2012, and in the public sector, membership remaining broadly stable at 56.3%. Overall membership decreased from 36% in 1995 to 26% in 2012.[788]

Insofar as industrial conflict is concerned, data for the period 1998-2004 shows a very low level of disputes and days lost to stoppages. This is consistent with the preceding decades, with working days lost per year averaging in the 1970s - 12.9 million, the 1980s – 7.2 million and in 1996, 1.3 million.[789]

As for collective agreements, the overall coverage of collective bargaining has also diminished considerably. It is reported that this is the case in every sector except transport and communication, reflecting the continued relatively high unionisation of, in particular, railways, and possibly some public sector outsourcing into partly protected arrangements in business services.[790]

Furthermore, sectoral collective agreements, it is reported, have all but faded away despite being significant only 50 years ago.[791]

Recently introduced mandatory information and consultation requirements are claimed by some to be partly responsible for the reduced coverage of trade unions and collective bargaining more generally. Until 1995, all the existing consultation requirements in Britain were vested exclusively in trade unions which were recognised by the employer in question. In the absence of a mandatory recognition procedure, they were therefore dependent solely upon a voluntary act of the employer. After this was held by the European Court of Justice as infringing obligations imposed by the respective directives on redundancies and transfers of undertakings, amendments were made to UK legislation, requiring employers to consult, at their choice either a recognised union or elected representatives of the affected employees. This is said by some to have marked a dramatic break with the traditional pattern of workers' representation with Community-required consultation diluting national collective bargaining and down-grading worker representation.[792]

Insofar as statutory rights of information and consultation are concerned, there is no known body of statistical data regarding their application in practice. Moreover, little information is available on the operation in practice of the TICER and ICER regimes.

Some commentators have however reported on the successes and failures of what is probably the most widely relied on information and consultation regime – that concerning large-scale redundancies. In particular, the requirement of the regulations only to consult – rather than to bargain – with employee representatives means that if there is a ultimately a failure to agree, the prerogative to proceed remains with management.[793] A further common observation is that there is a propensity in practice for employers to offer considerable incentives to employees to take voluntary redundancy in such situations, thereby obviating the need to enter into negotiations at all regarding compulsory redundancy. This, it has long been noted, can undermine the position of employee representatives, as

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788 Department for Business, Innovation and Skills, *Trade Union Membership 2012 – Statistical Bulletin*, *op. cit.,* p.6.

789 Office for National Statistics, Kate Sweeney, *Labour disputes in 1996 Labour Market Trends*, June 1997, pp.217-229.

790 William Brown and David Nash, *What has been happening to collective bargaining under New Labour? Interpreting WERS 2004*, *op. cit.,* p.96.

791 *Ibid*, p.96.

792 Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* p.870, quoting Paul Davies, *A Challenge to Single Channel*, 1994, Industrial Law Journal 23, 272-284, p.284.

793 Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* p.942.

well as the ability of trade unions to deploy tactics to oppose and resist the need for redundancies when dismissals are threatened.[794]

Overall, the future for collective bargaining and its success as a model of worker participation appears to be mixed. On one hand, the coverage of collective agreements has fallen dramatically in recent decades. It can be seen that much of the European-derived legislation promotes information and consultation rather than more of a co-determination model witnessed in other States. Furthermore, recent years have seen a growing tendency by some employers to communicate directly with employees through methods such as meetings between senior managers and the workforce and newsletters.[795] This has combined with changes in the labour market, with greater flexibility of labour, and a growth in short-term, temporary work and self-employment, eroding the bargaining power of those who remain in the core.[796] On the other hand, rules such as those introduced under ICER 2004 have given larger employers a strong incentive to establish at least some form of information and consultation arrangements where none previously existed, while the mandatory statutory recognition procedure for trade unions, introduced in 1999, would, according to recent statistics,[797] appear to have had some impact – again, where larger employers are concerned – not least in encouraging voluntary collective bargaining arrangements.

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794 W.W. Daniel, United Kingdom in M. Cross (ed.) *Managing Workforce Reduction*, 1985, Croom Helm London, p.74.

795 Mark Cully et al, *Britain at Work. As depicted by the 1998 Workplace Employment Relations Survey*, 1999, Routledge, p. 229-230.

796 Simon Deakin and Gillian S. Morris, *Labour Law*, *op. cit.,* p.983.

797 See section 5.2. of this country report, above.

III. ANALYSIS

A. Country summaries

The enhanced protection and protective rights of workers' representatives found in all of the countries featured in this study are diverse, and vary both in terms of the type of privileges and the level of protection afforded. Below is a brief summary of the main characteristics of each country's system.

Workers' representatives play an important role in **Austria**, where collective agreements are said to cover more than 98% of the workforce. Apart from general protection against dismissal for any reason relating to status as a workers' representative, there are only limited options open to employers who wish to dismiss a member of a works council. Except in cases of serious misconduct, approval from a court must first be secured to end the employment of a works council member. Various special rights are held by worker representatives according to the size of the company, including paid time off to perform duties and for training.

Extensive protection of trade union and employee representatives can be found in the **French** Labour Code. Authority is needed by an employer before proceeding to dismiss internal employee representatives, otherwise such a termination notice is deemed void. Representatives may not in any case be dismissed or discriminated against for any reason relating to their status, and it is even a criminal offence punishable by imprisonment to impede or undermine the activities of representatives.

An integral feature of the co-determination system operated in **Germany** is the considerable protection provided to employees who hold seats on works councils ("*Betriebsrat"*). An employer cannot routinely terminate the employment of such workers' representatives, but may only extraordinarily dismiss them for compelling reasons or with the prior consent of the works council itself. Workers' representatives are furthermore protected from early dismissal in the case of company shutdowns, and also have the right to paid time off to undertake their duties.

In **Italy**, half of all workers are members of one of the three main trade unions, and union membership in a number of industrial sectors has been increasing in recent years. Here, trade union membership and activities are listed by the Workers' Statute alongside other characteristics such as sex, race and religion as protected from discrimination. Workers' representatives cannot in any case be transferred away from their production unit to the detriment of those they represent nor can they be dismissed by reason of their status. Severe sanctions exist for employers who persistently engage more widely in anti-union conduct, and workers' representatives have various rights to time off to perform their duties, depending on the size of the workforce.

In **Slovakia**, the Labour Code affords workers' representatives wide-ranging and enforceable powers of inspection and involvement in proposals to dismiss staff, as well as participation in company decision making. Such individuals enjoy considerable protection from dismissal, with any purported termination notice being invalid without the prior consent of the relevant workers' representative body, unless the employer alternatively obtains a supporting judicial decision.

In **Sweden**, where co-determination operates even in relatively small enterprises, legislation provides rules on special protection for workers' representatives, but leaves considerable scope for additional protection to be provided as part of the comprehensive system of collective agreements – these being the principal source of regulation of workplace relations. As a minimum, workers' representatives are entitled to reasonable paid time off to perform their duties, and must furthermore not be discriminated against or dismissed by reason of their status. They are given priority to remain in

employment in redundancy situations, and cannot be subjected to any changes in terms and conditions without the local trade union first being notified and consulted.

Various categories of workers' representatives exist in the **United Kingdom**, each afforded different protection according to the legislation governing their rights and duties. Although there is no recognised mechanism for declaring a dismissal to be void as such, representatives are, broadly speaking, protected from being dismissed for reasons relating to their status or activities, and must furthermore be compensated for any detriment they suffer in connection with their position. Wide-ranging rights to paid time off for performing activities are also included in legislation.

B. Comparative tables

1. General overview of legal protection against unfair dismissal

COUNTRY	Substantive reasons and procedural requirements for legitimate dismissals; burden of proof and sanctions
Austria	Routine dismissals can be challenged if they are immoral, illegal or socially unbalanced (if for operational reasons). Workers representative may bring a court action on behalf of the worker. If challenge successful, dismissal is invalid. Extraordinary dismissals are legitimate for a compelling reason (e.g. criminal behaviour against the employer). If challenge successful, claim for compensation.
France	1) Dismissal for personal reason: In case of ground inherent to the employee (whether misconduct or other grounds) Procedure: Prior meeting with employee, notification of dismissal, conciliation procedure before legal proceedings Burden of proof : No burden of proof on parties – judge to order inquiry measures in case of lack of sufficient proof (*procédure inquisitoire*) Sanctions : Reintegration, compensation, reimbursement of unemployment allocation paid by competent authorities 2) Dismissal for economic reasons: In case of economic difficulties of the employer. Procedure varies depending on whether the dismissal is individual or collective; in case of collective dismissal, procedure depends on importance of the employer's enterprise. No burden of proof on parties. Criminal sanctions in addition to above mentioned sanctions
Germany	In businesses with at least 11 employees, routine dismissals are only legitimate if socially justified. This is possible (1) on grounds of personal capability, (2) on grounds of conduct or (3) for operational reasons. Extraordinary dismissals are legitimate for a compelling reason, if the employer cannot be reasonably expected to continue the contract. Procedure: - written form - respect notice period (routine dismissal)

	- respect preclusive period (extraordinary dismissal) - participation of works council, if one exists Burden of proof lies in general with the party profiting of the respective fact. No sanctions for unlawful dismissals, but employer has to compensate worker under certain circumstances.
Italy	Three typical legitimate reasons for dismissal exist: (1) a fair reason (*i.e.* a misconduct causing the loss of trust on the worker's will and/or capacity to work for the employer); (2) subjective grounds (*i.e.* lack of personal capabilities); (3) objective grounds (economic reasons for reducing the number of workers). It is always illegal to dismiss an employee during characteristic periods of his life (sickness, accident, pregnancy, birth of a child) Procedure - written form - reasons mentioned in writing - respect notice period - In case (1) and (2) prior to the dismissal employee has to be heard with the assistance of a representative if he asks for it. - In case (3), if business employs more than 15 persons, the dismissal must be transmitted to a competent Conciliation Committee. Burden of showing reason for dismissal is with the employer. Available sanctions are compensation and re-engagement.
Slovakia	Grounds for the notice can be divided into economic reasons, reasons related to the individual workers concerned, and disciplinary reasons. The employer may immediately terminate an employment, only in cases where the employee a) was lawfully sentenced for committing a wilful offence, b) was in serious breach of labour discipline. A common prerequisite for given notices is that they must be issued in writing and it must be personally served on the employee. An employee may claim in court the invalidity of termination of an employment relationship by notice. Burden of proof lies in general with the party profiting of the respective fact. Participants of a court procedure are obliged to identify evidence to prove their claims.

	Available sanctions are wage compensation, reinstatement and reengagement. Administrative sanctions are also possible.
Sweden	The general rule is that there must be just cause/objective grounds for dismissal. Fair reasons for dismissal are divided into two groups: (1) shortage of work (circumstances related to the enterprise), and (2) personal reasons (i.e. circumstances related to the employee). Dismissal on personal grounds includes misconduct, neglect etc. as well as reason for which the employee is not responsible, such as reduced working capacity. Procedures are rather extensive and complex and depends on the reason for dismissal. If the employee is a union member, the employer has an obligation of notification and negotiation with the union. The employer also has a duty to investigate whether there are other vacant positions within the organization for the employee. Ultimately, it is for the Labour Court to judge whether there is just cause/objective grounds for dismissal Burden of showing just cause/objective grounds for dismissal is with the employer. Available sanctions are re-instatement, compensation and damages.
United Kingdom	Potentially fair reasons for dismissal are: (1) lack of capability; (2) misconduct; (3) redundancy; (4) failure to comply with a statutory requirement; (5) some other substantial reason. Procedure depends on reason for dismissal but tribunal will simply assess whether employer has acted “fairly” in dismissing for that reason. Burden of showing reason for dismissal is with the employer; burden of proof for showing a fair procedure is neither with employer nor employee. Available sanctions are compensation, re-instatement and re-engagement.

2. Special protection for workers' representatives and available sanctions

COUNTRY	Special protection for workers' representatives	Applicable sanctions and available statistics
Austria	Prior consent of the court necessary. If routine dismissal, consent of the court can be given for reasons of total incapacity to perform work or for special operational reasons without possibility for further occupation. If extraordinary dismissal, consent may be given for special reasons (e.g. heavy criminal behaviour against employer). Without prior consent of the court, every dismissal is invalid.	In some cases the dismissal is simply invalid. Other sanctions are, according to the particular case, continuation of the contract or payment of damages.
France	Special protection applies in case of dismissal of an employee pending his/her workers' representative mandate or shortly after the end of such mandate, as well as in certain specific situations. Dismissal of workers' representatives requires prior authorization by the competent *Inspecteur du travail*. Such authorization is rendered after inquiry. In certain cases, also consultation of the workers' representation body inside the enterprise. Also: General prohibition to discriminate or hinder workers' representatives' activities.	Sanctions are more severe than in case of dismissal of other workers. Civil sanctions include reintegration in the employment, termination indemnities and compensation for the loss suffered as a result of the employer's misconduct. Criminal sanctions apply in case of violation of the special procedure for dismissal of workers' representatives and in case of hindering of workers' representatives' activities : imprisonment (one year or two in case of repeated offence) and fines (3750 euros, or 7500 euros in case of repeated offence).
Germany	Workers' representatives cannot be routinely dismissed. Extraordinary dismissals: - for a compelling reason - consent of works council - or, in lieu of consent, approval of labour court - in case company shuts down, dismissal takes effect at the earliest at the moment of shutdown	Same sanctions apply when illegitimately dismissing a workers' representative or another worker: (1) Court finds dismissal void, (2) employment thus continues, unless unreasonable to worker, then instead (3) compensation upon request. (4) If workers' representative already has a new job, she/he can choose which employment shall continue.

	Protection lasts for one year after term of office ended.
	
	Rights of workers' representatives:
	- carry out office duties during working hours
	- until one year after term of office ended:
	  - similar tasks compared to other workers in same position
	  - similar wages compared to other workers in same position
		Statistics:
		- found 16 court decisions:
		- 7 dismissals legitimate
		- 9 dismissals unlawful, employment thus continued
		- Compensation has apparently not been requested

Italy	Workers' representatives can be dismissed for the same reasons as all other workers, however a special procedure is required and special powers are given to the judge in order to allow the worker to continue his contract. Protection and rights of worker's representatives lasts for one year after term of office ended. Rights of workers' representatives: - carry out office duties during working hours and permissions to leave office in addition to the general ones	In addition to the sanctions applying in case of illegitimately dismissing of workers (reintegration, compensation) : - penalty to be paid to a Fund - criminal sanctions in case of repeated misconduct of the employer (crimes against collective representation of workers) - revocation of fiscal advantages
Slovakia	Validity of a notice given by the employer to an employees' representative is subject to a prior consent by employees' representatives, otherwise the notice is invalid. A prior consent of employees' representatives is required if the notice is given to a representative of employees during his term of office and a period of six months upon its termination.	Available sanctions are wage compensation, reinstatement and reengagement. Administrative sanctions are also possible. No statistics available.
Sweden	Protection against dismissal and discriminatory treatment connected with status as workers' representative under general employment law and specific protection and rights regulated in the Act on Trade Union Representatives.	Available sanctions in in case of dismissal are re-instatement, compensation and damages. Remedies for violation of provisions in the Act on Trade Union Representatives are compensation for pay and other employment

	Act on Trade Union Representatives regulates right to time off, right to keep employment benefits (pay) during time off and priority right to continued employment in the event of redundancy.	benefits, compensation for damages and damages to the local trade union. No statistics available.
United Kingdom	Protection against dismissal and any detriment for any reason connected with status as: (a) Employee representative (and candidates) for collective redundancies, transfer of undertakings; (b) Information and consultation representative (and candidates) under ICER 2004; (c) EWC, SNB and ICP representative (and candidates) under TICER 1999; (d) Trade union representatives (only protection against detriment for those who are "workers" and not employees). [nb, rights to time off to perform representative duties]	Remedies for unfair dismissal: - minimum basic compensation plus normal [limited] compensation based on loss; and/or re-instatement or re-engagement; - interim relief (up to final tribunal decision); - reinstatement or re-engagement (although very rare in practice). Remedy for having been subjected to a detriment is just and equitable compensation (no limit). Remedy for failure to provide time off is cash compensation based on actual loss suffered. No statistics available.

3. Collective representation of workers: constitutional basis and role in practice

COUNTRY	Constitutional basis for collective representation of workers	Role of collective work relations
Austria	Vereinsgesetz 2002 (Constitutional Act on Associations 2002) and ECHR (as directly transposed into Austrian Law)	Comparably rather strong role of collective work relations; Very high density of collective work agreements (98 %); double system of organisations protecting workers interests: Arbeiterkammer (chamber of workers, mandatory membership) and classical union, voluntary membership (Gewerkschaftsbund), about 1.2 million persons are members of a union (of about 4.1 million employees in total, i.e. about 30 %, downward trend)
France	Constitution of 1958 refers, in its Preamble, to Article 6 of the Preamble of the Constitution of 1946 : "All men may defend their rights and interests through union action and may belong to the union of their choice." This provision is part of the *bloc de constitutionnalité*.	The *délégués syndicaux* represent trade unions within the enterprise; their mission is to defend the collective interests of employees against the employer. The workers' representatives (*représentants du personnel*) represent the workers within the enterprise. The form of representation and the competences depend on the importance of the enterprise. For example, in case of an enterprise with more than 50 employees, a *comité d'entreprise* is established, with economic and cultural attributions. The *comité d'entreprise* is informed and consulted on a large range of economic issues regarding the enterprise; it organizes social and cultural activities increasing conditions of work and life within the enterprise.
Germany	Art. 9 para. 3 German Constitution (Grundgesetz, GG): "The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article	No laws exist regarding collective work relations, only case law applies. Trade unions: - 6 million workers are members - downward trend - exist for the different industry sectors

	12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91 may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions."	Collective action: - only permitted in order to negotiate collective labour agreement - 70.000 collective labour agreements in force to date - means of collective action: strike (workers), lockout (employers) - collective action does not play very important role in practice
Italy	Art. 1-1: " Italy is a democratic Republic founded on labour". Art. 2 (right of the individuals to express their personality within society); 18 (freedom of association); and 39 (positive and negative freedom of collective action) : "Trade unions may be freely established. No obligations may be imposed on trade unions other than registration at local or central offices, according to the provisions of the law. A condition for registration is that the statutes of the trade unions establish their internal organisation on a democratic basis. Registered trade unions are legal persons. They may, through a unified representation that is proportional to their membership, enter into collective labour agreements that have a mandatory effect for all persons belonging to the categories referred to in the agreement."	Trade unions: - not subject to registration (in derogation of what originally prescribed by art. 39 of the Constitution) - 11 million of the 22 million workers are members of one of the 3 main Trade Union - sectorial trade unions (police, nurses) are increasing and represent circa 6 to 8 million workers Collective action: - The CNEL – National Council on Labour and Economy – publishes a database with all existing collective contracts available on line; - Trade union collective agreements benefit all workers (even non-members) and are binding (ban of *reformatio in pejus* = special conditions may be agreed in derogation of the collective contract only if beneficial to the single worker). - Employment tribunal system for enforcement; - Government-provided conciliation services.
Slovakia	Article 37 of the Slovak constitution. According to its wording everyone has the right to freely associate with others in order to protect his economic and social interests. Trade union organizations are established independently of the state. It is inadmissible to limit the number of trade union organizations, as well as to give some of them a preferential status in an enterprise or a branch of the economy. The activity of trade union organizations and the founding and operation of other	Union membership has declined since the creation of the Slovak Republic in 1993 from 1,540,000 to 310, 649 members. The Act on Collective Bargaining (1991) regulates collective bargaining between the respective trade union bodies of trade union organizations and employers, in an effort to conclude collective agreements. Employees have the right to collective bargaining only

	associations protecting economic and social interests can be restricted by law, if such measure is necessary in a democratic society to protect the security of the state, public order, or the rights and freedoms of others. The right to strike is guaranteed.	through the competent trade union body. Around 35% of all employees were covered by collective bargaining. As well as industry and company-level collective bargaining, there are also tripartite meetings between unions, the employers and the government in what is now known as the Economic and Social Council. Collective work relations in practice correspond to the unionisation rate in the Slovak Republic.
Sweden	No single constitutional basis but principally derived from the constitutional right of freedom of association and the right to take industrial action unless otherwise provided in an act of law or under an agreement (Chapter 2 section 1 and 14 respectively of the Instrument of Government). Protection for freedom of association also in the European Convention on Human Rights (Art. 11) and in the Charter of Fundamental Rights of the EU (Art. 12).	Collective bargaining and co-operation plays a central role. Trade unions, employers' organizations and employers have a general right and duty to negotiate with the other party. Collective bargaining is relatively centralized and the major part of the employees and employers are organised in a few large unions and employer organisations respectively. Right of unions to take collective action appears extensive in an international comparison. However, when collective agreement is reached, the right to take collective action is limited (the so called "peace obligation). High degree of organization density: 70 percent of employees are trade union members. Due to contractual obligation of the employer, almost 90 percent of employees are protected by a collective agreement. The important role of trade unions and the collective bargaining and co-operation with employers' organisations are reflected by the fact that important issues are not laid down in law, for example rules on minimum pay.
United Kingdom	No single constitutional basis but principally derived from statute which respects international and European norms.	Institutional system: - Trade union collective agreements voluntarily agreed and usually without legal force;

	International standards: - Freedom of Association principles under ILO conventions 87 and 98; - ICESCR and ICCPR on forming and joining trade unions. European standards: - European Convention on Human Rights (Art. 11 regarding freedom of association); - Charter of Fundamental Rights of the EU (Art. 12 regarding freedom of association). Common law recognition of trade union status (and statutory immunities for trade unions in relation to industrial action).	- Workforce agreements; - Codes of conduct and work rules; - Employment tribunal system for enforcement; - Government-provided conciliation services. Means for engaging: - Via formally recognised trade unions; - Information and consultation representatives in relation to redundancies, transfers of undertakings, health and safety, pensions; - I&C bodies under ICER 2004 and TICER 1999. In practice: - Declining union membership (to less than 30% of all UK employees) and collective agreement coverage; - Very low level of industrial disputes; - Laws introducing I&C rights having limited impact, allowing for minimal influence on company decisions and weak enforcement of breaches.

C. Comparative examination

1. General overview of legal protection against unfair dismissal

All countries examined in the present study provide some form of protection for employees against unfair termination of employment. Such protection may be **a constitutional right against arbitrary dismissal**, as is the case in Slovakia, contained in a **Labour Code** such as in the French *Code du Travail*, or, more usually, provided for in **provisions of national legislation** – for example, the German Protection against Dismissal Act or the UK's Employment Rights Act. In Austria, different legal instruments apply according to whether the individual is a manual or non-manual worker, and in Italy, relevant provisions can be found in a variety of Laws as well as the Civil Code. In Sweden, the safeguards of the Employment Protection Act are heavily supplemented by additional rules **contained in industry-wide collective agreements**.

Some countries, such as the UK and Germany, only afford **unfair dismissal rights after a statutory probationary period** (known in the UK as a "qualifying period of employment") has been completed by the employee. In the UK, this has recently been extended to two years, whereas in Germany it is six months. In the UK at least, this requirement is waived where the employee claims their dismissal was based on specially protected grounds such as trade union membership or status as a health and safety representative. Other particular **unfair dismissal rights only operate in relation to larger employers.** This is the case in Italy (for economic dismissals only) and Germany (routine individual dismissals), where full protection provisions only apply to staff in companies with more than 15 employees and more than 10 employees, respectively.

1.1 Substantive reasons for legitimate dismissals

Although it is possible to extract common principles from the ways in which a legitimate dismissal may be effected in the jurisdictions studied, the legal rules underpinning them vary considerably. In all countries, some provision is made for circumstances in which it is appropriate to dismiss for **gross misconduct or otherwise with immediate effect**. This may be referred to as "extraordinary dismissal". For all other dismissals, employers must either have substantive reasons or avoid certain prohibited grounds, as well as following procedural requirements.

In Sweden and in France, the relevant legal rules are divided between dismissals based on the one hand, on **economic or "operational" reasons**, and **personal or individually motivated reasons** on the other. Individually motivated reasons are not explicitly set out in respective laws, but courts will expect to see that there is an objective reason behind the dismissal and that it was for a serious, rather than trivial, matter.

The applicable rules of Germany offer more precision on the acceptable reasons for dismissal, requiring that a dismissal be **"socially justified"** and citing grounds of personal capability, [mis]conduct or redundancy for operational reasons. Italy adopts three categories of legitimate dismissal: a **fair reason** (based on the individual's behavior or lack of capacity), **subjective grounds** (principally referring to a personal lack of capabilities on the part of the employee) and **objective grounds** – this usually concerning economic reasons for dismissal. UK legislation and the Slovakian Labour Code are even more specific, setting out **categories of potentially fair reasons** for dismissal, including redundancy, incapability (including ill health), misconduct, and a failure to meet legal requirements.

Austrian rules applying to manual and non-manual workers are probably the most restrictive for employers, with an **exhaustive list of grounds set out in legislation** on which employees may fairly be

dismissed ("*Entlassung*"). Although - consistent with the fundamental principles of party autonomy and freedom of contract – the employment relationship may alternatively be terminated ("*Kündigung*") by either party **for no particular reason**, the legislation again places significant **additional constraints** on an employer requiring that any such termination is not contrary to "good morals" and does not impair the essential interests of the employee (for which an examination of the employee's personal situation is required).

As is the case in other countries (such as the UK, Italy, France and Germany), any employer-initiated termination in Austria must furthermore **not be based on a particular identified prohibited ground**, such as trade union activities or work as a health and safety officer.

1.2 Procedural requirements for legitimate dismissals

In all jurisdictions, specific rules apply to the **manner in which notice of dismissal must be provided**. The relevant procedure for providing notice to a dismissed employee will often depend on whether the dismissal relates to one individual or is part of a collective termination of employment for operational reasons. Strict **minimum notice periods** for routine (rather than immediate) dismissals appear to be stipulated in legal rules in all countries covered, and usually depend on the length of service of the employee concerned.

Similarly, there is evidence in all countries of prescribed **procedures in relation to all collective redundancy dismissals**. The definition of "collective" differs from country, but in France for example, where different rules apply according to the number of employees affected as well as the number of overall staff in the enterprise concerned, there are specific rules contained in the *Code du Travail* on the number of meetings that must be held with worker representatives and the intervals of the meetings. Indeed, similar rules apply across the countries studied, and some form of **consultation with employee representatives** prior to collective redundancy dismissals can be expected, being required, as it is, by European legislation.

As to the **procedural requirements relating to individual dismissals**, there is greater disparity between the rules applied in the jurisdictions concerned. Although there is evidence across most of the studied countries of employers being required to provide employees with **advance warning of a proposed dismissal**, German, Austrian and Swedish legislation makes particular provision for **employee representatives to be informed and consulted** prior to notice being issued. Union members in Sweden are entitled to have their employer conclude consultations with their union before a final decision, and in Germany, company works councils may even formally oppose (although not veto) dismissal of an employee.

On the other hand, in France and Slovakia, dismissals are more likely to be rendered unfair where the employer has failed to respect **strict rules concerning the content and timing of a notice** terminating employment, and associated requirements concerning meeting the employee or serving notice on them.

In Italy, amendments were made in 2012 introducing a requirement on larger employers to engage in a period of **conciliation prior to dismissing** an employee on "objective" grounds. A failure to do so will render any subsequent dismissal null and void.

By contrast, principles of fair procedure for individual dismissals in the UK (outside ensuring statutory minimum notice periods are respected) are not contained in legislation, but have been almost entirely established through jurisprudence. Tribunals therefore assess **procedural fairness on a case by case basis**, according to the reason relied on for dismissal.

1.3 Burden of proof

Stark **differences exist between the jurisdictions** examined with regard to the operation of the burden of proof in cases of illegitimate dismissal.

In Germany and Austria, the burden of proof concerning the fairness of the dismissal (or the procedures followed) is **broadly shared by the employer and employee**. In both countries, the burden of showing facts supporting the claim of unfair dismissal initially lies with the employee. In Germany, the individual concerned must prove most of the key facts and that they are eligible to claim that their dismissal was unfair. In Austria, the employee need only show a *prima facie* case that the dismissal was unfair. The burden of proof for showing that the dismissal was for a fair reason (or in Germany, was "socially justified") lies with the employer however.

The burden of proof for showing that there was a fair reason for the dismissal **lies entirely with the employer** in Sweden, Italy and the UK. In Sweden and the UK however, the burden is on the employee when challenging the reason by showing a competing reason for their dismissal (although in the UK, this is only to advance facts which support, rather than prove, the alternative reason). As to the reasonableness of the dismissal which more usually concerns procedural fairness, the burden of proof under UK law is said to be neutral.

In Slovakia, it is the Slovak Code of Civil Procedure which applies to disputes concerning the invalidity of employment relationships. As a civil matter, it is **for the party which brings the claim to prove their case**. This is arguably consistent with the Labour Code's neutral treatment of a termination of employment, where both employer and employee each may claim compensation in respect of an invalid termination of the employment relationship by the other.

Consistent with its *procedure inquisitoire*, the burden of proving an unfair dismissal in France **rests neither with the employee nor the employer**. The parties must simply provide the Judge with all relevant facts and documentation. If at the end of such assessment however, there is any doubt about the fairness of the reason for dismissal, the employee is given the benefit of that doubt.

1.4 Available sanctions

The **available sanctions for illegitimate dismissals are various** across the countries studied and can depend on whether the dismissal is an individual termination of employment or part of collective redundancies as well as on whether the dismissal is found to be unfair on procedural or substantive grounds.

Notably, in Germany, there is, in effect, **no sanction for an illegitimate termination of contract**; the action is simply declared void and the employee is entitled to continue in employment. If the court considers it unreasonable or impossible for operational reasons for the employee to continue in employment, compensation to the worker may be ordered. Anything between up to 12 months' and 18 months' salary can be payable, depending on the worker's age and length of employment.

Declaring the termination void is, for the majority of examined countries, the primary outcome of a successful challenge by an employee to the legitimacy of their dismissal. In France, such a result is, broadly speaking, only possible in redundancy situations where procedural rules have not been properly followed or where the reason of redundancy no longer applied. The UK rules do not provide for courts to declare a dismissal void, but do technically permit for an employer to be ordered to re-employ an unfairly dismissed employee.

Indeed, **re-instatement** is the automatic consequence of a termination being declared void in Slovakia, Italy, Germany, Austria and Sweden. In France, outside redundancy dismissals, the tribunal may only propose to (rather than order) the employer to re-instate the employee; similarly, in the UK, although the tribunal may order reinstatement of the employee (or re-engagement in a comparable role), this only happens in less than 1% of successful cases. In all countries where re-instatement is not considered appropriate by the court, provision is made for compensation to be awarded to the employee.

Across the countries considered, **compensation** is generally seen as a secondary sanction for illegitimate dismissals, although in the UK, it is by far the most common penalty in practice. The amount of compensation usually depends on whether it is a collective redundancy or individual dismissal, and in most cases, is tied to the employee's age and length of service.

In France, a **distinction is between substantively unfair and procedurally unfair individual dismissals**, with the latter attracting up to a month's pay by way of sanction for employees in larger companies with the requisite length of service. For other individual dismissals, at least six months' salary may be ordered to be paid by the employer by way of compensation as well as indemnifying up to six months' unemployment benefits. A **similar distinction** is made in Austria between dismissals purporting to be on substantive serious grounds ("***Entlassung***") and general terminations of contract ("***Kündigung***"), the former attracting compensation where successfully challenged, and the latter leading to a declaration of invalidity and re-instatement of the employee.

Italian law allows for **compensation rather than reinstatement in certain circumstances**: namely, where the employer is found not to have subjective reasons for dismissal, where the dismissal was procedurally defective and for objective (or "economic") dismissals where there is no proper justification. The amount varies according to seniority and size of the employer, but ranges from 6 to 24 months' salary.

In the UK, **compensation** is equivalent to up to one year's pay plus a further nominal award based on age and length of service; in Slovakia, up to nine months' pay; in Sweden, considerable exemplary damages may be awarded, and in the case of a refusal by the employer to re-employ an unfairly dismissed employee, up to 32 months' pay may be available to an employee with ten or more years' of service.

1.5 Reforms

No substantive relevant reforms to unfair dismissal laws in response to the recent financial crisis are reported for any of the countries studied, **except for Italy and the UK**.

A new 2012 law in **Italy** introduced a number of changes to existing labour legislation in response to the financial crisis. These include the **new conciliation procedure** for larger employers who wish to dismiss an employee for objective reasons and the relaxation of sanctions for certain individual and collective unfair dismissals, such as **retraction of the requirement to reinstate** an employee whose dismissal is ruled unfair on procedural grounds.

In the **UK**, the **qualifying period of employment** needed by an employee to secure the right to be protected from unfair dismissal has been **extended from one year to two years**, and the **available compensation limited** from a previous cap of over £70,000 to one year's pay (where this figure is lower than the cap). Furthermore, the **minimum period to be respected by employers for consulting** with affected staff in collective redundancy situations involving 100 or more employees has been **halved** from 90 days to 45 days.

2. Special protection for workers' representatives

In all of the jurisdictions concerned, special protection for workers' representatives extending beyond that which is available to ordinary employees is provided for. There are certain types of protection and/or special rights guaranteed to workers' representatives shared by a number of the countries covered, but on the whole, the **degree of protection available varies** both between countries as well as within the jurisdiction concerned. In particular, this may **depend on the type of representative** (e.g., works council member, trade union representative or employee representative) **and the particular situation** where protection is afforded (e.g., treatment related to status generally or only when engaging in representative activities).

In many cases, the **protection** referred to covers **not just active representatives**, but **candidates in elections** to become representatives, and, as is the case, for example, for employee representatives in France, Italy and Sweden and for works council members in Germany and Austria, **for a limited period after the end of the individual's term of office**.

The types of protection and special rights identified across the countries studied can be categorized as follows:

- Pre-dismissal protection;
- Enhanced protection against unfair dismissal;
- Protection against unfair treatment or being subjected to a detriment;
- Protection in redundancy situations;
- Time off and other special rights.

2.1 Pre-dismissal protection

"Pre-dismissal protection" for workers' representatives refers to **limits on an employer's freedom to terminate their employment**. Of the various kinds of legal measures identified as protecting workers' representatives, this perhaps represents the most radical form of protection available. Some form of **legal obstacle capable of invalidating the termination notice of a workers' representative** can be seen in all of the countries examined, except for the UK and Italy. At one end of the spectrum is the German legislation concerning the proposed dismissal of a member of a works council ("*Betriebsrat*"). This **prohibits, without exception, the routine dismissal** by an employer of a works council member, and only permits so-called extraordinary dismissals in very limited circumstances. Even an extraordinary dismissal cannot be effected without the consent of the works council itself, leaving referral to a labour court for advance approval to dismiss as the ultimate recourse for an employer.

Arguably as extensive, is the protection afforded by Austrian legislation to members of works councils. Although there is no absolute prohibition on ordinary dismissals, it is generally the case that **advance approval from the labour court is needed** for an employer to terminate a works council member's employment. Immediate dismissals for gross misconduct may be approved after the event, but for ordinary dismissals, a labour court may only authorise dismissal on a limited number of strict grounds such as site closure, persistent violation of duties or legal impossibility of continued employment.

The Slovakian and French Labour Codes provide a similar level of protection, with the dismissal of employee representatives and trade union representatives – for whatever reason - being **subject to advance authorisation**. According to the French Labour Code, such authorisation is needed from a public authority work inspector, who following an investigation into the circumstances surrounding

the reasons for the proposed dismissal, will issue a binding decision which may only be appealed by the employer to the relevant Labour Minister and eventually to the courts. The Slovakian Labour Code requires such consent to come from the relevant trade union body, works council or works trustee, depending on the category of worker representative proposed to be dismissed. **Where consent is refused, an employer will need to go to court**. Under both systems, dismissals effected without the necessary authority are treated as null and void.

In Sweden, third party permission, as such, is not required for dismissal, but proposed changes by an employer to working conditions or terms of employment of a trade union representative are subject to the employer providing **advance warning to the local trade union** and engagement in discussions with the relevant representative prior to the changes being implemented.

2.2 Enhanced protection against unfair dismissal

In view of the pre-dismissal protection legislated for in most of the countries examined, there are automatically strong safeguards against worker representatives being dismissed for reasons which relate to their status or representative activities. That a worker representative cannot be dismissed for such reasons, is nevertheless **something expressly provided for in the legal instruments of a number of the jurisdictions**, including Austria, Italy, Sweden, France and the UK.

In the UK, where no recognised pre-dismissal protection akin to that seen in other States is offered, dismissal of a worker representative by reason of his or her activities will be **treated as** "**automatically unfair**" by an employment tribunal. This means that the usual two year probationary period, during which time an ordinary employee may be unfairly dismissed without consequence for the employer, is dis-applied; successful worker representative claimants will also be entitled to a minimum level of compensation.

In Italy, an **application may be made to the court by the union and dismissed representative**; where the court considers evidence on which the employer has relied to dismiss the representative as irrelevant or insufficient, it may order the employer to reinstate him or her.

2.3 Protection against unfair treatment or being subjected to a detriment

Other than dismissal or treatment during a redundancy situation, the other principal protection provided to workers representatives beyond that offered to ordinary workers is that witnessed in a number of the countries studied – namely, **general protection against discrimination** by an employer which relates to the representative's status or activities.

The French *Code du Travail* not only prohibits all discriminatory treatment of worker representatives and those exercising their right to strike, but also treats any impediment by an employer on the exercise by an employee of a "*droit syndical*" as a **criminal offence**, as well as any form of undermining a works council.

In the UK, unfavourable treatment of worker representatives is characterised as a "detriment", whereby **any act or deliberate failure to act by an employer** on the ground of a workers' representative's activities or proposed activities is prohibited. Sweden's Act on Trade Union Representatives similarly **prohibits less favourable working conditions and terms of employment** because of a representative's position and activities. In Italy, trade union membership and activities are **protected from discrimination in the same way as sex, race and religion** and separate legislative

provisions give unions the ability to apply to court for an order preventing an employer from engaging in anti-union conduct more generally.

2.4 Protection in redundancy situations

The role of a workers' representative is of central importance during times of economic difficulty for an employer, when re-organisation or cost-savings can lead to the need for dismissals of large numbers of staff on economic grounds. For this reason, **many countries recognise the need to offer additional protection of workers' representatives** themselves against dismissal on economic grounds or to give them priority for continued employment in redundancy situations.

For the majority of countries studied (France, Slovakia, Germany and Austria), the **pre-dismissal authority** required by respective legislative provisions for the termination of workers' representatives' contracts **also applies to dismissals by reason of redundancy** (otherwise referred to as "economic dismissals"). Such individuals are therefore automatically assured of a certain level of protection in such cases. Nevertheless, in the case of a company shutdown in Germany, the law provides that the **earliest an employer may dismiss workers' representatives** is at the moment of the shutdown, thereby ensuring (subject to imperative management requirements) their continued employment while others are being dismissed.

In the UK and Sweden however, where there is no such requirement imposed on employers, provision is made nonetheless for workers' representatives to be given **extended employment protection in redundancy situations**. In Sweden, there is a priority right for trade union representatives to remain in employment in the event of redundancy if it is of special importance to trade union activity at the work place. In the UK, although there is no such priority given to workers' representatives, both employee and trade union representatives will have been automatically unfairly dismissed where they have been selected for redundancy by reason of their status.

2.5 Time off and other special rights

Certain rights are intrinsic to the role and functions of a workers' representative, according to the jurisdiction in which the representative operates. In Germany and Austria for example, the members of a *Betriebsrat* have **numerous rights of participation** in the direction of a company which, in these respective States, are part and parcel of the role of a member of a works council. By contrast, in Slovakia, it is a key function of a workers' representative that he or she **inspect compliance by an employer** with labour law regulations and other obligations arising from collective agreements. Extensive powers are given to representatives to **request information from management**, to request rectification of discovered faults and to take other measures to enforce recommendations to company management.

Such special rights – or privileges – of workers' representatives are specific to the collective work relations systems of these particular States, and can be examined in more detail in the respective country reports. However, consistent with the notion of protection of workers' representatives, it is rather **rights supplemental to, and protective of, the functions and privileges of workers' representatives** which are the focus of this enquiry.

The principal supplementary right is the **right to time off from work to perform one's duties** as a workers' representative. Although it is likely that such right features in most, if not all of the States examined, it is worth commenting on the characteristics of this right in particular countries.

In the UK, for example, certain workers' representatives are said to be entitled to "***reasonable paid time off***" during working hours to perform their functions and to undergo training to perform such functions. Union and employee representatives are also entitled to access to affected employees and accommodation and other facilities, and union representatives are also allowed reasonable paid time off to take part in union activities.

Similar rights are available to members of works councils in Germany and Austria, although arrangements are arguably even more generous. In Germany, there is no mention that time off need be "reasonable", and representatives are furthermore **remunerated in relation to duties carried out during free time and not just working time**. In Austria, the number of works council members entitled to such rights will **depend on the size of the enterprise**, but up to three weeks' paid time off is available for **training and educational needs**.

Sweden's Act on Trade Union Representatives provides for a similar framework of time off for union representatives to that seen in the UK, with access to accommodation, time off for trade union activities and rights to reasonable time off for regular duties subject to agreement by the employer. Additional rights however, may be afforded through collective agreements. As is the case in Italy, where time off rights depend on the size of the enterprise, a **distinction** is nevertheless made **between general union activities**, time off for which is unpaid, **and work-related union activities**, which are considered equivalent to work performed for the employer and which are therefore remunerated.

3. Sanctions available and application in practice

In the majority of the countries studied, the illegitimate dismissal of a workers' representative will result in their **termination notice being declared null and void**. The automatic consequence of this is that the **employee is entitled to return to work**, and, as is seen in some countries, such as Sweden, France, Slovakia and Italy, to be **compensated for lost salary for the period between dismissal and reinstatement**. In the UK, a dismissed workers' representative may even apply to a tribunal immediately after their dismissal for an order to continue their employment contract for the purposes of pay and other benefits (known as '**interim relief'**) up to the date of the outcome of the final tribunal hearing.

The legislation in some States, such as France, Germany, UK and Slovakia, nevertheless recognises that it **may not be appropriate, no longer possible or simply not desirable for the employee to be reinstated**. In these circumstances, provision is usually made for some form of enhanced compensation which goes beyond that available to ordinary employees who have been unfairly dismissed. In the UK and France, this takes the form of a **minimum level of compensation**; in Slovakia, wage compensation of up to nine months; in Germany, damages equivalent to up to 12, 15 or 18 months' salary, according to age and length of service.

Unfavourable treatment not amounting to dismissal, as well as refusal by an employer to honour rights to time off are usually as minimum, punished by way of **compensation corresponding to the damage caused** to the representative. Additional more severe sanctions are provided for in a number of countries which effectively treat the undermining of union or other representative activity as the restriction of a fundamental right. In Italy for example, an employer which engages in the broadly defined "anti-union conduct" can be ordered by a court to cease such behaviour and to remove its effects. A failure to respect such order not only results in **removal of tax incentives** for an enterprise but amounts to a **criminal offence** punishable by up to **three months in prison**. The French *Code du Travail* goes even further, by criminalising the actions of an employer which fails to respect rules on the dismissal and treatment of workers' representatives. Penalties for persistent violations can be **as much as two years' imprisonment**.

There is **little empirical evidence on the application in practice** of such sanctions. Cases of note and commentary on the effectiveness of sanctions are referred to in some country reports, but these must be treated with caution and cannot necessarily be viewed as representative of the broader picture.

4. Constitutional basis for the representation of workers

The **constitutions** of Germany, France, Italy and Slovakia all guarantee, in some form, protection of the **freedom of association**. These are all **supplemented either by respective Labour Codes** (in the case of Slovakia and France) or **legislation** (in Germany and Italy) which contain the detailed provisions for implementing this protection, and for providing specific protections to workers' representatives.

In the UK, Sweden and Austria, rules on the collective representation of workers, including protection of workers' representatives, are, broadly speaking, to be found in **legislation which loosely gives effect in domestic law international and European legal instruments** which provide for the freedom to associate, including the right to form and join trade unions. The principal accords are the **European Convention on Human Rights**, and more recently for European Union Member States, the **Charter of Fundamental Rights of the European Union**, both of which seek to guarantee the freedom of association. All countries studied have also ratified **ILO Conventions** no. 87 (Freedom of Association and the Right to Organise Convention 1948) and no. 98 (The Right to Organise and Collective Bargaining Convention 1949), both of which demand protection against any acts of interference with the manifestation of such rights.

5. Role of collective work relations

Features of systems of collective work relations found across the countries studied are intrinsically linked to the history and development of social and economic rights within each jurisdiction. These often unique characteristics of institutional and legal frameworks do not lend themselves to a comparative examination but are best understood by referring to the individual country reports. Some of their more notable features are nevertheless summarized here:

Collective agreements play very important role in **Austria**, where 98% of workers are covered by at least one such agreement, and where 800 collection agreements govern relations across entire industries and regions, binding on union and non-union members alike. As in Germany, employer and employee representative bodies are given considerable autonomy to negotiate the working conditions of workers. Although collective agreements must respect minimum employee-friendly standards provided for by legislation, these can be derogated from where even they are even more favourable to employees.

France is characterized by trade union and employee representatives working alongside one another. In larger companies, employee representation takes place through a Works Council consisting of union representation, an elected employee representative and the head of the enterprise. A Works Council has the right to be informed and consulted on a wide range of matters concerning the management of a business which affect employee interests, whereas union representatives are principally engaged in collective bargaining and conflict resolution. Although union representation stands at only 8%, more than half of all employees say that unions are present in their enterprise, while the coverage of collective agreements has even increased to almost 98% of all employees.

Despite there being around 70,000 collective agreements registered in **Germany**, these directly cover only around 55-60% of all employees, and collective action is relatively rare. Collective work relations

are not governed by legislation, but instead tend to rely on case law from the Federal Labour Court and Federal Constitutional Court. Rulings have guaranteed the autonomy from the State of employers and trade unions to negotiate their own arrangements for many working conditions. Collective action is also restricted by case law, which demands arbitration before industrial action, respect for the terms of a collective agreement on any matter about which collective action is proposed and a prohibition on disproportionate action by employers and unions which create an unfair bargaining advantage.

Collective agreements play an important role in collective work relations in **Italy**, and are binding on union and non-union members alike. Collective bargaining usually takes place at the national level, for particular industrial sectors, but also at the company level. Half of all workers are members of one of the three main trade unions, and trade unions in particular industrial sectors, particularly in the public sector, are growing in popularity.

In **Slovakia**, where union membership has declined dramatically since the creation of the Slovak republic in 1993, collective agreements only cover around 35% of employees. Collective agreements are concluded with trade union bodies on working conditions and will also apply to non-union members. A collective agreement may regulate all working conditions provided they are more favourable for workers than minimum standards provided for in the Labour Code. Works councils, which participate in company decision making, can operate alongside trade unions. They usually represent employees in larger companies (and works trustees in smaller companies) and where a union does not operate may instead take responsibility for negotiating on working conditions.

Swedish labour law has long been characterized by the significant autonomy given to social partners, with a limited number of often centrally-agreed collective agreements governing working conditions for, by some estimates, around 90% of Swedish employees. Legislative rules are limited in scope and where they do apply, are even deemed to be “semi-mandatory”, allowing for them to be overridden by collective agreements. There is generally no restriction on the right to take collective action where parties are not subject to a collective agreement as this is guaranteed by the Swedish constitution; where a collective agreement does apply however, the Co-determination Act dictates that a peace obligation applies, providing very little room for collective action.

In the **UK**, collective work relations are governed through formal law by the common law, legislation and Government issued codes of practice, and through voluntary sources, principally in the form of collective agreements. Collective agreements, which cover around 35% of all employees have historically been presumed not to be legally enforceable, and binding in honour only. This practice continues today, with provisions of collective agreements generally being enforceable only where expressly incorporated into individual employment contracts. Trade union membership and collective action has reduced considerably in recent decades, partly being attributed to the introduction by EU and domestic law of mandatory information and consultation requirements, but also because of increased labour market flexibility and a growing tendency for direct communication.

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