Prof. Dr. Armin Höland
Martin-Luther-University
Halle-Wittenberg
Faculty of Law

"Fairness-control of dismissals by labour courts – legal conception and practical effects – "

paper to be presented in the panel "Employment Protection and Non-Standard Work in European Member States and in the US" at the International Conference "Law and Society in the 21st Century" in Berlin, International Research Collaborative "Social Europe"

Session tracking number: 29120

– Abstract –

The highly controversial debate in Germany on the relationship between labour law and labour market has put labour courts in the front line of criticism. They are being blamed mainly for cultivating a fanciful and biased making of law in favour of dismissed employees rendering the outcome of dismissal decisions for employers unforeseeable and, due to the allegedly almost automatic attribution of severance payments, unnecessarily expensive. Given these legal risks, critics argue, employers would refrain from recruiting new employees and would, therefore, not sufficiently contribute to the reduction of mass unemployment. Apart from the lack of any serious empirical confirmation for that hypothesis the critical perception eclipses important functions and effects of labour courts regarding employment and fairness conditions. On the basis of recent socio-legal research on labour courts and unfair dismissals the paper shall discuss some major findings and effects. The analysis shall start with (1) the contribution of labour courts to basic requirements of fairness in a modern labour society, discuss (2) fairness issues in dismissal cases brought before labour courts, describe and analyse (3) the opening of a judicially supervised floor in the court-room for dispute resolving negotiations and for achieving an amicable settlement, ask for the effects of the intervention of third parties (4) regarding the safeguard of procedural justice, and conclude with remarks (5) on the effects of rationalising human resources management and dismissal decisions by systematizing and communicating case-law regarding the termination of employment.

Armin Höland
Law Faculty of the
Martin-Luther-University
Halle-Wittenberg

**“Fairness-control of dismissals by labour courts
– legal conception and practical effects –“**

1. Labour courts and fairness in industrial relations

If one includes historic predecessors, labour courts have been existing in Germany since the second half of the nineteenth century (Cole 1956:479-480; Blankenburg / Rogowski 1986:67). With the exception of the twelve fascist years of the Third Reich labour courts have been working as an autonomous judicial institution serving mainly two functions. The first function consists, of course, of the professionally legal treatment of conflict cases having arisen in connection with employment. Currently, between 500.000 and 600.000 cases a year are heard by 1100 judges in 122 labour courts and in 19 higher labour courts in Germany. The number is shrinking since a couple of years after having peaked in the middle of the 1990s in the wake of the German unification and again in the years 2002-2003 (Statistisches Bundesamt 2006). Around 98 % of the total of cases heard by German labour courts tell conflict stories of individuals, the vast majority of them, around 98 %, have been launched by employees disputing with their employers. The majority of these individual disputes – between 50 to 60 per cent – have to do with dismissals, perceived as “unfair” by the employees. Besides these employee-employer disputes there is a small, but legally demanding minority of around 2 per cent of the whole work load of labour courts dealing with issues of collective labour law, notably with disputes between works councils and employers. Although there are questions of fairness in the inter-institutional conflicts between works councils and employers, too, the focus of our considerations on the role of labour courts concerning fairness perceptions in industrial relations will lie on individual conflict experiences arising from dismissals.

The second main function of labour courts in Germany translates into a systemic effect beyond the individual dispute resolution. By their frequently published and intensely discussed jurisprudence labour courts are perpetually generating and sending out standards of fairness. Fairness has the status of a fundamental value and of a basic procedural principle for the implementation of social justice for the whole system of industrial relations (Höland / Zeibig 2007:1-3). An empirical confirmation for this hypothesis is the majority of almost three quarters of 3000 Germany interviewees

opting in 2004 for further improvement or at least maintaining the status quo of the legislation protecting against unfair dismissals (Pfeifer 2006:139).

Modern risk societies have become significantly more receptive for issues of social and procedural justice and fairness. The shrunken security of expectations concerning the stability of employment relationships and the grown extension of precariousness in industrial relations has contributed to sharpen the consciousness of employees regarding just and unjust distribution of risks and chances, of happiness and unemployment. Labour law in general and unfair dismissal protection law in special are theoretically thought to provide for justice in industrial relations. The usually mentioned primary purpose of protecting employees is a legislative concretisation of this basic idea of distributive justice. Labour courts are institutionally in charge of concretising by their case law the principle of fairness for disputes arising out of industrial relations.

2. Fairness issues in dismissal cases brought before labour courts

Dismissal is a very good example to demonstrate the fairness generating effects of labour courts. This is not only to explain by the number of cases. Estimated two millions employment relationships a year become currently terminated at the initiative of employers (Pfarr et al. 2005:46; Bielenski 2003:17). Dismissal cases make up more than half of the annual caseload of individual disputes brought before labour courts in Germany. Apart from the statistical weight of around 300.000 disputed dismissal cases before German labour courts the event as such – the involuntary termination of an employment relationship by the unilateral decision of the employer – raises and in a sense scandalises the issue of fairness. This has to do with the status of the employment relationship as an implicit or psychological contract (Sadowski 2002:72; Durkheim 1986:189; Fehr / Klein / Schmidt 2004; Pfeifer 2004:130). Employment contracts belong to this type of contracts because their performance conditions cannot be fully spelled out by contract clauses. The indispensable mutual cooperation between employer and employee requires a certain minimum of trust and willingness on both sides of the legal relationship. A vital source for achieving this minimum of trust is the expectation of reciprocity of both contract partners (Magen 2005: Pfeifer 2004:130). The expectation of reciprocity nourishes the engagement of the employment contract parties in investing time, skills and knowledge into the fulfilment of contract obligations, and occasionally even more, in the achievement of goals beyond the written performance programme of the employment relationship. The cancellation

of the contractual bond by the employer[1] sends a clear stop signal against any further reciprocity expectations. Nevertheless, even in this situation respecting the conditions of procedural justice and of distributive fairness may considerably mitigate the effects of such a breaking-down event.

In principle, the notice of termination given by the employer puts the trust-building basis of reciprocity for two groups of the employees at jeopardy, the negatively selected group of dismissed employees and the remaining part of (not yet) not dismissed employees. Empirical research is able to show how the employer by complying with the rules of procedural justice and by striving for a fair distribution of consequences may even in this situation contribute to safeguard standards of fairness. According to the results of the German research project on “Labour and fairness”, based on more than 3000 telephone interviews, the perception of dismissals is much less unfair under the condition that the employer has manifestly engaged in avoiding dismissals or in diminishing their economic and social consequences (Stephan 2006:3; Gerlach et al. 2006:17; Krause et al. 2006:35; Pfeifer 2006). An additional support for the impression of fairness may be be achieved by financial compensation offered by the employer, above all by collectively negotiated or individually granted severance payments for the loss of the workplace.

On the other hand, gratifications set out by the company for the successful implementation of lay-offs by the management will seriously damage the legitimacy and acceptability of down-sizing decisions.

The litigation rate in dismissal cases in Germany is astonishingly low. Only one out of six dismissed employees (15 per cent) brings his (66 per cent) or her (34 per cent) case before the labour court. Conversely, that figure means that in five out of six cases the distributive and procedural justice requirements for reaching the acceptance of the dismissal decision seem to have been met.

Resuming this part of the analysis one can state that fairness matters a lot for explaining the reactions of dismissed employees – and for shaping the value consciousness of the remaining staffs.

---

[1] In principle, the same is true for the symmetric situation of a notice of termination given by the employee; but in practice the effect is usually much less dramatic.

3. Fairness through negotiations: The court-room as a judicially supervised floor for dispute resolving negotiations

Given that the conditions of procedural justice are operational the fair resolution of a dismissal conflict may also be achieved by means of negotiation. Labour court hearings open the floor for a judicially supervised legal communication which may end up – and in fact quite often ends up – with an amicable settlement. The proportion of this kind of amicable settling of dismissal disputes is quite impressive. Two thirds (65 per cent) of all dismissal cases before first instance labour courts and a little more than half of the appeal cases (51 per cent) find a negotiated settlement. Only one out of nine dismissal cases will be formally and judicially decided by judgment in the first instance; the corresponding proportion of judgments in dismissal cases before higher labour courts is 30 per cent (Höland / Kahl /Zeibig 2007). In comparison to other jurisdictions in Germany the settlement rate in labour court procedures in general and in dismissal cases in special is extraordinarily high.

There are two explanations for the high proportion of settlements. The first is the traditional inclination of labour courts towards conciliation and mediation. Conflicts in industrial relations follow distinct patterns of causes and resolutions. The judicial techniques of the labour court system has since its beginning in the 19th century been in tune with these specific conflict configurations. The original design of a primarily non-judicial going-between (see the French name for the “conseils de prud’homme”) has remained enshrined in modern codes of procedure and gives the priority to amicable settlements.[2] The second explanation for the high settlement rates in dismissal cases is reflecting the frequent lack of any reasonable alternative to the winding up of the employment relationship. This holds especially true for economically motivated dismissals – redundancies – which count currently for roughly two thirds of all notices of termination given by employers in the private economy (Pfarr et al. 2005:51 pp.). In economic crisis situations there is often not much *marge de manoeuvre* left for human resources management in situations of necessary cost-cutting. The dismissal decision will then turn out to be more or less definite. This diagnosis restricts the judicial battle fields rather to financial compensation than to the realisation of the logical purpose of the Protection Against Unfair Dismissal Act. This scenario is being reflected in the large proportion of severance payment agreements. Three quarters (75 per cent) of all settlements achieved in the first instance and almost four fifths (79 per cent) of the settlements in the higher labour courts in dismissal matters are based on

[2] See the compulsory first stage of the conciliatory proceedings (Güteverfahren) according to s. 54 of the German Code of Labour Court Procedure.

financial compensation agreements reached under the supervision and sometimes with more or less persuasive help of the court (Höland / Kahl / Zeibig 2007:160).

From the point of fairness in the procedure and in the substantial outcome amicable settlements reached in the court room reveal at least three advantages. Albeit it is legally a private-autonomously created contract between two individuals the settlement has been prepared and achieved under the auspices of a judge. This means, there will usually be an element of judicial control of the reasonableness and justice and equity which are underpinning the settlement. The public forum of a court-room with a legally trained supervisor are more likely to provide for fairness conditions than an exclusively private setting. In a sense, “Rechtsstaat” is watching. The second advantage of this kind of closing the dismissal dispute is the chance to find an interest-specific tailoring of the solution. The simple institution of a private contract may be complex in terms of integrating subjects and interests into an obliging format. Fairness then is a precisely weighed and calibrated prerequisite for reaching an amicable settlement. To a certain extent, the definition of fairness in negotiating the settlement clauses in the labour court-room is at the disposal of the disputing parties. This offers an interesting alternative to fairness designed by the legislator and the judiciary. The third element furthering the perception of fairness by the parties of the settlement of a dismissal dispute is the active role taken by both litigation parties. In a sense, it is their own success to have found a solution for the conflict.

4. The intervention of third parties as a means to safeguard procedural justice

Any intervention of third parties helps to pull out from the binary conflict structure which is usually linked to dismissals. Under the angle of fairness it is always a problem to have but private participants in an evolving dispute. During the proceeding of a dismissal conflict there are different chances to mobilise external observers. Two of them dispose of special knowledge and authority in observing and giving statements and seem more than others capable to assure elements of fairness.

4.1. The participation of works councils in dismissal decisions of the employer

Given that they exist in the establishment works councils have to be heard prior to any notice of termination by the employer. The reach of the legally binding consultation is in fact limited. Works councils are being elected in Germany in only 10 per cent of all establishments falling under the scope of the Works Constitution Act. Nevertheless, as these establishments tend to be larger ones, roughly half of all employees in establishments in the private sector are covered by the representation of works councils (Ellguth 2003; Pfeifer 2007:66).

Works councils have a predominantly sceptical view on dismissal projects of the employer. In more than a third of all statements given by works councils they refuse explicitly to approve the dismissal or at least express doubts and objections. In another third of all consultations works councils decide to remain silent – which comes up to an approval. In a quarter of all consultations works councils give their explicit consent (Höland / Kahl / Zeibig 2007: 102). Irrespectively of their statement, the consultation of works councils prior to the dismissal decision of the employer contributes to the perception of concerned employees that their dismissal case has gone through a fair procedure (Pfeifer 2004:136).

4.2. The legitimising effects of lay-judges in the labour courts

Another source for the impression of fairness is the participation of lay-judges in the labour court chambers. Two lay judges are sitting together with the presiding professional judge and are deciding on the same footing with the president of the court chamber. The involvement of lay judges, elected from proposal lists set up by trade unions and employers' associations, has an impact on both sides of the court-room. The vast majority of the professional judges, presiding the chambers of the court, appreciate explicitly the expertise and the work life experiences of the lay judges (Höland / Kahl / Zeibig 2007:221 pp.). For the claimants the visible participation of lay judges is a kind of institutional fairness promise as regards the proceeding of their dismissal case. The fully manned chamber of a labour court, of which the two lay members are known to represent the two opposite sides of the industrial relations, increases the institutionalised aesthetics of fairness of the dismissal procedure. Empirical research on the self-perception of lay judges in administrative courts in Germany regarding the fair treatment of themselves and of the parties by the professional judges gives an additional insight into the importance of fairness in judicial procedures (Machura 2006). Lay judges seem to be in an especially good position to perceive and to evaluate the quality of fairness on both sides of the court-room, the public proceeding and the secrete deliberating.

5. Concluding remarks

In a society in which the economic and social well-being of a large part of the active population depends on employment the termination of the employment relationship by the employer raises immediately and vigorously questions of justice and fairness. Answers to these questions are on the level of legislation given notably by the Protection Against Unfair Dismissals Act and by some other special protection acts. On an operational level it is above all the system of labour courts which plays an important role for the conceptualisation and concretisation of the principle of fairness in industrial relations in Germany. Even if only one out of six dismissal cases is brought

before labour courts this accumulates to hundreds of thousands disputed dismissals a year. By processing that case-load the labour court system is working as a central agency in translating the principle of fairness into everyday orientation in the working life.

References

Bielenski, Harald (2003): Wie viele Arbeitgeberkündigungen gibt es in Deutschland? Ein Vergleich von Daten aus unterschiedlichen Quellen. Unveröffentlichtes Manuskript von Infratest Sozialforschung, München 2003

Blankenburg, Erhard / Rogowski, Ralf (1986): German Labour Courts and the British Industrial Tribunal System. A Socio-Legal Comparison of Degrees of Judicialisation, Journal of Law and Society, Vol. 13, No. 1 (1986), pp. 67-92

Cole, Taylor (1956): The role of the labor courts in Western Germany, The Journal of Politics 1956, pp. 479-498

Durkheim, Emile(1986): De la division du travail social, pp. 189

Ellguth, Peter (2003): Quantitative Reichweite der betrieblichen Mitbestimmung, WSI-Mitteilungen 3/2003, S. 194-199

Fehr, Ernst / Klein, Alexander / Schmidt, Klaus M. (2004): Contracts, fairness, and incentives, München, CESifo working paper no. 1215, Labour Markets

Gerlach, K. / Levine, D. / Stephan, G. / Struck, O. (2006): The Acceptability of Layoffs and Pay Cuts: Comparing North America with Germany, IABDiscussionPaper No. 1

Höland, A. / Kahl, U. / Zeibig, N. (2007): Kündigungspraxis und Kündigungsschutz im Arbeitsverhältnis. Eine empirische Praxisuntersuchung aus Sicht des arbeitsgerichtlichen Verfahrens. Schriften der Hans-Böckler-Stiftung, Nomos Verlag Baden-Baden und Rainer Hampp Verlag.

Höland, Armin / Zeibig, Nadine (2007): Fairness bei Kündigungen des Arbeitsverhältnisses durch den Arbeitgeber, WSI-Mitteilungen 5/2007, pp. 1-7

Krause, A. (2006a): Die Einstellung zum Kündigungsschutz – wie wichtig sind Gerechtigkeitsnormen und Entlassungserfahrungen?, in: Struck, O./ Stephan, G./ Köhler, C./ Krause, A./ Pfeifer, C./ Sohr, T.: Arbeit und Gerechtigkeit. Entlassungen und Lohnkürzungen im Urteil der Bevölkerung, Wiesbaden, pp. 105-119

Krause, A./ Pfeifer, C./ Sohr, T. (2006): Was beeinflusst die Akzeptanz von Entlassungen und Lohnkürzungen, in: Struck, O./ Stephan, G./ Köhler, C./ Krause, A./ Pfeifer, C./ Sohr, T.: Arbeit und Gerechtigkeit. Entlassungen und Lohnkürzungen im Urteil der Bevölkerung, Wiesbaden, pp. 33-69

Machura, Stefan (2006): Ehrenamtliche Verwaltungsrichter, Münster

Magen, Stefan (2005a): Fairness, Eigennutz und die Rolle des Rechts. Eine Analyse auf Grundlage der Verhaltensökonomie. Reprints of the Max Planck Institute for Research on Collective Goods, Bonn 2005/22.

Magen, Stefan (2005b): Zu einer Verhaltenstheorie der Gerechtigkeit. Vortrag anlässlich der Eröffnungsfeier des Max- Planck- Instituts zur Erforschung von Gemeinschaftsgütern; Bonn, http://www.coll.mpg.de/pdf_dat/ Magen% 20Verhaltenstheorie%20der%20Gerechtigkeit.pdf

Pfarr, Heide / Ullmann, Karen / Bradtke, Marcus / Schneider, Julia / Kimmich, Martin / Bothfeld, Silke (2005): Der Kündigungsschutz zwischen Wahrnehmung und Wirklichkeit: Betriebliche Erfahrungen mit der Beendigung von Arbeitsverhältnissen, München und Mering 2005

Pfeifer, Christian (2004): Fairness und Kündigungen. Eine theoretisch und empirische Analyse, Zeitschrift für Arbeitsmarktforschung 2/2004, pp. 127-145

Pfeifer, Christian (2006): Die Akzeptanz des Kündigungsschutzes. Empirische Evidenz aus einer repräsentativen Telefonumfrage, Industrielle Beziehungen 13(2), pp. 132-149

Pfeifer, Christian (2007): Betriebsräte, Tarifverträge und freiwillige Kündigungen von Arbeitnehmern, WSI Mitteilungen 2/2007, pp. 63-69

Sadowski, Dieter (2002): Personalökonomie und Arbeitspolitik

Statistisches Bundesamt (2006): Justizgeschäftsstatistik. Geschäftsentwicklung bei Gerichten und Staatsanwaltschaften seit 1995