DISMISSALS EFFECTED BY AN EMPLOYER FOR ONE OR MORE REASONS RELATED TO THE INDIVIDUAL WORKERS CONCERNS

German Team Report

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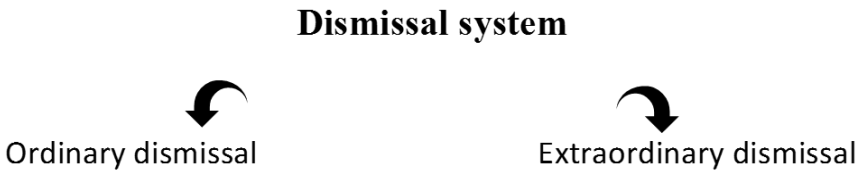
1. DEFINITION

The German Employment Dismissal Law is an accumulation of regulations and applies only to employment agreements.[1] According to sec. 611a BGB (German Civil Code), the employment contract obliges the employee to perform work in the service of another person that is subject to the instructions of a third party and to personal dependency.

The German Civil Law differs between two forms of dismissals: ordinary and extraordinary dismissal.[2]



1.1. Ordinary dismissal

The legal term "dismissal" stands for the termination of a continuing employment or service relationship by a declaration of intent.[3] Ordinary termination is the termination of an employment relationship by a written declaration in compliance with the notice period, secs. 620 para. 2, 622, 623 BGB

1.2. Extraordinary dismissal

Both employer and employee can terminate the employment relationship in an extraordinary way. Sec. 626 German Civil Code allows an extraordinary dismissal without notice for a compelling reason. ”Extraordinary” means the employment agreement ends immediately without any notice period.[4]

2. RELEVANT FACTORS FOR ALLOWING DISMISSALS

The number of workers employed and the duration of the employment relation are relevant for allowing dismissals.

The German Protection Against Dismissal Act (Kündigungsschutzgesetz – KSchuG) protects employees in larger companies. It covers employees who have been employed at least six months and work in a business operation that has more than 10 full time employees (sec. 23

[1] *Wörlen*, Arbeitsrecht, § 5 margin no. 246.
[2] *Stober/Schunder*, Deutsches und internationales Wirtschaftsrecht, § 1 margin no. 1109.
[3] *Müller-Glöge,* Erfurter Kommentar, BGB sec. 620, margin no. 16.
[4] *Niemann,* Erfurter Kommentar, BGB sec. 626 margin no. 1.

para. 1 sentence 2 KSchG).[5] According to KSchG, every ordinary dismissal must be socially justified.

The dismissal notice period for a ordinary dismissal exercised by the employer extends with the duration of the employment relationship, sec. 622 para. 2 BGB (see in detail in the section on formal requirements).[6]

3. SOURCES OF LAW

There are several sources of dismissal law.

3.1. Constitution (GG)

The Basic Law for the Federal Republic of Germany (Grundgesetz – GG) is Germany's constitution. It provides fundamental rights in labour law.

3.1.1. Article 9 GG - Freedom of association

According to art. 9 para. 1 GG, all Germans shall have the right to form corporations and other associations. It is a basic right of all German citizens. Further regulation of this article provides this right for every occupation and profession. Restrictions of this right are strictly forbidden. Every individual and every occupation or profession has the right to form associations to safeguard and improve working and economic conditions.[7] Art. 9 GG protects labour unions who fight for better working conditions and protection against dismissals.

3.1.2. Article 12 GG - Occupational freedom

The right of occupational freedom is a fundamental right in Germany. All Germans shall have the right to freely choose their occupation or profession, their place of work and their place of training. It is not an assurance to get an employment but available choice of one. Art. 12 GG protects the employer's freedom to establish and lead a company and to decide about employments and dismissals.[8] On the other hand, it protects the employee's interest in the continuation of the employment relationship.[9]

[5] *Hund*, Employee Relations Law Journal, Vol. 40, No 3, 2014, p. 61 f.
[6] *Hund*, Employee Relations Law Journal, Vol. 40, No 3, 2014, p. 61 f.
[7] *Löwisch*, Arbeitsrecht, § 4 margin no. 109.
[8] *Löwisch*, Arbeitsrecht, § 4 margin no. 118.
[9] BVerfG Case 1 BvL 15/87, 1 BvL 22/93, 27 January 1998, BVerfG Case 1 BvR 1659/04, 21 June 2006.

3.1.3. Article 14 GG - Property, Inheritance, Expropriation

According to this article, property and the right of inheritance shall be guaranteed and it entails obligations. Its use shall also serve the public good. This fundamental right protects the freedom to use a company's property and protects the employer's leading decisions as well.[10]

3.2. Federal Acts

In Germany, there is no prescript statute of labour law. Instant many different acts regulate labour and dismissal law.

3.2.1. German Civil Code (BGB)

The German Civil Code provides general regulations about labour law and especially about formal requirements and statutory notice periods for dismissals. It states the conditions for extraordinary dismissal as well (secs. 620 to 626 BGB).

3.2.2. General Act on Equal Treatment (AGG)

The General Act on Equal Treatment provides fairness in labour law and should prevent and stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation (sec. 1 AGG). This act is especially important considering the quantity of discrimination problems existing not only by hiring and dismissing employees but also during employment relationships.

3.2.3. Protection Against Unfair Dismissal Act (KSchG)

This act covers every socially unjustified dismissal and protects especially employees.[11] Regulations of this act specify terms and conditions of justified dismissal and settle the statutory sum in compensation. Every larger company must comply with these regulations.

3.2.4. Maternity Protection Act (MuSchG)

The Maternity Protection Act prohibits dismissing woman under special conditions and covers payment conditions and other benefits for the time of pregnancy and maternity. Dismissals violating this act are invalid.[12]

[10] *Löwisch*, Arbeitsrecht, § 4 margin no. 118.
[11] *Rost*, Gemeinschaftskommentar zum Kündigungsschutzgesetz und zu sonstigen kündigungsschutzrechtlichen Vorschriften, 9th edition 2008, KSchG sec. 2 margin no. 7.
[12] *Bader*, Gemeinschaftskommentar zum Kündigungsschutzgesetz, 9th edition 2008, MuSchG sec. 9 margin no. 166.

3.2.5. Works Constitution Act (BetrVG)

The Works Constitution Act provides regulations on works councils in companies and works agreements negotiated by the works council and employer. Works councils in Germany has no right to prevent the employer of dismissing an employee. Nevertheless, the employer must consult the works council before every dismissal. In some cases, works councils might refuse a dismissal, which strengthens the employee's position in litigation against the employer.

3.3. Collective labour agreements

Collective labour agreements set legal norms that affect the content, hiring conditions and termination of employment agreement, sec. 1 para. 1 of the Collective Agreements Act (Tarifvertragsgesetz – TVG). The regulations of collective labour agreement might differ from statutory regulations for the benefit of both contracting parties and could for example specify compensation or benefits in case of dismissal.[13] The conditions for collective negotiations are stated by the Collective Agreements Act, which applies to both collective bargaining parties and regulates the special employment conditions that might be negotiated between labour unions and employers' association.

3.4. Case – law

In general, there is no such thing as case law in Germany. However, this is different in labour law. A large part of German labour law is case law or derives from collective bargaining agreements. An exception is the protection against dismissal of employees, which is strictly regulated by law. But even in dismissal law labour courts have ruled on a series of cases, which has to be considered by interpreting the law. Over the course of time, courts have developed special grounds that allow to extraordinary dismiss an employee because of his behaviour, e.g. refusal to work or serious insult to the employer.

3.5. Impact of international and European law

There is no apparent impact of international law in Germany. Besides that, the European Union has not yet made use of its authority to issue guidelines on general protection against dismissal in order to check the social justification of dismissal.[14]

Nevertheless, the Anti-discrimination directives (e.g. directive 2000/78/EG and 2000/43/EG) have an impact on German law. The General Act on Equal Treatment (AGG) was enacted to implement these guidelines. Apart from this, the German law about workers' representation is influenced by the Directive 2002/14/EG to determination of general conditions of employee's consultation in European Union, especially modalities of employee's consultation and measures in case of violation of these duties

[13] *Junker*, Grundkurs Arbeitsrecht, 12th edition 2013, § 8 margin no. 501.
[14] *Kocher,* Unionsrechtliche Harmonisierung, § 5 margin no. 125.

Furthermore, Art. 30 of the Charter of Fundamental Rights of the European Union applies for Germany as well. According to this, every worker has the right to protection against unjustified dismissal in accordance with Community law and national laws and practices.

The rulings of the European Court of Justice (ECJ) affect the German dismissal law as well, especially in cases regarding anti-discrimination in dismissal law. Current for Germany are decisions of the ECJ about wearing a headscarf by Muslim women on their shifts.[15]

4. CRITERIA FOR ALLOWING DISMISSALS

In general, the service relationship ends at the end of the period for which it has been entered into, sec. 620 para. 1 BGB. Either party may terminate the relationship under the provisions of sections 621 to 623 BGB with given notice if the duration of the service relationship is not defined (sec. 620 para. 2 BGB).[16]

Only if the Protection Against Dismissal Act is applicable, the employer must additionally provide evidence for a "justifying" reason for ordinary dismissals. Otherwise, the dismissal is so called "socially unjustified" and therefore invalid.

Irrespective of the protection of the KSchG, both contracting parties may also terminate the employment relationship extraordinary.

4.1. Ordinary Dismissal under the protection of KSchG

The German Protection Against Dismissal Act (KSchuG) protects employees in larger companies in case of ordinary dismissals. The KSchG applies to employees who have been employed at least six months in the same business that has more than ten full-time employees (sec. 1 para. 1 and sec. 23 para. 1 sentence 2 KSchG).[17]

The German Protection Against Dismissal Act itself does not define the term employee. The legal term was defined by court rulings. Thereafter, an employee is a person who provides services in duty for someone else due to a private employment agreement.[18] Part-time employees are also protected against dismissal acts, regardless of the extent of part-time working.

The members of the corporate bodies representing the company remain unaffected by the protection against dismissal (sec. 14 para. 1 no. 1 KSchG). Furthermore, the employer might terminate the contractual relationship with executive employees without giving any justification (sec. 14 para. 2 sentence 2 KSchG). Executive employees are employees who can employ or

[15] ECJ Case, C-157/15 *Samira Achbita*, 14 March 2017; ECJ Case C-188/15 *Bougnaoui und ADDH*, 14 March 2017.
[16] *Reichhold*, Arbeitsrecht, § 10 II margin no. 5.
[17] *Hund*, Employee Relations Law Journal, Vol. 40, No 3, Winter 2014, p. 61 f.
[18] *Wörlen*, Arbeitsrecht, § 5 margin no. 349.

dismiss people in the company and are responsible for them, i.e. manager or managing director.[19] This rule is justified because of special bond of trust between the executive employee and the employer.

According to KSchG, ordinary dismissals might only be valid on grounds of personal capability, on grounds of conduct or for operational reasons (which are excluded from this report).[20]

4.1.1. Dismissal on grounds of personal capability

Dismissal on grounds of personal capability obligates to the person's qualities and abilities.[21] It concerns cases, in which employees do not have the necessary quality or ability to do their work and to commit to it. It might be on physical or mental grounds or other defects that make executing work duties difficult or impossible.

The most common reason to dismiss an employee is ongoing illness. German jurisdiction developed a three levels control to check the validity of dismissal:[22]

Level 1:

First, the health prognosis for the future worker's condition has to be considered. The employee might be dismissed if he or she is unable to work for a longer period caused by a long-term illness and a negative health condition is expected. The employer might dismiss an employee even if he or she signs in ill for 6 weeks in a year combined.[23]

Level 2:

There has to be a significant impact on the employer's company caused by that person's absence. The employer needs to face economic disadvantages,[24] which are rarely given because the employer may stop the continued remuneration after six weeks (sec. 3 para. 1 sentence 1 Remuneration Continuation of Payments Act – Entgeltfortzahlungsgesetz).

Level 3:

The sickness has to effect the employer and the company in such an intensity that further employment would be unreasonable hard. Therefore, both sides and their interests must be taken under consideration. [25] It must be taken into account if the employer can be expected to bear the caused economic disadvantages but also the personal situation of the employee. In

[19] *Wörlen*, Arbeitsrecht, § 5 margin no. 350.
[20] *Reichhold*, Arbeitsrecht, § 10 II margin no. 34.
[21] *Reichhold*, Arbeitsrecht, § 10 II margin no. 46.
[22] *Kaiser*, Dornbusch/Fischermeier/Löwisch, KSchG sec. 1 margin no. 77.
[23] BAG Case 2 AZR 400/08, 10 December 2009.
[24] BAG Case 2 AZR 292/06, 8 November 2007.
[25] *Kaiser*, Dornbusch/Fischermeier/Löwisch, KSchG sec. 1 margin no. 93.

case, the employee's performance is reduced because of illness he or she might be moved to a position suiting his or her condition.[26] There even needs to be a balance of interest if the health expectation is bad and there is no possibility to move the employee.[27]

Example:

> *An employee who had worked for the same employer for 25 years was often unable to execute his duties because of repeated sick leaves caused by various illnesses for over three years. This caused additional costs of 19,000 euros for the employer. The employer issued the notice of termination and claimed that it was an unjustified economical and financial burden to him. The Labour Court held the dismissal to be invalid. It took into consideration the long-standing employment relationship and a positive health prognosis. It also emphasized that financial burdens caused by employee's illnesses are typical employer's issues. Only grave burdens would justify the dismissal on this ground.*[28]

4.1.2. Dismissal on grounds of conduct

Non-contractual conduct might justify a dismissal.[29] A dismissal due to conduct is often but not necessarily pronounced as extraordinary termination without notice period. According to the principle of proportionality, the employee should have a chance to improve himself. Therefore, the employer must "warn" the employee before she or he can be dismissed. In case the employer wants to dismiss the employee in an ordinary way, he or she must comply with the notice period.

An employer can dismiss an employee in case of strong misbehaviour or violation of duties from the working contract (also known as a disciplinary dismissal).[30] This misbehaviour includes non-performance such as coming late on a regular basis.[31] A dismissal can also be justified by low-performance such as slow or knowingly wrong work, insults,[32] theft,[33] not calling in sick[34] or violating company rules like ban on smoking[35] or consumption of alcoholic beverages.[36] The employee must have committed the misbehaviour culpable and the termination must be proportionate and ultimata ratio.[37]

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[26] BAG Case 2 AZR 1020/08, 10 June 2010.
[27] BAG Case 2 AZR 292/06, 8 November2007.
[28] ArbG Paderborn Case 3 Ca 493/15, 18 September 2015.
[29] *Reichhold*, Arbeitsrecht, § 10 II margin no. 51.
[30] BAG Case 2 AZR 751/08, 26 November 2009; *Kaiser*, Dornbusch/Fischermeier/Löwisch, KSchG sec. 1 magrin no. 51.
[31] BAG Case 2 AZR 302/96, 27 February 1997; BAG Case 2 AZR 609/00, 15 November 2001
[32] BAG Case 2 AZR 665/98, 21 January 1999
[33] BAG Case 2 AZR 485/08, 16 December 2010
[34] BAG Case 2 AZR 748/10, 3 November 2011
[35] LAG Köln Case 4 Sa 590/08, 1 August 2008
[36] BAG Case 2 AZR 30/81, 26 January 1995
[37] *Kaiser*, Dornbusch/Fischermeier/Löwisch, KSchG sec. 1 margin no. 74.

There are three types of misbehaviour: in service field, company field and trust field.

Dismissal on Grounds of Conduct[38]		
Service	**Company**	**Trust**
Breach of main duties based in employment agreement: - Unexcused absence - Unpunctuality - Refusal to work - Low performance	Breach of secondary duties based in employment agreement and company regulations: - Delayed notification of illness - No use of health and safety regulations - Violation of smoking and alcohol ban - Physical assaults	Lack of trust in worker's willingness, honesty and loyalty: - Theft - Fraud - Embezzlement - Falsification of documents - Taking bribe money - Serious insult - Falsification of illness notes - Manipulation of time-recording system
Warning required *Exception:* - employee is not willing to improve his behaviour - employee knows his behaviour is so inappropriate that it would not be accepted by any employer	**Warning required** *Exception:* - employee is not willing to improve his behaviour - employee knows that his behaviour is so inappropriate, that it would not be accepted by any employer	Warning **not** required *Exception:* - employee believes that his behaviour is allowed and has valid grounds to think so, e.g. because of earlier tolerance.

4.2. Extraordinary dismissal

Both employer and employee can terminate the employment relationship in an extraordinary way. According to Art. 626 BGB, either the employer or the employee must present a compelling reason why he or she cannot be reasonably expected to continue the service relationship. Generally, a reason is compelling if it is expected that the misbehaviour will influence the service relationship negatively in the future and if the risk of repetition is seen.[39] A misbehaviour or misconduct does not need to happen culpable to be compelling.[40] All circumstances of the individual case must be considered and the interest of both contractual parties weighted. The extraordinary dismissal needs to be the most fitting and mildest way to clear the disruption in the service relationship.[41]

4.2.1. Extraordinary dismissal by the employer

A compelling reason for the employer might be a grave misconduct, breach of confidence or personal reason related to the employee's person.

[38] *Stober/Schunder*, Deutsches und internationales Wirtschaftsrecht, § 1 margin no. 1122.
[39] *Lingemann*, Prütting/Wegen/Weinreich, BGB sec. 626 margin no. 3. l.
[40] *Lingemann*, Prütting/Wegen/Weinreich, BGB sec. 626 margin no. 4.
[41] *Lingemann*, Prütting/Wegen/Weinreich, BGB sec. 626 margin no 5.

Examples:

Misconduct:

- employee refuses to work[42]
- using working time for private internet usage or private telephone conversations[43], e.g. surfing websites with pornographic content[44] or causing massive telephone cost because of private usage[45]
- ignoring company rules, e.g. smoking in an area where it is dangerous to smoke[46]
- disregarding the employer's order[47]
- driving under the influence of alcohol as professional driver[48]
- not fulfilling works council duties[49]

All interests must be balanced if an employee is terminated because of misbehaviour, e.g. the years of service without misconduct,[50] the age of the employee,[51] nature and gravity of the misconduct like the degree of culpability,[52] damage caused by the misconduct and subordinately even maintenance obligations and family status.[53]

Breach of confidence:

- stealing company property or third-party properties[54] or insulting co-worker or the employer[55]
- sneaking company secrets to competitors or the public[56]
- violating the papers politic tendencies as a newspaper editor[57]
- documenting work time untruthfully.[58]

Reason on personal grounds:

- committing a punishable crime that is related to the service relation[59]

[42] BAG Case 2 AZR 273/12, 28 August 2013; BAG Case 2 AZR 357/95, 21 November 1996.
[43] LAG Köln Case 2 Sa 181/14, 29 September 2014.
[44] BAG Case 2 AZR 386/05, 27 April 2006
[45] AG Hamburg Case 36a C 459/13, 14 Oktober 2014.
[46] BAG Case 2 AZR 955/11, 27 September 2012.
[47] BAG Case 2 AZR 845/08, 12 May 2010.
[48] LAG Nürnberg Case 6 Sa 480/01, 17 December 2002.
[49] BAG Case 2 AZR 487/08, 5 November 2009.
[50] BAG Case 2 AZR 249/13, 8 May 2014; BAG Case AZR 381/10, 9 June 2011.
[51] BAG Case 2 AZR 75/99, 16 March 2000.
[52] BAG Case 2 AZR 258/11, 19 April 2012.
[53] BAG Case AZR 323/10, 9 June 2011; BAG Case 2 AZR 827/06, 18 September 2008; BAG Case 2 AZR 415/05, 27 April 2006.
[54] BAG Case 2 AZR 400/05, 7 December 2006.
[55] LAG Rheinland-Pfalz Case 5 Sa 275/16, 17 November 2016
[56] BGH Case III ZR 107/10, 12 May 2011
[57] LAG Sachsen-Anhalt Case 8 Sa 40/02, 9 July 2002.
[58] LAG Mecklenburg-Vorpommern Case 4 Sa 43/14, 16 July 2014; BAG Case 2 AZR 372/13, 23 January 2014.
[59] BAG Case 2 AZR 790/09, 24 March 2011.

- losing the driver's license as a professional driver[60] even if it is not the employees fault[61]
- getting caught drunk while driving as a professional driver even if the employee does not exceed the legal dinking limit[62]
- an imprisonment if the employee does not receive permission to leave for his work[63]

In case, the employer only suspects that the employee committed a serious crime, which destroys the necessary trust in the service relationship, the employee can be dismissed.[64] The employee can be dismissed before even convicted as far as the suspicion is based on the opening of a trial. Whereas investigations or search warrants issued by a judge are not sufficient. [65]

The employer might issue an extraordinary dismissal as well when co-workers or important business partners threaten to terminate their service relationship or enter a mass strike demand the termination of a certain employee and the employer faces huge damages.[66]

4.2.2. Extraordinary dismissal by the employee

The employee has the same right to an extraordinary termination if it is no longer reasonable to maintain the employment relationship.[67]

Examples:

- violating work safety standards by the employer and endangers the health of the employee[68]
- unjustified suspension by the employer[69]
- criminal offences by the employer like violation, sexual harassment or the violation of honour.[70]
- repeatedly missing remuneration payment.[71]

5. FORMAL AND PROCEDUAL REQUIREMENTS AND CONSEQUENCES OF INFRINGEMENT

There are several formal and procedural requirements in German dismissal law.

[60] BAG Case 2 AZR 630/76, 30 May 1978.
[61] BAG Case 2 AZR 665/98, 21 January 1999.
[62] LAG Nürnberg Case 6 Sa 480/01, 17 December 2002.
[63] BAG Case 2 AZR 790/09, 24 March 2011; BAG Case 2 AZR 984/08, 25 November 2010.
[64] *Niemann,* Erfurter Kommentar, BGB sec. 626 margin no. 173.
[65] *Lingemann*, Prütting/Wegen/Weinreich, BGB sec. 626 margin no. 9.
[66] *Lingemann*, Prütting/Wegen/Weinreich, BGB sec. 626 margin no. 10.
[67] BAG Case 2 AZR 894/07, 12 March 2009.
[68] *Lingemann*, Prütting/Wegen/Weinreich, BGB sec. 626 margin no. 8.
[69] BAG Case 8 AZR 470/14, 19 May 2016.
[70] LAG Niedersachsen Case 5 Sa 1393/03, 8 March 2004.
[71] BAG Case 8 AZR 796/06, 26 July 2007.

5.1. Declaration of notice

Check-list for a valid declaration of notice:

I. Content and form
   1. Determination and Interpretation (sec. 133, 157 BGB)
   2. Written Form (sec. 623, 125 sentence 1 BGB)

II. Receipt of Dismissal
   1. Moment of receipt: Theory of Receipt
   2. Thwarting of receipt: Occurrence of fiction of receipt
   3. Legal consequences of receipt: No unilateral recall

III. In case of dismissal through deputy
   1. Acting for another person (sec. 164 para. 1 sentence 1,2 BGB)
   2. Authorised Agent (sec. 164 para. 1sentence 1 BGB)
   3. Proof of Authorisation (sec. 174 BGB

5.1.1. Content and Form

5.1.1.1. Content

The notice of dismissal is only effective if the intention of terminating the employment is unequivocally clear. Furthermore, the principle of precision requires an exact date on which the employment terminates. However, it is sufficient to write "at next possible date", if the employee knows the period of notice.[72] An explanation for the dismissal is not compelling for its effectiveness. An exception applies only to the termination of apprenticeships according to sec. 22 para. 3 Vocational Training Act (Berufsbildungsgesetz). However, the person giving notice of termination is obliged to state a reason for giving notice of termination as soon as possible when asked to do so (sec. 626 para. 2 sentence 3 BGB).[73]

5.1.1.2. Form

According to sec. 623 BGB, the dismissal is required to be in written form. The electronic form, e.g. a notice via e-mail or WhatsApp, is not sufficient. Furthermore, the declaration of notice must be sent in original. A fax or copy is not sufficient.[74] In accordance with sec. 126 para. 1 BGB, the issuer must sign the document with his name in his own hand, or with his notarial certified initials. A signature above the text on the document is not enough. The document must conclude with the signature.[75] The form of the document is free, which means it can be written by hand, with a computer or a typewriter.[76] Furthermore, the usage of the German language is not mandatory. Therefore, the document can be in any living or dead language.[77] As far as the

[72] *Junker*, Grundkurs Arbeitsrecht, 16th edition, § 6 margin no. 324.
[73] *Junker*, Grundkurs Arbeitsrecht, 16th edition, § 6 margin no. 395.
[74] LAG Düsseldorf Case 4 Sa 1817/94, 22 February 1995.
[75] BGH Case XI ZR 107/89, 20 November 1990.
[76] *Ellenberger,* Palandt, BGB sec. 126 margin no. 2.
[77] *Einsele*, MüKo BGB, BGB sec. 126 margin no. 6.

characters adhere to the document, no certain material is required. Moreover, there must be no statement of location or time on the document.[78]

5.1.2. Receipt of Dismissal

The notice must be received by the addressee to become effective.[79] The notice is received in such a way that knowledge is to be expected. It is not necessary that the addressee actually takes note of the notice. Even when the employer knows about the holiday-related absence the dismissal is effective.[80]

If the recipient thwarts the receipt, the notice of termination is deemed to have been received.[81] In the case the addressee refuses to take the document of their dismissal and leaves the room the notice of termination is deemed to have been received.[82] That is also the case when the addressee, who was supposed to pick up the document at the post office because of their absence, simply leaves the documents at the post office.[83]

5.1.3. Dismissal by authorised agent

A dismissal by a deputy is generally permitted, according to sec. 164 BGB. Due to the requirement of written form it must be clear that the signing person does not function as the delivering person.[84] According to sec. 174 BGB the addressee has the right to refuse the declaration of notice if the authorised representative does not present a letter of authorisation. The refusal shall be without any further hesitation, although federal labour court stresses the importance of being able to think about legal actions and to get legal advice.[85] The right of refusal does not apply if the represented person informed the addressee beforehand. The information can be given in the employment contract or through official announcement at the work place.[86] A dismissal without authorisation is ineffective according to sec. 180 sentence 1 BGB. However, if the addressee does not question the authorisation or the addressee agrees that the agent might act without authority, the provisions apply on normal contracts. (cf. sec. 180 sentence 2 BGB) These regulations concerning the letter of authorisation do not apply in the case that the deputy is authorised by law. This is the case for the general manager (Geschäftsführer), according to sec. 35 para. 1 GmbHG, or the authorized officer (Prokurist), where the authorization is noted in the register of companies (Handelsregister).

[78] *Ellenberger*, Palandt, BGB sec. 126 margin no. 2.
[79] *Junker,* Grundkurs Arbeitsrecht, 16th edition, § 6 margin no. 328.
[80] BAG Case 2 AZR 461/03, 24 July 2004.
[81] *Preis,* Ascheid/Preis/Schmidt, Grundlagen D. margin no. 58.
[82] BAG Case 2 AZR 483/14, 26 March 2015.
[83] BAG Case 2 AZR 475/01, 7 November 2002.
[84] *Hesse,* BeckOK ArbR, BGB sec. 620 margin no. 15.
[85] BAG Case 2 AZR 633/76, 30 May 1978.
[86] *Hesse*, BeckOK ArbR, BGB sec. 620 margin no. 17.

5.2. Notice period

In accordance with sec. 622 para. 1 BGB, the usual period of notice is four weeks to the fifteenth or to the end of a calendar month for employer and employee. Four weeks does not mean one month but 28 days.[87]

5.2.1. Extended period of notice

Sec. 622 para. 2 BGB states the notice period for ordinary dismissals. The notice period extends the longer an employee works in a company.

"For notice of termination by the employer, the notice period is as follows if the employment relationship in the business or the enterprise

1. has lasted for two years, one month to the end of a calendar month,
2. has lasted for five years, two months to the end of a calendar month,
3. has lasted for eight years, three months to the end of a calendar month,
4. has lasted for ten years, four months to the end of a calendar month,
5. has lasted for twelve years, five months to the end of a calendar month,
6. has lasted for fifteen years, six months to the end of a calendar month,
7. has lasted for twenty years, seven months to the end of a calendar month."

Important is that these periods only apply for a termination by the employer and not by the employee. Employer and employee might extend the period of notice for the employee by contract. The regulations in sec. 622 para 2 BGB are just supposed to protect the employee on a minimum level.[88]

5.2.2. Probationary period

The notice period is often shorter during the probationary period. The period of notice during the probationary period is two weeks, if the probationary period is no longer than six months. (cf. sec. 622 para. 3 BGB) If the probationary period is longer than six months, the period of notice is determined in accordance with sec. 622 para. 1 BGB which means it is four weeks.[89]

5.2.3. Special notice periods

According to sec. 622 para. 4 BGB, the period of notice can differ in a collective agreement.

Furthermore, there are autonomous regulations for apprentices. There is no notice period because a dismissal is only possible because of compelling reasons (sec. 22 Vocational Training Act – Berufsbildungsgesetz). The notice period is four weeks for disabled persons (sec. 169 Social

[87] *Schmitt,* Däubler/Hjort/Schubert/Wolmerath, BGB sec. 622, margin no. 12.
[88] *Müller-Glöge,* Erfurter Kommentar, BGB sec. 622, margin no. 10b.
[89] BAG Case 6 AZR 519/07, 24 January 2008.

Security Code IX – Sozialgesetzbuch IX). In case of bankruptcy of a company, the insolvency administrator can terminate the employment within a notice period of three months until the end of the month or less, if a shorter period of notice is relevant (sec. 113 Insolvency Act – Insolvenzordnung).

5.2.4. Period of declaration of notice in case of extraordinary dismissal

According to sec. 626 para. 2 sentence 1 BGB, the extraordinary dismissal needs to be transmitted within two weeks after the employer discovers the compelling reason. The notice period commences on the date on which the person entitled to give notice obtains knowledge of facts conclusive for the notice of termination.[90] Otherwise, the dismissal is ineffective.

5.3. The role of good faith

The whole German legal system of private law and therefore also the labour law are subject to the principles of good faith. According to sec. 242 BGB, an obligor has the duty to perform according to the requirements of good faith taking customary practice into consideration. A dismissal might violate the principle of good faith either because of the manner pronouncing the dismissal or the time it is transmitted.[91] Furthermore, it is necessary that the violation of the employer ignores the interest of the employee in a reprehensible way.[92] The employer must show an appropriate behaviour in the procedure. However, not every statement of displeasure or sharp expression is a violation of good faith.[93]

Example: A dismissal of a supervisor declared by a trainee violates sec. 242 BGB.[94]

Furthermore, the notice of termination may not be pronounced at the wrong time. However, the limit of what counts as a violation is very high.

It is not an infringement when the declaration of notice is delivered:

- on Christmas eve,[95]
- right after the death of the civil partner,[96]
- on International Women's Day[97]
- or when it is short before probation period.[98]

[90] BAG Case 2 AZR 825/09, 27 January 2011; BAG Case 2 AZR 1037/12, 20 March 2014.
[91] *Friedrich/Lipke,* KR-Gemeinschaftskommentar zum Kündigungsschutzgesetz, BGB sec. 242 margin no. 34.
[92] BAG Case 2 AZR 185/00, 5 April 2001.
[93] *Röhsler,* DB 1969, 1147, 1149.
[94] ArbG Hamburg Case 21 Ca 125/07, 28 August 2007.
[95] BAG Case 7 AZR 174/83, 14 November 1984.
[96] BAG Case 2 AZR 185/00, 5 April 2001.
[97] *Friedrich/Lipke,* KR-Gemeinschaftskommentar, KSchG sec. 13, margin no. 246.
[98] LAG Mecklenburg-Vorpommern Case 5 Sa 52/08, 24 June 2008.

It counts as a violation if the dismissal is delivered

- just before an important surgery following a serious work accident in the hospital,[99]
- just before a stillbirth by the employee,[100]
- or in a public bathroom, on a company party, during a break in theatre or concert, at a wedding ceremony or at church.[101]

6. THE ROLE OF LABOUR AUTHORITY; WORKERS' REPRESENTATION AND COLLECTIVE BARGAINING

6.1. Co-determination in the case of dismissal

Works councils in Germany must be consulted about specific issues and have the right to make proposals to management. In general, the works council has no right to prevent the employer of dismissing an employee. It is the individual right of each person though to fight against their dismissal.[102]

6.1.1. Hearing of works council

According to sec. 102 para. 1 sentence 1 BetrVG, the employer is required to consult the works council before any dismissal. Otherwise the dismissal is not effective, sec. 102 para. 1 sentence 3 BetrVG. This hearing does not require any special form, i.e. it may even be done over phone.[103] The employer may not declare the dismissal before any consultation with the works council.[104] Any legal error caused by the employer inevitably leads to the ineffectiveness of the dismissal.[105]

6.1.1.1. Applicability of sec. 102 BetrVG

First of all, there must be a works council in the company at the time of dismissal (sec. 1, sec. 21 sentence 2, 118 para. 2 BetrVG). According to sec. 102 BetrVG, the obligation of consultation applies only in case of dismissing employees, not executive employees. However, if there is a committee for executive employees the committee has the same right and duties as the works council (sec. 31 para. 2 Act on Spokesmen's Committees of Senior Executives – Gesetz über Sprecherausschüsse der leitenden Angestellten).

[99] LAG Bremen Case 4 Sa 151/85, 29 October 1985.
[100] BAG Case 8 AZR 838/12, 12 December 2013.
[101] *Friedrich/Lipke,* KR-Gemeinschaftskommentar, BGB sec. 242, margin no. 39.
[102] *Preis,* Kündigungsrecht, 1. Teil. Grundlagen zur Beendigung von Arbeitsverhältnissen, G. Grundprinzipien des Kündigungschutzrechts, margin no. 3.
[103] BAG Case 6 AZR 348/11, 13 December 2012.
[104] *Junker,* Grundkurs Arbeitsrecht, 16th edition, § 10, margin no. 770.
[105] BAG Case 2 AZR 707/01, 16 January 2003.

6.1.1.2. Objections of the works council

According to sec. 102 para. 2 sentence 1 BetrVG, in case of objections to an ordinary dismissal, the works council is required to notify the employer in writing within a week giving its reasons. If the works council does not report its objection within the time limit, their consent is assumed (sec. 102 para. 2 sentence 2 BetrVG). In accordance with sec. 102 para. 3 no. 1 to 5 BetrVG, the works council may oppose a routine dismissal in the following cases:

1. *if the employer disregarded or did not take sufficient account of social aspects;*
2. *if the dismissal amounted to non-observance of a guideline covered by section 95;* (*According to sec. 95 para. 1 BetrVG the works council shall approve guidelines for the selection of employees for recruitment, transfer, regrading and dismissal.)*
3. *if the employee whose dismissal is being envisaged could be kept on at another job in the same establishment or in another establishment of the same company;*
4. *if the employee could be kept on after a reasonable amount of retraining or further training; or*
5. *if the employee could be kept on after a change in the terms of his contract and he had agreed to such change.*

According to sec. 102 para. 4 BetrVG, the statement of opposition must be in written form because the employee shall receive a copy of the works councils point of view to the notice of dismissal. The works council can raise its objections even if there is no reason in accordance with sec. 102 para. 3 no. 1 to 5 BetrVG.

There are no legal effects through the statement of the works council. Nevertheless, it could strengthen the position of the employee in court indirectly.[106]

6.1.2. Refusal of the works council

In case, the refusal of the works council was formally correct, the employer still can declare the dismissal. However, in case the employee fights against their dismissal in court, the employer is bound to keep the employee in his employment until the courts final decision, according to sec. 102 para. 5 BetrVG. If the objection has not only been filed in due time and orderly manner, but also if the alleged ground of objection is actually available, the dismissal is socially unjustified in accordance with sec. 1 para. 2 KSchG – insofar as the employee is subject to the KSchG.[107] Thereby the position of the employee in a lawsuit against the employer is strengthened.

[106] *Kania,* Erfurter Kommentar, BetrVG sec. 102, margin no. 13.
[107] *Kania,* Erfurter Kommentar, BetrVG sec. 102, margin no. 16.

6.1.3. Hearing in case of extraordinary dismissal

In accordance with sec. 626 para. 2 BGB, the exceptional dismissal must be given within two weeks. Within this period and according to sec. 102 para. 2 sentence 3 BetrVG, the employer has to consult the works council which has to report any objections it might have within three days. However, contrary to the case of an ordinary dismissal, the works council has no right to oppose the dismissal.

6.2. Works Agreement

According to sec. 77 para. 2 sentence 1 BetrVG, the works agreement shall be negotiated by the works council and employer and recorded in a written form. The works agreement is a contract between these two parties and it may contain regulations about the content, the start and termination of employment as well as company and work constitutional related questions.[108] According to sec. 622 para. 4 sentence 1 BGB the period of notice is dipositive and regulations in works agreements can differ from legal regulation. That means the period of notice can be longer, but also shorter than in sec. 622 para. 2 BGB.[109] It would even be possible to reduce the period of notice for the probation period down to one day.[110] Furthermore also an ordinary dismissal without any period of notice could be legal.[111] Sec. 622 para. 6 BGB restricts that possibility. Thus, the period of notice in case the employee wants to end their employment cannot be longer than the period for the employer.

The works agreement shall be mandatory and directly applicable according to sec. 77 para. 4 sentence 1 BetrVG. In general, all employees are in the scope of the works agreement, except the works agreement narrows the scope to a certain group of people. However, the works agreement does not apply to executive employees.[112]

The regulation of legal transactions (cf. sec. 133, 157 BGB) apply to the interpretation of works agreement in the obligational part, i.e. the relation between employer and work council. The general rules for interpreting laws (explicit wording, systematic and the general context) apply to the interpretation of the normative part, i.e. the relation between employer and employee.[113]

6.3. Collective Agreements

According to sec. 2 para. 1 TVG, collective agreements are negotiated "collectively" between labour unions (on behalf of employees) and the employer or employers' associations. Collective agreements may regulate conditions of probation period, severance payments or an extended right of participation. Furthermore, in comparison to works agreements the collective

[108] *Richardi,* BetrVG, BetrVG sec. 77, margin no. 17.
[109] *Müller-Glöge,* Erfurter Kommentar, BGB sec. 622, margin no. 19.
[110] LAG Berlin Case 13 Sa 1555/05, 28 October 2005.
[111] BAG Case 4 AZR 46/77, 2 August 1978.
[112] *Kania,* Erfurter Kommentar, BetrVG sec. 77, margin no. 32.
[113] BAG Case 1 AZR 721/87, 8 November 1988; BAG Case 4 AZR 454/74, 27 August 1975.

agreements may regulate the workers payment. According to sec. 77 para. 3 BetrVG, the works agreement shall not deal with remuneration and other conditions of employment that have been fixed or are normally fixed by collective agreements. The phrase 'conditions normally fixed in collective agreements' refers to the case the collective agreement has expired and a new agreement could not be found yet.[114] This prevents the works council to become a complementary labour union and substitute the real labour union.[115]

The collective agreement consists of two different parts: The obligational part, which functions as a contract, and the normative part, which has an effect of law. The collective agreement regulates the conditions of employees in their workplace, their duties and the duties of the employer (like a work contract) as well as constitutional questions for the company (normative part with the effect of law).

In a trial, the judge must apply the legal norm of the collective agreement under the principle of "iura novit curia" (ex officio), whereas for the obligational part the principle of party presentation applies.[116]

According to sec. 4 para. 1 sentence 1 TVG, the collective agreement shall be mandatory and directly applicable between the bounded parties. In accordance with sec. 4 para. 3 TVG the individual contract of employment can only contain an improvement of the conditions for the employee, although the collective agreement allows different regulations in individual contracts.

7. JUDICAL CONTROLE OF DISMISSAL

In Germany, ordinary civil courts do not handle dismissal lawsuits. Instead, special so-called Labour Courts have subject matter jurisdiction. The procedure in labour court follows the Code of Civil Procedure (ZPO) as well as some special regulations in the Labour Court Act (ArbGG).

There are three instances:

1		2		3
Labour courts	→	**State labour courts**	→	**Federal Labour Court**
First instance		Courts of appeal		Appeal on points of law
secs. 2-3, 14-32 ArbGG		secs. 33-39 ArbGG		secs. 40-45 ArbGG

[114] Oberthür/Seitz, Betriebsvereinbarungen, A. Einführung XIII. Tarifvorbehalt margin no. 14.
[115] Oberthür/Seitz, Betriebsvereinbarungen, A. Einführung XIII. Tarifvorbehalt margin no. 2.
[116] *Junker,* Grundkurs Arbeitsrecht, 16th edition, § 8, margin no. 507 seqq.

There are several reasons to start litigation. It is the only way of knowing the reasons for the dismissal because the employer does not need to inform the employee. Furthermore, the dismissal could be invalid for formal errors. The access to labour court is easy, the attorney fees relatively low[117] and employees may be represented in court by themselves or by a union member, sec. 11 para. 1 ArbGG.

7.1. Conciliatory Hearing/ Extrajudicial resolution of conflicts

All dismissal procedures begin with a conciliatory hearing, sec. 54 ArbGG. The goal of this hearing is to accomplish an amicable settlement supporting the rule of sec. 57 para. 2 ArbGG which says that throughout the procedure an amicable settlement must be aimed for. The parties can discuss their issues openly and freely without being bound to procedural regulations but supported by the presiding judge.[118] The conciliatory hearing opens the door to conflict management. Rather than strictly focusing on the legal aspects of the case it allows for a more interest based solution.[119]

According to sec. 54a ArbGG, the court can suggest mediation or another form of dispute resolution to the parties. The suggestion can be made at any stage of the trial. It is up to the judge's discretion whether the case and the parties could benefit from out-of-court conflict resolution. Both parties have to consent as a large amount of trust and active participation is required to accomplish a satisfactory result.[120]

7.2. Judicial Control

In case the conciliatory hearing fails, the court has to decide by judgment whether the dismissal was valid or not. The scope of judicial control depends on the type of dismissal that is subject to the procedure.

The Court only takes into account the types of grounds directly related to the employment relationship. Circumstances that only affect one party's sphere of privacy or issues that do not have a negative impact on the company or the employment relationship are not to taken into account. [121]

7.2.1. Ordinary Dismissals, secs. 622 sqq. BGB

As there is no need for a reason to terminate the employment relationship, judges only verify if the notice limits are met (sec. 622 BGB) and if the dismissal might be void (sec. 134 BGB). Sec. 134 BGB states that a legal transaction violating a statutory prohibition is void.

[117] *Hund*, Employee Relations Law Journal 69 Vol. 40, No. 3, Winter 2014.
[118] *Kloppenburg*, NomosKommentar-Arbeitsrecht, ArbGG sec. 54 Rn. 1-3.
[119] *Kloppenburg*, NomosKommentar-Arbeitsrecht, ArbGG sec. 54 margin no. 1-3.
[120] Däubler/Hjort/Schubert/Wolmerath, Arbeitsrecht, EDN 4 2017, ArbGG sec. 54a margin no. 1-8.
[121] *Hromadka/Maschmann*, Arbeitsrecht Band 1, edition 6 2015, sec. 10 margin no. 156.

Examples:

- dismissals as a disciplinary measure to punish the employee for exercising their rights are void (sec. 612a BGB)
- discriminatory dismissals on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation are void (secs. 1, 3, 7 para. 1 AGG)

The burden of proof lies on the party who claims there is a longer or shorter time of notice.[122]

7.2.2. Ordinary Dismissals in the application area of KSchG and special statues

The court examines if the ability and qualification to fulfil the contractual duties are missing or immensely limited, namely permanent. Furthermore, it checks a concrete disruption of the employment relationship that cannot be resolved in the (near) future. The judges also check if the termination is the ultima ratio and weights all interests.[123] In the case of misconduct, the judge checks for a breach of contractual duty, which has to be considered significant and unlawful. In addition, the employee must be held responsible for his or her action. Based on the principle of proportionality, dismissals due to misconduct require a warning either to prevent future breaches of duty or to restore trust between the parties in hope of continuing the employment relationship. A grave breach of contract makes a warning unnecessary. [124] The court examines if the continuation of the employment is unreasonable for the employer.[125] A transfer to another free working space has to be taken into account, sec. 1 para. 2 sentence 3 KSchG.

The employee has to prove that the KSchG is applicable (burden of proof). The burden of proof shifts to the employer's side if the employee has presented such evidence. According to sec. 1 para. 1 sentence 4 KSchG, the employer has to convince the court that the dismissal was socially justified.[126]

The same principles (prognosis, ultima ratio, proportionality, weighing of interests and "prohibition of excessiveness") apply to dismissals in the application area of special protection statues. The burden of proof for the special protection is on the employee.[127]

If the circumstance of the case cannot justify an ordinary dismissal protected by the KSchG, it especially cannot justify an extraordinary one.[128]

[122] *Müller-Glöge,* Erfurter Kommentar, BGB sec. 622 margin no. 50.
[123] *Krause*, Arbeitsrecht, sec. 18 margin no. 38.
[124] *Krause*, Arbeitsrecht, sec. 18 margin no. 39.
[125] *Hromadka/Maschmann*, Arbeitsrecht Band 1, EDN 6 2015, sec. 10 margin no. 139.
[126] BAG Case 2 AZR 264/07, 26.06.2008.
[127] *Hromadka/Maschmann*, Arbeitsrecht Band 1, EDN 6 2015, sec. 10 margin no. 235.
[128] *Krause*, Arbeitsrecht, sec. 18 margin no. 12.

7.2.3. Extraordinary Dismissals, secs. 626 BGB

In court, judges follow a two-step control. First, they check if the reason itself could be categorized as a compelling reason to dismiss someone without looking at the particular case. Secondly, all factors to the individual case are coming into account in a full weighing of interests.[129] The burden of proof lies on the party who terminates the contract. He or she has to present and prove evidence which the extraordinary dismissal is based on.[130]

Step 1: Compelling reason in general

- Dismissal on personal grounds: These cases are rather rare. It could be serving a long prison sentence[131] or losing your license if one is working as a driver[132].
- Dismissal caused by misconduct: Cases in which misbehaviour results in a breach of duty are the most common ones, e.g. simulating being ill[133], unauthorized leave of workplace[134], assaulting or severely insulting the employer or colleagues[135] or stealing the employer's property regardless of its worth.[136]

Step 2: Full weighting of interests

Jurisdiction and academics have developed three principles to structure the weighing of interests:

- Prognosis:

The extraordinary termination can only be based on reasons that would have a concretely negative effect on the employment relationship in the future. This prognosis is based on the thought that extraordinary dismissals are no sanction for past misconduct but rather an instrument to avoid an unbearable/unreasonable employment relationship in the future.[137]

- Ultima-ratio-principle:

The dismissal of the employee must be the last resort to avoid future disruptions in the employment relationship and must be avoided if there is a less restrictive measure. Notably "warning notices" provide such measures or a transfer to another working space.[138] A warning

[129] BAG Case 2 AZR 3/83, 17. May 1984; BAG Case 2 AZR 541/09, 10. June 2010.
[130] LAG Rheinland-Pfalz Case 10 Sa 625/11, 22. March .2012, LAG Köln Case 3 Sa 239/10, 26. November 2015.
[131] BAG Case 2 AZR 236/93, 09. March 1995.
[132] BAG Case 2 AZR 984/06, 05. June 2008.
[133] BAG Case 2 AZR 154/93, 26. August 1993.
[134] BAG Case 2 AZR 521/93, 20. January 1994.
[135] BAG Case 2 AZR 534/08, 10. December 2009.
[136] BAG Case 2 AZR 36/03, 11. December 2003.
[137] *Müller-Glöge,* Erfurter Kommentar, EDN 16 2017, BGB sec. 626 margin no. 19.
[138] *Müller-Glöge,* Erfurter Kommentar, EDN 16 2017, BGB sec. 626 margin no. 24 sqq.

notice is unnecessary if conduct according to contract is not expected or mutual trust has been ultimately demolished.[139]

- "Prohibition of excessiveness"

Subject to this principle is the question whether the employer's interest to immediate termination outweighs the employee's interest to uphold the contract. Sec. 626 para. 1 BGB states that "all circumstances of the individual case" must be taken into consideration by court. Those circumstances could be the extent of the culpability in the employee's misconduct or his or her seniority or the extent of business interruptions for the employer caused by misconduct.[140]

Example:

> *The "Emmely case" [141] concerned the dismissal without notice of the Berlin supermarket cashier Ms. Emme who had unauthorized cashed two receipts for returned empties with a value of 1.30 € that had been lost by a customer. The employer issued extraordinary notice of termination of her employment relationship, without first giving her a warning letter. She had worked for the same employer for 30 years without having previously received any warnings relevant to this case. The Berlin Labour Court and the Berlin-Brandenburg State Labour Court both dismissed Ms. Emme's claim for unjust dismissal. The Federal Labour Court rejected this decision at last instance. The court held the termination to be invalid by giving special weight to employment relationships that have been long-standing and without cause for complaint on the employer's part.*

7.3. Time limit for legal action

According to sec. 13 para. 1 sentence 2 KSchG, the same period pf legal action apply to all written ordinary and extraordinary dismissals. The period of legal action is three weeks from receipt of notice of termination, sec. 4 sentence 1 KSchG. Even if the parties are already planing or taking part in a mediation process the period must still be met. The plaintiff can request the court to suspend legal proceedings in his complaint.[142] If the dismissal requires approval of authority, the period of limitation starts on the day the employee receives the approval, sec. 4 sentence 4 KSchG. The dismissal is deemed to be valid from the beginning if the employee neglets to meet the period of limitation, sec. 7 KSchG.

Exceptions:

- the employee contests the lack of written form (then sec. 4 KSchG does not apply)
- the employee is legally incompetent when she or he recieves dismissal notice (secs. 104, 105 BGB)

[139] *Krause*, Arbeitsrecht, sec. 18 margin no. 13.
[140] *Krause*, Arbeitsrecht, sec. 18 margin no. 13.
[141] BAG Case 2 AZR 541/09, 10 June 2010.
[142] *Rolfs,* in Tschöpe, Arbeitsrecht, EDN 9 2015, Part 5 A, margin no. 18.

- the employer was not authorized to give notice[143]

In case, the employee was unable to meet the time limit of legal action, although she or he has acted with reasonable diligence under the given circumstances, the court can agree to the litigation, sec. 5 para. 1 sentence 1 KSchG. The same applies if, due to circumstances beyond her control, a woman did not learn of her pregnancy until the time period set forth, according to sec. 5 para. 1 sentence 2 KSchG.

7.4. Enforcement of the judgement

In labour procedure the Code of Civil Procedure regulates the enforcement of judgement. Judgments of the labour courts which might be appealed are provisionally enforceable, sec. 62 para. 1 ArbGG.[144]

In case, the court finds in favour of the employee that the dismissal was ineffective, the operative part of the judgement is definite enough and its content can be enforced. The enforement follows sec. 888 ZPO.[145] The court can order a penalty payment and coercive punitive detention if the employer is not willing to reinstate the employee.

7.5. Interim Measures / Continuing Employment

Sec. 62 para. 2 sentence 1 ArbGG refers to the 8th book of the ZPO for interim measures judgment procedures (in which dismissals are handled). It regulates preliminary injunctions and detention. Both are specially regulated summary proceedings.[146]

If the works council has objected to an ordinary dismissal and the employee has brought an action under the Dismissal Protection Act, the employer must, at the request of the employee, continue to employ the employee after expiry of the notice period until the legal conclusion of the dispute with unchanged working conditions (sec. 102 para. 5 BetrVG). This regulation protects the employee's interests.

8. CONSEQUENCES AND EFFECTS OF A (LAWFUL AND UNLAWFUL) DISMISSAL

In case, the court deems the dismissal to be effective, the employment relationship ends at the end of the notice period.

If the court rules the dismissal to be void, the employment relationship continues, and the employee has a claim to his or her lost remuneration for the period following the dismissal. According to sec. 11 sentence 1 KSchG, earnings that the employee

[143] *Rolfs,* in Tschöpe, Arbeitsrecht, EDN 9 2015, Part 5 A, margins no. 24-26.
[144] *Grobys/Panzer-Heemeier*, StichwortKommentar Arbeitsrecht, Zwangsvollstreckung margin no. 1-33.
[145] *Koch*, Ascheid/Preis/Schmidt, BetrVG sec. 102 margin no. 215-218.
[146] *Grobys/Panzer*-Heemeier, StichwortKommentar Arbeitsrecht, Einstweiliger Rechtsschutz margin no. 1-41.

- received during this period,
- that he or she could have made taking a reasonable offered work, and
- any public aid that the employee received

must be deducted from the claim.

8.1. Dissolution of the employment relationship through a court decision

In case the employment relationship was not terminated by dismissal and continues, the court might decide to terminate the employment relationship and order the employer to pay an appropriate severance payment at the request of the employee, secs. 9 para. 1 sentence 1, 10 KSchG. For this, it is a prerequisite that a continuation of the employment relationship cannot reasonably be expected of the employee.[147]

The calculation of the severance payment is regulated in sec. 10 KSchG. In general, the severance payment shall not exceed a twelve-month pay, sec. 10 KSchG. It can rise up to a maximum of 15 months if the employee is older than 50 years and the employment relationship has lasted at least 15 years, sec. 10 para. 2 KSchG. The limit rises up to 18-month pay after 20 years of seniority and the employee's age of 55.[148]

8.2. Agreed judicial settlement and compensation

However, agreed settlements in dismissal cases are rather the rule than the exception compared to court dicisions. In 1979, 60% of all dismissal law suits before the Labour courts and 41% before the State labour courts ended in agreed settlements.[149] In 2016, 223 416 out of 361 626 German labour law suits were resolved through settlement, whereby 187 465 of those suits concerned dismissals.[150] The parties often resort to a settlement agreement if the employment relationship has become unbearable because the trust or the personal relationship has been ruined.[151] It is often less expensive for the employer to settle than to go through litigation and taking the risk of losing the case.[152] Hence, settlements and compensation payments play a very important role in dismissal proceedings.

The parties can decide to draft cancellation and compromise agreements in which an amount of compensation is agreed upon. The calculation of the amount is not regulated.[153] But the so called "rule of thumb" gives a guideline. Thereafter, the severance payment is one-half of the employee's monthly gross salary for every year of service. This rule is used if there is a fifty-fifty

[147] *Grobys/Panzer-Heemeier*, StichwortKommentar Arbeitsrecht, Abfindung margin no. 1-55.
[148] *Grobys/Panzer-Heemeier*, StichwortKommentar Arbeitsrecht, Abfindung margin no. 1-55.
[149] *Hümmerich*,NZA 1999, 342.
[150] Bundesamt für Arbeit und Soziales, Ergebnisse der Statistik der Arbeitsgerichtsbarkeit 2016.
[151] *Hund*, Employee Relations Law Journal 69 Vol. 40, No. 3, Winter 2014.
[152] *Hund*, Employee Relations Law Journal 69 Vol. 40, No. 3, Winter 2014.
[153] *Grobys/Panzer-Heemeier*, StichwortKommentar Arbeitsrecht, Abfindung margin no. 1-55.

chance of losing or winning the case.[154] However this rule does not take into account other personal factors that could determine the size of the compensation. Such factors could be the employee's age and chances on the employment market,[155] the general financial situation of the employee,[156] and on the employer's side major layoffs.[157] Apart from severances mentioned above a collective agreement, redundancy programme or –which is rather rare– the contract of employment can be the base of a severance pay.[158]

8.3. Consequences of infringement of the notice period

8.3.1. Dismissal by employer

In the case, the employer fails to observe the period of notice and the declaration of notice cannot be interpreted as "to next possible date",[159] the declaration will be reinterpreted the way that the employer desires the dismissal as soon as possible.[160] An exception would be that the employer wants the termination of employment for that exact date and not later. That way the declaration cannot be reinterpreted as "to next possible date".[161] Nonetheless, the employer may always provide a longer period of notice than the legal requirement. However, the date of dismissal must be the last day of a month as in the legal regulation of sec. 622 para. 2 BGB.[162] For instance, a dismissal declared on the 31st of May for the 1st of July must be assumed as to be for the 30th of June.[163]

8.3.2. Dismissal by employee

The employee might as well be interested in ending the employment as soon as possible (e.g. because of the prospect of a new and better paid job). The law obliges him or her to perform the services promised according to sec. 611 para. 1 BGB, which means the employee is supposed to meet the period of notice. Therefore, the German Federal Labour Court allows the employer to sue the employee when he or she neglects the period of notice.[164] Nevertheless, sec. 888 para. 3 ZPO designates that the judgement is not enforceable. Hence, the conclusion is evident that the legal action lacks a significant legal interest and thus, lawsuits are not permitted.[165]

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[154] *Hund*, Employee Relations Law Journal 69 Vol. 40, No. 3, Winter 2014.
[155] *Hund*, Employee Relations Law Journal 69 Vol. 40, No. 3, Winter 2014.
[156] *Hund*, Employee Relations Law Journal 69 Vol. 40, No. 3, Winter 2014.
[157] *Hund*, Employee Relations Law Journal 69 Vol. 40, No. 3, Winter 2014.
[158] *Schaub/Koch*, ArbR A-Z, EDN 21 2017, Abfindung, beck-online.
[159] BAG Case 2 AZR 492/05, 17 July 2007; BAG Case 8 AZR 201/07, 21 August 2008; BAG Case 8 AZR 865/08, 22 October 2009; BAG Case 2 AZR 714/08, 9 September 2010.
[160] BAG Case 2 AZR 197/84, 18 April 1985; BAG Case 5 AZR 700/09, 1 September 2010; *Däubler,* Kittner/Zwanziger/Deinert, BGB sec. 140, margin no. 21.
[161] BAG Case 2 AZR 215/05, 6 July 2006.
[162] BAG Case 2 AZR 492/05, 12 July 2007.
[163] LAG Köln Case 11 Sa 832/01, 26 October 2001.
[164] BAG Case 2 AZR 91/65, 2 December 1965.
[165] *Richter*, ArbRAktuell 2013, 509, 510.

It is essential for the employer to know when the employment ends as the employee might be entitled to vacation days or obliged to surrender any working papers, whereas the employer has to name a date on reference. Therefore, the Federal Labour Court recognizes an interest of the employer to determine on which date the employment is going to end according to sec. 256 ZPO.[166]

8.3.2.1. Contractual penalty

In general, sec. 309 no. 6 prohibits contractual penalties. However, the special features that apply in labour law must be taken into reasonable account, according to sec. 310 para. 4 sentence 2 BGB. Therefore, the Federal Labour Court accepts contractual penalties due to the unenforceability.[167] Nevertheless, the contractual penalty can be a violation of good faith when the penalty is unreasonable. The Federal Labour Court assumes that the penalty is unreasonable if it is higher than the amount of money the employee was supposed to earn until the end of the notice period[168] or the penalty exceeds a monthly salary.[169]

8.3.2.2. Compensation according to sec. 280 para. 1, 3, sec. 283, 275 para. 1 BGB

The employer is entitled to compensation for lost profit, additional workers, overtime or costs for job advertisements due to non-compliance with the notice periods. However, in practice it is difficult to prove that additional costs were caused by the infringement of the period of notice.[170]

8.3.2.3. Compensation according to sec. 61 para. 2 ArbGG

The employer might sue the employee for continuing to work. According to sec. 61 para. 2 ArbGG, the judge can state penalty for the case the employee refuses to do what is imposed on him or her by the judgment. The Federal Labour Court sees in sec. 61 para. 2 ArbGG an autonomous basis for claim.[171] However, there is no presumption of proof in sec. 61 para. 2 ArbGG. Therefore, the employer has to prove that any expenses were caused by the employee. Consequently, the employer will have the same difficulties proving his damages in accordance with sec. 61 ArbGG and sec 280 BGB.[172]

9. SPECIAL PROTECTED GROUPS BY DISMISSAL LAW

Special statues protect certain groups of employees.

[166] BAG Case 2 AZR 845/95, 24 October 1996.
[167] BAG Case 8 AZR 196/03, 4 March 2004.
[168] BAG Case 8 AZR 81/08, 18 December 2008.
[169] BAG Case 8 AZR 196/03, 4 March 2004.
[170] *Richter,* ArbRAktuell 2013, 509, 511.
[171] BAG Case 8 AZR 121/95, 20 February 1997.
[172] *Richter,* ArbRAktuell 2013, 509, 511.

9.1. Severely disabled persons

A severely disabled person can be terminated ordinary and extraordinary. The termination can be issued due to the same reasons non disabled persons can be dismissed. For the termination of a severely disabled person the approval of the integration office is needed (sec 168 Social Security Code IX – Sozialgesetzbuch IX).

9.2. Pregnant women

An employer cannot terminate a pregnant woman between the 12th week of pregnancy up to 4 months after childbirth. This also applies for a miscarriage.

The dismissal is inadmissible if the employer had knowledge of the pregnancy or was notified within 2 weeks after the dismissal (sec 9 para 1 sentence 1 MSchuG).

9.3. Employees in parental leave

An employer cannot terminate an employee from the moment he or she requested parental leave. The protection against dismissal starts earliest eight weeks before the beginning of parental leave in case the child is less than three years old and earliest 14 weeks before the beginning of parental leave if the child is between three and eight years old. A dismissal is inadmissible while the employee is in parental leave (sec. 19, 21 para. 4 Parental Benefit And Parental Leave Law – Gesetz zum Elterngeld und zur Elternzeit). Under special circumstances, the highest state authority responsible for workers protection can declare a dismissal for admissible (sec 18 para 1 BEEG).

9.4. Employee representatives

An ordinary dismissal of an employee representative is invalid (sec 15 para. 1 sentence 1 KSchuG). An extraordinary dismissal is admissible if the employee has a compelling reason and the approval of the works council (sec. 103 para. 1 BetrVG). A court ruling can replace a missing works council approval (sec. 103 para. 2 BetrVG).

9.5. Trainees

Within the probation time a termination can be issued without notice (sec 22 para. 1 BBiG). After probation an extraordinary termination is admissible. Also the trainee can terminate the traineeship with a notice of four weeks (sec. 22 para. 2 BBiG).

9.6. Employee in military service and in civilian service

If the employee is convened for military service or for an military exercise the employment rests. An ordinary termination is inadmissible (sec 2 para. 1 ArbPlSchG). An extraordinary dismissal is still admissible (sec. 2 para. 3 ArbPlSchG). The same regulations apply to employees in mandatory civilian service (sec. 78 para. 1 ZDG).

9.7. Parliamentarians

Parliamentarians cannot be terminated ordinary. The dismissal protection starts with the nomination by the political party or by entering the election proposal and ends one year after termination of the mandate. An extraordinary termination because of a compelling reason is admissible (art. 48 para. 2 GG, sec. 2 para. 3 Members of Parliament Act – Abgeordntengesetz).

10. DEVELOPMENTS IN DISMISSAL LAW IN THE PAST 10 YEARS

The biggest legal changes in dismissal law have already been made by the government in 2004. In sec. 1 para. 3 KSchuG the social criteria, which are supposed to be considered in an ordinary dismissal, were concretised. As of that date, the employer needs to consider seniority, the age, duties to support dependents and severe disabilities. Furthermore, there have been changes concerning sec. 23 KSchG. According to sec. 23 para. 1 sentence 3 KSchG, the Protection Against Unfair Dismissal Act is only applicable for companies with more than ten full-time employees. Before 2004 the applicability started with five full-time workers.[173]

Furthermore, the ECJ's ruling on legal notice period in German dismissal law was of great significance.[174] In 2010, the ECJ ruled that sec. 622 para. 2 sentence 2 BGB was contrary to EU law. According to this regulation, time period prior to completion of the twenty-fifth year of life of an employee were not taken into account in calculating the length of the notice period. This legislation is contrary to the principle of non-discrimination on grounds of age, as it unduly disadvantaged persons who have worked before the age of 25 in relation to older persons. Since then, the German courts no longer apply this rule because the legislature has not yet changed the legal regulation.[175]

Latest changes in dismissal law took place at the beginning of 2018. Since the 1st of January, students, apprentices, trainees, persons in the federal volunteer service and persons with disability fall under the scope of protection of the maternity protection act.[176] According to sec. 9 para. 1 sentence 1 MuSchG pregnant women and women, who recently gave birth, cannot be dismissed within the first four months after birth if the employer is aware of the pregnancy at the time of termination or if he is notified within two weeks of receipt of the termination (sec. 17 para. 1 MuSchG).

[173] *Willemsen/Annuß*, NJW 2004, 177 (184).
[174] EuGH Case C-555/07, 19 January 2010.
[175] LAG Düsseldorf Case 12 Sa 1311/07, 17 February 2010.
[176] *Schlachter,* Erfurter Kommentar, MuSchG sec. 1 margin no. 1.

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