Workers´ Rights in Economic Crisis

by Wolfgang Däubler, Professor at the University of Bremen

I. Introduction

In times of economic crisis, workers´ rights do not change automatically. The labour contract continues as well as the collective agreements. What has been stipulated must be followed especially in cases when one part or the other has difficulties to fulfil the contract. The risks are distributed between the parties: The employee cannot claim a wage increase if the enterprise makes an extra-profit, the employer cannot diminish the wages because the results of his activities are less satisfying than expected.

Despite this principle, a crisis of the enterprise, the branch or the whole economy has its repercussions on the employment relationship. In a lot of cases, some parts of the salary depend on the economic results of the enterprise: Everybody may get half a month´ salary if the benefits have increased during the preceding year, fringe benefits may be reduced if the results were worse than expected. Wages have been made flexible in quite a comparable way as working time; the notion of the "breathing enterprise" has been created at this occasion. In Germany, the Federal Labour Court has stated, that the flexible part of the wages must not exceed 25 % of the whole salary – more flexibility would be unacceptable for the worker who would be no more able to plan the economic side of his life. Obviously, in times of crisis, employers will use all these freedoms in order to react to the degrading economic situation.

If in a certain enterprise these clauses do not exist (because most of the contracts date from a period before flexibility made its career) or if they are not sufficient to adapt the employment relationship to the changed economic situation the employer may be entitled to dismiss workers for economic reasons. Most of the legal orders have, however, developed different means to avoid the alternative between full continuation of the contract (with corresponding losses for the employer) and dismissal. These means are sometimes pure practice without any specific legal basis. Considering especially the German situation, there are different "soft means" which normally do not provoke any resistance (below II). If they are not sufficient, short-time work can be applied which has a history of more than 80 years (below III). In some

branches, you can find collective agreements admitting a reduction of working time from 38 hours to 30 hours a week (below IV). If all these means are not sufficient, there may be a possibility to create a firm financed by the Federal Agency of Labour which takes over the employment relationships and gives workers some additional qualification in order to facilitate the finding of a new job (below V). I would like to give an overview on these different instruments.

II. Soft means as a first step

The most acceptable reaction to the crisis is the stop of over-time work. A second one is not to renew expiring fixed-term contracts; normally that will not create any legal problems. Much more important is the cancelling of temporary agency work. The contracts between the employer and the agency give very short delays for sending back the workers; within two or three days they may be forced to go back to the agency. If there is no other possibility to work they will normally be dismissed. According to recent German legislation from February 2009, short-time work is possible in this sector, too, but it is not practiced until now.

Another way of coping with the problem is using enterprise flexibility. In many cases, workers have built up so-called work accounts. If the regular weekly working time is – let´s say – 38 hours, they often work between 42 and 46 hours and thus accumulate between 100 and 250 hours within a year. This is an equivalent to a period of time between two and six weeks of full work which can now be consumed. There is no legal need to practice such a model of flexi-time, but it exists in many enterprises. If this possibility is used, one has to distinguish between normal accounts and "long term accounts" which are built up to reach a certain aim, to get a salary when being at home during educational leave or to be able to stop working at the age of 64 instead of waiting for the legal pension age which is now between 65 and 67 years. These long-term accounts can be conserved even if there is not enough work to be performed at the workplace.

Finally one can use the annual leave. According to collective agreements, nearly everybody has a right to six weeks of annual paid leave. At least a part of it can be used in times of low activity of the enterprise. To consume the whole leave would not be acceptable to workers who have planned their holidays for the months to come. But it would be not acceptable for the employer, too, because it would be difficult in a situation of crisis to pay the whole salary

during six weeks without getting any activity from the side of the workesr. So in practice, only one or two weeks of the annual leave are used in such a situation.

III. Short-time work

If all these means are exhausted (or if they were not available in certain cases) the so-called short-time work can be used. The idea is quite simple: the working time is reduced e. g. to 20, 15 or even to zero hours. Workers get benefits from the Federal Agency of Labouraccording to the reduction of their working time. The advantage is considered to be on both sides: The employee will not be dismissed, the employer keeps his well-trained workforce enabling him to restart under good conditions if the economic situation improves. This model was used for the first time in 1924 and is generally accepted as such. The details can show the reason for that story of success but also its limits which become quite visible in the actual situation.

Short-time work requires certain conditions in labour law and in social security law.

In labour law the employer must be entitled to reduce the working time stipulated in the labour contract. In collective agreements and in work agreements between works council and employer one can often find clauses giving such a power to the employer. If they do not exist the individual worker has to agree – a condition which is easy to be fulfilled because the alternative for him would be dismissal. The second condition is much more important: The works council has to give its consent.[1] There will be negotiations between employer and works council about the extent of short-time work, its duration and sometimes about a prohibition to dismiss workers for economic reasons during the time of the reduced schedule. What happens if the employer is of the opinion that the lack of work is not a provisional one? If the works council does not share this view, the conciliation board has to decide whether short-time work is possible or not. According to the law, the labour court will always design a chairman of the board if a codetermination right is not “obviously” non-existent.

In social security law, short-time work benefits are only paid if certain conditions are fulfilled.

[1] The works council is a body elected by all employees working in the establishment (i.e. a part of the enterprise with specific technical or organizational tasks). It is not a part of trade unions but in practice there is a close cooperation between works councils and unions. The works council has codetermination rights in certain fields like overtime und short-time work. This means that the employer needs the consent of the council; a unilateral decision would be without any legal effect. If an agreement cannot be reached, a conciliation board has to decide; it comprises an equal number of representatives of both sides (usually two or three) and an impartial chairman who is designed by both parties or by the labour court.

- The lack of work must be due to the general economic situation, not to difficulties of the individual enterprise.
- The problems must be of a provisional nature. In the actual situation the federal agency of labour is inclined to consider all difficulties of being provisional; the crisis would be still worse if one would take a pessimistic (although probably more realistic) view.
- Because of the short-time work the salary must be reduced by more than 10 percent. In the past, this condition had to be fulfilled by a whole part of the enterprise. Now it is sufficient that an individual worker suffers this kind of loss.
- All other means must be exhausted. There is, however, no need to melt down completely all working time accounts or to take the whole annual leave. The Federal Agency of Labour is quite generous on these points in the actual situation.

If all these conditions are fulfilled, the workers get short-time benefits. Their amounts are 60 percent of the difference between the salary paid on the level of the reduced number of hours and the salary the employee would have earned without the short-time work. If the employee has to take care for at least one child, the percentage is 67. The short-time benefits may be paid for a period of until 18 months; actually we are discussing to go to two years. If after a period of short-time work the enterprise comes back to its normal activities for a period of three months a new period of short-time work may begin. In some cases these three months of work have been realized in a way to put together the leave for two years; so, in reality, short-time work can take more than three years. However, the crucial condition will always be that the Federal Agency of Labour estimates the difficulties being still of a provisional nature which becomes more complicated the longer the benefits are paid.

The limits of the model become clear if we consider the costs which remain with the employer. He has to pay by his own the whole salary for the annual leave and the salary for national holidays like Christmas or Easter or the First of May. This is an equivalent of nearly two months of “ordinary” salary. In addition, the employer has to pay the contributions to the social security system, especially to health and to pension insurance. Normally these contributions are made in a way that each side pays 50 percent. As to the hours which are not performed because of the short-time work the employer has to pay for both sides. Until the recent change of legislation his only privilege was that the

contributions were calculated on the basis of 80 percent of the time of non-performed work. Now the privilege has been increased: The employer pays only 50 % of the contributions he had to pay before. He is completely freed from paying if the workers participate in courses giving them an additional professional qualification. Until now, the qualification measures are difficult to organize so most of the employers pay the 50 percent. This is a considerable amount of money because the contributions to the social security system are more than 40 percent of the wage costs in Germany. Actually the discussion deals with the idea of generally reducing the social security contributions to zero in all cases of short-time work. The state will have to give more subsidies to the social security bodies in the future.

IV. Reduction of working time outside short-time work

In some branches, one can find collective agreements which permit the reduction of working time to 30 hours in case of economic difficulties of the enterprise. Some 20 years ago, Volkswagen has introduced the 28.8 hours week in order to avoid dismissals for economic reasons.

This model applies only if there is still enough work for 30 hours a week. It has the advantage that it can be applied also in cases when the lack of work is not of a provisional nature. The collective agreements provide also an additional protection against dismissal: As long as the reduced schedule is practiced a dismissal for economic reasons is prohibited.

On the other hand, there are a lot of disadvantages for the workers. They do not get short-time benefits, their salary during annual leave is reduced, social security contributions (whose amount is important for the future pension) are calculated on the basis of the salary for 30 hours. Recently, the legislator has abolished an additional disadvantage: if the employee goes to short-time work after a period of reduced working time, the short-time allowances are calculated on the basis of the original working time. If the employee has reduced e. g. his working time from 38 to 30 hours for six months going afterwards to short-time work on the basis of 20 hours, the short-time allowance will be calculated on the basis of 18 hours not performed. Despite that rule, this kind of reduction can only be

practiced if employees get relatively high salaries. In the Volkswagen case the monthly salary remained the same but all kinds of bonuses and fringe benefits were cancelled.

V. Dismissal for economic reasons

If short-time work is no more possible or if its costs would lead the employer to bankruptcy dismissals for economic reasons can no more be avoided. The employer has to observe certain periods of notice between the "letter of dismissal" and the end of the employment relationship. After ten years of service, it will take four months and go up until 7 months after 20 years of service. During this time, the employer has to pay the normal salary; the short-time work ends with the moment of the dismissal declared because the lack of work is no more provisional.

If only some individuals or a part of the personnel are dismissed the employer has to take a selection according to social criteria. He has to take different steps. The first one is to analyse which of the employees perform comparable functions, who can take over the work of another one. If this "group" is found, the employer has to apply four criteria: Age, years of service, family obligations and handicap. Those who are the "socially strongest" are dismissed. But there are two exceptions: Persons with a special knowledge important for the enterprise and high performers can be taken out of the group of those being potentially dismissed. The same can be done in order to keep a "balanced" composition of the workforce in order to prevent that only old-aged persons remain with the enterprise. According to a new decision of the Federal Labour Court, the employer can make "groups" of comparable workers based on a certain age: People up to 30, from 30 to 40, from 40 to 50 and so on. In all these groups a certain percentage of workers can be dismissed; the individuals are of course selected according to social criteria – but only within the specific group. A person aged 51 can be dismissed because he is "socially strong" within the group between 50 and 60 but the same individual would never risk to be dismissed if the social selection would be made among all comparable workers.

Obviously, the system of social selection is quite complicated. Together with the works council, the employer can establish directives which establish a system more easily to handle. One creates "points" for year of service, age over 40 etc.; those getting the lowest number of points are dismissed. The situation of the employer is still more comfortable if he can

conclude an agreement with the works council about a “list of names”, containing all the persons to be dismissed. This is normally possible only if the dismissed persons get a higher compensation based on the social plan which has now to be explained.

In Germany, a dismissed worker does not get any automatic compensation like in many other countries. He will get unemployment benefits which give him 60 percent of his former salary (67 percent if he has to take care of at least one child). The duration is normally one year (for older workers with many years of service it may be more); afterwards social aid permitting only a very low living standard is the only alternative left if the worker does not find a new job. Before asking for social aid the employee has to consume most of his savings putting down even a life insurance and most old-age pension contracts. Only a small apartment where the worker lives can be kept; less modest apartments have to be sold.

The works council can ask for a so-called social plan if the reduction of workplaces is part of a mass dismissal or another fundamental change of the enterprise. As in other cases of codetermination, works council and employer negotiate about an adequate solution. If they do not agree the conflict will be solved by a conciliation board, i. e. in the same way as in the case of short-time work. Two main points have to be mentioned concerning the contents of a social plan.

The first one is the compensation which is normally calculated on the basis of the age and the years of service; the family situation and the fact of being handicapped are considered but normally give only the right to a small additional payment. By some lawyers, this is considered to be a discrimination against women taking alone care of a child and against handicapped people. The amount of the compensation can go to one month´ salary for each year of service, but normally will be inferior to that.

The second one is the creation of a so-called transfer company: Workers conclude a new employment contract with such a company which offers qualification measures. The idea is to qualify the worker for a new job and to take other measures to improve his situation on the labour market. During the time the worker passes at the transfer company he gets “transfer short-time benefits” which are calculated in the same way as the normal short-time allowance. The duration may be up to one year but Government is discussing actually to provide for two years. The transfer companies were often used in the eastern parts of the country. The success

obviously depends on the number of vacant posts which in times of crisis are not available. The only remaining advantage will be in such a situation to get some additional qualification and to be together with colleagues suffering from the same problems instead of being unemployed and staying at home. The transfer companies are often financed by the Federal Agency of Labour. In 2007, the EC Commission has established a so-called globalization fund with a budget of 500 million Euros destinated especially to such measures of adaptation to the market situation. Actually one discusses to increase the budget and to give the fund 1 billion Euros.

VI. Reinstatement

Can the dismissed worker ask for reinstatement if the situation of his former employer improves? Unlike French law, where this is possible during two years after the dissolution of the contract, German law is quite reluctant in this respect. There are only three cases where a reinstatement can be asked all three of minor practical importance.

- The reason for dismissal disappears during the period of notice. Especially in the situation of economic crisis, this will happen quite rarely.
- The employer re-employs many of his former workers but excludes X and Y without having any understandable reason. The two persons can ask for equal treatment.
- The social plan provides for reinstatement during one or two years after the dismissal. This is a rare provision. Employers do not like it, workers prefer to have a higher compensation instead of the small chance to come back to their former enterprise.

In German law, the interest of the employer to continue with his personnel seems to be largely satisfied by the rules on short-time work. But in the current situation, this will not be sufficient. One should pay much more attention to the dismissed employees and their reintegration into an enterprise they are familiar with.