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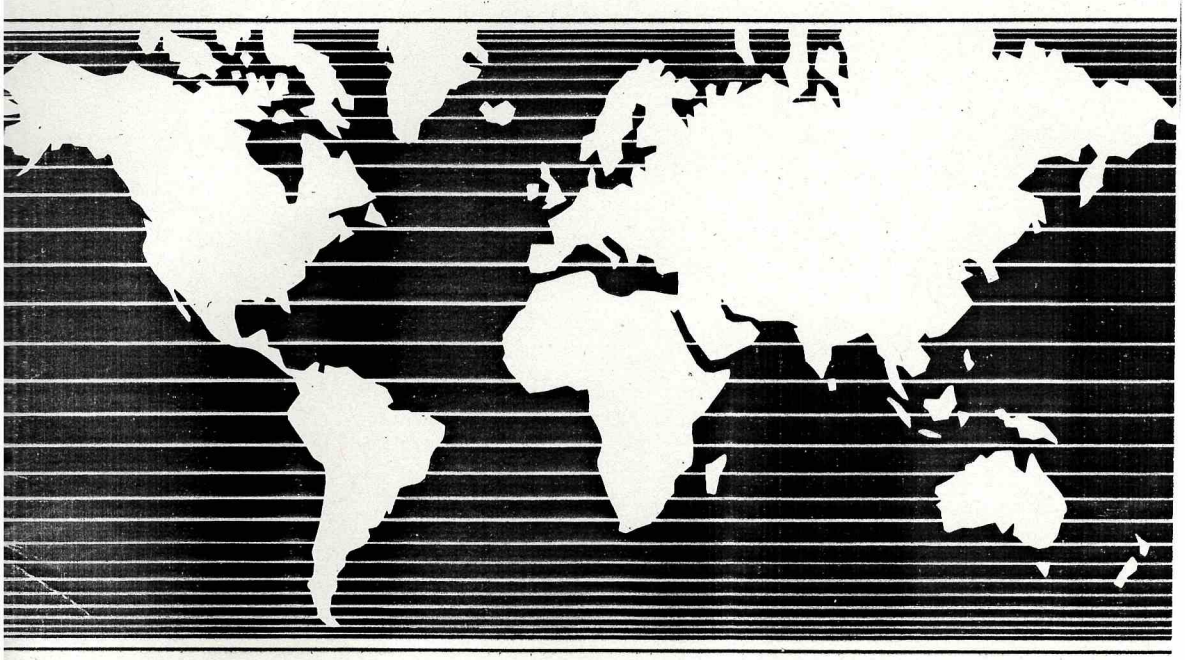

FEDERAL REPUBLIC OF GERMANY

Development of the Legal Framework

When discussing recent trends in the evolution of the labour law structure in Germany it is important to draw a distinction betweeen changes and trends initiated through the courts and changes and those introduced by the legislator. While the activities of the legislator focus mainly upon problems connected with the current economic crisis, the reactions of the court system are influenced much less by the current challenges created by that crisis. It is, consequently, much more difficult to discern a coherent pattern in the activities of the courts. The court system essentially reacts to long-lasting discussions within the legal profession on specific problems in need of resolution. Continuity of legal development and long-term perspectives thus play a much more important role in relation to the activities of the courts than in relation to acts by the legislator. Furthermore, the courts are not under the same pressure to produce speedy remedies for immediate problems, in the same way as is the legislator.

On the whole, it would be true to say that the role of the courts in the evolution of labour law in Germany has become much more important than that of the legislator. This is so not only for collective labour law but also in relation to individual labour law. Indeed, this tendency is on the increase as it becomes more difficult for Parliament to muster a voting majority for any measure to be taken in this area.

Contributions by the Courts to the Development of Labour Law

● Over the course of a large number of earlier decisions, the Federal Labour Court developed a range of pre-conditions which have to be satisfied by a union in order to enable it to enter into collective agreements. One of the requirements for this purpose is that the union has to be powerful enough to constitute a genuine counterpart to the respective employer side. This has had the effect, in particular, that smaller and less powerful organisations are excluded from the collective bargaining scene, and thereby remain unattractive to potential members.

Such a situation has provoked a fair deal of criticism from those who favour greater plurality within the system of workers' representation. On the other hand, it has been stressed by others that a certain amount of factual power is indispensable if the system of free collective bargaining is to fulfil its function of producing adequate terms for labour conditions. This position was confirmed in 1981 by the Constitutional Court, which, at the same time, warned against exaggerating the factual element. The Federal Labour Court, in a decision of November 1982, has followed this warning and has lowered significantly the standards set for satisfaction of this pre-condition.

● In a recent decision of September 1984, the Federal Labour Court has provided important clarification of the law relating to industrial action - an area

which, by and large, consists entirely of judge-made law. Starting with a basic decision in 1955, the Court has placed limitations upon the legality of strikes and lock-outs by accepting these instruments only where they constitute a last resort for the resolution of conflicts. This so-called principle of the *ultima ratio* means that no strike can be lawful as long as the means for peaceful negotiation have not been exhausted. Furthermore, it means that a strike has to be preceded by a secret ballot.

The use of this strategy gave rise to heated discussions over its legality. Those who argued against its legality based their views mainly upon the fact that the strategy has nothing to do with one specific case decided in 1976 in which the warning strike consisted of a single solitary action. In consequence, they argued, it should be treated just like any normal strike, which would mean respecting the principle of the *ultima ratio*. Those who argued in favour of its legality conceived the strategy as an accumulation of individual warning strikes, which, as such, are lawful and whose legality is not affected by the accumulation. Both sides sought support in decisions of Labour Courts and Appellate Labour Courts.

In elaborating upon its position of 1976, the Federal Labour Court has now confirmed the legality of the strategy of 'new mobility', and thereby weakened still further the principle of the *ultima ratio*. Nevertheless, this is not yet the end of the controversy, since the Constitutional Court is presently being asked to decide whether the position adopted by the Federal Labour Court remains in conformity with the Constitution.

- In another area of the law of industrial action, although the essential problem remains unresolved, the courts have now taken the first steps towards its solution. According to rulings of the Federal Labour Court, workers who are neither on strike nor have been locked-out, but who are indirectly affected by a strike or a lock-out, lose, in certain circumstances, their right to receive wages. Those who belong to the striking union will always lose this right, even if they do not belong to the region covered by the agreement concluded. Since, under union rules, these workers do not enjoy strike benefits, the question arises whether they can obtain short-time working benefits from the State employment agency. In other words, does the State have to pay for workers who are suffering loss of wages due to industrial action in which they are not involved? The problem lies in how far this would be compatible with the principle that the State should remain neutral in situations of industrial conflict. To date, the Social Security Courts have given only preliminary answers to this question, which is clearly crucial for the factual power relationship between the two sides to an industrial dispute. The Federal Social Security Court, and, possibly, even the Constitutional Court, will have to come up with the necessary clarification.
- Within the area of workers' participation, the Federal Labour Court has, in recent decisions, elaborated details of the co-determination rights enjoyed by Works Councils in circumstances where technological devices are introduced with which it is possible to monitor the performance and behaviour of workers. The effects of these decisions have

been mixed. Thus, while one ruling by the Court in relation to the introduction of VDU terminal screens somewhat restricted the position of the Works Council, in another the Court strengthened the Works Council's co-determination rights as regards the setting up of personnel data systems. However, more important than the content of these individual decisions is the fact that the Court has shown that it is willing to do everything possible in order to adapt the legal structure to the rapid changes brought about by technological developments.

● Under §.112 of the Works Constitution Act, the Works Council has a right to enforce what is known as a 'social plan' in certain situations where measures are taken which affect in some substantial way a relevant part of the workforce at a factory. The notion of 'social plan', in fact, amounts to nothing more than financial compensation for the disadvantages which the workers have to suffer in consequence of these measures. Such measures may consist *inter alia* of partial or total plant closures. They quite often coincide with a situation of bankruptcy.

Here, the problem of priority arises. Should priority be given to workers' claims based upon the 'social plan', or to the claims of other creditors? The legislator has not resolved the problem. Some years ago, the Federal Labour Court gave priority to claims arising out of the 'social plan'. However, the Constitutional Court has since declared the position adopted by the Federal Labour Court to be unconstitutional. The Federal Labour Court has accepted the consequences of this ruling, and has relegated workers' claims to the lowest category on the scale of priorities. In consequence, claims arising out of a 'social plan' in a case of bankruptcy can virtually never be met, and thus remain merely academic. The legislator has now been asked to remedy this situation, although there is little hope that this will be achieved in the near future.

● In reviewing the many contributions made by the Federal Labour Court in the area of individual labour law, two particularly significant trends are worth mentioning: *(i)* attempts to improve the standards applicable to dismissal law, and *(ii)* attempts to strengthen the principle of equal treatment.

The difficulties with which the Court is confronted in shaping the rules relating to dismissal law are particularly well illustrated in a decision of March 1983. According to §.1, para.3 of the Act on Protection against Dismissals, the selection of a worker to be dismissed in a situation of dismissal for urgent economic reasons has to take into account "social aspects". Since the notion of "social aspects" is extremely vague, and includes practically every possible factor defining the social situation of a human being, it is extremely difficult to compare different workers from a viewpoint of "social aspects". In consequence, some Labour Courts and Appellate Labour Courts have developed scales in which various factors have been given a specific weighting in order to deal with the selection procedure in a more open and simplified manner.

The Federal Labour Court held these scales to be illegal, since they do not guarantee a fair selection in every individual case. According to the Court, the weighting given to a particular factor depends upon the specific circumstances, and therefore cannot be placed within a general scheme. In other words, the Federal Labour Court has attempted to promote more individual justice. However, in view of

the vagueness of the notion of "social aspects", it may be doubted whether this goal can really be achieved in this manner.

In view of this dilemma, it is interesting to see, meanwhile, that, in a new decision, the Court has discovered another approach which falls between the two extremes. In this, the Works Council and the employer, in what are referred to as *guidelines* for selection, can, to some extent, agree to institute a general scheme. The difference between this approach and that of scales produced by a Court is seen as lying in the fact that the Works Council and the employer, acting together, have a better chance of satisfactorily meeting the needs of the workers in the specific plant.

As far as the principle of equal treatment is concerned, the Court has recently succeeded, through a number of decisions, in making less easy a different treatment of blue-collar workers as compared with white-collar workers. In relation to this issue, however, the Constitutional Court has gone even further, and has declared void certain statutory provisions which had the effect of treating blue-collar and white-collar workers in different ways. Here, the courts are clearly promoting a necessary development which, to date, has been ignored by the legislator.

Contributions by the Legislator to the Development of Labour Law

As has already been mentioned, the legislator has been concentrating upon the fight against unemployment. To date, three strategies have been adopted in order to meet this goal: *(i)* giving migrant workers a financial incentive for returning to their home countries (through an Act of 1983); *(ii)* lowering the standards of protection for specific groups (*eg.* an Act of 1983 made changes to the Young Workers' Protection Act); and *(iii)* improving terms for early retirement.

As regards the last of these, a recent Act of April 1984 bases itself upon close links with provisions contained in collective agreements. Thus, where a collective agreement lays down that the employer is obliged to pay, until normal pensionable age, not less than 65% of the gross income of any worker who has been employed for a certain minimum period, who is not less than 58 years old, and who voluntarily chooses early retirement, the State will refund to the employer 35% of his associated expenses. However, this will only be the case if the employer replaces that worker with another person who has hitherto been unemployed. In fact, it appears that quite a number of such collective agreements are in existence, although there appears to be little willingness on the parts of workers to take advantage of this possibility for early retirement.

In August 1984, the Federal Government introduced a Bill for an Act to promote employment, which is now being discussed in Parliament. The main strategies contained in this Act are: *(i)* to facilitate the making of employment contracts for a limited period; *(ii)* to improve the conditions of part-time workers; *(iii)* to lower the standards of protection against dismissal in small firms; *(iv)* to extend the possibility of hiring temporary workers supplied by an intermediary agency; and *(v)* substantially to restrict the cases where a 'social plan' can be enforced.

It should also be mentioned that a further provision had been included in an earlier draft of the Bill for this Act which would have limited the possibilities of

performing overtime work. Apparently, however, in order to soften resistance from the employers' organisations, this provision was withdrawn.

At the moment, it is not possible to say definitely whether the remaining strategies for increasing flexibility will be enacted or not. Furthermore, it is extremely difficult to attempt any assessment of the likely consequences of such measures. As things stand, the discussions over the possible results of this Act constitute the most significant feature of the current labour law and industrial relations scene in the Federal Republic of Germany.

Developments in practice

Arguably much more important than changes in the legal framework have been trends in developments in practice during the last few years. One of the most significant features in this respect is the fact that management and Works Councils at the micro-level of the plant or the enterprise are producing agreements to adapt employment standards within the plant or the enterprise to changed economic conditions. This quite often gives rise to tensions between trade unions and Works Councils.

For many years, collective bargaining in the Federal Republic of Germany was concentrated upon wage problems. In the face of the economic crisis, however, this has changed. Reduction of working time, in order to distribute the available jobs amongst more people, and the fight against disadvantageous effects of rationalisation have now become the dominant goals. Whereas the latter of these is still, by and large, at the planning stage, reductions of working time have been achieved in quite a number of collective agreements concluded during 1984. In addition, both in the metal and in the printing industries, it has only been possible to reach agreements in the wake of long strikes and lock-outs.

Most important of all is the collective agreement for the metal industry, in which weekly working time is not to exceed 385 hours. This figure, however, is only an average, which has to be calculated by taking the average of the total workforce in the plant. Under the terms of this agreement, it is possible to differentiate the working time for individual workers or for groups of workers within a range between 37 and 40 hours. In consequence, workplace agreements have to be negotiated between employers and Works Councils in order to specify the terms of the collective agreement. While, on the one hand, the union will try to avoid any differentiation whatsoever, employers, on the other hand, will plead for individualisation and flexibility.

In consequence, the Works Councils are playing a key role in this conflict. So far, however, only a few workplace agreements have been entered into. The deadline for their conclusion is 1st April 1985. In spite of pressure being exercised by the union, it is completely unclear whether the Works Councils will follow the union's policy line. In any event, this situation provides an interesting test of the power relationship between union and Works Councils, although there is no doubt that, due directly to this collective agreement, the bargaining power of the Works Councils has already increased enormously.

Federal Republic of Germany: A Note on Sources

Statutes

Michael Kittner, *Arbeits- und Sozialordnung* (9. Aufl., Bund-Verlag, Köln 1984)

Gerhard Etzel, *Arbeitsgesetze* (Luchterhand-Verlag, Neuwied und Darmstadt 1984)

Hans Carl Nipperdey, *Arbeitsrecht* (15. Aufl., Beck-Verlag 1983)

The labour law reforms to be passed by Parliament and by the *Bundesrat* during February and March 1985 can be found in:

Bundestags - Drucksache (BT - Drucks.) 10/2102: *Beschäftigugnsförderungsgesetz*

Bundesrats - Drucksache (BR - Drucks.) 401/84: *Arbeitszeitgesetz*

The draft Bill on the regulation of working time introduced by the SPD opposition can be found in:

BT - Drucks. 10/121

The opposition's draft Bill on part-time employment is published in:

BT - Drucks. 10/2559

The Greens Party has introduced a Bill on working time, which features a number of new ideas:

BT - Drucks. 10/2188

Articles

In relation to the strikes and lock-outs in pursuit of the 35-hours week, and the agreements reached at the end of the conflict, an account is given in:

Gewerkschaftliche Monatshefte (GMH) 1984, Heft 7, S.389-452

The following articles about collective agreements on early retirement are contained in the *Neue Zeitschrift für Arbeitsrecht* (NZA):

NZA 1984, Heft 1-2, S.28;

NZA 1985, Heft 2, S.54,55

Employers' proposals on flexibility of working-time are to be found in

Gewerkschaftsreport (edited by the institute of the employers' federation):

Gewerkschaftsreport 1983, Heft 3, S.9-15

Gewerkschaftsreport 1983, Heft 6, S.16-22;

Gewerkschaftsreport 1983, Heft 7, S.9-18;

A number of articles are to found setting out the views of the trade unions and of employers in relation to new technologies. In respect of communications and computer technologies, there are discussions in:

Court Decisions

Among recent important court decisions, the following references are important:

(i) Bundesarbeitsgericht - The Federal Labour Court (BAG)

On the co-determination right of the Works Council in relation to the introduction of screen work:

v.6.12.1983: *Betriebsberater* (BB) 1984, S.850

On the co-determination right of the Works Council as to the storage of employees' personal data:

v.14.9.1984: *Betriebsberater* (BB) 1984, S.1808

On the protection of co-determination rights by injunction:

v.22.2.83: *Arbeit und Recht* (AuR) 1983, S.283

On the legality of the so-called warning strike:

v.12.9.1984: NZA 1984, S.393

(ii) Landessozialgericht (LSG) Bremen

On the payment of unemployment benefits to those workers unable to continue to work because of a strike in other regional bargaining units:

NZA 1984, S.132

Literature

Der gewerkschaftliche Warnstreik im Arbeitskampfrecht. By Manfred Bobke and Herbert Grimberg, (Bund-Verlag, Köln 1983)

Der Warnstreik und die Funktion des Arbeitskampfes in der Privatrechtsordnung. By Eduard Picker, (Heymanns Verlag, Köln-Berlin-Bonn-München 1983)

These two books represent respectively the trade unions' (Bobke-Grimberg) and the employers' (Picker) views on a new form of strike which appears similar to the practice in Italy and Spain: While trade unions and employers are still negotiating over a new collective agreement, the employees stop work for a short period, usually not exceeding 4 hours. Since 1980, the trade unions have been using this form of strike more and more, combining it with public demonstrations and other activities (the so-called strategy of *'Neue Beweglichkeit'*). The legal problem lies in whether these strikes are in conformity with the peace obligation and the so-called principle of *ultima ratio*, which admits a strike only as a 'last resort'.

Handbuch des Arbeitskampfrechts. By Hans Brox and Bernd Rüthers, (2.Aufl., Kohlhammer, Stuttgart u.a. 1982)

Arbeitskampfrecht. By Wolfgang Däubler (Chief editor), (Nomos-Verlagsgesellschaft, Baden-Baden 1984); With contributions from Karl-Jürgen Bieback, Ninon Colneric, Wolfgang Däubler, Manfred Schumann and Henner Wolter.

There is no statute on strikes and lock-outs in the Federal Republic of Germany. Industrial conflicts are regulated by judge-made law, which is hotly debated in the jurisprudence. These two manuals provide information about the current state of the debate, and try to give a comprehensive view of all the detailed problems connected with collective stoppages of work.

Datenschutz für Arbeitnehmer. By Hans-Hermann Wohlgemuth, (1983)

Daten- und Informationsschutz im Arbeitsverhältnis. By Wolfgang Zöllner, (2.Aufl., 1983)

The protection of privacy in the computer age is one of the 'big themes' discussed not only in public opinion but also among lawyers. In particular, there is agreement about the necessity to limit the screening of employees' personal data by the employer. Wohlgemuth deals with legal protection standards, whereas Zöllner stresses more the freedom of information which is limited by the *"Datenschutz"*. The discussion has taken a greater leaning towards the protection of personal data, in view of the census-decision of the Federal Constitutional Court in December 1983.

Vorruhestandsgesetz: Kommentar unter Berücksichtigung der Durchführungsanweisungen der Bundeanstalt für Arbeit mit Erläuterungen zur 59er Novelle. By Michael Faude and Peter Schüren, (Verlagsgesellschaft Recht und Wirtschaft, Heidelberg 1985)

This book is the most important commentary on the new statute on early retirement (*Vorruhestand*) passed in April 1984. It deals with all labour law and social security questions arising when a worker retires at the age of 58. The practical importance is not yet known; collective agreements binding more than 5 million workers (*cf* RdA 1984, 367) include the right to retire, but the losses in compensation are considerable. The employer gets a subsidy of 35% of the decreased compensation of the retired worker if he engages an unemployed person to take the place of the retired employee.

Arbeitnehmerschutz bei Betriebsaufspaltung und Unternehmensteilung. By Michael Blank, Hermann Blanke, Thomas Klebe, Winfried Kümpel, Ulrike Wendeling-Schröder and Henner Wolter, (Bund-Verlag, Köln 1984)

This book, written by lawyers working with the trade unions, deals with the relatively new phenomenon of a company being split into two or more units in order to minimize the economic risk. The most current examples are the separation between a "possessing" and a "producing" company (*Besitz- und Produktionsgesellschaft*) or a "producing" and a "marketing" company (*Produktions- und Vertriebsgesellschaft*). The authors examine if, and how, the workers can keep a uniform structure of the Works Councils and what else they can do in order to prevent a total fragmentation.

Manfred Löwisch, "Arbeits- und sozialrechtliche Hemmnisse einer weiteren Flexibilisierung der Arbeitszeit", *Recht der Arbeit* (RdA) 1984, S.197-214

The flexibilisation of working time is the employers' most important concept for reducing unemployment and increasing the effeciency of production, and is the subject of much discussion among legal scholars. The author deals with the existing legal restrictions in regard to the main forms which are being practised: job sharing, work on call (*Arbeit auf Abruf*), and labour contracts fixing only the annual total of working hours (*Jahresarbeitsvertrag*), *eg.* 9 months of work and three months of leave.

Detlev Joost, "Tarifrechtliche Grenzen der Verkurzung der Wochenarbeitszeit", *Zeitschrift für Arbeitsrecht* (ZfA) 1984, S.173-194

This article deals with the principle of "the more favourable" (*Günstigkeitsprinzip*). This principle permits workers and employers to increase wages and to improve working conditions fixed in collective agreements through individual employment contracts. The author applies this principle to working-time agreements, and concludes that a 40-hour week is more favourable than a 35-hour week, and that overtime work cannot definitely be restricted by collective agreement, but only by law.

Peter Derleder, "Betriebliche Mitbestimmung ohne vorbeugenden Rechtsschutz?", *Arbeit und Recht* (AuR) 1983, S.289-304

The influence of the Works Councils is based on their co-determination rights. Their practical importance depends upon the sanctions available in the event of the employer disregarding them. The lower courts gave the Works Councils the right to obtain an injunction which prohibited the employer from carrying out the planned measure, but the Federal Labour Court then overruled this jurisdiction. The Court's main argument -no *explicit* prohibition of unilateral intervention - is discussed at length by the author, who places stress upon the protection given to other individual rights.

Wolfgang Däubler, "Verschlechterung der Arbeitsbedingungen durch Betriebsvereinbarung?", *Arbeit und Recht* (AuR) 1984, S.1-28

During periods of economic crisis fringe benefits are more and more reduced. Legal obstacles appear when they are an implicit part of the labour contract and are not guaranteed by collective agreement. Thus, one may ask, is it possible to reduce them by a collective agreement entered into by the employer and the Works Council? Furthermore, can individual rights be reduced or abolished by collective means? The author denies that they can, in contrast with the majority of legal scholars, who take the opposite view.

Manfred Zuleeg, "Gleicher Zugang von Männern und Frauern zu beruflicher Tätigkeit", *Recht der Arbeit* (RdA) 1984, S.325-332

This article deals with equal employment opportunities for women. The legal situation is influenced by a regulation of the EEC Council, which requires member countries to conform to legal regulations concerning equal job opportunities, training, promotion prospects and working conditions for men and women. In order to conform with the EEC guidelines, the Equal Employment Opportunities Act (*Gleichbehandlungsgesetz*) came into force in 1980. Since the Act has several weaknesses, there was much controversial discussion about its possible effectiveness. Two recent decisions of the EEC Court of 1984 ruling that sanctions imposed on employers infringing the Act have to be deterrent and effective have already had consequences for the intepretation of the Act. Thus a national Labour Court ruled in 1984 that women who had been discriminated against should receive six months' wages in damages, a possibility which was not foreseen in the Act.