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MARC LINDER

The Supreme Labor Court  
in Nazi Germany:  
A Jurisprudential Analysis

For the University of Michigan Library

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## Chapter 7

## Dismissals

The Nazis did not introduce fundamental statutory changes regarding the conditions under which employees could be dismissed. The provisions of the Industrial Code,<sup>100</sup> the Commercial Code<sup>101</sup> and the Civil Code,<sup>102</sup> which created a modicum of protection for salaried and hourly workers in the form of various notice periods<sup>103</sup> for dismissals without cause,<sup>104</sup> remained in effect. The statutory provisions for dismissals without notice for an "important cause" also remained unchanged.<sup>105</sup> The one change effected after 1933 related to the heightened protection afforded employees in the Weimar period by the Plant Council Statute (BRG).<sup>106</sup> It had permitted an employee to protest certain enumerated kinds of dismissals<sup>107</sup> to the plant council; if the latter agreed with the

<sup>100</sup> §§ 122, 133 GewO.

<sup>101</sup> §§ 66-68 HGB.

<sup>102</sup> §§ 621-25 BGB.

<sup>103</sup> Salaried employees had long been favored in this regard. The gap in protection between these two groups was recognized in G. über die Fristen für die Kündigung von Angestellten, 9 July 1926, RGBI I, 399, which provided that salaried employees employed by the same employer for five years had to be given three months' notice to the end of the calendar quarter; after twelve years the notice period was extended to six months. Like the notice period provisions mentioned in notes 100-102 above, this one, too, could be contractually bargained away. For an overview, see Alfred Hueck and H.C. Nipperdey, *Lehrbuch des Arbeitsrechts*, I (3rd-5th eds.; Mannheim, 1931 [1927]), 309-24.

<sup>104</sup> In a number of potentially significant decisions during Weimar, RAG limited the employer's traditional right to dismiss an employee for any or no reason or completely arbitrarily. It held that a dismissal was voidable where it was *contra bonos mores* (RAG 533/28, 6:96-103, No. 27, 24 April 1929 [trade union activity]); it also held that an employer's refusal to state the real reason for dismissal could under certain circumstances lead to the conclusion that the dismissal was bottomed on an irrelevant ground and was therefore *contra bonos mores* (RAG 303/32, No. 60, 16:297-304, 2 November 1932 [apprentice]). Hueck sharply criticized this decision as eliminating the employer's freedom to dismiss and change his personnel at will (RAG 16:303); cf. Hueck and Nipperdey, *Lehrbuch des Arbeitsrechts*, I, 305-306.

<sup>105</sup> §§ 123-24, 133 GewO; §§ 70-72 HGB; § 626 BGB. Cf. Hueck and Nipperdey, *Lehrbuch des Arbeitsrechts*, I, 325-34.

<sup>106</sup> Not discussed here is the protection afforded against mass layoffs. See VO über Betriebsstilllegungen und Arbeitsstreckung, 15 October 1923, RGBI I, 893; § 74 BRG; § 20 AOG. Cf. Hueck-Nipperdey-Dietz, *Gesetz zur Ordnung der nationalen Arbeit. Kommentar* (4th ed.; Munich, 1943 [1934]), pp. 283-314. RAG dealt with relatively few cases arising under § 20 AOG; see, e.g., RAG 149/41, 44:134-37, No. 20, 20 February 1942.

<sup>107</sup> § 84 BRG: 1. justified suspicion that dismissal was based on consideration of employee's gender, politics, trade unionism or religion; 2. no cause stated; 3. employee refused to perform work other than that for which he had been hired; and 4. dismissal was an unfair hardship not caused by the employee's conduct or plant conditions.

employee and arbitration between employer and employee was unsuccessful, the employee or the plant council could bring suit in labor court. If the court ruled in favor of the employee, the employer was faced with the choice of either reinstating the plaintiff with backpay or indemnifying him or her.<sup>108</sup>

With the repeal of BRG<sup>109</sup> the basis for this mechanism in the collectivist structure of Weimar industrial relations was, to be sure, destroyed. But the new labor code (AOG) took BRG as a model<sup>110</sup> in preserving a measure of independent outside review of the exercise of entrepreneurial authority.<sup>111</sup> It provided that after one year's employment in the same plant or enterprise, which employed at least ten persons,<sup>112</sup> an employee could file suit in labor court for retraction (*Widerruf*) of the dismissal where the latter was "unfairly harsh and not caused by conditions in the plant."<sup>113</sup> This general clause<sup>114</sup> was interpreted to mean that a dismissal required by plant conditions was by definition not unfairly harsh; thus

<sup>108</sup> §§ 84-90 BRG. The court could fix the sum up to a maximum of a half-year's wages, depending on the length of employment. Cf. Hueck and Nipperdey, *Lehrbuch des Arbeitsrechts*, I, 362-85.

<sup>109</sup> § 65 no. 1 AOG.

<sup>110</sup> See Hueck-Nipperdey-Dietz, *Kommentar*, pp. 673-74; [Hans Georg] Anthes, *Kündigungsschutz* (Munich, 1934), pp. 46-47.

<sup>111</sup> Cf. Hueck-Nipperdey-Dietz, *Kommentar*, p. 673 for Hueck's coded admission that this was the least that could be demanded of employers given their nearly autocratic position. Cf. the naive view of Ernst Scheld, "Das Direktionsrecht des Arbeitgebers im alten Arbeitsrecht, gegenübergestellt den Befugnissen des Betriebsführers nach dem Gesetz zur Ordnung der nationalen Arbeit" (Diss., Giessen, 1934), p. 54, who analogized between the permissibility of judicial review of governmental acts and plant-statutes.

<sup>112</sup> The limit had been twenty under BRG. In May 1935 DAF submitted a draft of a Gesetz zur Erweiterung des Kündigungsschutzrechts, which proposed that § 56 para. 1 AOG cover plants with fewer than ten employees. DAF was actuated by the insight that, "The patriarchal relationship presupposed by the legislator is unfortunately not present in a large number of plant-leaders of small plants." See Generalakten des Justizministeriums betreffend Arbeitsvertragsrecht, 22 October 1934-31 December 1937, BA R 22/2063, fol. 19-22. At a conference on 10 October 1935, a representative of the deputy Führer (Rudolf Hess) supported the amendment because there had been no end to the complaints, in particular concerning dismissals for political reasons. But when the ministries of economics and food and agriculture objected, Werner Mansfeld, in charge of labor law in the ministry of labor, stated that his ministry could not take any steps; rather, it was in the discretion of the deputy Führer to propose a *Chef*-conference at which the issue could be resolved. The files do not reveal whether the conference, which was scheduled for 4 December 1935, ever took place. See *ibid.*, fol. 59-67. Robert Franke, a labor court judge, noted that it was precisely in the smallest business units that the power to dismiss was most abused. See Franke, "Notwendigkeit und Wege einer Unschädlichmachung des Kündigungsdruckes," 2 *DAR* 307-12 at 310 (1934).

<sup>113</sup> "... wenn diese unbillig hart und nicht durch die Verhältnisse des Betriebes bedingt ist"; § 56 para. 1 AOG.

<sup>114</sup> See Hueck and Nipperdey, *Lehrbuch des Arbeitsrechts*, I, 368; Hueck-Nipperdey-Dietz, *Kommentar*, p. 695.

ended the inquiry.<sup>115</sup> Another obstruction to recovery by employees resulted from the very restricted ambit of review of entrepreneurial decisions concerning the economic necessity and expediency of technical and organizational measures.<sup>116</sup>

Although an employee could not file suit until the confidence council had unsuccessfully conferred on the matter,<sup>117</sup> its role was reduced to that of a formality compared to the role which the plant council had played in Weimar. The confidence council was, as the leading commentary formulated it, not suited to review the justification of an employer's decision to discharge an employee, for such authority would have disturbed the relationship of confidence between them.<sup>118</sup>

Like the Weimar statute, the Nazi labor code offered the employer the choice of reinstating the successful plaintiff or indemnifying him or her. It too established a maximum of six months' wages, but in addition permitted the imposition of an entire year's wages in cases of obvious arbitrariness or abuse of the employer's power.<sup>119</sup> Thus the employer retained the power to discharge any employee for any or no reason provided he was willing to pay a certain price; the law sought to avoid "unsocial" dismissals only indirectly.<sup>120</sup> The large volume of litigation before the social honor courts testified to the widespread nature of abusive and arbitrary conduct by employers. As one labor court judge, speaking uncustomarily radical language but not *ex cathedra*, noted, the law did not adequately compensate for the economically weaker contractual position of the employee whose docility could be compelled by an employer who could be confident that the difficulties of obtaining new employment would keep his employees in check.<sup>121</sup> The acute labor shortages that developed in the course of the militarization of the economy in the latter half of the 1930s and then during World War II itself modified this relationship significantly.<sup>122</sup>

<sup>115</sup> Hueck-Nipperdey-Dietz, *Kommentar*, p. 696; Anthes, *Kündigungsschutz*, pp. 47-48.

<sup>116</sup> See Hueck-Nipperdey-Dietz, *Kommentar*, p. 697. RAG does not appear to have ruled on this issue after 1933. Cf. RB 96/31, 14:546-49, No. 125, 27 February 1932.

<sup>117</sup> § 56 para. 2 AOG.

<sup>118</sup> Hueck-Nipperdey-Dietz, *Kommentar*, p. 674.

<sup>119</sup> § 58 AOG as amended by G. zur Erweiterung des Kündigungsschutzes, 30 November 1934, RGBI I, 1193.

<sup>120</sup> Hueck-Nipperdey-Dietz, *Kommentar*, p. 675. Cf. Werner Mansfeld, "Die Neuregelung des Kündigungsschutzes," 2 *DAR* 329-32 at 332 (1934).

<sup>121</sup> Franke, "Notwendigkeit." Cf. idem, "Verwirkungsklauseln und mangelnder Schutz gegen die Drückkündigung, ein Widerspruch im Arbeitsrecht," 64 *JW* 1306-11 (1935).

<sup>122</sup> See Timothy Mason, *Sozialpolitik im Dritten Reich* (Opladen, 1977), pp. 246, 299 and passim.

In the context of the extraordinarily comprehensive State control of the assignment, distribution, hiring and firing of labor as well as in that of the new statutory provisions for, and judicial facilitation of, the dismissals of political, "racial" and religious opponents, adjudications regarding the traditional doctrines of dismissal assume a subordinate socio-economic and jurisprudential status for the historical observer. Within this restricted scope RAG did not transform the state of the law as created by the court during Weimar. But in a number of areas, particularly those governed (or potentially governable) by general clauses, the court did make some distinctive contributions.<sup>123</sup>

Commentators, government officials and jurists directly and obliquely expressed fear of the consequences for the stability of the new order attendant upon arbitrary treatment of employees, who by law had already been deprived of many of the rights they had acquired since the latter part of the nineteenth century.<sup>124</sup> Yet the cases present no uniform trend. Thus in a number of cases the court rejected equitable resolutions that were jurisprudentially available. It held, for example, that dismissal of an employee of thirty-two years' standing was not *per se contra bonos mores* (RAG 139/40, 41:320-29, No. 43, 24 March 1941); similarly, the discharge of a long-time employee solely for reasons of profitability constituted no such violation. (RAG 78/42, 46:45-49, No. 9, 2 October 1942 [very highly paid executive employee with five-month notice period].)<sup>125</sup> On the other hand, RAG did rule that dissolution of an at-will employment relationship merely in order to deprive an employee of a paid holiday was void (RAG 115/38, 34:324-27, No. 51, 7 December 1938); similar reasoning underlay the court's holding *contra bonos mores* and void the dismissal of an employee who had been deprived of the heightened protection accorded confidence councillors<sup>126</sup> by an employer who delayed his swearing in in order to prevent him from taking office. (RAG 248/34,

<sup>123</sup> Cases falling under a number of other rubrics - e.g., dismissal resulting from insubordination - will not be discussed again here.

<sup>124</sup> See Franke, "Notwendigkeit"; Hetzell, "Die willkürliche Entlassung von Gefolgschaftsmitgliedern," 6 *DAR* 14-15 (1938); A.B. Krause, "Der Kündigungsschutz und die sittenwidrige Kündigung eines Arbeitsvertrags," 64 *JW* 1311-17 (1935).

<sup>125</sup> In accord with its Weimar precedents, RAG 305/38, 39:91-92, No. 15, 13 March 1940, held that lifetime tenure did not preclude dismissal for an important cause. Cf. RAG 201/34, 23:190-94, No. 40, 9 March 1935 (unilateral contractual right of lifelong employee to give notice not *contra bonos mores* where economically stronger employer not fettered). The court also held that although the employer's right to discharge without notice for important cause (§ 626 BGB) could be contractually limited to certain causes (RAG 228/38, 36:418-23, No. 75, 12 July 1939), it could not be eliminated (RAG 56/41, 43:100-107, No. 15, 30 September 1941).

<sup>126</sup> § 14 AOG.

23:58-64, No. 15, 20 February 1935.)<sup>127</sup> But the court also declared that it was not unlawful for an employer to threaten to dismiss an employee in order to induce the latter to forego a future contractual right provided that he could reach the same result in the present by dismissing the employee. (RAG 21/41, 42:241-49, No. 38, 16 June 1941.)<sup>128</sup> Although the court approved psychological pressure in that case, it ruled in favor of another employee whose employer had used a more subtle and sophisticated “tactic” to manipulate him into resigning rather than submitting to a dismissal that would have redounded to his dishonor but that would have been materially less disadvantageous. (RAG 24/43, 47:29-37, No. 5, 11 November 1943 [employer also reproached him for his “Jewish manners”].)

Although the court ruled that denunciation of a co-worker (for work-related lapses) on the basis of well-founded suspicion rather than solid proof did not warrant dismissal (RAG 71/35, 25:49-53, No. 6, 14 September 1935), less substantiated charges of a sexual (RAG 304/38, 38:217-19, No. 44, 16 January 1940) or political nature (RAG 54/43, 47:136-42, No. 26, 8 October 1943) against a superior or plant-leader were held to suffice as grounds for discharge. But in light of the potential destruction of an employee’s existence by a discharge, insulting an employer – even in the presence of other employees – did not *per se* justify dismissal. (RAG 86/36, 28:51-56, No. 12, 22 July 1936 [balancing test applied].)<sup>129</sup>

RAG considerably relaxed the standards under which an employer could dismiss an employee suspected of criminal activity. Although traditionally mere suspicion did not justify dismissal without notice,<sup>130</sup> and although the court continued to hold the employer liable for backpay in the event that the suspicion proved to be unfounded (RAG 19/41, 43:66-82, No. 12, 19 September 1941), it held that where the mine security police (*Bergpolizei*) demanded the removal of an employee who, the police were convinced, had committed sabotage at the mine, the employer was justified not only in removing him but in dismissing him without

<sup>127</sup> But see RAG 218/34, 23:183-87, No. 38, 23 February 1935.

<sup>128</sup> This case came up from Austria.

<sup>129</sup> Plaintiffs in the last three cases mentioned in the text were high-ranking executive employees. Where an older employee, who had been hired pursuant to Fünfte AO zur Durchführung des Vierjahresplans über die Beschäftigung älterer Angestellter, 7 November 1936, *Deutscher Reichsanzeiger*, no. 262, 9 November 1936, p. 3, was dismissed for swearing at the employer after he lost a promotion suit, the court upheld the employer on the ground that he was not trying to evade his statutory duty to employ an appropriate number of older workers since he might have to replace plaintiff with another older worker (RAG 119/38, 35:70-75, No. 13, 7 December 1938).

<sup>130</sup> See Hueck’s annotation to RAG 114/35, 25:121-24, No. 23, 2 November 1935.

notice even where the employer lacked procedurally exhaustive proof; the employee carried the burden of proving the falsity of the suspicion. (RAG 114/35, 25:121-24, No. 23, 2 November 1935.) Perhaps the most far-reaching decision involved a school teacher of twenty-seven years' standing who spent two months in pre-trial detention while awaiting trial on charges that she had refused to permit people evacuated from Rostock to be housed in her apartment.<sup>131</sup> While in detention she was dismissed without notice; when, later in 1942, she was acquitted by a special court (*Sondergericht*),<sup>132</sup> defendant-employer converted the discharge into one with one month's notice. Both lower courts found in plaintiff's favor, awarding her backpay and declaring the discharge void. RAG, on the other hand, while upholding the award of backpay, held the dismissal valid. It rejected LAG's view that with the acquittal the matter was over and done with (*erledigt*), especially in light of the fact that everyone could come under unfounded suspicion once in his or her life. On the contrary, reasoned the court, defendant-employer did not act *contra bonos mores* when he decided that it was intolerable to employ as an educator someone who had failed to live up to the demands of helpfulness. For the court it was crucial that the acquittal had been based not on proof of innocence but on the failure of the prosecution to offer certain proof that plaintiff had seriously refused to provide the help demanded of her. (RAG 89/43, 47:143-51, No. 27, 14 January 1944.)

The court sought to fit the decision within its precedents, citing several post-1933 decisions that held that under special circumstances an unfounded suspicion or charge raised by a third party could justify a discharge without notice (RAG 47:148). Unlike the case at bar, however, these earlier cases<sup>133</sup> all involved political pressure by the State or the

<sup>131</sup> She was specifically charged with having violated the Good Samaritan provision of the Penal Code (§ 330c StGB).

<sup>132</sup> See Walter Wagner, *Der Volksgerichtshof im national sozialistischen Staat* (Stuttgart, 1974).

<sup>133</sup> The court cites to these at RAG 47:148. This line of precedent can be traced back to the Weimar period. In one – in the light of later events, ironic – case, plaintiff, who was secretary of a steeplechase association that was authorized by the State to accept wagers, made a remark during business negotiations with a Jewish businessman that “objectively” appeared as an insult to the Prussian minister of agriculture, contempt for the republican form of State and an anti-Semitic insult to the Jewish businessman. Defendant-employer refused to accede to the businessman's demand that plaintiff be fired on the spot, whereupon the businessman carried out his threat to publish an account of the incident in a newspaper. When the ministry of agriculture made a similar demand on threat of revoking defendant's betting license, defendant did dismiss plaintiff. Like the lower courts, RAG upheld the discharge on the ground that pressure exercised by a third party could constitute “important cause” within the meaning of § 626 BGB even where the employer was not legally obligated to comply with the demand for dismissal, particularly

Nazi party, failure to accede to which might have injured the employer's material interests. Here, by contrast, nothing indicates that the employer had been subject to such pressure; moreover, the court did not use balancing-test language to weigh the employer's duties of welfare and loyalty against the potential damage accruing to him and the Following.<sup>134</sup> Still more significant is the fact that in this case the "third party" was another court. That RAG was unwilling to give full faith and credit, as it were, to a court that was notorious for its high conviction rate and disregard for traditional standards of procedure,<sup>135</sup> may reflect the pervasive internally terroristic methods and spirit that prevailed in Germany as morale collapsed in the face of increasingly certain military defeat.<sup>136</sup>

In its most extensive discussion of the standards by which to judge whether a discharge was *contra bonos mores*, the court both rendered transparent how conveniently elusive this general clause was and made the necessary obeisances to Nazi ideology in order to protect itself on its political flank. A discharge was *contra bonos mores* if in the view of all fair and and just thinking *Volk*-comrades it contradicted that degree of regard for morality and decency which the average person demanded of it. Not satisfied with the task of divining the universal view of the average, the court proceeded to introduce a temporal element, conceding that only the currently prevailing *Volk*-consciousness and sense of decency were dispositive. At the same time it indicated that the general clauses of public morals and good faith (§§ 138, 157 and 242 BGB) had

where the employee's conduct led to the employer's Hobson's choice. (RAG 221/31, 13:484-87, No. 113, 14 November 1931.) The Nazi ideology of the plant-community purported to impose a reasonable duty on the employer to shield his employees even at some cost to his material interests. See n. 134 below.

<sup>134</sup> Whereas a decade earlier Hueck had wanted to restrict thirdparty-pressure discharges to "extraordinary exceptional cases" (RAG 150/34, 22:209-14 at 214, No. 45, 28 November 1934), in his annotation to the 1944 case he apparently abandoned his belief in the mythology of the plant-community. By then he was constrained to concede that giving the employer a free hand to dismiss employees was not reconcilable with declaring the exercise of that right impermissible (RAG 47:150-51).

<sup>135</sup> See Albrecht Wagner, "Die Umgestaltung der Gerichtsverfassung und des Verfahrens- und Richterrechts im nationalsozialistischen Staat," *Die deutsche Justiz und der Nationalsozialismus*, part I (Stuttgart, 1968), pp. 242-74, esp. at 242-44 and 257-59. Where an ordinary court of law convicted an employee, RAG held a discharge without notice *per se* justified (RAG 228/39, 39:189-93, No. 34, 30 April 1940). Cf. however RAG 186/34, 31:254-60, No. 45, 19 January 1935.

<sup>136</sup> The case was decided in January 1944; the acquittal had taken place in October 1942. Earlier in the war, presumably in an attempt to maintain morale, the court gave retroactive effect to a decree protecting draftees against dismissal (RAG 143/40, 41:330-35, No. 44, 11 February 1941 [German people's legal convictions in total war outweigh detriment to legal certainty]).

become vehicles to introduce Nazi communitarian ideology into the legal system. But even this concession was conditional because the court characterized as decisive (only) those Nazi goals that found expression in laws enacted since 1933. (RAG 218/35, 26:125-43, No. 28, 7 March 1936.)<sup>137</sup>

Thus absent unambiguous Nazi statutes to the contrary, the court was as free as it had been during Weimar to apply the very capacious norms of the BGB. Even according to the court's own carefully articulated self-image, over a large range of social conduct its decisions were not quasi-automatically generated by a faithful positivistic reading of a seamless web of codified Nazi will.<sup>138</sup>

<sup>137</sup> Plaintiff in the case was a female employee with a one-day notice period. She was discharged because she alone among 125 female co-workers had refused to submit to an in-plant examination of her pubic hair for lice by a doctor. In a thematically related area the court halfheartedly attacked the employer's right to discharge female employees because of extra-marital pregnancy. Although the court in principle recognized that extra-marital pregnancy was – rightly – judged differently than it had been in the past, it left the door open for discharges and other discriminatory treatment where, for example, the employee's condition offended customers (RAG 90/37, 30:297-300, No. 49, 21 August 1937) or where she committed an egregious breach of loyalty such as engaging in extra-marital intercourse with a Jew (RAG 78/41, 42:389-97, No. 61, 29 July 1941).

<sup>138</sup> See Franciszek Ryszka, *Państwo stanu wyjątkowego* (2nd ed.; Wrocław, 1974 [(1963)]), pp. 345-46.