ECONOMIC DISMISSAL IN AUSTRIA*

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RESUMEN

En el Derecho del Trabajo austriaco la relación laboral puede concluir por consenso entre las partes, por extinción "por aviso" y por despido o dimisión del trabajador basados en una justa causa. En la extinción "por aviso" ("Kündigung"), ni el empleador ni el trabajador deben alegar razones, únicamente deben respetar las previsiones legales, convencionales o pactadas sobre los periodos de preaviso y fecha de la extinción. Sin embargo, si el trabajador considera que esta extinción no es legal, puede impugnarla judicialmente en determinadas circunstancias, siendo la más importante de ellas la de considerarse la extinción como "socialmente inaceptable". Si el tribunal laboral decide a favor del trabajador, la extinción es anulada y la relación laboral perdura. El empleador, por otra parte, puede presentar objeciones para justificar la legalidad de la medida, especialmente basadas en motivos económicos que apunten a que el trabajador era innecesario por causa de la racionalización del centro de trabajo, esto es, la decisión económica del empresario. Como consecuencia de ello, la extinción puede estar justificada incluso si se considera como socialmente inaceptable.

ABSTRACT

According to Austrian Labour Law, the employment relationship may be terminated by agreement between the parties, termination by notice and by dismissal by the employer or withdrawal by the employee for good reason. When terminating the employment relationship by giving notice ("Kündigung"), neither the employer nor the employee have to give reasons for the termination,

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they only have to abide to statutory or (collectively) agreed termination periods and termination dates. However, if the employee thinks that the termination by notice was unwarranted, he or she may contest the termination under specific circumstances (general protection regime against unwarranted termination by notice). The most important one is that the termination was socially unacceptable. If the Labour Court decides in favour of the employee, the termination is declared unlawful and the employment relationship continues to exist. The employer, on the other side, may raise an objection and declare that the termination was justified, particularly because of economic reasons that lead to the fact that there was no need for that specific employee anymore due to rationalisation of that specific workplace, i.e. the work place of the (former) employee was made redundant as a result of the employer's free economic decision. As a result, the termination is deemed to be justified even though it was declared socially unacceptable for the employee.

Palabras clave: extinción por aviso, motivos económicos, protección contra el despido ilegal, extinción por aviso en el marco de su impugnación.

Key word: termination by notice; free economic decision; general protection against unwarranted; termination by notice by contesting the termination.

1. PREFACE

According to Austrian Labour Law, the employment relationship may be terminated by agreement between the parties, termination by notice and by dismissal by the employer or withdrawal by the employee for good reason. A definite employment relationship cannot be terminated by giving notice in general, unless the parties to the employment contract agree upon the possibility of premature termination before the agreed ending of the employment contract.

When talking about "dismissal" in Austria, one has to be aware of two important characteristics: First, when terminating the employment relationship by giving notice ("Kündigung"), neither the employer nor the employee have to give reasons for the termination, they only have to abide to statutory or (collectively) agreed termination periods and termination dates. Only in order to dismiss an employee or to withdraw from the employment contract as an employee, the parties have to have a good ground ("Entlassung"). Since it is inherent to the good ground that it is (economically) unreasonable for the employer to continue the relationship with that specific employee because of the employee's behaviour and not because of economic reasons in the employer's sphere, the article will not focus on this possibility of terminating the employment contract. Therefore –to avoid any misunderstanding– rather than using the term "economic dismissal", the article sticks to the term "economic termination by notice".

Second, if however the employee thinks that the termination by notice was unwarranted, he or she may contest the termination under specific circumstances (general protection regime against unwarranted termination by notice). The most important one is that the termination was socially unacceptable. If the Labour Court decides in favour of the employee, the termination is declared unlawful and the employment relationship continues to exist. However, the employer may raise an objection and declare that the termination was justified because of reasons lying within the person of the employee or his or her behaviour at the work place. Furthermore, the employer may declare that the termination was justified because of economic reasons that lead to the fact that there was no need for that specific employee anymore due to rationalisation of that specific workplace. In these cases, the termination is deemed to be justified even though it was declared socially unacceptable for the employee.

Finally, it is important to note that the protection regime against unwarranted termination by notice strongly depends on the works council and its position[1]. If the works council gives its con-

[1] See chapter IV.D.1.

sent to the termination, the employee cannot contest his or her termination due to social unacceptance. In case there is no works council at all because there are less than five employees, the general protection regime against unwarranted termination by notice does not apply at all; in case there are at least five employees who have not made use of their right to establish a works council, the general protection regime applies only partially.

This article therefore focuses on the termination by notice by the employer and how the employer may justify the termination although the employee's social and economic interests are impaired by the termination. By enabling the employer to justify the termination due to economic interests, the Austrian legislator decided to give way to the employers "free" economic decision[2].

2. FUNDAMENTAL PRINCIPLES CONCERNING THE TERMINATION OF THE INDIVIDUAL EMPLOYMENT CONTRACT BY NOTICE

According to § 19 para 1 White Collar Workers Act (Angestelltengesetz[3]) and § 1158 para 1 Civil Code (Allgemeines Bürgerliches Gesetzbuch[4]), an employment relationship ends at the date agreed upon by the parties. However, there is no statutory provision which obliges the parties to an employment contract to conclude the contract for a definite period. Therefore, the employment relationship may also be terminated like other continuous civil relationships, i.e. by agreement, by termination by giving notice and by premature summary dismissal for good grounds/withdrawal for good grounds[5].

A. Freedom to Give Notice

The freedom to give notice is an important principle of Austrian Labour Law[6]. In order to terminate the employment relationship lawfully, employers as well as employees only have to abide to notice periods and dates of termination. However, also a termination by notice which does not comply with statutory, collectively agreed or contractual notice periods and/or dates of termination is valid, i.e. that the employment relationship ends at the date provided for in the oral, written or even conclusive declaration of giving notice. In case of termination without abiding with the notice periods and/or dates by the employer, the employee may then be entitled to damages, the so-called "Kündigungsentschädigung"[7]. Another restriction of the freedom to give notice was introduced in 2012: Since 1 January 2013[8], employers have to pay a lump sum of EUR 110, when terminating an employment relationship by giving notice, but also when terminating the employment relationship e.g. by dismissal without good cause or by agreement with the employee (so-called "Auflösungsabgabe")[9].

B. Protection against Unwarranted Termination by Notice

Although the freedom to give notice is one of the principles of Austrian Labour Law, this freedom is restricted by statutory provisions, also known as provisions concerning the general protection against unwarranted termination by notice ("allgemeiner Kündigungsschutz"). In case the

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[1] See chapter IV.D.1.

[2] However, there are mechanisms where even though the employer's interests prevail over the employee's interests, the employee may call for a so-called "Sozialvergleich", i.e. a comparison between his or her interests and the interests of other employees in the establishment, which may finally lead to the declaration that the termination was unlawful (see chapter V.C.)

[3] BGBl 1921/292.

[4] JGS 946.

[5] F. Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 291.

[6] F. Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 293, 299; G. Löschnigg, Arbeitsrecht, ÖGB Verlag, Wien, 2011, 530 f.

[7] G. Kuras, "§ 29", in Kommentar Angestelltengesetz, Manz, Wien, 2006, Rz 3.

[8] BGBl I 2012/35.

[9] The introduction of the obligatory payment of this lump sum was criticized in academia, see e.g. H. Aubauer/J. Enzelsberger, "Die Auflösungsabgabe", Zeitschrift für Arbeits- und Sozialrecht, 2013/2.

termination by notice is valid, i.e. that e.g. in case of a mass redundancy the employer has informed the public employment service of the supposed termination of a certain number of employment relationships in due time, under specific circumstances the employee may contest the termination. By these statutory provisions, the employer's freedom to give notice is restricted. Therefore –generally speaking– the employee may only contest the termination by notice if his or her interests prevail over the employer's interests.

3. TERMINATION BY NOTICE

The termination by notice is the common and most important way of giving notice – most employment relationships are terminated by giving notice. Employer as well as employee can terminate the employment relationship by giving notice[10].

A. Form and Legal Conditions

With regard to "economic termination by notice", it is important to note that the termination by notice can be given orally. The Austrian statutory provisions in general do not provide for the notice to be in written. Only very few statutes, e.g. the Act on Working in Theatres ("Theaterarbeitsgesetz"[11]) provide for a written termination by notice[12]. However, collective bargaining agreements as well as the individual employment contract may establish an obligation for the employer to give notice in written. At least with regard to white collar workers it is inadmissible to provide for the notice of termination to be in written since this prerequisite would interfere with the employee's freedom to give notice provided for in the White Collar Workers Act[13]. On the other hand, a contractual obligation or an obligation out of a collective bargaining agreement for the employer to give notice in written leads to invalidity of the termination in case the employer does not abide to this obligation[14].

The termination by notice itself is a unilateral declaration of intent that does not need to be accepted. In order to be valid, it only has to reach its recipient. Once the termination by notice is issued, it cannot be withdrawn unilaterally. Therefore, once the termination by notice is issued, the parties may only agree upon its withdrawal[15].

B. Periods of Notice and Termination Deadlines

In Austria there is no unified Labour Code regulating the employment relationships of all employees. There are several statutes which regulate specific issues, e.g. working time (Working Hours Act[16]) or holidays (Holidays Act[17]) or the Labour Constitution Act[18] (which also regulates the regime of general protection against unwarranted termination by notice[19]) for all groups of employees, but with regard to notice periods, no unification has taken place yet[20]. Therefore, periods of notice as well as termination deadlines are not regulated homogenously for blue collar and white collar workers.

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[10] B. Karl, "§ 20", in Kommentar Angestelltengesetz, Manz, Wien, 2006, Rz 1; F. Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 293.
[11] BGBl I 2010/100.
[12] F. Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 293.
[13] G. Löschnigg, Arbeitsrecht, ÖGB Verlag, Wien, 2011, 531.
[14] B. Karl, "§ 20", in Kommentar Angestelltengesetz, Manz, Wien, 2006, Rz 40.
[15] F. Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 293.
[16] BGBl 1969/461.
[17] BGBl 1976/390.
[18] BGBl 1974/22.
[19] See more detailed in section IV.
[20] It is however noticeable that during the past years, the implications of the distinction between blue collar and white collar workers have been levelled, e.g. regarding the continuation of payment during illness where there are hardly any differences anymore (see e.g. F. Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 48).

1. Blue-Collar Workers

Although there is no statutory definition of the term blue-collar worker ("Arbeiter"), it is uncontested that blue-collar workers are those employees who perform predominantly manual work. With regard to notice periods, the Industrial Code of 1859[21] applies to blue collar workers. Its § 77 provides that the notice period is 14 days. However, there is no provision concerning a specific termination date. Furthermore, the notice period of 14 days can be shortened by collective agreement or by individual contractual agreement[22]. As a result, some collective bargaining agreements even state a notice period of one day, i.e. that the employment relationship ends the day after the employer has issued the termination.

The only statutory restriction is that in case the period is shortened or extended, the period for the employee must not be longer than the employer's period to give notice according to § 1159c Civil Code, i.e. that generally speaking, notice periods have to be the same. Yet, the employee's period may be shorter than the employer's period, since a shorter notice period favours the employee[23].

Particularly in economic sectors where the need for work force strongly depends on the current situation concerning orders, e.g. in the construction business and industry, collective bargaining agreements provide for shorter notice periods than § 77 Industrial Code: The collective bargaining agreement for the construction business and industry, e.g., provides that the employer may terminate employment relationships which have lasted for less than five years at the end of the working week, without any specific notice period.

2. White-Collar Workers

The main criterion to differentiate between white-collar and blue-collar workers is that white-collar workers predominantly perform intellectual tasks. There even is a statutory definition of the work performed: According to § 1 para 1 White-Collar Workers Act provides that if an employee performs primarily commercial or higher non-commercial functions or office work within a trading establishment or other business enterprises he or she is deemed a white-collar worker. As there is no provision defining "higher non-commercial function", academia and Jurisdiction developed criteria to tie down these activities. In general, they include work which requires special preliminary knowledge and skill and which cannot be carried out just by any substitute. In addition, those white-collar workers have more responsibilities and perform their work more independently[24].

The White-Collar Workers Act not only provides for a definition of the work performed but also for notice periods as well as notice dates in § 20. According to § 40 White-Collar Workers Act, the parties may deviate from these statutory provisions by individual or collective agreement only in favour of the employee. Agreements that impair the employee's legal situation are invalid.

According to § 20 para 2 White-Collar Workers Act, the statutory notice period for employers is a minimum of six weeks, valid from the very beginning of the employment relationship[25]. This period is extended according to the years of service, i.e. that after two years of service, the notice period is two months, after five years of service three months, after 15 years of service four months and after 25 years of service five months. The date when the employment relationship actually ends (and not the date when the termination by notice is issued)[26] is statutorily determi-

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[21] Valid according to § 376 Z 47 Industrial Code 1973.
[22] G. Löschnigg, Arbeitsrecht, ÖGB Verlag, Wien, 2011, 532 f.
[23] G. Löschnigg, Arbeitsrecht, ÖGB Verlag, Wien, 2011, 532 f; diff G. P. Reissner, „§ 77 GewO" in Zeller Kommentar Arbeitsrecht, Manz, Wien, 2011, Rn 9.
[24] F. Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 50 f.
[25] Only during the first month the employment relationship may be terminated without notice period and without need for a good ground, provided.
[26] B. Karl, "§ 20", in Kommentar Angestelltengesetz, Manz, Wien, 2006, Rz 109.

ned by the end of each quarter, although this date can be altered in favour of the employee. § 20 para 3 White-Collar Workers Act provides that the parties can agree upon the date when the employment relationship ends to be either the 15th or the last day of a month.

It is important to note that these notice periods are only binding for the employer. Unless there are individually or collectively agreed more favourable provisions, the white-collar worker can terminate the employment relationship with a notice period of one month at the end of each month (§ 20 para 4 White-Collar Workers Act). This notice period may be extended to a maximum of six months. However, the employee's period must not be longer than the employer's period.

3. Economic Consequences for the Employer when Giving Notice

Provided that the employer adheres to the statutory or individually/collectively agreed notice periods (and notice dates), and provided that the employee does not contest the termination because he or she deems the termination by notice to be unwarranted, the employee has to continue working for the employer until the actual date when the employment relationship ends and the employer has to continue with paying the employee his or her remuneration. In case the employer renounces on the employee's workforce during the notice period, he or she nonetheless has to continue with the payment according to § 1155 Civil Code[27]. From the date when the notice was issued until the date when the employment relationship ends, the employee is entitled to one day-off per week according to § 22 White-Collar Workers Act and § 1160 Civil Code (applicable to blue-collar workers), originally in order to look for a new job (so-called "Postensuchtag"). However, it is uncontested that the employee is entitled to these days-off even though he or she is not actually looking for a new job[28].

Especially if the notice period is longer than three months, the question arises if the employee can be obliged to consume the rest of his or her holidays and time credit deriving from overtime-work which would save the employer from having to settle with the due amount of money for the employee's entitlement to holidays and/or overtime-work at the end of the employment relationship. Generally speaking, the employee cannot be obliged to take the holiday or the days-off for overtime-work, but the parties have to agree upon the consummation. However, according to the Supreme Court of Justice, the employee may be obliged to the consummation of the days-off for overtime-work if this is reasonable for him or her and if the employer's economic interests prevail over the employee's interests[29].

In case the employer does not adhere to notice periods and/or notice dates, the employment relationship notwithstanding ends at the date intended by the employer. However, provided for that the employee does not contest the termination according to the general protection regime against unwarranted termination by notice, the employee is in these cases entitled to damages[30] according to § 29 White-Collar Worker Act, § 84 Industrial Code 1859 or § 1162b Civil Code, which mainly consist of the due remuneration until the employment relationship would have ended if the employer had adhered to notice period and/or notice date. The reason behind this regulation is that the employer should not make a profit from giving notice without adhering to statutory, individually or collectively agreed notice periods.

4. GENERAL PROTECTION AGAINST UNWARRANTED TERMINATION BY NOTICE

As already mentioned in the Preface, the provisions concerning the general protection regime against unwarranted termination by notice are regulated likewise for blue-collar as well as for white-collar workers in the Labour Constitution Act (§§ 105 ff). However, the provisions concer-

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[27] G. Löschnigg, Arbeitsrecht, ÖGB Verlag, Wien, 2011, 535.
[28] B. Karl, "§ 22", in Kommentar Angestelltengesetz, Manz, Wien, 2006, Rz 2 ff.
[29] Supreme Court of Justice, 3. 6. 1986, 14 Ob 65/86, ZAS 1987, 168 (Adamovic).
[30] Uncontested; see e.g. W. Wagnest, "Der Anspruch des Arbeitnehmers auf Kündigungsentschädigung bzw Schadenersatz bei vorzeitiger Auflösung des Arbeitsverhältnisses", Das Recht der Arbeit, 2002, 254.

ning general protection against unwarranted termination by notice do not apply if there are less than five employees. In this case, the employees may only contest a termination by notice if they deem it to be contra bonos mores or contra statutory legal provisions according to § 879 Civil Code. If there are at least five employees who have not made use of their right to establish a works council provided for in § 40 Labour Constitution Act[31], the general protection regime applies only partially.

However, in case there are more than five employees in an establishment who have established a works council according to §§ 40 ff Labour Constitution Act, the interaction between employer –works council– employee with regard to the process of terminating an employment relationship by notice must not be underestimated. Employers intending to avoid court procedures therefore should always try to keep a good relationship with the works council.

A. The Preliminary Procedure

The works council's role with regard to the termination procedure is diverse. First, the employer has to inform the works council about an intended termination. Depending on the works council's reaction, it then may contest the termination if it is deemed unwarranted by the employee and if the employee asks the works council to do so.

1. Information of the Works Council

According to § 105 para 1 Labour Constitution Act, the employer has to inform the works council one week in advance before issuing any termination by notice. The works council may then give its opinion on the termination and may demand that the employer consults with the works council within the mentioned period of one week. If the employer issues the termination by notice before the end of this one week's period the termination is invalid, unless the works council has given its opinion on the termination before the end of the one week's period. In other words: In order to validly terminate the employment relationship by giving notice, the employer has to adhere to the periods provided for in § 105 Labour Constitution Act. If the employer does not adhere to these provisions, the employee may file a claim for the employment relationship to be considered as not terminated[32], i.e. that the employee does not even have to prove any social unacceptance of the termination.

2. The Works Council's Decision

During the one week's period, § 105 para 1 Labour Constitution Act grants the works council the right to give its opinion on the termination. The works council can react in different ways. It may

- explicitly agree with the termination by notice (from here on "explicit agreement"),

- explicitly contradict the termination by notice (from here on "explicit contradiction") or

- not give any opinion (from here on "no opinion")

The possibility to contest the termination by notice strongly depends on the reaction of the works council:

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[31] It is important to note that according to the Labour Constitution Act, it is not the employer's but the employees' obligation to establish a works council. However, the only sanction for the employees for not establishing a works council is that in this way, most of the co-determination and information rights and the rights to be heard established in the Labour Constitution Act, i.e. also the rights regarding the termination of an employment relationship, do not apply (F. Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 543).

[32] I. Trost, "§ 105", in Kommentar ArbVG, Manz, Wien, 2012, Rn 172; Supreme Court of Justice 13.2.2003, 8 ObA 4/03a, DRdA 2004/15 (Trost) = ASoK 2003, 247.

- In case the works council explicitly agrees with the termination, the works council itself cannot contest the termination but only the employee. However, according to § 105 para 4 and 6 Labour Constitution Act, the employee cannot contest the termination because of social unacceptance, but only because of unlawful motives.

- In case the works council explicitly contradicts the termination, either the works council or the employee can contest the termination. The explicit contradiction furthermore leads to the employee's possibility to ask for a so-called obligation to compare employee's interests ("Sozialvergleich").

- If the works council does not give any opinion, the employee may contest the termination, although the so-called "Sozialvergleich" cannot be asked for in this case.

C. Collective Redundancies

In order to live up to the obligation to transform the Directive on Collective Redundancies (Council Directive 98/59/EC)[33], the Austrian legislator established a system where –depending on the size of the establishment– the Public Employment Service has to be informed before the termination of a certain number of employment relationships.

1. The Directive on Collective Redundancies (Council Directive 98/59/EC)

Recital 2 of the Directive states that "it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the Community". In order to overcome the remaining differences between the provisions in force in the Member States concerning the practical arrangements and procedures for such redundancies and the measures designed to alleviate the consequences of redundancy for workers –which can have a direct effect on the functioning of the internal market[34]– the Council has adopted the Directive 98/59/EC.

The Directive itself defines "collective redundancies" as "dismissals effected by an employer for one or more reasons not related to the individual workers concerned" where a specific number of employees shall be dismissed (Article 1). In order to enable employees, their representatives and the public authorities to arrange for the aftermath of those collective redundancies, the Directive obliges the Member States to establish information procedures regarding workers' representatives as well as the competent public authority. According to Article 4 (1) "projected collective redundancies notified to the competent public authority shall take effect not earlier than 30 days after the notification … without prejudice to any provisions governing individual rights with regard to notice of dismissal".

2. Transformation of the Directive 98/59/EC

The Austrian legislator decided to transform the Directive by establishing the so-called "Kündigungsfrühwarnsystem" (system of premature information of terminations of employment relationships) within the Act on Support of the Labour Market ("AMFG – Arbeitsmarktförderungsgesetz"[35]). By transforming the Directive provisions, the Austrian legislator even introduced some provisions which are more favourable to workers compared to the provisions of the Directive[36].

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[33] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12/08/1998, p. 16–21.
[34] Recitals 3 and 4 of the Directive 98/59/EC.
[35] BGBl 1969/31.
[36] F. Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 331.

According to § 45a of the Act on Support of the Labour Market, every employer has to inform the competent Public Employment Service Agency in written if he or she intends to end employment relationships of the following number within 30 days:

- at least 5 employees in establishments with regularly more than 20 and less than 100 employees,
- at least 5 % of the employees in establishments with 100 to 600 employees,
- at least 30 employees in establishments with regularly more than 500 employees, or
- at least 5 employees who are older than 50.

§ 45a of the Act on Support of the Labour Market does not only apply in case the employer wants to terminate the employment relationships by economically motivated termination by notice, but also if the employer suggests a termination by agreement[37], if the employer's behaviour is the reason for the employee's termination by notice[38] or by dismissal without good ground or.

§ 45a para 2 of the Act on Support of the Labour Market provides that the employer has to inform the competent Public Employment Service Agency at least 30 days before the first of the "mass redundancies" shall be issued. Within these 30 days, information and consultation procedures shall take place in order to arrange for solutions to alleviate the impact on the employees and the labour market.

When informing the competent Public Employment Service Agency of the intended terminations of employment relationships, the employer also has to inform the Agency about the information of the works council according to § 109 para 1 Z 1 and 1a Labour Constitution Act. In case there is no works council established, the employer has to make sure that he or she informs every single employee about the intended termination of his or her employment contract[39]. If there is a works council, it may ask for or promote the conclusion of a social plan, i.e. a works agreement concluded in order to alleviate the negative consequences of the termination of employment relationships of a considerable part of the employees of an establishment or even of all employment relationships of an establishment.

3. Invalidity of the Termination

In case a termination is issued before the information period of 30 days has expired, the termination is invalid according to § 45a para 5 of the Act on Support of the Labour Market. Only in case the employer is able to prove that termination has been issued on good ground before the period of 30 days has expired, the competent Public Employment Service Agency may give its consent to the termination although the employer has not observed the provisions concerning the information period. In this case, the termination is deemed to be valid despite the non-adherence to the statutory information period.

However, the invalidity of the termination of the employment relationship is only relative, i.e. that the employee has to file a claim and ask for the termination to be declared invalid by the competent Labour Court. This claim has to be filed within a certain period of investigation granted to the employee, although there are no statutory provisions establishing specific periods. Yet, according to the Supreme Court of Justice, filing a claim one and a half years after the termination is definitely too late[40].

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[37] Supreme Court of Justice 16.2.2000, 9 ObA 336/99y, RdW 2000/532 = ARD 5127/14/2000.
[38] F. Marhold in M. Fuchs/F. Marhold, Europäisches Arbeitsrecht, Verlag Österreich, Wien, 2009, 232.
[39] G. Löschnigg, Arbeitsrecht, ÖGB Verlag, Wien, 2011, 585.
[40] Supreme Court of Justice 26. 1. 2000, 9 ObA 322/99i, DRdA 2001, 38 (Kerschner).

D. Contesting Notice

Provided that the termination of the employment relationship by notice is valid, i.e. that particularly the procedure according to § 105 para 1 Labour Constitution Act and, in case of mass redundancy, the information-obligation according to § 45a Act on Support of the Labour Market have been adhered to, there is the possibility to contest the notice if specific prerequisites are fulfilled.

1. Formal Procedure

As already mentioned in section IV.B., the employer has to inform the works council about every intended termination by notice. Depending on the statement of the works council (explicit agreement, explicit contradiction or no opinion) either the works council or the employee him or herself may then, after the employer has given notice to the employee, have the right to contest the termination. After having given notice of the termination of the employment contract to the employee, the employer has to inform the works council about having actually issued the termination by notice.

a. Appeal by the Works Council

In case the works council has explicitly contradicted the termination by notice, the employee can ask the works council to file a claim at court in order to contest the termination. The works council has to file the claim within one week after having received the information about the termination by the employer (§ 105 para 4 1st case Labour Constitution Act). If the works council decides to withdraw the claim without the employee's consent, the employee has the right to enter the court procedure and to contest the termination him- or herself within 14 days after having been informed about the works council's withdrawal.

If the works council decides to contest the termination, it may also ask for the so-called obligation to compare employee's interests ("Sozialvergleich")[41].

c. Appeal by the Employee

In case the works council has explicitly contradicted the termination bur does not follow the employee's request to contest the termination, the employee him or herself can contest the termination by filing a claim at court within two weeks after the contest-period for the works council (one week after having been informed by the employer about the actual termination) has expired. Only in this case, the employee may ask for the so-called obligation to compare employee's interests ("Sozialvergleich").

If the works council has neither explicitly contradicted nor agreed with the termination ("no opinion"), the employee may contest the termination by filing a claim at court within two weeks after having received the termination by notice. However, in this case the employee cannot ask for the so-called obligation to compare employee's interests ("Sozialvergleich").

If the works council has explicitly agreed with the termination, the employee nevertheless may contest the termination within a two week's period after having received the termination by notice. However, according to § 105 para 4 last sentence, para 6 Labour Constitution Act, the employee cannot contest the termination because of social unacceptance but only because of unlawful motives.

2. Grounds of Appeal

With regard to "Economic Termination by Notice", the appeal because of socially unacceptable termination by notice is of the utmost importance. However, also the appeal because of unlawful motives must not be underestimated: In these cases, the employer has no possibility to justify the termination, e.g. because of economic reasons.

[41] See already supra IV.A.2.

a. Unlawful Motives

§ 105 para 3 (1) Labour Constitution Act enlists specific cases in which the employee may contest the termination by notice. In other words: Generally speaking, only in these cases enlisted in § 105 para 3 (1) Labour Constitution Act the employee may contest the termination by notice because the employer has apparently terminated the employment relationship due to an unlawful motive. These motives are:

a) the employee's (intended) membership with a trade union
b) the employee's activities within a trade union
c) the call for a works meeting by the employee
d) the employee's engagement with regard to works council elections
e) the employee's application for the works council elections or his or her former membership in the works council[42]
f) the employee's engagement as member of the conciliation board
g) the employee's activity and engagement regarding health and safety at work
h) the employee's approaching obligatory military service or his community service as alternative to obligatory military service
i) the employee's claim for obviously legitimate entitlements deriving from the employment relationship (e.g. in case the employer has not lived up to his or her obligation to remunerate the employee for his or her service)
j) the employee's activity as a spokesperson of the special negotiation body[43] according to § 177 para 1 Labour Constitution Act.

In order to contest a termination which has apparently been issued because of one of these unlawful motives, the employee convincingly has to claim that the unlawful motive was the fundamental reason for the termination. Only in case the employer can convincingly claim that the termination took place because of another motive not enlisted in § 105 para 3 (1) Labour Constitution Act and that it is more probably that the termination took place because of the other reason, the court can dismiss the employee's complaint[44].

Only in very few other cases explicitly stated by statutory provisions, the employee may as well contest the termination due to unlawful motives, e.g. terminations because of discrimination according to the Equal Treatment Act (GlBG – Gleichbehandlungsgesetz)[45].

b. Socially Unaccceptable Termination by Notice

The first prerequisite that has to be fulfilled in order to contest the termination by notice for social unacceptance is that the employment relationship has to have existed for at least six months. Thus, during the first six months of an employment relationship, there is no general protection scheme against socially unacceptable termination by notice. In case there is an agreement about the first month of an employment relationship being a probationary period, the employer can terminate the employment relationship during that first month even without adhering to notice periods[46].

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[42] For current members of the works council, there is a special protection regime against termination by notice and dismissal, regulated in §§ 120-122 Labour Constitution Act.

[43] Implemented according to Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) (Text with EEA relevance), OJ L 122, 16/05/2009, p. 28–44.

[44] Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 308; Supreme Court of Justice 29.5.2001, 9 ObA 40/01z RdW 2002/103.

[45] BGBl I 2004/66.

[46] Supreme Court of Justice 27.6.1990, 9 ObA 141/90 Arb 10.872; the current national government even intends to extend the probationary period to three months (http://www.bka.gv.at/DocView.axd?CobId=53264 5.4.2014).

In order to contest termination by notice according to § 105 para 3 (2) Labour Constitution Act, the termination has to be socially unacceptable for the employee. According to Jurisdiction[47] and Academia[48], a termination is socially unacceptable for an employee if his or her interests are considerably impaired. The following criteria are applied by courts when determining if there actually is a considerable impairment of the employee's interests:

- considerable impairment of the employee's financial situation
- noticeable impairment of the employee's economic situation, although that does not necessarily imply that the employee's existence is threatened as a result of long-term unemployment.

During court procedures, the court determines –with the help of a court-appointed expert– if the employee's situation actually is considerably impaired by taking into account several criteria –the most important ones are:

- the employee's age
- the length of the employment relationship
- the expected duration of unemployment
- the employee's property, obligation to provide maintenance according to agreements or statutes, legitimate debts, i.e. for buying a house/apartment to live in
- the employee's and his/her partner's income[49].

It is the court-appointed expert's task to determine how long it will take the employee to find a new job and what he or she can expect to get paid. Generally speaking, an income-loss of around 10 %[50] and unemployment of around 6 months[51] have to be accepted. In other words: If the employee can find a new job in about 6 months where he or she earns (the maximum) 10 % less, the termination is not categorized as socially unacceptable.

If the Labour Court decides that there is a considerable impairment on the employee's financial situation implicating a noticeable impairment of his or her economic situation, the termination by notice is declared unlawful and the employment relationship continues to exist, unless the employer raises an objection and declares that the termination was justified.

3. Legal Justification of the Termination by Notice

On the one hand, the employer can prove the termination to be justified because of reasons lying within the person of the employee or his or her behaviour at the work place. On the other hand, the employer may declare that the termination was justified because of economic reasons that lead to the fact that there was no need for that specific employee anymore due to rationalisation of that specific workplace. In these cases, the termination is deemed to be justified even though it was originally declared socially unacceptable for the employee.

a. Substantive Reason: Employee or His/Her Behaviour

First, the employer may justify the termination by notice according to § 105 para 3 (2) lit a Labour Constitution Act if the employee him or herself is not able to fulfil his or her tasks as agreed upon in the employment contract. The employee may either physically or mentally not

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[47] See e.g. Supreme Court of Justice 20.9.2000, 9 ObA 179/00i Arb. 12.040.

[48] I. Trost, "§ 105", in Kommentar ArbVG, Manz, Wien, 2012, Rn 235 ff and many others.

[49] See e.g. F. Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 312.

[50] E.g. Supreme Court of Justice 20. 9. 2000, 9 ObA 179/00i RdW 2001/250 = wbl 2001/119 = ASoK 2001, 163; the Court also decided that an income-loss of 20 % is socially unacceptable: 21. 10. 1998, 9 ObA 261/98t ARD 5001/13/99; 28. 10. 1986, 2 Ob 554/86 DRdA 1988, 229.

[51] Six to eight months, 15 % income-loss, non-married employee without any obligations to provide maintenance: no social unacceptance: Supreme Court of Justice 10.6.1998, 9 ObA 108/98t ASoK 1998, 428.

be able to perform his or her duties. However, if the inability to live up to the contractual obligations derives from an illness, the employee is in general protected from justification of the termination. Only if the employer can either prove that the illness is a long-term illness, that frequent short-term illnesses have to be expected or that the decrease in the employee's ability to perform the contractually agreed tasks derives from the illness[52], the termination may be justified, provided that the prognosis for the future is bad. In other words: If it cannot be expected that the employee will be able to perform his or her work in the foreseeable future, the termination can be justified[53].

However, the employer can also try to justify the termination because of the employee's behaviour, but which does not fulfil the requirements for a good ground for premature dismissal yet. Such reasons can be that the employee is frequently unpunctual, that he or she does not perform the agreed tasks or that he or she does not work diligently enough, yet it is not necessary that the employee is culpable for his or her behaviour[54].

In both cases, i.e. in case the employer proves that the employee is not able to perform the agreed duties as well as in case the employer proves that the employee's behaviour is not bearable anymore, the employer additionally has to prove that establishment's interests are disadvantageously impaired. The burden of prove is quite hard because the employer has to show that without terminating the employment relationship, the establishment's productivity and or the order in the establishment would be unfavourably impaired[55].

b. Substantive Reason: Economic Reasons

If the employer can prove that the establishment's interests prevail over the employee's interests, i.e. that there are economic difficulties that have to be overcome, the termination –although originally socially unacceptable– may be justified as well, according to § 105 para 3 (2) lit b Labour Constitution Act[56]. However, it is in any case necessary for the employer to prove that there is no need any more for the specific employee whose contract has been terminated by notice. In other words: The employer cannot terminate the employment relationship of one employee by notice and then employ another person to perform exactly the same work at the same work place the former employee has worked at[57].

Yet, the employer does not have to prove that by the termination by notice the economic difficulties are eliminated. The termination only needs to be a comprehensible measure any economic-thinking entrepreneur would have taken. However, it is neither the Labour Court's task to prove if the measure –the termination by notice– is necessary and practicable, nor can the Labour Court prescribe any economic measures to the employer. However, the Labour Court can prove if the termination has actually led to the desired cost-reduction.

Thus, although Labour Courts are not allowed to decide whether the termination by notice was necessary or practicable, they play an important economic role: According to Jurisdiction[58] , even if due to economic reasons there is no need for a specific employee anymore and who cannot be employed at any other workplace within the establishment, nevertheless employees' interests have to be weighed up against employers' interests[59]. As a result, in the end the employer may be obliged to keep the employee because the termination is declared unlawful although from economic point of view there is no need for that employer anymore.

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[52] E.g. Supreme Court of Justice 26.2.2003, 9 ObA 10/03s ASoK 2004, 38.
[53] F. Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 314 f.
[54] B. Karl, Die sozial ungerechtfertigte Kündigung, Linde, Wien, 1999, 95 ff.
[55] G. Löschnigg, Arbeitsrecht, ÖGB Verlag, Wien, 2011, 556.
[56] See also infra V.A.
[57] Supreme Court of Justice 31.8.1994, 8 ObA 236/94, ZAS 1996/14; M. Windisch-Graetz, „Soziale Gestaltungspflicht über die Betriebsgrenzen hinaus?", Zeitschrift für Arbeits- und Sozialrecht 1996, 109 ff.
[58] E.g. Supreme Court of Justice 12. 10. 1988, 9 ObA 206/88, DRdA 1991, 33 (B. Schwarz).
[59] E.g. G. Löschnigg, Arbeitsrecht, ÖGB Verlag, Wien, 2011, 559.

5. THE EMPLOYER'S FREEDOM OF ECONOMIC DECISION-MAKING VS. THE EMPLOYER'S DUTY OF ACTING SOCIALLY RESPONSIBLE ("SOZIALE GESTALTUNGSPFLICHT")

When terminating the employment relationship of an employee, whose financial and economic interests are considerably impaired, by notice and if the employer wants to justify the termination due to economic reasons, even before terminating the employment relationship the employer has to adhere to his or her duty of actin socially responsible. If the employer does not live up to this duty, Labour Courts may declare the termination as socially unacceptable.

A. Accepted Economic Reasons as Justification for Giving Notice

As already stated before, the employer has to prove that there is no need any more for the specific employee whose contract has been terminated by notice. In other words: The employer's economic situation forces him or her to terminate employment relationships by notice.

1. Reduction of the Establishment's Activities

Regardless whether the employer decides to reduce the establishment's activities out of personal reasons or whether the reduction is the consequence of a falling demand of the employer's products, the general protection regime against socially unacceptable termination by notice does not restrict the employer's economic freedom to reduce the activities: As already mentioned before, Labour Courts must not examine whether the economic measure was necessary and/or practicable. The general protection regime against unwarranted termination by notice does not oblige the employer to keep up a certain branch of activity or to maintain his or her production only in order to guarantee the employees' workplaces. Such an obligatory guarantee would illegally restrict the employer's fundamental right to property and his or her fundamental freedom to exercise a profession and the principle of private autonomy. In case there is no possibility to further employ a worker, the termination by notice is in any case justified[60].

2. Improvement in Efficiency

In case the employer decides to improve the establishment's efficiency, e.g. by adopting new methods, by installing new machines etc., and thus terminates employment relationships by notice because the work places are redundant, the Labour Courts must not either examine whether the measure was necessary and/or practicable when being asked to declare if the termination was unwarranted[61]. It is the employer's free economic decision whether he or she wants to improve the establishment's efficiency. This is also true in case the employer does not adopt new methods or installs new machinery but also if the establishment/the undertaking are reorganized in order to save expenses.

However – and this is valid for both reduction of the establishment's activities and improvement in efficiency, there is the employer's duty to act socially responsible.

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[50] E.g. 60 J. Hutter, Die unternehmerische Entscheidungsfreiheit bei der Beendigung von Arbeitsverhältnissen, Manz, Wien, 2014, 56 ff, 109 ff.

[61] Supreme Court of Justice 28.10.1986, 2 Ob 554/86; 5.11.1997, 9 ObA 142/97s.

[62] F. Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 317; Supreme Court of Justice 19.12.2001, 9 ObA 189/01m, ASoK 2002, 417.

B. The Employer's Duty to Act Socially Responsible

Before terminating employment relationships due to economic reasons, the employer is obliged to implement his or her duty to act socially responsible ("soziale Gestaltungspflicht"). The termination of employment relationships has to be the last resort, i.e. ultima ratio[62]. The employer may be obliged to finance reasonable training measures for the employee and to accept necessary training periods if the employee is generally able to perform another job within the establishment. Any possible work place in the establishment has to be offered to the employee whose work place was made redundant. However, the employer is not obliged to offer the employee a work place within the whole enterprise or concern if the original employment relationship was only between one establishment of the enterprise or the concern and the employee[63]. At least the general protection regime against unwarranted termination by notice cannot be named as justification for extending the employer's duty to offer the redundant employee a work place within the concern[64].

C. Obligation to Compare Employees' Interests ("Sozialvergleich")

Only in case

- the works council has explicitly contradicted the employee's termination by notice,
- the employee's financial and economic interests are considerably and noticeably impaired according to § 105 para 3 (2) Labour Constitution Act and
- the employer has tried to justify the termination due to economic reasons according to § 105 para 3 (2) lit b Labour Constitution Act,

the employee may demand for a so-called "Sozialvergleich" according to § 105 para 3c Labour Constitution Act during court procedure. However, this obligation to compare employees' interests only takes place if the employee whose employment relationship has been terminated demands for it and at the same time names other employees within the establishment and performing equal tasks, who –according to his or her opinion– would not have suffered from such a severe impairment of their financial and economic situation if their employment relationships had been terminated[65]. It is contested whether the employee can also declare that he or she would want to work for less remuneration and at a lower position only in order to take into consideration more work places with regard to the "Sozialvergleich"[66]. Yet, the wording of § 105 para 3c explicitly provides that only those work places shall be taken into consideration where the employees perform equal tasks[67].

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[63] Supreme Court of Justice 31.8.1994, 8 ObA 236/94, ZAS 1996/14; M. Windisch-Graetz, "Soziale Gestaltungspflicht über die Betriebsgrenzen hinaus?", Zeitschrift für Arbeits- und Sozialrecht 1996, 109 ff.

[64] J. Hutter, Die unternehmerische Entscheidungsfreiheit bei der Beendigung von Arbeitsverhältnissen, Manz, Wien, 2014, 181 ff.

[65] F. Marhold/M. Friedrich, Österreichisches Arbeitsrecht, Verlag Österreich, Wien, 2012, 317; Supreme Court of Justice 11. 5. 2010, 9 Ob A 69/09a, DRdA 2010, 512.

[66] The Supreme Court of Justice extends the possibility of the "Sozialvergleich" in one decision: 22. 2. 1989, 9 ObA 39/89 DRdA 1989, 425.

[67] F. Marhold, "Grenzen vertikaler Austauschbarkeit im Sozialvergleich", Zeitschrift für Arbeits- und Sozialrecht 1993, 9.

In case the Labour Court decides that the termination of an employment relationship with another employee would have caused less impairment to that employee's financial and economic situation, the termination of the employment relationship of the employee who has demanded the "Sozialvergleich" is declared unlawful. However, Labour Court cannot declare the employment relationship of the economically stronger employee to be terminated.

V. CONCLUSION

When terminating an employment relationship due to economic reasons, the Austrian legislator prima facie does not interfere with the employer's free economic decision. On the contrary –according to statutory provisions, employers in general only have to adhere to notice periods (and in most of the cases notice dates) in order to lawfully terminate an employment relationship by notice. Only in case of premature dismissal for good ground the employer has to give a reason for the dismissal.

However, in case the general protection regime against unwarranted termination by notice applies and the employee files a claim in order for the termination to be declared as unlawful, the employer may be obliged to specify his or her economic reasons for the termination. If the employee's financial and economic situation is noticeably impaired and the employer has terminated the employment relationship due to economic reasons, Labour Courts (should) then decide that the termination was justified by economic reasons if the work place of the (former) employee was made redundant as a result of the employer's free economic decision.