

Flexibility of Labor Law. The European Discussion and the Example of Germany

Udo Mayer

Volume 29, numéro 1, 1988

URI : <https://id.erudit.org/iderudit/042875ar>
DOI : <https://doi.org/10.7202/042875ar>

[Aller au sommaire du numéro](#)

Éditeur(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (imprimé)
1918-8218 (numérique)

[Découvrir la revue](#)

Citer cette note

Mayer, U. (1988). Flexibility of Labor Law. The European Discussion and the Example of Germany. *Les Cahiers de droit*, 29(1), 231-245. <https://doi.org/10.7202/042875ar>

Résumé de l'article

Dans la plupart des pays européens, on a, ces dernières années, assoupli la protection législative de l'emploi, de manière à faciliter à l'employeur le recrutement du personnel par divers procédés. Cette nouvelle législation n'offre qu'une protection de second ordre à ceux dont l'engagement n'est que pour une durée déterminée, aux employés à temps partiel, de même qu'aux personnes dont les services sont proposés par des entreprises de personnel temporaire. Le recours à de telles catégories de personnel offre, certes, de multiples avantages à l'employeur. Par exemple, il diminue ses indemnités de licenciement ; il n'a pas, non plus, à payer un personnel trop considérable dans des périodes de sous-emploi. Par contre, la libéralisation de l'emploi précaire suscite différents problèmes. Elle tend à créer deux classes d'employés. D'une part, il y a ceux qui jouissent de la sécurité d'emploi : leur travail est stable, bien rémunéré et donne lieu à des avantages sociaux significatifs ; d'autre part, il y a le travail de « seconde zone », mal payé, précaire et pratiquement dénué d'avantages sociaux. Tels sont les effets de la loi dite, non sans euphémisme, *Loi en vue de promouvoir l'emploi*, adoptée en 1985 en R.F.A.

Les syndicats s'opposent à l'implantation de telles normes d'emploi inévitables. Ils tendent, par voie de négociation collective, à assurer un traitement égal pour l'ensemble des travailleurs, en particulier, par la réduction du temps de travail. Mais cette politique syndicale pourrait bien se révéler impuissante à contrer le fractionnement du travail. Une politique gouvernementale favorisant activement l'emploi, y compris le retour à une protection véritable de l'emploi, doit la compléter.

Flexibility of Labor Law. The European Discussion and the Example of Germany

Udo MAYER *

Dans la plupart des pays européens, on a, ces dernières années, assoupli la protection législative de l'emploi, de manière à faciliter à l'employeur le recrutement du personnel par divers procédés. Cette nouvelle législation n'offre qu'une protection de second ordre à ceux dont l'engagement n'est que pour une durée déterminée, aux employés à temps partiel, de même qu'aux personnes dont les services sont proposés par des entreprises de personnel temporaire. Le recours à de telles catégories de personnel offre, certes, de multiples avantages à l'employeur. Par exemple, il diminue ses indemnités de licenciement ; il n'a pas, non plus, à payer un personnel trop considérable dans des périodes de sous-emploi. Par contre, la libéralisation de l'emploi précaire suscite différents problèmes. Elle tend à créer deux classes d'employés. D'une part, il y a ceux qui jouissent de la sécurité d'emploi : leur travail est stable, bien rémunéré et donne lieu à des avantages sociaux significatifs ; d'autre part, il y a le travail de « seconde zone », mal payé, précaire et pratiquement dénué d'avantages sociaux. Tels sont les effets de la loi dite, non sans euphémisme, Loi en vue de promouvoir l'emploi, adoptée en 1985 en R.F.A.

Les syndicats s'opposent à l'implantation de telles normes d'emploi inévitables. Ils tendent, par voie de négociation collective, à assurer un traitement égal pour l'ensemble des travailleurs, en particulier, par la réduction du temps de travail. Mais cette politique syndicale pourrait bien se révéler impuissante à contrer le fractionnement du travail. Une politique gouvernementale favorisant activement l'emploi, y compris le retour à une protection véritable de l'emploi, doit la compléter.

* Professeur à l'Université d'économie et de sciences politiques, Hambourg, R.F.A. Cet article a été écrit pendant son séjour comme professeur invité à l'Université Laval. L'auteur remercie le professeur Pierre Verge pour son aide et son appui.

	<i>Pages</i>
Introduction	232
1. Job Security for Individuals	234
2. Procedure of Collective Dismissals	237
3. Recent Developments in Dismissal Law	238
4. Farewell to Lifetime Employment	239
5. The Alternative: Equal Employment Standards for All	242
Conclusion	244

Introduction

One of today's most discussed issues in European Labor Law is the claim for deregulation of current labor law standards, for more flexibility of employers in hiring and firing employees. Many Europeans are impressed by the development of the American Labor market, the high growth of jobs and the low unemployment rate over the last years considering it as a result of higher flexibility in employee staffing in the USA and hence pleading for more deregulation of the existing employment law in Europe¹.

But the U.S. has not been the only example that has pushed forward the debate about deregulation of labor law standards. There also has been the experience involving one of the largest economic recessions after World War II at the beginning of the eighties and at the same time a change of the governments of the leading European nations such as the United Kingdom, Germany and France. Conservative parties have taken power in these countries that are most important economically. Their politicians are more open to arguments against all kinds of regulations in the area of the employment and state that they reduce the ability of firms to adjust to new market conditions. Stiff international competition is said to have increased pressure on enterprises to adjust to new market conditions and to create the need for a flexible staff. Contracts and laws disturbing this aim should be cut back and in doing so the enterprises could adjust labor costs to the developments of competition. This is the classical viewpoint of economists since the time of Adam Smith but a viewpoint that has had a renaissance with the Friedman economists, the monetarists, not only in the USA and nowadays in Canada but also in the above mentioned countries.

1. See OECD, *Flexibility in the Labour Market — The Current Debate*, Paris, 1986.

This viewpoint is heavily opposed by the trade unions. The European trade unions generally insist upon statutory rights in labor codes as well as in collective bargaining agreements (with a slight exception from the British unions due to the different tradition of the British common law). They share with European societies in general the understanding that employees should have the chance to stay unlimited in an employment relationship².

This understanding is backed by the labor law of most European countries which usually considers a labor contract as unlimited. This contractual concept was established at the beginning of the twentieth century³. But at that time job protection rules did not include advance notice requirements only. It was not until after World War II that there began a general boom of employment law focusing on job security rules in the case of individual dismissals, collective dismissals and temporary and fixed term contracts which in a way are a circumvention of dismissal laws.

A closer look at the European scene reveals many common structures of national legislation in several countries. It is worth mentioning that this common structure of job security legislation in Europe is little influenced by the European Common Market Law. In general the Contract of the Common Market of Europe supports freedom of trade and commerce rather than social aspects in an employment relationship and so do the directives of the European Commission⁴. This gap between commercial and social regulation in the Common Market Law has been widely criticized. Due to the critical voices particularly on the part of the unions, the European Commission passed a directive at the end of the 1970's requiring an advance notice period prior to collective dismissals⁵. But at that time most European countries already had such advance notice requirements. Similar job protection measures are on the other side more influenced by the International Labor Organization. Most European countries have ratified Convention No. 97 of the ILO which obliges signatory states to legislate unjust dismissal protections into their domestic labor laws.

This article will briefly describe the treatment of the above mentioned main cases of job security in European legislation and jurisdiction. The common structure of this legislation explains why there is a common demand for

2. *Policy Review of the Canadian Labour Congress*, 1987.

3. B. HEPPLE (ed.), *The Making of Labour Law in Europe — a comparative study of nine countries up to 1945*, London, New York, 1986.

4. G. SCHNORR, "European Communities", in R. BALNPAIN, F. MILLARD (ed.), *Labour Law and Industrial Relations*, Deventer, 1982, p. 65.

5. *Mass Dismissal Directive*, n° 75, 129, 7.2.1975.

deregulation under the sign of "more flexibility"⁶. In a second step this general approach shall be deepened by a presentation of the German job security system, the current debate about deregulation of the labor law and the legal acts for creating more flexibility in employee staffing.

1. Job Security for Individuals

In the case of the dismissal of an individual, most European legislations provide the statutory right to employees not to be unfairly dismissed (*e.g.* Germany, Italy, France, Spain, United Kingdom)⁷. For the dismissal of an individual a just cause must be warranted which is described in a most general manner in several of the labor codes. Normally the employer has to prove that the dismissal was related to certain behaviour such as misconduct or incapacity on the part of the individual or is justified because of redundancy. Only if the employer is able to prove that the dismissal is "socially warranted" in the language of the German Protection against Dismissal Act of 1950 does it then apply.

This act was prepared by an agreement between the unions and the employers association and demonstrates the close cooperation between unions and employers in the area of social legislation prevailing at that time, a social "partnership"; which in this field soon was gone. This procedure in preparing social acts by negotiating details with unions and employers is well known in other European countries, for instance in France, the Netherlands or Sweden.

In France it is common practice since 1968 to prepare social laws by negotiations between the employers association and the large unions. The result of those negotiations will then be translated by the government into legislation. If the social parties do not come to an agreement the government then threatens to pass legislation. This was applied for example in 1981 in preparing the later Auroux Laws⁸.

In the early 1950's conditions generally had been optimal for job security legislation in many European countries when the idea of a social welfare policy was widely estimated⁹. In Germany in particular the reputation of the unions

6. S. BARKIN, "The Flexibility Debate in Western Europe — The Current Drive to restore Management's Rights over Personnel and Wages", *Industrial Relations*, vol. 42, n° 1, 1987, p. 12.

7. B. HEPPLER, "Security of Employment", in R. BLANPAIN, F. MILLARD, *supra*, note 4, p. 355.

8. To the French "tripartisme" in general see M. DESPAX, "De l'accord à la loi", *Droit social*, n° 3, 1987, p. 184.

9. G. CLARK, "Remedies for unfair dismissal — a European comparison", *International and Comparative Law Quarterly*, 20, (1971), p. 397.

and their influence on social legislation was strong after the breakdown of the fascist system because they had never been affiliated with this system. On the other hand, everywhere after the war there existed an immense need for workers during the period of the reconstruction of the economy.

The main issue of the German Anti-Dismissal Act of 1950 is the employers' duty to explain to employees the reason for their dismissal. This act finished the practice of termination at will which existed before, although the Civil Code of 1900 had already provided a prior notice requirement. The supervision of the proper procedure of dismissals in most European countries is concentrated in special labor courts (e.g. Germany, France and Italy) with a jurisdiction besides the civil courts. Europeans do not know the practice of arbitration in the area of dismissing an individual as is common under collective bargaining legislation in the USA and Canada¹⁰ as well as under a few standards pertaining to employment legislation in Canada.

In most of the European countries the vague formula of the "just cause" renders the labor courts extremely important due to their power of interpretation. They have developed a very sophisticated jurisdiction describing under which circumstances a just cause is warranted or not. German courts provide a good example in that the German Protection against Dismissals Act has presently been reduced to case law and as such is similar to common law practice. At the beginning of the 1970's this supervision system of the courts towards the dismissal of an individual was supplemented by a stronger supervision of the works council — the elected representatives of the workers in the enterprises. The works council has to be informed about each dismissal prior to its going into effect¹¹.

Under some circumstances it has the right to object to a dismissal. In this case the employee may stay in his employment until the labor court has handed down a sentence on the case. Hence labor courts still have the last say, but the works council may play a very important role in the background by objecting to a dismissal. Such an additional intervention in the procedure of the dismissal of an individual may be found in several European countries although it is difficult to generalize due to the broad variation of institutional arrangements¹². There are two channels to provide additional protection in the dismissal

10. A.P. RODRIGUEZ, *Termination of Employment on the Initiative of the Employer and Income Security of the Worker Concerned*, 10th International Congress of the International Society for Labor Law and Social Society, Washington, 1982, vol. II.

11. A dismissal without advance notice of the works council has been nullified by the Federal Labour Court I ABR III, 74, in *International Labour Law Reports*, vol. I, 1978.

12. J. STIEBER, "Protection Against Unfair Dismissal — a comparative view", *Comparative Labor Law*, n° 3, 1980, p. 229.

procedure : Either workers representatives are allowed to interfere (relying on collective bargaining agreements as in Italy or on codetermination laws as in Sweden or Germany) or a governmental institution like the labor inspectorate in France.

On first glance, this control system of dismissals in Europe seems to be very striking. But on second glance, labor courts do not form a highly effective barrier against dismissals. In general the employers are free to decide who they want to lay off and they are able to dismiss instantly. Therefore it is not surprising that a German research study of the late 1970's about the job security system brought evidence of its little value in practice. After this study (ordered by the government) for instance only 8% of the dismissed persons during the period of one year brought their case to the court. There had been a total amount of 1.4 million dismissals a year which was 7% of the whole workforce. Of the 8% employees who sued against their dismissals only 2% achieved a reinstatement. The overwhelming majority received a lump sum as severance pay. This meager result was by no means different when the works council was involved. It objected only to 6% of the cases, that means in most cases the works council did not stop the lay off of an individual¹³.

This nationwide study does not relate to the practice of other countries. The barrier for lay offs may be higher in some of them. But in general the European job security legislation gives the employer considerable flexibility as to whom he wants to lay off and at what time. By comparison, job security provisions in collective bargaining agreements may restrain the employer more sensibly in lay offs due to the strong seniority rules — a restraint which does not exist for European employers¹⁴. In spite of greater internal flexibility in the selection of persons to be laid-off, European employers complain about their dismissal system. But they find their flexibility seriously affected as an employment legislation covers the workforce as a whole whereas the collective bargaining agreement only applies to the unionized segment of the staff. European employers' demand for more flexibility aims at accelerating the procedure and lowering indemnities for lay offs. In their opinion, the current system delays employment adjustment thus increasing their costs with negative influence on their competitiveness¹⁵.

13. V. GESSNER (ed.), *Kuendigungsschutz und Kuendigungspraxis in der BRD*, Hamburg, 1981.

14. M. PIÖRE, "Perspectives on Labor Market Policy", *Industrial Relations*, vol. 25, n° 2, 1986, p. 146.

15. As an example see the Netherlands Council of Employers' Federations, *Réduction de la durée du travail — le point de vue des employeurs*, Bureau International du Travail, Genève, n° 1, 1984, p. 107.

2. Procedure of Collective Dismissals

This demand for rapid procedures and lower indemnity costs is not only claimed for the dismissal of an individual but also for collective dismissals. In the case of collective dismissals all European countries except Switzerland have legislation requiring employers to give advanced notification to workers or their representatives¹⁶. The legislation requires the workers to be given a minimum period of written notice or pay in lieu before terminating their employment. The purpose of the notification is to enable management and workers to find out whether planned lay-offs can be reduced or avoided and if not, how the costs of the workers involved can be offset.

Several countries also furnish a governmental authorities (*e.g.* France, Netherlands) or the labor office (*e.g.* Belgium, Germany, Luxembourg) with some power to intervene in collective dismissals. In general they have the power to extend the waiting period according to economic circumstances. Laws in some countries (though not in Germany) stipulate minimum severance payments¹⁷.

Many countries such as France, Italy, the United Kingdom and Germany have public schemes of income protection and redundancy funds to compensate workers for lost wages due to shorter periods of employment. The aim of those schemes is to defer or avert dismissals. In Germany income support is part of the unemployment insurance system.

Especially in the 1960's and early 1970's the regulation of collective dismissals in Europe was connected with an active manpower policy¹⁸. This strategy meant that weaker enterprises were to be phased out rather than sustained. The emphasis was therefore on offering relatively continuing employment but not necessarily specific employment security in particular enterprises. In Germany the phase of an active manpower policy began with the change of the government in 1969. One point of this policy was to force negotiations between management and workers in the case of plant closings and collective lay offs. The works council can demand an agreement on the reconciliation of interests which settles the "ifs and hows" of the planned measure as well as a social plan which alleviates the negative economic effects for the workers¹⁹. Even these rights of the works council cannot ultimately

16. J. GENNARD, *Job Security — Redundancy Agreement and Practices in Selected OECD Countries*, Paris, OECD, 1985.

17. See L. LUGO, "Protecting Workers faced with Job Loss due to New Technology, The EEC Approach", *Comparative Labor Law Journal*, vol. 8, n° 2, 1987, p. 183.

18. R.A. JENNESS, *Manpower and Employment Problems and Prospects*, Paris, OECD, 1978.

19. J. SCHREGLE, "Co-Determination in the Federal Republic of Germany — comparative view", *International Labour Review*, 1978, p. 81.

prevent dismissals since the economic decisions leading to a cessation of the economic operation are taken by the employer alone. There have been examples, however, that works councils that consistently make use of their rights, can considerably delay plans for the cessation of operations. The closure of the Kassel plant of the Dutch-German Enka concern in the midst of the 1970's was delayed for more than two years. Usually the works council can just partially offset the economic disadvantages for the employees. Social plans usually contain redundancy pay for workers having been given notice. The amount of these payments depends largely on the negotiating skill of the works council and the financial capacity of the company²⁰.

In the current debate about the deregulation of the dismissal law it is not the concept of advance notice prior to collective dismissals that is being opposed.

Critical voices focus on the length of those periods and the costs stipulated by the need of severance pay (e.g. Belgium) or by the mandatory social plan (e.g. Germany).

3. Recent Developments in Dismissal Law

The objections against delay and costs of dismissals due to the European employment protection system have caused some changes in European labor law legislation over the past years²¹. But these changes have been limited to special aspects of employment protection. The general system of advance notice requirements, labor court supervision and public authority intervention has been weakened in details but has not been cancelled totally.

Advanced notice periods for example have been reduced in Belgium²². Additionally the law has been restricted where it used to provide the worker with severance pay in lieu of notice immediately. Up to 1985 firms had to pay a single lump-sum if they failed to give notice previously. Conditions were changed then by an act allowing the firms to postpone this mandatory severance payment if they were in economic difficulties.

In the Netherlands the administrative procedures for dismissals are slated to be simplified²³. And in France it is no longer up to the labor

20. As an example see W. RYDZY, "Settlement of Labour Disputes in private Industry — The Example of Adam Opel AG", in T. HANAMI, R. BLANPAIN, *Industrial Conflict Resolution in Market Economies*, Deventer, Kluwer, 1984, p. 113.

21. M. KRANKEN, "Deregulating the Employment Relationship: Current Trends in Europe", *Comparative Labour Law*, vol. 7, n° 2, 1986, p. 143.

22. Loi de redressement contenant des dispositions sociales, 22.1.1985, see *European Industrial Relation Review*, n° 130, 1984, n° 131, 1984.

23. See *Europe sociale*, n° I, 1985, p. 87.

inspectorate to authorize dismissals. In firms with less than 10 employees, the need for an authorization by the labor inspectorate has been abolished. In firms with more than 10 employees it has been simply turned into a duty for the employer to inform the labour inspectorate of intended dismissals²⁴.

Also in Germany the 1985 Employment Protection Act did not touch the procedure of individual and collective dismissals in general but impaired details²⁵. For example: Workers employed in small enterprises with less than five workers never had been covered by the job security legislation. But at least part-time workers in the past had been counted in the same way as full time workers. They are now not being taken into account any more. So small firms may be able to manipulate the amount of their employees by hiring only part-time workers. In doing so they may circumvent the dismissal law for all employees.

In the area of mass dismissals the framework of mandatory bargaining between works council and employer has been reduced. The 1985 act raises the percentage of the work force which may be dismissed before the firm is obliged to negotiate a social plan with the works council. In addition the works council is required to regard the economic circumstances of the firm and to minimize the costs for social plans.

Up to now these changes of traditional structures in European dismissal law have been marginal and by far not as profound as one might suppose considering the strong criticism of employers. But at the same time secondary employment provisions have been developed in European legislation in addition to the traditional system creating a group of employees with lower dismissal protection.

4. Farewell to Lifetime Employment

During the past years many European countries that have changed their traditional dismissal law only in details have developed a "second class law" for special labor contracts which makes it easier to lay off workers²⁶. These laws introduce less restrictive conditions for hiring temporary workers and making-up fixed-term contracts thus allowing firms to circumvent traditional unlimited contracts with their typical dismissal protection²⁷. Governments

24. See *Europe sociale*, n° I, 1987, p. 99.

25. See *Europe sociale*, n° I, 1986, p. III.

26. J. PÉLISSIER, *La relation de travail atypique*, Report to the IIth International Congress of the International Society of Labour Law and Social Security, Caracas, 1985, vol. I, p. 523.

27. E. CORDOVA, "De l'emploi total au travail atypique, vers un virage dans l'évolution des relations de travail?", *Revue internationale du travail*, vol. 125, n° 6, 1986, p. 715.

supporting such a "second class law" have argued that their measures will make the labor market more flexible, lower the labor costs of firms and induce employers to hire more workers.

In the United Kingdom a 1985 law doubled the qualifying period for unfair dismissal cases (now two years)²⁸. In Italy a 1982 law extended the possibilities of using fixed-term contracts, particularly for young people and for women by weakening protective legislation²⁹.

In the Netherlands the maximum permissible length of a fixed-term contract is plan stated to be doubled from six months to one year by allowing firms to renew these contracts³⁰.

In Spain temporary help and limited duration contracts were allowed in the beginning of the 1980's³¹.

French legislation in a 1982 law restrained on the one hand cases for fixed-term contracts regulating circumstances under which firms could request these types of contracts³². On the other hand a 1985 law extended the maximum permissible duration of a fixed term contract from six to twenty four months³³.

Also in Germany the government now has eased these flexible forms of employment with the Employment Promotion Act of 1985³⁴. This act facilitates the use of fixed term contracts by allowing such contracts to be concluded for up to an eighteen months period without any need for justification. This broke the narrow classification of permitted fixed term contracts as it was created by the labor courts³⁵.

Another main aim of the German act is a higher demand for temporary workers supplied by temporary service agencies. Labor supplying is rather a young business in Germany and has not been practiced but for twenty years because it was forbidden before (as it still is in Italy). In Germany, job placements are exclusively organized by the labor office and private employment agencies are not permitted. But in 1967 the German Constitutional Court

28. See *Europe sociale*, n° 2, 1986, p. 117. See also P. LEIGHTON, "Atypical Employment — The Law and Practice in the United Kingdom", *Comparative Labour Law Journal*, vol. 8, 1986, p. 34.

29. See *Europe sociale*, n° 3, 1986, p. 83.

30. See M. VRANKEN, *supra*, note 21, p. 148.

31. See *Europe sociale*, n° 3, 1986, p. 83.

32. A. JEAMMAUD, "Flexibilité : le procès du droit du travail", in *Flexibilité du droit du travail : objectif ou réalité*, Paris, Éd. Législatives et administratives, 1986.

33. See *Europe sociale*, n° 2, 1987, p. 78.

34. See *Europe sociale*, n° 1, 1986, p. 111.

35. See S. SIMITIS, "The Juridification of Labor Relations", *Comparative Labor Law*, vol. 7, 1986, p. 93.

admitted the existence of temporary service agencies³⁶. They have been regarded as not comparable to private employment agencies if there is a permanent employment relationship between the supplying firms and their temporary labour staffs. An Act of 1972 granted to the leasing agency the status of the employer of the workers it supplies. Agencies need a licence in order to do business and are restricted in the duration of the leasing period of such staff to a customer. Till 1985 this period could not exceed three months in each individual case. This period has been doubled now up to six months.

The result of this legislation has been a tremendous growth of fixed-term contracts, part-time work in general and temporary help service work.

Part-time work has trebled since 1960 and has nowadays reached about 10% of the workforce. Almost 90% of part-time workers are women. The situation of part-time workers is worse than the situation of full-time workers: Less payment and less fringe benefits in individual contracts and collective bargaining agreements even if part-time workers are covered by the public social security legislation on a *prorata* basis and by a general anti-discrimination order in the 1985 law³⁷.

Recently part-time workers also have been used for work on call. This includes a part-time contract with the peculiarity that the work time is not determined in advance but instead depends on the actual need of the employer at any given time. In retail business, particularly shop assistants and those working at cash registers enter this kind of contract. The 1985 legislation has set up some minimum employment standards for people working on call.

Personnel leasing reached its highest level in 1986. Even though only 1% of the work force is engaged in such a triangular employment the economic impact is much higher: Employers may thus keep their permanent staff small and reduce the permanent work-places because they can at any time order additional employees from the leasing companies.

Fixed-term contracts also contributes to the curtailment of the permanent workforce. Those contracts have had an enormous growth since the 1985 act in Germany. Meanwhile there has been established a common practice to hire employees with a fixed-term contract first, keeping an eye on them if they are doing well, and so the firms presently exercise a stronger supervision and control of employees behaviour. There is no evidence that fixed-term contracts induce employers to hire more workers. They only have changed the hiring

36. See F. BECKER, "Temporary Work in Germany", in W. ALBEDA, R. BLANPAIN, G. VELDKAMP, *Temporary Work in Modern Society*, Deventer, Kluwer, 1978, vol. I, p. 131.

37. For the situation in Canada see G. ENGLAND, *Part time, casual and other atypical workers — a legal view*, Kingston, 1987.

practice. The unemployment-rate has not fallen during the last years. Up to now, the use of fixed-term contracts has not raised the amount of employed persons. But workers have been forced to change the status of their employment. The employment is no longer based on an unlimited status with a lifetime perspective depending on the choice of the employee. Employment is based now on limited duration where the choice of an unlimited engagement depends on the decision of the employer. That means that the perspective of unlimited employment has been strongly affected thus ending substantial legal advantages which employees enjoyed under the traditional employment protection law.

5. The Alternative: Equal Employment Standards for All

The splitting of labor law standards for several groups of employees is being heavily opposed by the European trade unions and their affiliated political parties³⁸. One reason for a secondary employment law had been the long unemployment period which should be brought to an end by a greater variety of job contracts. But as unemployment mainly results from the replacement of work by new technologies, microelectronics — computer and telecommunications technologies have become job killers rather than job creators. On the one hand all parties of the industrial relations system agree that the diminished amount of work ought to be shared by a greater number of people. The shortening of working hours no longer exclusively serves an individual employee's health or personality but it also favours labor market policy.

But as to the practical consequences of this manpower policy, conservative governments and unions represent totally different viewpoints. The unions try to find a way to have a greater number of people share the reduced amount of work which guarantees more equity for all workers. The trade unions in Germany as well as those in a number of other European countries seek to secure an across-the-board shortening of the working time of all employees without any decrease in wages. In addition to extending the annual holiday leave an introducing rest pauses there are two particular approaches for achieving this aim.

First there is the issue of shortening the overall working life of individual employees either by lowering the age of retirement in general or by providing employees the possibility of leaving the production process prematurely.

38. The European Trade Union Institute, (ed.), *Flexibility and Jobs — Myths and Realities*, Brussels, 1985.

Since 1984 there is a special German law which provides employees this possibility³⁹. At the age of 58 they can leave the firm prematurely and claim for 65% of the wages from the employer. But this possibility exists only if there is a collective agreement which regulates the details. The employer shall hire another worker for everybody who leaves the firm prematurely. In this case the employer gets half of his wage costs back by the employment insurance. That means he is not allowed to use the early retirement of his workers to reduce his staff.

But the employment effect of this act did not turn out to be as high as suspected. Only 20% of the concerned group of workers who are at least 58 years old made use of it, *i.e.* from 1984 to 1986, about 60,000 workers. And not each of them was replaced by a new one in the case of early leave (only 40 000).

Premature retirements are an effort to develop alternative strategies in order to avoid lay offs. So a number of European countries encourage retirement at an earlier age⁴⁰. Britain for example has passed special legislation similar to German legislation that helps finance early retirement under the condition that the firm replaces the retiree with an new employee. The retirement age at which employees are provided with a full pension has been lowered *e.g.* in France (down to 60) and the Netherlands (down to 62).

Since the employment effect of those measures is not overwhelming, in most European countries unions, follow a second track in trying to negotiate a shortening of the work week. They hold that only decisions banning or restricting overtime hours can have an employment effect. In France they were supported by the socialist government which reduced the statutory work week in 1982 from 40 to 39 hours but widened at the same time the range for flexible working hours⁴¹. In 1986 the new conservative government tried to abolish this legislation. But it failed because proper parliamentary procedure had not been respected. Also in the Netherlands in 1985 the 38 hour week was introduced by the government following a 1982 negotiation between employers and unions. In this agreement the reduction of working time had been bargained by conceding a greater variety of working time including weekends⁴².

39. For more details see M. WEISS, "Federal Republic of Germany", in R. BLANPLAIN (ed.), *International Encyclopaedia for Labour Law and Industrial Relations*, Deventer, Kluwer, 1986, vol. 5, p. 60.

40. As an example see the Netherlands, *Europe sociale*, n° 2, 1985, p. 82.

41. Y. DELAMOTTE, "La loi et la négociation collective en France — Réflexion sur l'expérience 1981-1985", *Industrial Relations*, vol. 42, 1987, p. 46.

42. For the agreement see *Bulletin d'informations sociales*, n° 2, 1983, p. 240.

On the contrary the German government heavily opposed the unions fight for a collective bargaining agreement to reduce the work week. In 1984 German metal industry unions had to stand a long strike of eight weeks before they succeeded. At the beginning of 1985, the work week in the metal branch was reduced to 38.5 followed by other industries later on. But the unions had to concede more flexibility in the working time, the details of which had to be bargained between works council and employers. In 1987 metal industry unions succeeded in shortening the working time by a new collective agreement without a strike. From the beginning of 1989 weekly working hours in this industry will be downgraded to 37 hours.

It is difficult to figure out whether and to what extent the shortening of working hours will lead to new jobs or to the prevention of further lay offs only. There are many pros and cons in this debate. Some argue that there is no employment effect at all by shortening working hours. To them, other market conditions — for instance: an expanding economy, the terms of trade and monetary exchange — are regarded as the only reliable ways to achieve greater employment. But some research studies on the employment effect of reduced working hours brought evidence that there is a net effect of this measure as creating about 100 000 new positions.

This may be regarded as a poor result but it seems to be the only way in the near future to increase the number of people who share the diminished amount of jobs under equal conditions.

Conclusion

During the past years most European countries have favoured a legislation deregulating employment protection standards in order to increase the external flexibility of personnel staffing. They have forced legislation which provides second class protection for employees in fixed-term contracts in triangular relationships or as part-timers. The increasing use of these peripheral workers has on the one hand many advantages for the employers by means of lower direct and indirect labor costs, *e.g.* the costs of redundancy payments and carrying workers on payrolls during nonproductive periods. But relaxing some restrictions on short-term contracts raises on the other hand some problems. The growth of peripheral employees bears the danger of reinforcing the segregation between “good” core employment characterized by higher payment, fringe benefits and job security and “bad” peripheral employment characterized by low pay, few if any benefits and no job security. Employees are to complete the work at hand as best as they can within the time allotted to them. Depending on the falling or increasing workload they are hired for a flexible time with less if any job protection.

This development of inequity in labor law standards is opposed by the unions. They try to protect equity for all employees especially by a collective agreement for shortening the statutory work week. This manpower policy of the unions might not be sufficient to stop further segmentation of the workforce. It has to be completed by the return to an active manpower policy of governments including a reinstatement of equal employment protection.

The German Employment Promotion Act of 1985 for instance is in effect only until the end of 1989. After the evaluation of the law's efficiency the government has to decide if the act will be cancelled or extended. It is a challenge for the unions to influence the government to cancel the act. Should the unions succeed in having the act cancelled they could claim to have restored more equity in employment.