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DISMISSAL ON GROUNDS OF SUSPICION: A LEGAL COMPARISON BETWEEN GERMANY AND NEW ZEALAND

TALES ABOUT CRIMINAL EMPLOYEES AND PARANOID EMPLOYERS

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ABSTRACT

This research paper deals with the termination of employment in Germany and New Zealand. It particularly aims to analyse dismissal of employees on grounds of mere suspicion in relation to possible dishonesty and criminal offences, and raises the question of whether or not this kind of dismissal can be lawful. Part I gives the introduction to the topic. Part II illustrates the basic framework of termination of employment in Germany, whereas Part III looks into the termination of employment in New Zealand. Part IV provides a definition for *dismissal on grounds of suspicion* and demonstrates the conflict of interest. The German approach of dismissal on grounds of suspicion, developed by the Federal Labour Court, is presented in Part V, and Part VI shows how New Zealand employment courts deal with this issue. Problems, doubts and arguments against the legal validity of *dismissal on grounds of suspicion* are expressed and reviewed in Part VII. The main thesis of this paper is that *dismissal on grounds of suspicion* pushes the limit of employment law, and only complies with fundamental rights and employment law provisions if it takes the requirements set out by German and New Zealand employment courts into account.

STATEMENT ON WORD LENGTH

The text of this research paper (excluding footnotes, coversheet, contents and bibliography) comprises approximately 15,800 words.

I INTRODUCTION

Physical labour has always been at the core of life for most people. In the last 50 years, the impact of economic, social and political changes has resulted in major changes to employment patterns and approaches to industrial relations.[1] The era of globalisation has made it possible to transfer workplaces, companies and whole industries to other countries in no time at all. Today, employees and employers find themselves in a world of insecurity caused by the permanent threat of competition. As a result of this, one of the fundamental legal issues in employment law is the termination of employment.

Employment law regulates the employment relationship. It attempts to bring together the different interests of employees and employers and the various threads of law that have an influence on the employment relationship.[2] How a legal system poses and answers this question generally depends on the attitude, history, needs, aims and, more often, on the most powerful industrial lobby of a country. Yet an increasing number of workers are not protected by employment law. What is more, even when employment law is constituted, this does not mean that employees are adequately protected.[3] Some countries have developed employment law, which can be labelled as *Employment Protection Act* and other countries have at least constituted the general right to challenge dismissal. But what happens when constituted employment law comes to an end? What if established provisions do not provide appropriate answers? What if employment courts deal with approaches that are more doubtful and confusing than clear and helpful?

Dismissal on grounds of suspicion in cases of possible dishonesty and criminal offences is very much a grey legal area. In the last 12 months, for example, at least three sports-celebrities (Jan Ulrich, Ivan Basso and Michael Rasmussen) were summarily dismissed by their employers without official evidence or legal

[1] *Employment Law Guide* (Butterworths, Wellington, 2001) 3, The nature of modern employment law, Intro 2.
[2] *Employment Law Guide*, above n1, 3, The nature of modern employment law, Intro 2.
[3] Paul Benjamin 'Who needs Labour Law?' in Joanne Conaghan (ed) *Labour Law in an Era of Globalization* (Oxford University Press, New York, 2002) 75, 75.

proceedings.[4] At the time of dismissal, only suspicion of anti-doping rule violation and breach of the employment contract existed. The media and public condemnation was sufficient enough to warrant the ignoring of fundamental rights, employment law and ethical principles. These three cases, however, are not individual exceptions. All over the world, an unknown number of employees have to defend themselves against allegations of unproved dishonesty, and employers have to deal with potentially criminal employees. It seems that employers, in cases of possible dishonesty, dismiss employees very quickly in order to prevent damage to the company. Moreover, the legal systems for termination of employment are not prepared for situations of just possible misconduct, and treat guilty and innocent employees with the same provisions. Thus, many questions arise, like whether the presumption of innocence does not apply to employees or the area of employment law. Can suspicion create an appropriate reason for dismissal? Has an employee the right to silence during an investigation conducted by the employer? Is it not the employer's obligation to protect an employee, or at least to behave objectively, until a final and official decision has been made? In other words, is the employer justified in dismissing an employee on grounds of mere suspicion?

Dismissal based on possible dishonesty is a quite complex legal area, which affects different and contrary interests of employers and employees. In Germany, dismissal on grounds of suspicion is a separate legal area, established by the national employment courts.[5] In New Zealand, it is not. Dishonesty, however, is recognised as reason for dismissal.[6] Accordingly, New Zealand employment courts also deal with cases of possible dishonesty and criminal offences. The decided cases and the developed solutions in the jurisdiction of Germany and New Zealand are controversial, not because of the Judges and their decisions but because of the question of whether or not dismissal on grounds of mere suspicion is consistent with fundamental rights and the established employment provisions. In Germany, quite a few legal experts and

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[4] The cases of Jan Ulrich, Ivan Basso and Michael Rasmussen can be found with many background information at different internet sports-homepages, like ESPN (http://espn.go.com/), Sports Illustrated (http://sportsillustrated.cnn.com/), Eurosport (http://www.eurosportpress.com/), UCI Pro Tour (http://www.uciprotour.com/) and Sky Sports (http://www.skysports.com/).

[5] Ulrich Preis *Arbeistrecht* (Verlag Dr. Otto Schmidt KG, Cologne, 2003) § 66 IV 2c.

[6] *Employment Law Guide*, above n1, 550, Dishonesty, ER 103.39.

scholars raise doubts about the legitimacy of dismissal on grounds of suspicion. To better understand these doubts, it is necessary to look at the national legal systems of termination of employment first. Then if these doubts are justified, a wider review of cases and the legal system as a whole is required.

II TERMINATION OF EMPLOYMENT IN GERMANY

There are different possibilities how an employment relationship can end. In Germany, the most important way for termination of employment was and is dismissal.[7] In 2001, German employment courts had to decide more than 582,000 trials and approximately 271,000 or 47 % were related to termination of employment.[8] As a result, the law of termination can be labelled as the *nervous system* of the German employment law.[9]

A The German Approach

In Germany, job security is provided by law, especially by the *Dismissal Protection Act 1951* (KSchG (GER)).[10] The KSchG (GER) offers a quasi provision to safeguard existing standards for an employment relationship. In other words, job security can be seen as legal right and employees have a right to continue employment.[11]

Where an employer wants to dismiss an employee, the employer has to show a legitimate interest for the termination of employment. In addition, if the employment

[7] In New Zealand the most common way or reason for termination of employment might be resignation in order to go to a new job. Germany, in contrast, has a quite high unemployment rate. The situation of the labour market is completely different compared to New Zealand. Germans do not change employment as often as New Zealanders, because they do not have to possibility to do so. Therefore, dismissal becomes the most common reason for termination of employment.
[8] Ulrich Preis, above n5, § 56 I.
[9] Ulrich Preis, above n5, § 56 I.
[10] The German translation for *Dismissal Protection Act 1995* is *Kuendigungsschutzgesetz* (KSchG).
[11] Clyde W Summers "Propter Honoris Respectum: Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries" [1995] Notre Dame Law Review 41, 7.

contract is subject to the KSchG (GER), the employer has to show a so-called *social justification* of dismissal. Otherwise, the KSchG (GER) declares dismissals, which are *socially unjustified* as legally void.[12] The KSchG (GER) recognises that employment is the basis for the economical and social existence of employees. Consequently, the legal intent of the KSchG (GER) is to protect employees from arbitrary dismissals and to create a balance between the contrary interests of employers and employees.[13] The protection of employment or employees, however, is not an absolute right. Employers have a fundamental right of freedom of profession (Article 12 of the *German Constitution 1949*), which includes the right for dismissal.[14]

B Types of Dismissal

The *German Civil Code 1900* (BGB (GER))[15] determines in Section 620 to 627 the different types and requirements of dismissal. These provisions are added and modified by different other acts, like the KSchG (GER) or the *Works Constitution Act 1952* (BetrVG (GER))[16].

Within German employment law two main types of dismissal are available: *dismissal with a period of notice* and *summary dismissal*.[17] Dismissal with a period of notice is constituted in Section 620 and 622 BGB (GER), and can be seen as the usual case for termination of employment. Employers and employees are authorised to end employment without any reason at a particular time in the future.[18] This kind of dismissal is bound by the expiry of a determined time limit. In plain words, the employment relationship ends not immediately after dismissal has been declared. The

[12] Thus, critics argue that an efficient forecast for dismissal trials is impossible and that the existing KSchG (GER) has an inhibiting effect on the German economy. Pure reduction of dismissal protection, however, would never develop new employment. In contrast, employment relationships would become more and more insecure.
[13] Ulrich Preis, above n5, § 56 I.
[14] Ulrich Preis, above n5, § 66 I.
[15] The German translation for *German Civil Code 1900* is *Buergerliches Gesetzbuch* (BGB).
[16] The German translation for *Works Constitution Act 1952* is *Betriebsverfassungsgesetz* (BetrVG).
[17] The German translation for *Summary Dismissal* is *ausserordentliche fristlose Kuendigung*. Therefore, the exact translation would be extraordinary dismissal.
[18] Wilhelm Duetz *Arbeitsrecht* (CH Beck Verlag, Munich, 1999) 126.

length of the time limit is appointed by law and depends on the time the employment relationship existed

In contrast, summary dismissal, which is positioned in Section 626 BGB (GER), is not connected to a specific time limit. Where an important and serious reason for dismissal has occurred, employers and employees are authorised to terminate the employment relationship immediately. The German legislator wanted to provide the option to stop employment directly, if it is not reasonable to declare a dismissal with a period of notice.[19]

C Requirements for Dismissal

The German legal system keeps the different types of dismissal within various legal bounds. These legal bounds can be divided into general and specific requirements. General requirements are constituted in the BGB (GER) and apply to all types of dismissal, whereas specific requirements only apply to specific types of dismissal.[20] For instance, a lawful summary dismissal has to comply with the general requirements and the specific requirements that were directly established for summary dismissal. Thus, employers who want to dismiss lawfully, have to take all relevant requirements into account.[21]

D Prohibitions of Dismissal

The employer's right to terminate an employment relationship is subject to different legal prohibitions of dismissal and prohibitions of discrimination or

[19] Ulrich Preis, above n5, § 56 II.
[20] The general requirements set out that each dismissal has to be in written form, the will or declaration of termination has to be clearly formulated, a dismissal has to be declared by an authorised person, a dismissal has to be received by the other party in order to be effective and a dismissal has to comply with different legal *prohibitions of dismissal*.
[21] Wilhelm Duetz, above n18, 126-130; Ulrich Preis, above n5 § 57.

disadvantage.[22] These provisions can have a massive effect on the legal validity of dismissal.

An employment relationship is based on a contract between employers and employees.[23] Therefore, it is possible to make contractual agreements or clauses within the employment contract, which exclude prohibitions of dismissal or arrange financial compensation in the case of dismissal. It is also possible to exclude the right of dismissal, with a period of notice, by an agreement. In that case, employment can only be terminated by summary dismissal.[24]

The German legislator, however, was not willing to leave the content of employment relationships or the requirements for dismissal just with employers and employees. Thus, a couple of provisions and prohibitions of dismissal are not excludable. Summary dismissal, for example, is not excludable, neither by contractual agreement nor by the German legislator.[25] The right for dismissal is part of Article 12 of the *German Constitution 1949* (GG (GER)) and the freedom of profession.[26] Employers and employees need the possibility to terminate an employment relationship should there occur extraordinary circumstances or extreme burden. In other words, the prior purpose of summary dismissal is to protect. Consequently, one can argue that the non-excludable right for summary dismissal is a basic right, to which employers and employees are entitled.

As a basic principle it is possible to divide prohibitions of dismissal into general prohibitions and prohibitions because of the status or situation of an employee. In Germany, protection exists for all employees. Yet, there are employees that need more protection than others. The existing prohibitions of dismissal are various. For this reason, this paper will only focus on prohibitions that have an influence on dismissal on grounds of suspicion.

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[22] Ulrich Preis, above n5, § 58.
[23] Wilhelm Duetz, above n18, 50; Ulrich Preis, above n5 § 20.
[24] Ulrich Preis, above n5, § 58.
[25] BAG, 8 August 1963 – 5 AZR 395/62; Ulrich Preis, above n5, § 58.
[26] The German translation for *German Constitution 1949* is *Deutsches Grundgesetz* (GG).

1 *General prohibitions of dismissal*

General protection against dismissal is mainly constituted in the KSchG (GER). This special act of employment law does not restrict the employer's fundamental right for freedom of profession, but it limits the employer's freedom for unlimited termination of employment.[27] Employment is the basis for existence for employees and the KSchG (GER) eliminates capriciousness and unfair dismissals.[28]

The KSchG (GER) does not establish requirements or provisions for lawful dismissal. Section 1 KSchG (GER) only declares when a dismissal is unlawful. The wording of the law sets out:[29] Termination of employment will be strictly unlawful, if a dismissal is not *socially justified.* A socially justified dismissal is where the employee is dismissed because of well-founded personal, conduct or economic reasons[30], like ineptness, misconduct or insolvency. In this process, the crucial point of judgment or the appropriate source to answer the question of what might be well-founded and what not, is the view of an objective, fair and decent employer.[31]

General protection against dismissal provided by the KSchG (GER), however, is bound by different requirements. Dismissal protection does not capture all kinds of companies, nor does it include all employees.[32] The scope of the KSchG (GER) is constituted in Section 1, 14, 23 and 25 KSchG (GER). As a result, Section 1 KSchG (GER) might offer support for employees and make dismissals unlawful, but it does not guarantee an unlimited employment relationship or the right of continuance.[33]

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[27] Wilhelm Duetz, above n18, 141.
[28] Wilhelm Duetz, above n18, 141.
[29] KSchG (GER), s1 (1).
[30] KSchG (GER), s1 (2).
[31] Wilhelm Duetz, above n18, 142.
[32] Wilhelm Duetz, above n18, 139.
[33] Ulrich Preis, above n5, § 62.

2 *Special prohibitions of dismissal*

Special prohibitions of dismissal provide protection for specified employees. This protection from dismissal depends on a particular status of the employee or on specific circumstances.[34] Therefore, the scope of these prohibitions can be identified quite easily, because only employees that are stated or named by law receive protection. Where an employee argues that the termination of employment is unlawful because of special prohibitions of dismissal, the burden of proof lies with the employee.[35]

Special prohibitions of dismissal are also widely spread through German employment law. Accordingly, this paper will only present three special prohibitions of dismissal, which have a remarkable effect on dismissal on grounds of suspicion related to possible dishonesty and criminal acts.

(a) Section 9 Mother Protection Act 1952 (MuSchG (GER))[36]

Section 9 (1) MuSchG (GER) takes the special circumstance of pregnancy of women into account. If an employer has knowledge about the pregnancy of a female employee, the termination of the employment relationship is basically prohibited, during the time of pregnancy and up to four months after the child was born.[37]

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[34] Ulrich Preis, above n5, § 58.

[35] Ulrich Preis, above n5, § 58. In this paper the term *burden of proof* is used and can be understood as onus or obligation of proof. In other words, the term determines which party (employer or employee), involved in a court session, has to give evidence of allegations and circumstances. Basically the party that raises an allegation has to give evidence of it. Therefore, in cases of dismissal the burden of proof lies with the employer, because he argues that the employee has caused dismissible conduct or breach of contract.

[36] The German translation for *Mother Protection Act 1952* is *Mutterschutzgesetz* (MuSchG).

[37] MuSchG (GER), s9 (1).

(b) Section 18 Federal Child Raising Benefit Act 1985 (BErzGG (GER))[38]

Another prohibition of dismissal, which is quite close to Section 9 (1) MuSchG, is constituted in Section 18 (1) BErzGG (GER). One parent has the opportunity and the right to take child-raising-leave for one year, after the child is born. For this reason, the employer is not allowed to terminate the employment agreement with the affected employee and parent, if he or she has applied for child-raising-leave.[39]

(c) Section 85 Social Security Act IX 2001 (SGB IX (GER))[40]

Section 85 SGB IX (GER) constitutes a special prohibition of dismissal for severely disabled employees.[41] The Federal Labour Court has decided that the protection of this provision is applicable, regardless of whether or not the employer knew about the disability.[42]

3 Interim conclusion

The three presented special prohibitions of dismissal make a dismissal impossible, with one single exception. This exception raises a serious question in terms of dismissal on grounds of suspicion related to dishonesty and criminal acts.

In all three cases, employers have the possibility to dismiss an employee, if they have consulted the relevant state authority, and if the consulted state authority has accepted the presented reason for dismissal.[43] Dismissal will be strictly unlawful, where the state authority has refused its acceptance or where the acceptance is absent, because the employer has not applied for it. Moreover, the acceptance has to be given before a dismissal is declared. Dismissal without the acceptance of the state authority

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[38] The German translation for *Federal Child Raising Benefit Act 1985* is *Bundeserziehungsgeldgesetz* (BErzGG).
[39] BErzGG (GER), s18.
[40] The German translation for *Social Security Act 2001* is *Sozialgesetzbuch* (SGB).
[41] SGB IX (GER), s85.
[42] BAG, 31 August 1989 – 2 AZR 8/ 89.
[43] MuSchG (GER), s9 (3); BErzGG (GER), s18 (1); SGB IX (GER), s85.

is legally void, even where the acceptance is given afterwards.[44] As a result, disabled, pregnant or child-raising employees are only dismissible, if the relevant and consulted state authority agrees first.

It might be possible that employers do not have to take notice of the so-called *presumption of innocence*, if they want to dismiss an employee on grounds of suspicion. State controlled institutions and authorities, however, have to consider the presumption of innocence.[45] Accordingly, if an employer wants to dismiss disabled, pregnant or child-raising employees, the relevant state authority becomes involved and has to agree. In that case, one has to ask whether or not dismissal on grounds of suspicion related to possible dishonesty and criminal offences is, either strictly unlawful, or an exemption from the basic principle that the state has to take the presumption of innocence into account.

E Summary Dismissal

In the past, dismissal on grounds of suspicion related to dishonesty and criminal acts was exclusively declared as summary dismissal.[46] On the one hand, where employees might have committed a criminal offence, employers want to terminate the employment agreement as fast as possible. An official investigation by the police or prosecution against employees creates worries by employers that the reputation or image of their company becomes damaged. On the other hand, dismissal on grounds of suspicion related to dishonesty, as dismissal with a period of notice, is highly controversial and doubtful within German employment law.[47] Where an employer is willing to declare a dismissal with a period of notice, one has to ask, if the employer is not able to wait for the findings of an official investigation conducted by the police or prosecution. Nevertheless, the fear of permanent damage to the company often outweighs the employer's patience and calmness to wait for official findings.

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[44] BAG, 16 October 1991 – 2 AZR 332/ 91.
[45] Jura ABC *Die Unschuldsvermutung* at http://www.jur-abc.de/cms/index.php?id=831 (last accessed 06 August 2007).
[46] Ulrich Preis, above n5, § 64 IV 1.
[47] Kurt W Hergenroeder *Muenchner Kommentar zum BGB* (Beck, Munich, 2005) § 626 no. 196; Ulrich Preis, above n5, § 66 IV 2c.

Summary dismissal is constituted in Section 626 (1) BGB (GER) and is rightfully entitled to both sides of the employment contract.[48] The right for summary dismissal is based on Article 12 of the *German Constitution 1949*.[49] Section 626 (1) BGB (GER) is an indispensable right, which can not be changed or annulled by any agreement. Moreover, even the mere restriction of the right for summary dismissal would be unlawful.[50]

Section 626 (1) BGB (GER) sets out that employers and employees are allowed to terminate the employment relationship without a period of notice, if an appropriate and plausible reason for the immediate termination has occurred.[51] In other words, the employment agreement can be terminated directly where the contractual relationship has been strongly or irreconcilable breached.

1 Requirements

Summary dismissal will only be lawful, if it complies with both the general requirements of termination (see Chapter *II C*, page 11) and the special requirements that only apply to this kind of dismissal. These special requirements are:[52]

(1) The declaration of termination has to be formulated clearly as a summary dismissal. The recipient (employee) of the declaration (dismissal) has to know undoubtedly that the employment relationship is finished immediately.[53]

(2) Most significant, summary dismissal requires an important reason, which is able to justify immediate termination of employment.[54] Whether or not the reason for dismissal is seen as important depends on objective or neutral

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[48] Wilhelm Duetz, above n18, 162. It is needless to say that most problems arise where the employer declares the termination of employment.
[49] Ulrich Preis, above n5, § 66 I.
[50] BAG, 8 August 1963 – 5 AZR 395/ 62. See also page 12.
[51] BGB (GER), s626 (1).
[52] Wilhelm Duetz, above n18, 162.
[53] BAG, 13 January – 7 AZR 757/ 79.
[54] BGB (GER), s626 (1).

criteria. Accordingly, it has to be an appropriate and plausible reason, at first view. The personal motivation of the employer for dismissal is irrelevant.[55]

(3) Summary dismissal is bound to a two week time limit.[56] The employer has to declare a dismissal within two weeks after the misconduct or breach of contract has happened. In order to avoid a hasty decision or dismissal, the Federal Labour Court has decided that employers are allowed to conduct adequate investigations and consultations first. In this case, the two week time limit will not start to run unless the employer has found decisive facts.[57]

The last provision causes big doubts as to whether or not dismissal on grounds of suspicion related to dishonesty is acceptable.[58] The central feature for dismissal on grounds of suspicion is suspicion. Consequently, if facts cannot be established, the two week time limit would never start to run and summary dismissal could be declared at any point in the future. One can argue, dismissal on grounds of suspicion offers employers the possibility to take the law into their own hands.

2 Important reason for dismissal

Section 626 (1) BGB (GER) requires summary dismissal facts, that make the continuance of employment and a dismissal with a period of notice unacceptable. The Federal Labour Court reviews this condition in two steps.[59] Firstly, it proves if a situation or case has happened that can establish an appropriate and plausible reason for dismissal in general. Secondly, if such a case has happened the Federal Labour Court conducts a so-called *comparison of interests* and checks if the case can establish a specific appropriate and plausible reason.[60]

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[55] Ulrich Preis, above n5, § 66 III 2.
[56] BGB (GER), s626 (2).
[57] BAG, 21 March 1996 – 2 AZR 455/ 95.
[58] Mathias Busch "Die Verdachtskuendigung im Arbeitsrecht" (1995) MDR 217, 219.
[59] BAG, 2 March – 2 AZR 280/ 88.
[60] BAG, 2 March – 2 AZR 280/ 88.

(a) Reason for dismissal in general (Step 1)

Reasons that can justify summary dismissal in general are various and come into effect under different aspects. Section 1 KSchG (GER), however, which sets out that a dismissal has to be *socially justified*, is not applicable in terms of summary dismissal.[61] On the one hand, Section 626 (1) BGB (GER) requires an important reason of dismissal. Consequently, it is impossible that a different statute or just the KSchG (GER) provides this reason. On the other hand, the requirement of *social justification* is not appropriate in the case of summary dismissal.[62] If an employee causes reasons that justify the immediate termination of employment, the question of *social justification* does not arise, because really serious misconduct or breach of contract has occurred.

Nevertheless, because of the hierarchical relationship between dismissal with a period of notice and summary dismissal, the Federal Labour Court has decided that the reason for summary dismissal shall be established in the style or shape of Section 1 (2) KSchG (GER).[63]

(i) Reasons for dismissal set out by Section 1 KSchG (GER)

Section 1 (1) KSchG (GER) constitutes that a dismissal will be unlawful, if it is not *socially justified. Social justified* is a dismissal, where the employee is dismissed because of well-founded conduct, personal or economic reasons.[64]

(1) Economic reasons for dismissal take not just the employer's freedom of profession, but also the effects of business competition into account.[65] Employers need the possibility to respond to the changes in the economic market, and unfortunately quite often companies go bankrupt. Therefore, dismissal on grounds of economic reasons is *socially justified*, where the

[61] Ulrich Preis, above n5, § 66 IV.
[62] Ulrich Preis, above n5, § 66 IV.
[63] BAG, 15 August 1989 – 2 AZR 280/ 88.
[64] KSchG (GER), s1 (2).
[65] Ulrich Preis, above n5, § 63 I.

termination of employment is the result of imperative changes within the company.[66]

(2) Conduct reasons for dismissal deal with the direct behaviour and performance of employees.[67] Dismissible conduct, directly caused by the employee, can occur in many different types. Thus, dismissal on grounds of conduct reasons will be *socially justified*, where the employee has breached the employment contract, work rules or single duties of the employment agreement.[68] If the occurred misconduct, however, is not a serious or intentional one, the employer has to declare a written warning first before he can declare a summary dismissal.[69]

(3) Personal reasons for dismissal take the individual abilities, qualifications, attributes, in other words, the competence of an employee into account.[70] The Federal Labour Court has determined employers need the possibility to terminate an employment relationship, if the employee has not or not longer the ability to comply with the duties of the employment contract.[71]

The difference between personal and conduct reasons for dismissal might be confusing and, in fact, the borders overlap. Personal reasons for dismissal are also often a result of misconduct and breach of contract. Breach of contract in terms of conduct reasons, however, is committed by a wilful and controllable act, whereas misconduct in terms of personal reasons, is a result of uncontrollable or unintentional actions due to lack of competence.[72] The most common forms of personal reasons are increasing age, absence of qualification or sickness.[73] As a result, culpable or intentional misconduct is not required for dismissal on grounds of personal reasons.

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[66] Ulrich Preis, above n5, § 63 I.
[67] Wilhelm Duetz, above n18, 144.
[68] Ulrich Preis, above n5, § 65 I 1.
[69] BAG, 18 May 1994 – 2 AZR 626/ 93.
[70] Ulrich Preis, above n5, § 64 1.
[71] BAG, 20 May 1988 – 2 AZR 682/ 87.
[72] Ulrich Preis, above n5, § 64 1.
[73] Wilhelm Duetz, above n18, 143.

One can argue personal reasons for dismissal occur where the initial purpose of an employment contract (work performance) cannot be reached (anymore).

(b) Particular reason for dismissal or 'comparison of interests' (Step 2)

The second part of the test whether or not circumstances can justify summary dismissal is highly influenced by the so-called *comparison of interests*.[74] The *comparison of interests* includes a few other requirements, which are also reviewed by employment courts.

(1) To answer the question of whether or not dismissal is lawful, the employer has to conduct a *forecast* into the future.[75] The Federal Labour Court has decided dismissal is not the appropriate way to respond to an already occurred breach of contract.[76] In other words, dismissal shall not punish past misconduct, but rather prevent misconduct that might happen in the future. For this reason, the Federal Labour Court has implemented the so-called *principle of prognoses*.[77] Where the employment relationship cannot be continued in an adequate way, after misconduct has occurred, the prognosis is negative and the termination of employment might be necessary.

(2) Furthermore, summary dismissal will only be suitable, if other or less restrictive measures are not available.[78] As employment is the basis of existence for employees, the so called *principle of ultima ratio*[79] forces the employer to think about other options apart from dismissal, like a written warning, a change of the employment contract or the displacement of the effected employee.[80]

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[74] Ulrich Preis, above n5, § 62 IV.
[75] Ulrich Preis, above n5, § 62 II.
[76] BAG, 15 August 1984 – 7 AZR 536/ 82.
[77] BAG, 15 August 1984 – 7 AZR 536/ 82. For instance, the loss of confidence or the possibility of other misconducts can establish a negative forecast for the future.
[78] Ulrich Preis, above n5, § 62 III.
[79] Ultima ratio is a Latin term or expression and can be translated as the last option.
[80] BAG, 30 May 1978 – 2 AZR 630/ 76.

(3) The last part of the *comparison of interests* is the strict impossibility of continuing the employment relationship.[81] Summary dismissal is only lawful, when the employer can give good reasons why an immediate termination of employment is more important than a dismissal with a period of notice.[82]

3 *Interim conclusion*

The German law of termination is structured and coherent. The legislator has recognised the more powerful position of employers and that employment is the basis for livelihood. Consequently, German employment law puts employees in a stronger but not dominant position and attempts to create a balance between the different interests of employers and employees. However, it seems to be that these procedures do not work in terms of dismissal on grounds of suspicion. An employer, who wants to dismiss lawfully by summary dismissal has to take all the presented sections, provisions, principles and requirements into account. The German law of termination is not only structured and coherent, but rather quite massive and overwhelming. Companies without their own lawyers within the company, struggle to use this part of law correctly or in the right manner. Thus, doubts and criticism by employers are understandable.

III TERMINATION OF EMPLOYMENT IN NEW ZEALAND

Until 1907, New Zealand was a British colony.[83] Therefore, the legal system of New Zealand was shaped and highly influenced by the United Kingdom. The English *common law system*, which was implemented in New Zealand, is based on judicial cases, precedents and the further development of common law. New Zealand employment law, however, developed on its own. Over the years, employment law

[81] Ulrich Preis, above n5, § 62 IV.
[82] BAG, 14 November 1984 – 7 AZR 474/ 83.
[83] Auswaertiges Amt (Department of Foreign Affairs) *Neuseeland Geschichte* at https://www.auswaertiges-amt.de/diplo/de/Laenderinformationen/Neuseeland/Geschichte.html (last accessed 23 July 2007).

was increasingly influenced by enacted law. Statutory concepts were introduced and much of the former common law was replaced.[84]

A The New Zealand Approach

New Zealand employment law is quite dynamic compared to other employment legislation.[85] Firstly, New Zealand employment law has been fundamentally changed twice in the last fifteen years. Secondly, it seems that the New Zealand legislator is not too afraid to strike a new or alternative path in terms of employment law.[86]

In New Zealand common law, termination of employment with appropriate notice was generally lawful. Employers who wanted to dismiss an employee were not forced to give any reasons for dismissal. This situation has changed.[87]

New Zealand employment law now requires always good and sufficient reasons for every termination of employment by the employer. In other words, New Zealand employment law does not allow a one-sided termination of employment by the employer without an explanation.[88] In addition, Section 120 (1) of the *Employment Relations Act 2000* (ERA 2000 (NZ)) sets out the right that employees, within 60 days after the dismissal or after the employee has become aware of the dismissal, may request the employer to provide a statement of the reasons for dismissal. Where such a request has been made, the employer has to provide the statement to the employee within 14 days.[89]

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[84] *Employment Law Guide* (Butterworths, Wellington, 2001) 7-13, The Development of New Zealand Employment Law, Intro.5-10.
[85] Martin E Risak "Arbeitsrecht in Neuseeland" (2004) ZIAS 301.
[86] Martin E Risak, above n85, 301.
[87] *Employment Law Guide*, above n84, 7-13, The Development of New Zealand Employment Law, Intro.5-10.
[88] Martin E Risak, above n85, 320.
[89] ERA 2000 (NZ), s120 (2).

B Involuntary Termination

In New Zealand, employment contracts can also be terminated in various ways and under different circumstances.[90] Within New Zealand employment law, it is possible to describe the termination of employment, which is initiated by the parties of the employment contract as voluntary and involuntary.[91] The termination, initiated by the employer, will be relevant for this paper only. Where the employee accepts such a termination, the employment agreement definitively ends. That, however, is not what usually happens and the termination of employment delivered by employers can generally be labelled as *involuntary termination*.[92]

Involuntary termination of employment itself can be divided into two other groups. These two groups can only be separated by the requirement of a *period of notice*. Where the employer takes a contractual agreed or reasonable period of notice into account, the termination of employment is just termed as *dismissal*. Where the employer terminates the employment relationship immediately, the termination is called *summary* or *instant dismissal*.[93]

C Grounds for Dismissal

Once a dismissal has been challenged, the employer has to show that the dismissal was based on good and sufficient reasons. The range of possibilities for grounds for dismissal is extremely wide and only limited by human ingenuity.[94] It is therefore almost impossible to catalogue all grounds for dismissal in a comprehensive way. Confirmed or accepted and common reasons for dismissal are:[95]

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[90] The ERA 2000 (NZ) constitutes or divides employment contracts into individual and collective employment agreements. Individual employment contracts that have no expiry date generally continue until one of the contractual parties takes actions to bring the employment relationship to an end. For collective employment agreements are subject to Section 52 and 53 ERA 2000 (NZ) which sets up special provisions of validity periods, and an employment contract can also be enforced beyond its expiry date.

[91] Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002) 139.

[92] Martin E Risak, above n85, 320.

[93] Martin E Risak, above n85, 322.

[94] *Employment Law Guide,* above n84, 541, Conduct of the employee, ER 103.31.

[95] *Employment Law Guide,* above n84, 541-556, Grounds for dismissal, ER 103.31 – 103.45.

(1) misconduct;

(2) disobedience and breaches of work rules;

(3) dishonesty and breaches of the duty of loyalty, trust and confidence;

(4) assault, fighting, threats and harassment;

(5) insubordination;

(6) negligence;

(7) permanent absence or other attendance problems like illness;

(8) incompatibility with the company or other employees;

(9) unsatisfactory work performance;

(10) incompetence;

(11) redundancy.

Summary dismissal (without prior warning) is of course quite a dramatic form of termination. Therefore, a summary dismissal requires obviously more serious or specific reasons.[96] The immediate termination of employment might be justified in cases of:[97]

(1) *serious disobedience* of a lawful and reasonable order given by the employer;

(2) *serious misconduct* that causes a fundamental breach of the employment contract.

D Summary Dismissal

Summary dismissal is a common law term where common law rules apply. Nevertheless, the question of *justification*, which is actually a statutory concept under the ERA 2000 (NZ), has to be reviewed in cases of summary dismissal as well.[98]

Misconduct is identified as behaviour, which is contrary to the requirements of the employment contract. The scope for employee misconduct, however, is extremely

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[96] *Employment Law Guide,* above n84, 540, Summary dismissal, ER 103.30.
[97] *Mazengarb's Employment Law* (Buttherworths, Wellington, 2007) Summary dismissal, ERA 103.26 available at http://www.lexisnexis.com.helicon.vuw.ac.nz/ (accessed 24 September 2007).
[98] *Employment Law Guide,* above n84, 539, Wrongful dismissal and unjustifiable dismissal, ER 130.28.

wide stretched and the Court of Appeal has declared it is not possible to define the kind of serious misconduct, which is able to justify an instant dismissal.[99]

In *Central Clerical Workers Union v Taranaki Maori Trust Board*, Chief Judge Goddard took the view that the grounds for dismissal have to be of such gravity that the continuation of the employment relationship becomes just impossible.[100] This opinion, however, has been disapproved of by different Judges. In *Smith v Armourguard Security Ltd*, Judge Travis declared that an instant dismissal did not require the impossibility of continuation of the employment contract.[101] Judge Palmer followed this point of view in *Click Clack International Ltd v James*[102], and in *BP Oil NZ Ltd v Northern Distribution Workers Union* also the Court of Appeal did not go as far as Chief Judge Goddard.[103] As a result, grounds for summary dismissals must be serious or special, but the impossibility of the employment agreement is not a necessity. Unfortunately, this approach is not comprehensible and far from clear and definitive.

E Protection against Dismissal

New Zealand was one of the first countries of the Commonwealth to have a specific statutory procedure for employees to challenge dismissals.[104] Where employees believe that they have been unjustifiably dismissed, the ERA 2000 (NZ) provides the possibility of taking action against an employer or former employer, a so-called *personal grievance*. These personal grievance procedures, which were first introduced by the *Industrial Relations Act 1973*,[105] are now based in Section 103 of the ERA 2000 (NZ).

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[99] *Northern Distribution Workers Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483 (CA).
[100] *Central Clerical Workers Union v Taranaki Maori Trust Board* [1989] 3 NZILR 612 (EmpCt) Goddard CJ.
[101] *Smith v Armourguard Security Ltd* [1993] 1 ERNZ 446 (EmpCt) Travis J.
[102] *Click Clack International Ltd v James* [1994] ERNZ 15 (EmpCt) Palmer J.
[103] *BP Oil NZ Ltd v Northern Distribution Workers Union* [1989] 3 NZLR 580 (CA); *Northern Distribution Workers Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483 (CA).
[104] *Employment Law Guide,* above n84, 7-13, The Development of New Zealand Employment Law, Intro.5-10.
[105] *Employment Law Guide,* above n84, 7-13, The Development of New Zealand Employment Law, Intro.5-10.

1 Personal grievance

Originally, personal grievance procedures were only available to union members.[106] The *Employment Contracts Act 1991* extended personal grievance procedures to all employees. A personal grievance can be seen as a claim that an employee may have against an employer or former employer. Moreover, Section 113 of the ERA 2000 (NZ) says clearly that a personal grievance action is the only way for an employee to challenge a dismissal. The term personal grievance is defined by including an extremely wide range of employer actions. For this reason, Section 103 ERA 2000 (NZ) constitutes six particular grounds on which a personal grievance action may be taken:[107]

(1) unjustifiably dismissal;
(2) disadvantage in employment by an unjustifiable action;
(3) discrimination;
(4) sexual harassment;
(5) racial harassment and
(6) duress in relation to union membership.

A personal grievance refers only to a completed action by an employer. It is not sufficient to base a grievance upon a potential action.[108] Furthermore, the dismissed employee has 90 days from the date the dismissal was delivered or declared to raise a personal grievance with the affected employer. To raise a personal grievance, the employee need only make the employer aware that there is a grievance, which the employee wants the employer to address.[109]

The most common and, for this paper, relevant personal grievance is a claim that the declared dismissal was unjustifiable. The requirements for such a successful claim are:[110]

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[106] Alexander Szakats *Dismissal and Redundancy Procedures* (Butterworths, Wellington, 1990) 41.
[107] ERA 2000 (NZ), s103 (1).
[108] *Employment Law Guide*, above n84, 505, Personal grievance, ER 103.3.
[109] ERA 2000 (NZ), s114.
[110] *Employment Law* Guide, above n84, 510, Introduction, ER 103.7.

(1) the employee must have been dismissed, and

(2) the dismissal must be unjustifiable.

F Unjustifiable Dismissal

The term *unjustifiable dismissal* is unfortunately not defined in the ERA 2000 (NZ). It is, however, a statutory concept and with the introduction of this concept by earlier legislation, the Courts had to develop new guidelines and distinguish it from *wrongful dismissal* at common law.[111] In *Auckland City Council v Hennessey*, Judge Somers formulated an appropriate definition:[112]

> "Its integral feature is the word 'unjust'. A course of action is unjustifiable when that which is done cannot be shown to be in accord with justice or fairness."

1 Justification

What can be seen as just and fair always depends on the facts of the individual case. Once an employee has made use of its right to challenge a dismissal[113], the employer (and not the employee) has to show that the dismissal was justified.[114]

The proof of justification generally involves two elements. The first is that there must be a substantive reason, which is able to justify a dismissal (Chapter *III A* and *C*, page 23 and 24). The second is that the procedure by which the employer reached the decision to dismiss must be fair.[115]

(a) Substantive justification

The question of whether or not a reason is good, sufficient and able to justify a dismissal is from time to time unclear and doubtful. Traditionally, employment courts

[111] Alexander Szakats, above n106, 93.
[112] *Auckland City Council v Hennessey* [1982] ACJ 699, 703 (CA) Somers J.
[113] ERA 2000 (NZ), s103 (1).
[114] *Employment Law Guide*, above n84, 535, Justification, ER 103.24.
[115] *Employment Law Guide*, above n84, 535, Justification, ER103.24.

have decided cases on their individual merits, rather than lay down general and constant guidelines. The *Employment Relations Amendment Act 2004*, however, has introduced Section 103A, which includes a subjective test as grounds for dismissal, which reads:

> 103A Test of Justification
>
> For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.[116]

(b) Fair and reasonable dealing

In order to show that a dismissal has been justified, employers not only have to show that there were good reasons for a dismissal, they also have to give proof that the dismissal was carried out in *procedural fairness*. If it cannot be established that a dismissal was carried out in procedural fairness, the dismissal will be unjustified regardless of the substantive justification.[117] In *New Zealand (with exceptions) Food Processing, etc, IUOW v Unilever New Zealand Ltd*[118] the Court declared that the minimum requirements would be:[119]

(1) the employee must be given notice of the specific allegation of misconduct;

(2) the employee must be given a real opportunity to explain or refute the allegation;

(3) there must be an unbiased consideration of the explanation, and

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[116] ERA 2000 (NZ), s103A.
[117] *Employment Law Guide*, above n84, 575, Procedural Fairness, ER 103.56.
[118] *New Zealand (with exceptions) Food Processing, etc, IUOW v Unilever New Zealand Ltd* [1990] 1 NZILR 35, 40 (EmpCt) Goddard CJ.
[119] Richard Rudman, above n91, 127.

(4) the employee must be told that dismissal could be the result of any planned investigation.

Employers have argued that if a dismissal was substantively fair then it should not be held to be unjustified because it was carried out in procedural unfairness.[120] The Employment Court, however, has taken the view that it is inappropriate to separate substantive justification and procedural fairness, especially when the question is whether the dismissal was justified at all.[121]

G Interim Conclusion

At first view, the New Zealand law of termination seems to be more straightforward and easier to handle compared to the German one. This appearance, however, is deceptive and get lost if one takes a closer look into the legal area of New Zealand employment law, because it is more complex than it appears.

As result of a *civil law system*, German employment law, including the law of termination, is completely and in detail based on legal codes and statutes. Accordingly, people of the legal profession have to deal with a huge mass of statutes, sections, rules and provisions. This existing mass makes it almost impossible for employers to handle legal issues of the employment relationship alone and lawfully. New Zealand employment law, in contrast, has the background of a common law system. The developed statutory concept of New Zealand employment law and the ERA 2000 (NZ) constitutes "only" basic principles. Consequently, the mass of legal codes, statutes and sections is much less than in Germany. This difference creates the appearance that New Zealand employment law is easier and more straightforward.

Indeed, the "single" ERA 2000 (NZ) is more straightforward to handle than the over sixty employment law related legal codes of Germany.[122] The constituted principles of the ERA 2000 (NZ), however, are supplemented, enhanced and completed by hundreds and thousands of cases and decisions by New Zealand

[120] *Employment Law Guide*, above n84, 575, Procedural Fairness, ER 103.56.
[121] *Phipps v New Zealand Fishing Industry Board* (1996) 1 ERNZ 195 (EmpCt) Goddard CJ.
[122] Reinhard Richardi *dtv Arbeitsgesetze* (65ed, Beck, Munich, 2007).

employment courts. In addition, some issues of New Zealand employment law are still subject to common law rules, which create two separate judicial systems within one legal area.[123] Therefore, New Zealand employers are faced with the same problem as their German colleagues. It is almost impossible to handle legal problems of the employment relationship lawfully without professional support. The mass of German legal codes and statutes is balanced by a mass of New Zealand cases and employment court decisions.

Nevertheless, New Zealand and German law of termination are surprisingly similar. Both legal systems classify the different types of dismissal in the same way. Both legal systems require adequate and comprehensible reasons for dismissal. And, both legal systems judge employer decisions on the basis of fairness, rationality and reasonableness. The weaker position of employees is recognised in both countries, and both countries attempt to balance this difference. Thus, the terms and headings might be different, but the legal principle and intent is the same.

IV DISMISSAL ON GROUNDS OF SUSPICION

An employment relationship can be defined as a mutual contract and an individually-related obligation.[124] The basis for such an agreement is confidence.[125] For example, in New Zealand, Section 4 (1) of the *Employment Relations Act 2000* (ERA 2000 (NZ)) constitutes that the parties of an employment agreement shall always deal in good faith. Relationships based on confidence, by their very nature, can mean there is a lot of room for mistrust. The strong suspicion of an employer that one of his employees has committed a criminal offence or another breach of contract within the employment relationship can destroy essential confidence. Moreover, it can easily create a situation in which the continuance of the employment agreement becomes impossible.[126]

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[123] Alexander Szakats, above n106, 12. For example, summary dismissal and wrongful dismissal.
[124] Wilhelm Dutz *Arbeitsrecht* (Beck, Munich, 1999) 63.
[125] BAG, 14 September 1994 - 2 AZR 164/94; *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd* [1990] 3 NZLR 549 (CA).
[126] BAG, 14 September 1994 - 2 AZR 164/94; *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd* [1990] 3 NZLR 549, 556 (CA).

Dismissal on grounds of suspicion[127] is very much a grey legal area, regardless of the legal system or country. German and New Zealand employment law always require adequate reasons for dismissal, and the employer has to support this reasons with assured facts. When employers dismiss on the basis of mere suspicion in relation to possible dishonesty or criminal offences, they often miss this requirement for reasons for dismissal. Therefore, the legal validity of dismissal on grounds of suspicion is quite controversial.

A Definition

Dismissal on grounds of suspicion can be defined as a dismissal where the employer terminates the employment relationship because of an action or behaviour by the employee, which destroys the confidence between the parties and where the employer just assumes and cannot give proof of, at the time dismissal is declared.[128]

The most common reason for dismissal on grounds of suspicion is suspicion of possible dishonesty and criminal offences.[129] This includes, for instance, fraud of money by a cashier or theft by a warehouse-employee. Other reasons for dismissal on grounds of suspicion related to dishonesty and criminal acts, which do not damage directly the employment agreement, are also possible.[130] These include, for instance, attempted murder by an employee, fraud as a bank employee or the presentation of a faked sickness certificate. Accordingly, almost any unwanted action of an employee can cause dismissal on grounds of suspicion as long as they are not provable.

The difference between dismissal on grounds of suspicion and other types of termination can be difficult. To illustrate dismissal on grounds of suspicion and the general perils associated with the process, a practical example is given here.

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[127] The German translation for *dismissal on grounds of suspicion* is *Verdachtskuendigung*.
[128] Olaf Deinert "Die Verdachtskuendigung – Neues zum alten Thema?" (2005) 8-9 AuR 285, 286.
[129] BAG, 4 June 1964 - 2 AZR 310/63.
[130] BAG, 17 May 1984 - 2 AZR 3/83.

1 BAG[131], 20th of August 1997 (2 AZR 620/96)

The following case is an example from the German jurisdiction, but similar cases may be found in almost every other Western or modern jurisdiction such as the United Kingdom, New Zealand or France. The circumstances and the content of this case are therefore most important. These circumstances can be discussed in relation to any law of termination, regardless of where the case actually happened.

In 1997, the Federal Labour Court of Germany had to decide the following case after two lower Employment Courts made contrary judgments:

Employee X was working as a cleaner in company B. The main client of company B was hospital C. Every morning, several employees of company B cleaned the premises of hospital C. A strict cleaning plan did not exist. After several cases of theft of money from the desk of the chief physician, hospital C decided to install a video camera. The video camera recorded the next theft. Due to bad lightning conditions (it was 5am in the morning) it was not possible to identify the thief exactly but it could be seen that the thief was wearing work clothes from company B. For this reason, hospital C threatened to cancel its cleaning contract with company B, if company B were not able to identify and dismiss the offending employee. During a meeting, company B showed the video tape to all their employees. The majority of the employees declared that the person on the video tape resembled employee X. The German prosecution started an investigation against employee X on the basis of the video tape and the declarations of the other employees. Employee X, in contrast, declared that she was not the thief and that any employee of company B, who was cleaning at hospital C, could be the wanted person. Moreover, employee X's shift generally started 30 minutes later (at 5.30am) than the time at which the theft was recorded. Accordingly, it is possible that employee X was not even on the premises of hospital C when the theft happened. The investigations conducted by company B did not lead to other or new results.

[131] BAG means *Bundesarbeitsgreicht*, which is the Federal Labour Court of Germany.

Company B terminated the employment contract with employee X without prior notice. The reason for dismissal was the strong suspicion that employee X committed the theft at hospital C. A few weeks later, the German prosecution stopped all investigations and brought no further action against employee X, because of lack of evidence. The thief was never identified or caught and employee X always maintained her innocence. Hospital C is still the main client of company B, because the thefts stopped after employee X was dismissed.[132]

B Conflict of Interest

In such a case, the different interests of the affected employee and employer clash. On the one hand, the employee could lose his employment without any real reasons if he is innocent. Moreover, an investigation by the prosecution or a bad employment reference is able to ruin any further occupational career. On the other hand, if the employer keeps, in his employ, a person whom he does not trust, theoretically it could cause more damage were he the culpable party. The further employment of such employees may affect the relationship between colleagues, damage the working atmosphere, and be a serious risk for the company and its economic situation.[133]

The desire of an innocent employee to keep and protect his workplace definitively outweighs the employer's interest of termination, whereas the employer's desire to terminate definitively outweighs the interests of a guilty employee. One can thus argue that the biggest problem for the legal validity of a dismissal on grounds of suspicion is the fact that the level of protection for employees and their workplace cannot be defined.[134]

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[132] Although the fact that the employer would have lost the business was irrelevant for the final ruling, the Federal Labour Court decided that the declared dismissal was lawful. At the time of dismissal, the employer complied with all necessary requirements for dismissal in cases of possible dishonesty (see the following Chapter).

[133] Olaf Deinert, above n128, 286.

[134] Olaf Deinert, above n128, 288.

V DISMISSAL ON GROUNDS OF SUSPICION IN GERMANY

In Germany, dismissal on grounds of suspicion related to possible dishonesty, criminal acts and breach of contract is a separate area of law.[135] The Federal Labour Court of Germany and the majority of lower employment courts take the view that not only a proved breach of the employment contract, but rather the strong suspicion of dishonesty, criminal offences or other misconduct are reasons that can justify summary dismissal.[136]

Courts justify this opinion with the fact that not only provable actions, but also strong suspicions of such actions can destroy the fundamental confidence between employers and employees. Any employment relationship, as an individually-related obligation, requires mutual confidence. Where this confidence gets lost, it raises an adequate reason for dismissal according to Section 626 (1) BGB (GER). Thus, the Federal Labour Court considers that Section 626 (1) BGB (GER) includes suspicion as ground for dismissal.

One can argue the Federal Labour Court labels dismissal on grounds of suspicion as dismissal where the employer declares that suspicion of a non-proved criminal offence or other breach of contract has destroyed the essential employment confidence, which is fundamental for the continuance of the employment relationship. In other words, strong suspicion of dishonesty is directly recognised as reason for dismissal.[137]

The most common type for dismissal on grounds of suspicion is summary dismissal.[138] Where employees might have committed a criminal offence, employers try to terminate the employment contract as fast as possible, to avoid further damage to the company. The Federal Labour Court, however, accepts both, dismissal on grounds of suspicion as summary dismissal and as dismissal with a period of notice.[139]

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[135] Kurt W Hergenroeder *Muenchner Kommentar zum BGB* (Beck, Munich, 2005) § 626 no. 195-200; Ulrich Preis *Arbeitsrecht* (Dr. Otto Schmidt KG, Cologne, 2003) § 66 IV 2c; Wilhelm Duetz, above n124, 144.

[136] BAG, 4 June 1964 - 2 AZR 310/63; BAG, 26 March 1992 - 2 AZR 519/61; BAG, 14 September 1994 - 2 AZR 164/94; BAG, 13 September 1995 - 2 AZR 587/94; BAG, 20 August 1997 - 2 AZR 620/96.

[137] BAG, 10 February 2005 - 2 AZR 189/04.

[138] Ulrich Preis, above n135, § 66 IV 2c.

[139] BAG, 10 February 2005 - 2 AZR 189/04.

A Requirements

If dismissal is based on suspicion and not on facts, it is always possible that an innocent employee, in other words, an employee that did not breach the employment contract, becomes dismissed. For this reason, the Federal Employment Court has developed quite high requirements for lawful dismissal on grounds of suspicion.[140] Every employer who wants to dismiss an employee on grounds of suspicion has to conduct an extensive *comparison of interest*, which includes different steps and circumstances.[141]

1 Specific position of employment

The Federal Labour Court determined dismissal on grounds of suspicion is acceptable because strong suspicion of dishonesty is able to destroy the necessary confidence between employer and employee.[142] Accordingly, an idea had been developed that dismissal on grounds of suspicion is only applicable where the affected employee has had a special position of confidence, compared to other employees.[143] If such a special relationship of confidence does not exist, it shall be reasonable to wait for findings of an official investigation before the employer makes his decision.

The Federal Labour Court did not follow this approach.[144] Every employment relationship is based on confidence, loyalty and welfare, which means, every employment relationship is a relationship of special confidence. Suspicion of dishonesty, the loss of confidence and the impossibility to continue an employment agreement can occur everywhere, regardless of the position of employment. Consequently, a particular position of employment is not required for dismissal on grounds of suspicion.

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[140] BAG, 4 June 1964 – 2 AZR 310/63.
[141] Kurt W Hergenroeder, above n135, no. 195-200; Ulrich Preis, above n135, § 66 IV 2c.
[142] BAG, 10 February 2005 - 2 AZR 189/04.
[143] Klaus Moritz "Grenzen der Verdachtskuendigung" (1978) 9 NJW 402, 405.
[144] BAG, 14 September 1994 -2 AZR 164/94; Oliver Luecke "Unter Verdacht: Die Verdachtskuendigung (1997) 36 BB 1842, 1846.

2 *Investigation conducted by the employer*

Employers who want to dismiss someone on grounds of suspicion have to take all reasonable steps to support the clarification of circumstances. In brief words, employers have a *duty or obligation of clarification.*[145] This *duty of clarification* is based on the *ultima ratio principle* (see Chapter *II E 2* (b) 2, page 21) and a condition for the validity of dismissal.

An investigation conducted by the employer is always possible and desired. Moreover, it would stop the statutory two week time limit for summary dismissal set out by Section 626 (2) BGB (GER).[146] Nevertheless, the employer also has the option to wait for the findings of criminal proceedings conducted by a criminal court or the prosecution.[147] In this case, the two week time limit for summary dismissal starts when the findings have been notified. Where employers, however, decide to conduct their own investigation, it has to be managed fairly and efficiently.[148] The actions of the employer during an investigation are restricted by the personal rights of the employee and a violation of these rights can cause the exclusion of evidence.[149]

3 *Hearing of the affected employee*

Essential part of the *duty of clarification* and of every investigation by the employer is a hearing of the affected employee.[150] Generally a hearing of employees is not necessary before dismissal. The special circumstances of dismissal on grounds of suspicion, however, require the possibility for employees to explain their point of view.

Employees need the possibility to delete existing suspicion and to give evidence of their innocence. Thus, the hearing has to be conducted in an appropriate way and related to the relevant circumstances only. Furthermore, the employer has to

[145] BAG, 11 April 1985 - 2 AZR 239/84.
[146] Mathias Busch "Die Verdachtskuendigung im Arbeitsrecht" (1995) MDR 217, 219.
[147] Kurt W Hergenroeder, above n135, no. 199; BAG AP BGB § 626 Verdacht strafbarer Handlung Nr. 1.
[148] Mathias Busch, above n146, 219.
[149] BAG, 27 March 2003 – 2 AZR 51/02.
[150] BAG, 13 September 1995 - 2 AZR 587/94.

provide all facts and findings. Mere subjective evaluation or the restraint of information is strictly prohibited.[151] If the employee can provide supporting facts of his innocence, which are later invalidated by new suspicions, the hearing has to be repeated.[152]

The hearing should always be the last action of the employer's investigation. Therefore, the hearing has to be conducted within one week after the employer has finished his investigations, and the end of the hearing marks the beginning of the two week time limit for summary dismissal.[153] The purpose of the hearing requires that the hearing has to be conducted before a dismissal is declared. Where the hearing is conducted later or not conducted at all, dismissal will be unlawful.[154]

4 Strong suspicion based on objective facts

The suspicion of dishonesty or other misconduct has to be based on objective circumstances and has to be strong. The personal or subjective view of the employer is completely insufficient or irrelevant.[155]

Although, there is no direct evidence that the affected employee has breached his duties, there has to be at least evidence for strong suspicion that the employee actually caused serious misconduct. Furthermore, circumstances or facts which raise suspicion against an employee have to be so strong that the essential confidence between employer and employee can get lost. Thus, the possibility that the affected employee actually committed a criminal offence or dishonesty has to be as good as certain.[156]

Suspicion, however, as reason for dismissal will only be accepted and appropriate, if a fair and reasonable employer would have reached the same decision

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[151] BAG, 13 September 1995 - 2 AZR 587/94.
[152] Kurt W Hergenroeder, above n135, no. 199.
[153] BAG, 13 September 1995 - 2 AZR 587/94.
[154] BAG, 4 June 1964, 2 AZR 310/63; BAG, 30 April 1987 - 2 AZR 283/ 86; BAG, 13 September 1995 - 2 AZR 587/94.
[155] Kurt W Hergenroeder, above n135, no. 198.
[156] BAG, 10 February 2005 - 2 AZR 189/04.

given all the circumstances.[157] Moreover, dismissal on grounds of suspicion will be lawful only, if a corresponding dismissal based on available facts would be lawful as well.[158] One can argue, only strong suspicion of misconduct based on objective circumstances can establish a *negative forecast* (see Chapter *II E 2* (b) 1, page 21) for the employment relationship.

5 Extensive effect on the employment relationship

The strong suspicion of the employer has to be related to serious or significant misconduct and has to have an extensive negative effect on the employment relationship.[159]

Where the employer's suspicion is related to dishonesty or a criminal offence, a dismissal will be lawful only, if the alleged misconduct or action would also justify dismissal if it were in fact occurred and not just based on suspicion. In any other case of alleged misconduct or breach of contract, which is not related to possible dishonesty, the affected employee must have caused suspicion culpably.[160]

Controversial, however, is the question if suspicion of dishonesty and criminal acts has to be compulsively connected to the employment agreement. Lower employment courts have taken the view that dismissal on grounds of suspicion is only lawful, where the suspicion has a directly connection to the activities and duties of the employment contract.[161] The Federal Labour Court did not follow this opinion.[162] Indeed, suspicion of misconduct has to have a negative impact on the employment relationship and the mutual confidence. Suspicion of dishonesty and criminal offences, however, are always able to destroy the basis for an employment agreement, regardless of whether or not suspicion is directly connected to the employment contract. Accordingly, any behaviour or suspicion of misconduct, within or beyond employment, can cause and justify dismissal as long as it has an extensive negative effect on the employment relationship.[163]

[157] BAG, 21 May 1992 – 2 AZR 10/92; BAG, 12 August 1999 - 2 AZR 923/98.
[158] BAG, 12 August 1999 - 2 AZR 923/98.
[159] BAG, 04 June 1997 - 2 AZR 526/96; Kurt W Hergenroeder, above n135, no. 198.
[160] Kurt W Hergenroeder, above n135, no. 198.
[161] LAG Cologne, 16 January 1990 - 11 Sa 853/89.
[162] BAG, 26 March 1992 - 2 AZR 519/61.
[163] BAG, 26 March 1992 - 2 AZR 519/61.

6 *Dismissal based on suspicion*

The employer has to declare clearly that a dismissal is based on suspicion related to possible dishonesty, criminal offences or breach of contract.[164] In other words the employer has to notify the employee and to label a dismissal as dismissal on grounds of suspicion.

Employers have to provide one particular reason for dismissal. Therefore, they are not allowed to move from one reason to another one, if the first one fails.[165] German employment law differentiates quite clearly between dismissal based on facts and dismissal on grounds of suspicion. Strong suspicion is a separate reason for dismissal and dismissal on grounds of suspicion is a separate area of law within German employment law. Where a dismissal is based on suspicion, reason for dismissal is not possible miscount or dishonesty, but rather suspicion of misconduct, which causes the loss of confidence. In other words, dismissal is declared because of lack of confidence and nothing else.[166]

As a result, the different types of dismissal require special proceedings, and employers have to make clear what kind of dismissal they want to declare. Otherwise, the termination of employment becomes likely unlawful, because either the relevant proceedings are not applicable or the special requirements for a particular dismissal are not fulfilled.[167]

B Interim Conclusion

The requirements for dismissal on grounds of suspicion, set out by the Federal Labour Court, have to be present at the time a dismissal is declared. Although, the requirements are quite high the possibility to dismiss an innocent employee still exists. The legal validity for dismissal on grounds of suspicion related to dishonesty and criminal offences depends not on the decision of a criminal court or the findings of the

[164] BAG, 14 September 1994 - 2 AZR 164/94.
[165] Ulrich Preis, above n135, § 66 IV 2c.
[166] BAG, 4 June 1964 - 2 AZR 310/ 63; Kurt W Hergenroeder, above n135, no. 195.
[167] Kurt W Hergenroeder, above n135, no. 195. For instance, if an employer labels a dismissal as dismissal on grounds of facts, which is based on possible dishonesty that he cannot give proof off, dismissal will be unlawful. In contrast, if the employer labels the same dismissal clearly as dismissal on grounds of suspicion, dismissal might be lawful, because different provisions are applicable.

prosecution. Only the occurred damage of confidence for the employment relationship is important. If an employer can support his allegation that possible dishonesty has destroyed the mutual confidence, in an adequate and comprehensible way, dismissal on grounds of suspicion will be accepted. Therefore, the employee's guilt is irrelevant as long as any other fair and reasonable employer could safely rely upon the reached decision.[168] Where an employment court, however, takes the view that the *negative forecast* (see Chapter *II E 2* (b) 1, page 21) for the future of the employment relationship fails, which basically means, evidence for the innocence of the employee is available, dismissal will be unlawful and employees have the right for reinstatement.[169]

Nevertheless, a dismissal only based on strong suspicion raises questions, and the approach of the Federal Labour Court to accept dismissal on grounds of suspicion under particular circumstances is still controversial and not universally accepted.

VI DISMISSAL ON GROUNDS OF SUSPICION IN NEW ZEALAND

In New Zealand, dismissal on grounds of suspicion related to possible dishonesty and criminal acts is not a separate legal area. Nevertheless, dishonesty is clearly recognised as misconduct that can justify dismissal, regardless of whether or not dishonesty takes place at work.[170] Dishonesty as reason for dismissal develops a couple of problems for an employer, especially where disciplinary matters and criminal proceedings become entangled.

A The Employer's Decision

The perpetration of a criminal offence does not necessarily constitute a breach of the employment contract.[171] Yet, the perpetration of criminal acts has an influence on the employment relationship, especially if the offence is related in some way to

[168] BAG, 21 May 1992 – 2 AZR 10/92; BAG, 12 August 1999 - 2 AZR 923/98.
[169] Ulrich Preis, above n135, § 66 IV 2c ; Kurt W Hergenroeder, above n135, no. 200.
[170] *Mazengarb's Employment Law* (Buttherworths, Wellington, 2007) Dishonesty, ERA 103.36 available at http://www.lexisnexis.com.helicon.vuw.ac.nz/ (accessed 24 September 2007).
[171] *Honda NZ Ltd v NZ Boilermakers Union* [1991] 1 NZLR 392, 395 (CA).

employment. From time to time, the breach of expected standards is so obvious that specific rule violation is not even required.[172] For instance, the breach of work rules that result in damage to the employer's equipment generally justifies dismissal, regardless of whether or not the action committed a criminal act. In *Wellington Road Transport Union v Fletcher Construction Co*, the Court decided that employees are also subject to *obvious rules of everyday behaviour*, which basically means to behave within legal boundaries.[173] This approach of the Court is definitively comprehensible and fair, but becomes difficult to follow, where dishonesty, criminal acts or other misconduct cannot be proved.

In the case of possible dishonesty, it has been suggested that the employer should suspend an employee until criminal proceedings are completed.[174] Suspending an employee, however, causes another significant problem for employers. Employers would have to suspend an employee on full pay for the whole time of the suspension.[175] Official investigations or criminal proceedings can take a couple of months and long delays in the hearing of a criminal charge are not impossible. As a result, employers would have to carry the financial risk of the affected employee in relation to wages and other benefits. This might be acceptable where the employee is not found guilty and can come back to work, but becomes fatal where the employee is guilty and the reason for dismissal is definitively established. A quite common approach in cases of possible dishonesty is to base a dismissal on other grounds than the alleged action of dishonesty.[176] Indeed, this solution removes the financial risk and the possibility that a charge or investigation is not sustained because of lack of evidence or lack of intent. The employer, however, has to take care not to make the affected employee the scapegoat for the present circumstances. Thus, the employer has to put the true allegation to the employee and not ambiguous, vague or some type of *catch all* allegation.[177]

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[172] *Employment Law Guide* (Buttherworths, Wellington, 2001) 542, Breaches of work rules and related conduct, ER 103.34.
[173] *Wellington Road Transport Union v Fletcher Construction Co* [1983] ACJ 653, 654-655 (AC) Williamson J.
[174] *Mulder v Ocean Beach Freezing Co* [1984] ACJ 487, 488 (AC) Horn CJ.
[175] Nicola Whittfield "Employment law and police investigations" (2002) 2 ELB 28, 30.
[176] *Mazengarb's Employment Law*, above n 170, Dishonesty, ERA 103.36.
[177] *Employment Law Guide*, above n172, 550, Dishonesty, ER 103.39.

1 *Auckland Hotel Union v Bourke*[178]

In *Auckland Hotel Union v Bourke*, it was suspected that the employee, who was working as a bartender, was giving free drinks to customers. The employer decided to employ private investigators. A written report from the investigators confirmed the employer's suspicions and the dismissal took place. In addition, the employee was charged with theft from the evidence of the investigators. The charge, however, was dismissed because the evidence of both investigators was regarded as highly doubtfully.

The union of the affected employee argued that the dismissal was unjustified because the employee had been acquitted on charges of theft. The Court, however, rejected this argument. Criminal law procedures and civil law procedures require different considerations and a different standard of proof. Criminal charges of theft require specific allegations and proof beyond reasonable doubt. Employment courts, in contrast, have to decide whether or not a dismissal is shown to be unjustified by a consideration of all the circumstances and on a *balance of probabilities*.[179]

Employers are allowed to take criminal proceedings into account to come to a decision whether or not a dismissal should be declared.[180] Moreover, they do not have to show criminal intent and even if the criminal intent of the employee is definitely missing, it does not mean that a dismissal would be unjustified.[181] Nevertheless, dismissal should not be based purely on the belief that the employee has committed a criminal offence, nor should employers pay too much attention to criminal investigations. Criminal law proceedings and civil law proceedings require different standards and different conditions.[182] Consequently, the findings of both proceedings

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[178] *Auckland Hotel Union v Bourke* [1981] ACJ 491(AC).
[179] *Auckland Hotel Union v Bourke* [1981] ACJ 491, 492 (AC)Williamson J.
[180] *Moore v Commissioner of Police* [2001] ERNZ 335 (EmpCt) Shaw J.
[181] *Wellington Road Transport Union v Fletcher Construction* [1983] ACJ 653, 654 (AC) Williamson J; *McPherson v Chloride Batteries Ltd* [1983] ACJ 291, 291 (AC) Horn J.
[182] *Honda NZ Ltd v NZ Boilermakers Union* [1991] 1 NZLR 392, 394 (CA); *Auckland Hotel Union v Bourke* [1981] ACJ 491, 492 (AC) Williamson J.

can be different. For this reason, it is very important that employers reach and make their decision independently from any police or other external investigations.[183]

B Standard of Proof

Proof in personal grievance cases generally involves two parts.[184] Firstly, which party has to bear the *burden of proof*, and secondly, what *standard of proof* is required. While the first question can be answered quite easy, the second question causes a few problems, especially in cases of (possible) dishonesty.

Where a person makes an allegation, it is suitable for that person to be required to show the necessary justification.[185] This approach accords with ILO Convention 158 (Article 9) and is also established in New Zealand employment law. Employees have the right to challenge dismissals[186], and once a dismissal has been challenged, the employer (and not the employee) has to show that the dismissal was justified.[187] Accordingly, if a dismissal includes allegations of unlawful behaviour, the burden of proof definitively rests with the employer.[188] The standard of proof, however, is a different legal issue. In cases of (possible) dishonesty and criminal offences, the standard of proof is quite stringent, but also ambiguous, as a result of the nature of the allegations.[189]

1 Honda NZ Ltd v NZ Boilermakers Union[190]

In *Honda NZ Ltd v NZ Boilermakers Union* an employee was given authority to remove five cans of mixed paint. A little later, when the employee began to leave with

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[183] *Employment Law Guide*, above n172, 550, Dishonesty, ER 103.39; *Hati v Auckland Farmers Freezing Co-op Ltd* [1988] NZILR 667, 668 (AC) Finnigan J.
[184] *Employment Law Guide*, above n172, 498, Proof, ER 102.9.
[185] *Employment Law Guide*, above n171, 498, Proof, ER 102.9. In this paper the term *burden of proof* is used and can be understood as onus or obligation of proof. In other words, this term determines which party (employer or employee), involved in a court session, has to give evidence of allegations and circumstances. Standard of proof, in contrast, determines the scope or the measure of the burden of proof.
[186] ERA (NZ), s103 (1).
[187] *Employment Law Guide*, above n172, 535, Justification, ER 103.24.
[188] *Employment Law Guide*, above n172, 498, Proof, ER 102.9.
[189] *Employment Law Guide*, above n172, 550, Dishonesty ER 103.39.
[190] *Honda NZ Ltd v NZ Boilermakers Union* [1991] 1 NZLR 392 (CA).

the cans, one of them was inspected and was observed to contain new thinners. The employer declared that the employee had attempted to remove a can of new thinner without authority. The employee was dismissed on grounds of 'unauthorised possession of company property'. The Labour Court held that on the totality of the evidence it was not proved that the employee had attempted to remove clean thinners.

The Court of Appeal declared that in such a case the burden of proof, of course, rests with the employer. Therefore, the challenging legal question was the level of the standard of proof.[191] In other words, it was unclear of what and in which scope the employer has to give evidence.
The Court said the presented case is a civil law case to which the civil standard of persuasion applies.[192] The question of whether or not dismissal is justified depends on what the employee has done. Dismissal is a consequence of misconduct, and the employer has to prove that the employee is guilty of misconduct. The justification has to be considered in the light of the employment relationship.[193] The difference between civil law and criminal law standards might decrease with the seriousness and the criminality of the circumstances. A criminal offence or criminal intention, however, is not necessary to establish grounds for dismissal. For this reason, a criminal offence which did not involve intent can still justify dismissal.[194]

As a result, the standard of proof, which the employer must attain, is the civil standard of probabilities rather than the criminal standard of beyond reasonable doubt'.[195] Where a serious charge is the basis for dismissal, the supporting evidence must be by its very nature, serious as well. This does not mean proof beyond reasonable doubt, nor does it mean 'some kind of half-way house between proof on a balance of probabilities and proof beyond reasonable doubt'.[196] The standard of proof in cases of (possible) dishonesty is no more than *the barest balance of probabilities*, because of the special nature of the employment relationship.[197]

[191] *Honda NZ Ltd v NZ Boilermakers Union*, above n190, 394.
[192] *Honda NZ Ltd v NZ Boilermakers Union*, above n190, 395.
[193] *Honda NZ Ltd v NZ Boilermakers Union*, above n190, 396.
[194] *Honda NZ Ltd v NZ Boilermakers Union*, above n190, 395.
[195] *Honda NZ Ltd v NZ Boilermakers Union*, above n190, 395.
[196] *Honda NZ Ltd v NZ Boilermakers Union*, above n190, 394.
[197] *Honda NZ Ltd v NZ Boilermakers Union*, above n190, 395.

2 *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd*[198]

In *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd* four Air New Zealand Ltd cabin crew members were believed by United States Customs to have attempted to import alcohol removed from the bonded stock in the aircraft. Air New Zealand Ltd, after making extensive inquiries, dismissed the four crew members for serious misconduct. The crew members claimed that they purchased the alcohol at retail outlets in the United States. The employer did not allege that the employees committed theft, but did allege they caused the company grave embarrassment.

Again, the burden of proof undoubtedly lies with the employer. Yet, the difficult question for the Court was, what the employer must prove to show that the dismissal was justifiable. The Court declared good working relations depend on loyalty and confidence. Where the employee destroys this relationship to the extent that the employer has reasonable grounds to believe there has been misconduct, dismissal can be justifiable.[199] Thus, the employer has to 'show that the decision to dismiss was in the circumstances and at the time a reasonable and fair decision'.[200] From the employer's point of view, they have to show that they had reasonable grounds, and did believe that misconduct had occurred. What can be seen as reasonable grounds for a belief of misconduct depends on the individual case. At the time of dismissal, however, the employer must have either clear evidence or conducted investigations that left him on the balance of probabilities with grounds to believe that the employee caused misconduct.[201]

The *Test of Justification* (see Chapter *III F 1* (a), page 28), as constituted in the ERA 2000 (NZ), determines that the question of whether or not a dismissal was justifiable depends on what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.[202] The employer does not have to give evidence that misconduct in fact happened, but mere suspicions are also not regarded as sufficient. The Court decided that 'strong suspicion that serious

[198] *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd* [1990] 3 NZLR 549 (CA).
[199] *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd*, above n198, 556.
[200] *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd*, above n198, 555.
[201] *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd*, above n198, 556.
[202] ERA 2000 (NZ), s103A.

misconduct has occurred, particularly when that serious misconduct is an act of dishonesty, if reasonably founded on established facts after an adequate inquiry fully and fairly conducted', will justify the decision of dismissal.[203] As a result, the standard of proof in cases of possible dishonesty can be summarised as follows:[204]

(1) The critical or deciding moment for judgement is the time when the dismissal has been declared.

(2) The relevant standard of proof is the civil standard of probabilities rather than the criminal standard of beyond reasonable doubt.

(3) The decision of the employer to dismiss must be based on a reasonably founded belief, honestly held, on a balance of probabilities that serious misconduct has occurred.

(4) The employer must prove that he was justified in believing that serious misconduct had occurred.

C Procedural Fairness

Employers have to show that a dismissal was carried out in *procedural fairness* (see Chapter *III F 1* (b), page 29). On the basis of the presented standard of proof, procedural fairness is definitively a critical issue in cases of (possible) dishonesty. If it cannot be established that a dismissal was carried out in procedural fairness, the dismissal will be unjustified.[205]

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[203] *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd*, above n198, 555.
[204] *Employment Law Guide*, above n172, 498, Proof, ER 102.9; *Honda NZ Ltd v NZ Boilermakers Union*, above n190, 394-395; *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd*, above n198, 556.
[205] *Employment Law Guide*, above n172, 575, Procedural fairness, ER 103.56.

1 *Sloggett v Taranaki Health Care Ltd*[206]

In *Sloggett v Taranaki Health Care Ltd* a nurse made a formal written complaint that she was touched in a sexual manner by one of her male colleagues. The employer arranged a meeting pursuant to the employers *Guide to Disciplinary Procedures*. Sexual harassment was not classed as serious misconduct or ground for dismissal in *the Guide*. At the second meeting the affected employee was dismissed not for sexual harassment, but for breach of house rule five listed in *the Guide* under serious misconduct, for "behaving in a manner likely to affect one's safety, cause injury or unreasonable distress".

In this case, the employee appealed that the dismissal was procedurally unfair because the employer failed to advise the employee that a charge was being proceeded against him for serious misconduct. In other words, the employer failed to give reasons for dismissal. Consequently, the Court of Appeal said the primary factual issue for this case is not what happened between the dismissed employee and the nurse, but rather how the employer handled the dismissal.[207] In order to solve this legal issue, the Court deferred to the case *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd* first and cited:[208]

> … before dismissing an employee … the employer must have either clear evidence … or have carried out reasonable enquiries which left him … believing that the employee was at fault. … the employer has not made reasonable enquiries if the employee has not had a sufficient opportunity to answer the employer's complaint.

On the basis of this statement, the Court declared that the justification and quality of a dismissal decision must stand or fall on substantive and procedural fairness.[209] Only the most obvious cases exempt the employer from the obligation to inquire fairly into the alleged conduct. Where the employer dismisses without holding

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[206] *Sloggett v Taranaki Health Care Ltd* [1995] 1 ERNZ 553 (EmpCt) Goddard CJ.
[207] *Sloggett v Taranaki Health Care Ltd*, above n206, 561 and 563.
[208] *Sloggett v Taranaki Health Care Ltd*, above n206, 563.
[209] *Sloggett v Taranaki Health Care Ltd*, above n206, 567.

an inquiry, the "clear evidence" will need to consist of admissions by the employee.[210] The absence of a fair inquiry or any conclusion from such an inquiry makes it impossible to say that the employee's action caused dismissible conduct.

In addition, it is impossible to argue that an unfair procedure does not matter if the employee was in fact guilty and could have been dismissed lawfully if a fair procedure had been used.[211] In terms of procedural fairness the employer's action, and that action only, has to be reviewed as reasonable or not. If an employer has failed to take a proper procedural step, the hypothetical question of whether it would have made a difference if all steps had been taken, is just irrelevant.[212] Only what the employer in fact did is judged and not what the employer might have done. As a result, dismissal on grounds of a particular form of misconduct is neither fair nor is it reasonable, if the employee was unaware of being suspected of that form of misconduct. In contrast, an employee dismissed for possible dishonesty that is in fact innocent has no redress, if the employer acted fairly on the facts and circumstances known at the time of dismissal.[213] In plain words, if the employer complied with the provisions of *procedural fairness*, the employee's innocence is irrelevant.

In *Sloggett v Taranaki Health Care Ltd* none of the criteria or propositions, which were used as reason for dismissal, had ever been put to the affected employee. The failure to tell an employee that his action is being looked at as dismissal conduct is a procedural failing. In the case of (possible) dishonesty, the employer will not act reasonably unless the employer investigates the alleged misconduct fully and fairly, and hears whatever the employee wishes to say in his defence or in explanation.[214] Employee's conduct, which has not been established by the employer by fair inquiry can affect only remedies and never justify dismissal, whereas fair inquiry in all the circumstances can justify dismissal of innocent employees. In order to show procedural fairness in cases of (possible) dishonesty, the Court has developed the following requirements:[215]

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[210] *Sloggett v Taranaki Health Care Ltd*, above n206, 564.
[211] *Sloggett v Taranaki Health Care Ltd*, above n206, 565.
[212] *Sloggett v Taranaki Health Care Ltd*, above n206, 565-566.
[213] *Sloggett v Taranaki Health Care Ltd*, above n206, 566.
[214] In *Sloggett v Taranaki Health Care Ltd*, above n206, 566.
[215] In *Sloggett v Taranaki Health Care Ltd*, above n206, 569.

(1) The employer had given appropriate notice of the specific allegation against the employee and its likely consequences.

(2) The employee had a real opportunity for explanation.

(3) The employee had given the explanation free from predetermination and uninfluenced by irrelevant considerations.

(4) After the hearing of the employee, the employer had reached and believed that the employee was guilty of misconduct.

(5) The identified misconduct was serious misconduct able to justify summary dismissal.

D Interim Conclusion

Although, New Zealand employment law does not have a separate legal area of dismissal on grounds of suspicion, the approach of New Zealand employment courts to possible dishonesty and criminal offences is (again) quite similar to the German one. New Zealand and German employment courts accept dismissal based on strong suspicion under specific, determined circumstances. These requirements in both countries are understandably quite high. The Courts, however, agree that criminal proceedings or the guilt of the affected employee is irrelevant to the employer's decision and to the question of whether or not a dismissal is lawful. Strong suspicion of dishonesty can justify dismissal as long as employers act fairly and as long as they can provide adequate and comprehensible reasons for their decision.

A difference between Germany and New Zealand might be that German courts focus mostly on the mutual confidence between employers and employees, whereas New Zealand courts look very closely on *procedural fairness* and of whether or not the employer has conducted a fair and reasonable investigation. Accordingly, the German approach seems to be more detailed. The very detailed operating principles, however,

are just the result of the fact that dismissal in cases of possible dishonesty is a separate legal area in Germany.

Nevertheless, both jurisdictions are not far apart, if the most important criterion is established by "the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred".[216]

The possibility to dismiss an innocent employee still exists and cannot be eliminated, where dismissal is based and accepted on strong suspicion only. Therefore, one has to review the criticism and the approach of employment courts to possible dishonesty and criminal offences, regardless of the country and the legal system.

VII LEGAL VALIDITY OF DISMISSAL ON GROUNDS OF SUSPICION

In Germany and New Zealand, the right to dismiss an employee exists only where the employer can provide adequate reasons for dismissal. Dishonesty and criminal offences within the employment relationship clearly are reasons that can cause and justify dismissal.[217] Legal systems, however, are just clear and straightforward as long as the circumstances are clear. Where circumstances become incapable of proof, however, the law becomes less clear. This is because the legal provisions are mainly based on clear facts and not on suspicion.

Dismissal on grounds of strong suspicion related to dishonesty and criminal offences is well accepted and supported by New Zealand and German employment courts.[218] Yet, the idea that possible dishonesty can destroy mutual confidence and

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[216] ERA 2000 (NZ), s103A. See also: *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd*, above n198, 556; *Sloggett v Taranaki Health Care Ltd*, above n206, 563; BAG, 21 May 1992 – 2 AZR 10/92; 12 August 1999 - 2 AZR 923/98.

[217] Ulrich Preis *Arbeitsrecht* (Dr. Otto Schmidt KG, Cologne, 2003) § 66 IV 2c; Wilhelm Duetz *Arbeitsrecht* (Beck, Munich, 1999) 144; Kurt W Hergenroeder *Muenchner Kommentar zum BGB* (Beck, Munich, 2005) § 626 no. 195; *Employment Law Guide* (Buttherworths, Wellington, 2001) 550, Dishonesty, ER 103.39.

[218] Ulrich Preis, above n217, § 66 IV 2c; Wilhelm Duetz, above n217, 144; Kurt W Hergenroeder, above n217, no. 195; *Employment Law Guide*, above n217, 550, Dishonesty, ER 103.39.

make the continuance of an employment relationship impossible is controversial and not universally accepted. In Germany, where dismissal on grounds of suspicion is a separate legal area, lower employment courts, scholars and professors of law doubt the legal validity of dismissal on grounds of suspicion. One of the main reasons might be the fact that the Federal Labour Court had to develop its own solution, because dismissal on grounds of suspicion is not directly constituted by law. The biggest weakness for dismissal on grounds of suspicion is that innocent and guilty employees are treated with the same rules and provisions.[219] This *fifty/fifty chance* of justice raises the question of whether or not a system can be lawful and consistent with fundamental rights where a scapegoat might be used in every second dismissal. For this reason, it is necessary to review whether or not employment courts have developed and used an unlawful or unacceptable approach on this issue.

A Suspicion as Reason for Dismissal

New Zealand and German employment law requires comprehensible or good and sufficient reasons for a lawful dismissal.[220] Therefore, the question is whether strong suspicion is enough or does one need accomplished and provable facts as an appropriate reason for dismissal.

1 The argument

Summary dismissal requires provable facts. In Germany, neither the clear wording of Section 626 (1) BGB (GER) nor the legal intent includes the possibility of replacing the requirement of facts by suspicion.[221] In New Zealand, neither the ERA 2000 (NZ) nor *Butterworths* or *Mazengarb's Employment Law Guide* specify suspicion and possible dishonesty as reasons for dismissal. Suspicion, even if it is based on facts, is not a fact, but rather a clue or idea. Moreover, suspicion might be

[219] Olaf Deinert "Die Verdachtskuendigung – Neues zum alten Thema?" (2005) 8-9 AuR 285, 288.
[220] Martin E Risak "Arbeitsrecht in Neuseeland" (2004) ZIAS 301, 320; BGB (GER), s626 (1).
[221] Klemens Dörner "Abschied von der Verdachtskündigung?" (1993) NZA 873, 874.

the motivation for dismissal, but this still does not create a provable fact.[222] Thus, suspicion of misconduct is never a good and sufficient reason for dismissal.

2 The testing

In Germany, summary dismissal is in fact constituted in Section 626 BGB (GER). This Section reads:

> Both parties of the employment contract can terminate the employment relationship without a period of notice (*summary dismissal*) because of important reasons, if there are facts available which make the continuance of the employment relationship impossible.

Fundamental to every employment relationship is confidence and honesty by both parties of the employment contract.[223] This basis can undoubtedly get damaged or lost by suspicion of dishonesty and criminal offences. Moreover, where this suspicion is strong because it is based on objective circumstances the continuance of the employment relationship can become impossible.

The subjective opinion, motive or knowledge of an employer for dismissal is not important, but rather the objective circumstances and the objective reasons for dismissal.[224] Section 626 (1) BGB (GER), however, only requires facts that make the continuance of the employment relationship impossible. The Federal Labour Court asks for objective and provable facts which establish strong suspicion of dishonesty. In other words, the fact of dishonesty or a criminal offence is not required. Reason for dismissal in relation to dismissal on grounds of suspicion is the fact that the necessary confidence between the employer and the employee is lost. Reason for dismissal is not the mere suspicion of misconduct or dishonesty.[225] Loss of confidence might be a subjective experience, but it can be proved by the provision of objective circumstances and facts. These provided facts cause strong suspicion and make the continuance of employment impossible. As a result, dismissal on grounds of suspicion might be

[222] Clemens Appel/ Doris Gerken "Pro und contra Verdachtskündigung" (1995) AuR 1995 201, 205.
[223] BAG, 14 September 1994 - 2 AZR 164/94.
[224] BAG, 17 August 1972- 2 AZR 415/71.
[225] Kurt W Hergenroeder, above n217, no. 195.

doubtful but under the requirements of the Federal Labour Court it does comply with the wording of Section 626 (1) BGB (GER).

In New Zealand, the situation is easier because a section like Section 626 (1) BGB (GER) does not exist. Nevertheless, to justify dismissal "employers must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him, on the balance of probabilities, with grounds for believing that the employer was at fault".[226] Employers do not have to give evidence of whether or not a breach of contract in fact occurred. Employment courts do not review the alleged misconduct, but rather whether or not the conducted investigations by the employer were fair and reasonable, and whether or not the decision to dismiss, in the light of the circumstances and the investigation, was a comprehensible and reasonable response.[227] Therefore, good and sufficient reason for dismissal can be established by strong suspicion as long as the employer acted fairly and did what a fair and reasonable employer would have done in all the circumstances.

B Suspicion as Reason for Dismissal according to Section 1 (2) KSchG (GER)

In Germany, dismissal has to comply with the provisions of Section 1 (2) KSchG (GER). In other words, a lawful dismissal has to be *socially justified.* Therefore, the question arises whether dismissal on grounds of suspicion can be classified as reason for dismissal according to Section 1 (2) KSchG (GER).

1 The argument

Dismissal on grounds of suspicion can not be identified or classified as one of the three essential reasons for dismissal according to Section 1 (2) KSchG (GER).[228]

Dismissal on grounds of economic reasons (see Chapter *II E 2* (a) (i), page 19) is not applicable a priori. Dismissal on grounds of conduct reasons (see Chapter *II E 2* (a) (i), page 20) is not applicable because only suspicion of misconduct exists and

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[226] *Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd* [1990] 3 NZLR 549, 556 (CA); *Sloggett v Taranaki Health Care Ltd* [1995] 1 ERNZ 553, 563 (EmpCt) Goddard CJ.
[227] *HSBC Bank plc (formerly Midland Bank plc) v Madden* [2000] 1 All ER 550, 560 (CA).
[228] Reinhard Schütte "Verdacht als Kuendigungsgrund" (1991) NZA-Beilage (2) 17, 21.

not a proved breach of contract. Suspicion may arise without any action by the employee, but this situation can never establish misconduct or other unlawful behaviour. If a provable misconduct of the employee is not available, employers cannot just feign a reason for dismissal. Therefore, dismissal based on suspicion can only belong to the system of dismissal on grounds of personal reasons (see Chapter *II E 2* (a) (i), page 20).[229] This classification however, is also doubtful. Individual or subjective suspicions of the employer are not able to delete the employee's qualification or ability to comply with the requirements and provisions of the employment relationship.[230] As a result, dismissal on grounds of suspicion cannot be integrated in the system of Section 1 (2) KSchG (GER).[231]

2 The testing

Indeed, if an employment relationship is subject to the KSchG (GER), employees have to be dismissed on the basis of well-founded economic, conduct or personal reasons.[232]

Dismissal on grounds of suspicion obviously cannot be classified as a dismissal on grounds of economic reasons.[233] A provable misconduct or breach of contract is also not available, which eliminates the possibility for dismissal on grounds of conduct reasons.[234] Suspicion of dishonesty and criminal acts, however, can destroy the essential confidence between the contractual parties. As a consequence, the employer does not trust his employee anymore regardless of whether the employee is innocent or guilty. Where the trust in the employee gets lost, a necessary qualification or ability for the performance of employment gets lost as well. If this necessary ability can get lost regardless of the fact of whether or not the employee is guilty, one can argue, an employee's reliability or trustworthiness is not at all controllable by them, but reliant on the subject view of their employer. Thus, lost confidence is a personal issue.[235]

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[229] Reinhard Schütte, above n228, 21.
[230] Ulrich Preis, above n217, § 66 IV 2c.
[231] Reinhard Schütte, above n228, 21.
[232] KSchG (GER), s1 (2).
[233] Ulrich Preis, above n217, § 66 IV 2c; Kurt W Hergenroeder, above n217, no. 195.
[234] Ulrich Preis, above n217, § 66 IV 2c; Kurt W Hergenroeder, above n217, no. 195.
[235] Ulrich Preis, above n217, § 66 IV 2c; Kurt W Hergenroeder, above n217, no. 195; BAG, 26 March 1992 - 2 AZR 519/61.

Lack of ability, competence, qualification or attributes are the requirement for dismissal on personal reasons.[236] As a result, possible dishonesty can cause a dismissal on grounds of personal reasons. In plain words dismissal on grounds of suspicion is classified as dismissal for personal reasons.[237]

C Reversal of the Burden of Proof

If an employer wants to dismiss an employee, the employer has to provide adequate and comprehensible reasons for dismissal, and he has to give evidence about these reasons. In New Zealand and Germany, employment law puts the *burden of proof* of whether or not dismissal is justified with the employer and not with the employee.[238] Therefore, the question arises if dismissal on grounds of suspicion establishes an unlawful reversal of the burden of proof.

1 The argument

Strong suspicion of dishonesty as reason for dismissal develops an unlawful reversal of the burden of proof.[239] If an employer is allowed to dismiss an employee on the basis of strong suspicion, the only chance for an employee to keep his workplace is to give evidence about his innocence. Accordingly, in the case of dismissal on grounds of suspicion the employee, and not the employer, has to give evidence that he has not breached the employment contract. This result, however, is a reversal of the burden of proof. Moreover, such a reversal is unlawful, because the employer, and not the employee, has caused or declared dismissal.[240] Only when an employer has to provide provable facts for dismissal, which eliminates the possibility for dismissal on grounds of suspicion, would this result be prevented.

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[236] Ulrich Preis, above n217, § 64.
[237] Ulrich Preis, above n217, § 66 IV 2c; Kurt W Hergenroeder, above n217, no. 195.
[238] *Employment Law Guide*, above n217, 535, Justification, ER 103.24; Ulrich Preis, above n216, § 57. In this paper the term *burden of proof* is used and can be understood as onus or obligation of proof. In other words, the term determines which party (employer or employee), involved in a court session, has to give evidence of allegations and circumstances. Basically the party that raises an allegation has to give evidence of it. Therefore, in cases of dismissal the burden of proof rests with the employer, because he argues that the employee has caused dismissible conduct or breach of contract.
[239] Reinhard Schütte, above n228, 21.
[240] Reinhard Schütte, above n228, 21.

Indeed, in New Zealand and Germany the burden of proof lies always with the party that wants to terminate the employment relationship.[241] If an employer wants to dismiss an employee on grounds of strong suspicion, the employer has to provide objective circumstances and facts first on which any other employer could safely rely and could have reached the same decision to dismiss. The subjective opinion of the employer is not important and the mere allegation of lost confidence never justifies a dismissal, neither in Germany nor in New Zealand. Moreover, within the necessary hearing and investigation procedure the employee has the possibility to provide their own arguments and can challenge the presented allegations. Where they do so, the employer has to confute this statement first and has to give evidence of the reason for dismissal later. As a result, if an employer wants to dismiss on grounds of strong suspicion the burden of proof strictly lies and stays with the employer. Therefore, dismissal on grounds of strong suspicion does not cause an unlawful reversal of the burden of proof.

D Violation of Article 12 of the German Constitution 1949 (GG (GER))

The German constitution determines with Article 12 GG (GER) a fundamental right for employers and employees, at the same time. On the one hand, employers have the right for freedom of profession. On the other hand, employees have the right to a workplace, free occupation and education. Where these interests clash a so-called *balancing of fundamental rights* becomes necessary.[242] Therefore, the question arises whose interests are more valuable in the case of dismissal on grounds of suspicion.

[241] BAG, 14 September 1994 - 2 AZR 164/ 94; Ulrich Preis, above n217, § 57; *Sloggett v Taranaki Health Care Ltd*, above n226, 567; *Employment Law Guide*, above n217, 535, Justification, ER 103.24.
[242] BVerfGE 41, 29 (51); BVerfGE 77, 240 (255); BVerfGE 81, 298 (308); BVerfGE 83, 130 (140); BVerfGE 89, 214 (232); BVerfGE 93, 1 (15); BVerfGE 104, 92 (111); BVerfGE 108, 282 (296).

1 The argument

Dismissal on grounds of suspicion and the approach of the Federal Labour Court are incompatible with Article 12 GG (GER) and its provisions.[243] The *balancing of fundamental rights* is based on the *principle of proportionality*, which takes circumstances like the affected goods, applicable provisions and a lawful purpose or the aim of action into account. At the end of this process or comparison either the employee's or the employer's right outweighs and eliminates the lower interests.[244]

In the case of dismissal on grounds of suspicion the clash is between the employer's interest and right to dismiss, and the employee's interest to keep employment and to be protected from unlawful dismissal. The employer's interest (to dismiss) is based on suspicion that the employee might have committed a criminal offence, dishonesty or other breach of contract. The employee's interest (not to lose his job) is based on the fact that the employer wants to dismiss. At the time of dismissal, the consequences for employers are vague and unclear, whereas the employee's consequence of redundancy is already established. For this reason, the *balancing of fundamental rights* has always to result in favour of the employee. In other words, the current approach of the Federal Labour Court violates the fundamental right based on Article 12 GG (GER).[245]

2 The testing

Article 12 (GER) is subjected not only to employees, but also to employers.[246] Employers have the right for freedom of profession. This right includes other rights like summary dismissal or to employ employees, chosen by the employer. The German legislator has recognised the weaker position of employees. Accordingly, employment courts have the function to create a balance between the different and contrary interests of employers and employees. Dismissal on grounds of strong suspicion with its high requirements and own provisions was exactly developed for

[243] Olaf Deinert, above n219, 294; Klemens Dörner, above n221, 876.
[244] BAG, 10 May1957 - 1 AZR 249/56; BAG, 29 June 1962 - 1 AZR 343/61.
[245] Olaf Deinert, above n219, 294; Klemens Dörner, above n221, 874.
[246] BVerfGE 41, 29 (51); BVerfGE 77, 240 (255); BVerfGE 81, 298 (308); BVerfGE 83, 130 (140); BVerfGE 89, 214 (232); BVerfGE 93, 1 (15); BVerfGE 104, 92 (111); BVerfGE 108, 282 (296).

this purpose.[247] Moreover, the German legislator has already created an appropriate balance between the different fundamental rights by the adoption of Section 626 (1) BGB (GER) and Section 1 KSchG (GER).[248] Courts, employers and employees are bound by these provisions, which are also subject to dismissal on grounds of suspicion. As a result, dismissal on grounds of suspicion does not violate Article 12 GG (GER), because an appropriate *balancing of fundamental rights* is directly established by German employment law.

E Right to Silence

In New Zealand, employers have to conduct a reasonable investigation if they want to dismiss an employee lawfully on the basis of possible dishonesty.[249] Part of this investigation is the hearing of the affected employee. Where the affected employee does not respond to the employer's questions, the employer can come to a conclusion and decision on the evidence at hand. Thus, the question arises if the necessary employment investigation is compatible with the employee's right to silence.

1 The argument

In cases of possible dishonesty, the employment investigation violates the employee's fundamental right to silence in a criminal court.[250] The problem arises where the police and the employer conducts an investigation about the same complaint separate and parallel from each other. If an employer has conducted an investigation and the employee refuses to offer an explanation for the conduct a dismissal will be justified.[251] The police, however, might apply for a court order to have all pertinent information by the employer released. This released information most likely includes the questions and response from the affected employee in the employment investigation. Later, the police or prosecution is able to use this information against

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[247] BAG, 14 September 1994 - 2 AZR 164/ 94.
[248] Ulrich Preis, above n217, §56 & § 57.
[249] *Sloggett v Taranaki Health Care Ltd*, above n226, 566 and 568; *Employment Law Guide*, above n217, 550, Dishonesty, ER 103.39; 498, Proof, ER 102.9.
[250] Nicola Whittfield "Employment Law and Police Investigations" [2002] ELB 28, 31.
[251] *Employment Law Guide*, above n217, 550, Dishonesty, ER 103.39.

the employee. As a consequence, the affected employee is imprisoned in a dilemma. The employee either responds to his employer and the information might incriminate him later or the employee refuses to answer the employer's questions and risks a dismissal. Therefore, employment investigations, in the case of possible dishonesty and criminal offences, undermine the employee's right to silence and protection from self-incrimination in criminal proceedings.

2 The testing

If an employer who suspects dishonesty conducts an investigation, the investigation must be held to be fair and adequate.[252] Moreover, once an employment investigation has been initiated, the employer has to carry out the investigation without undue delay. The investigation has to be conducted according to *the rules of natural justice* and *procedural fairness*.[253] This includes putting the allegation to the employee, providing the opportunity to respond and taking that response into account before a decision has been made.[254] Where the employee, however, does not respond the employer can make a decision based on the available findings. Hence, employment investigations are in fact able to affect the employee's right to silence. To avoid this situation, employees are granted the right to apply to the Court for an injunction stopping the employment investigations until the criminal proceedings have been concluded.[255]

The fundamental right to silence and a fair trail are very important and paramount considerations, which can outweigh all other considerations and weigh heavily in favour of a stay.[256] Where the employee applies for the stay of proceedings, the court has to balance the right to silence and right to protect oneself from self-incrimination in a criminal investigation, against the employer's right to conduct and conclude an investigation into possible misconduct.[257] As a result, there is no automatically right to a stay until criminal proceedings are determined.[258] An

[252] *Employment Law Guide*, above n217, 550, Dishonesty, ER 103.39.
[253] Nicola Whittfield, above n250, 28.
[254] Nicola Whittfield, above n250, 28.
[255] Nicola Whittfield, above n250, 28.
[256] *A v B* [1999] 1 ERNZ 613, 618 (EmpCt) Travis J.
[257] Nicola Whittfield, above n250, 28.
[258] *Mann v Alpinewear* (NZ) Ltd [1996] 1 ERNZ 248 (EmpCt) Travis J.

injunction can only be granted where there is strong evidence that it is necessary to protect the affected employee. The major factors that can favour a stay are the real possibility of prejudice or injustice in the criminal case.[259] The burden of proof, however, lies with the employee to show that his fundamental rights are jeopardised.[260]

In *Wackrow v Fonterra Co-op Ltd*, Judge Shaw stated from different sources a summary of principles and guideless in relation to the right to silence and employment investigations:[261]

(1) The employer is entitled to conduct an investigation, and is bound to do so.

(2) The burden is on the employee to show that his rights are endangered.

(3) No party is entitled as of right to have a civil proceeding stayed because of possible criminal proceedings.

(4) The Court's task is one of balancing justice by taking all relevant factors into account.

(5) Each case must be judged on its own.

(6) The right to silence and the undesirability of exposing a person to double jeopardy have to be considered.

(7) There must be a real and not only theoretical danger of injustice in the criminal proceedings.

In cases of possible dishonesty and criminal offences, it is quite unlikely that an employer can conduct a private investigation without violating the employee's rights in relation to the criminal process. Although a stay in proceedings is not automatically,

[259] Mazengarb's Employment Law (Buttherworths, Wellington, 2007) Employment investigations if criminal charge pending, ERA 103.36A available at http://www.lexisnexis.com.helicon.vuw.ac.nz/ (accessed 24 September 2007).
[260] Nicola Whittfield, above n250, 28.
[261] *Wackrow v Fonterra Co-operative Group Ltd* [2004] 1 ERNZ 350, 351 (AC 32/04) Shaw J.

the right to silence and a fair trial are paramount considerations.[262] The stay of proceedings will be most likely granted, where it is necessary. The argument that employment investigations can violate the right to silence is a serious one, but appropriately defused by New Zealand employment courts.

F Violation of the Presumption of Innocence

The *European Convention of Human Rights* (EMRK) constitutes the so-called *presumption of innocence*, which is also a basic principle of New Zealand and German criminal law.[263] Every defendant or culprit of criminal proceedings has to be presumed innocent as long as the proof of guilt has not been given. In the case of dismissal on grounds of suspicion the employee is dismissed because of possible dishonesty. In other words, the proof of guilt or misconduct has not only been given but is also not necessary for a lawful dismissal. Therefore, the question arises if dismissal on grounds of suspicion related to dishonesty and criminal offences is compatible with the presumption of innocence.

1 The argument

Dismissal on grounds of suspicion violates the presumption of innocence.[264] Article 6 (2) EMRK[265] reads: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". The legal intent and purpose of Article 6 (2) EMRK is to protect citizen from punishment without the proof of guilt. In this function, the presumption of innocence protects not only from imprisonment and fine, but also from other sanctions and discrimination.[266]

Dismissal on grounds of suspicion, like any other dismissal, causes the loss of employment. Redundancy and financial disadvantages however, are not the only consequences of dismissal. The loss of occupational and individual prestige and

[262] Nicola Whittfield, above n250, 31.
[263] EMRK, s6 (2); Janet November *Burdens and Standards of Proof in Criminal Cases* (Butterworths, Wellington 2001) 1; Johannes Wessels *Strafrecht Allgemeiner Teil* (Mueller, Heidelberg, 2006) 2.
[264] Olaf Deinert, above n219, 291; Klemens Dörner, above n221, 873; Reinhard Schütte, above n228, 22.
[265] EMRK means *Europaeische Menschenrechtskonvention*, which is the German name for *European Convention of Human Rights*.
[266] Olaf Deinert, above n219, 292.

difficulties finding new employment are often other concomitant circumstances.[267] Thus, dismissal establishes sanctions that are similar to punishment, which is incompatible and unlawful according to Article 6 (2) EMRK or the basic principles of criminal law as long as reasons for dismissal have not been proven. The reasons for dismissal on grounds of suspicion are not provable at the time of termination. Consequently, dismissal on grounds of suspicion related to dishonesty and criminal offences, violates Article 6 (2) EMRK. [268] Especially in the case of disabled, pregnant or child-raising employees (see Chapter *II D 2*, page 14), where the acceptance of the relevant state authority is necessary, dismissal on grounds of suspicion is unacceptable.

2 The testing

Both the *presumption of innocence* based on Article 6 EMRK as well as the constitutional principle within the German and New Zealand legal system is not subject to single citizens or employers, but rather to the state and state controlled authorities.[269] Hence, *the presumption of innocence* develops no directly effects between citizens or on the relationship between citizens. Although, constitutional principles have an effect on statutes, sections and reasons for dismissal, the *presumption of innocence* does not prohibit dismissal on grounds of suspicion.[270] Dismissal on grounds of suspicion does not include an allegation of guilt or shame. It cannot be seen as criminal punishment. Reason for dismissal is lost confidence and a comprehensible decision to dismiss after a fair and reasonable investigation, but not a prejudgment because of possible dishonesty or criminal offences.[271] Dismissal and judicial punishment are completely different in terms of requirements, purpose, function, proceedings and legal consequences.[272] Moreover, neither an employment court nor the employer is bound by an investigation of the prosecution or by a trial of a

[267] Olaf Deinert, above n219, 294.
[268] Olaf Deinert, above n219, 291; Reinhard Schütte, above n228, 22; Klemens Dörner, above n221, 873.
[269] Oliver Luecke "Unter Verdacht: Die Verdachtskuendigung" (1997) BB 1842, 1845; Janet November, above n 263, 7; Johannes Wessels, above n 263, 2.
[270] BAG, 14 September 1994 - 2 AZR 164/ 94.
[271] Kurt W Hergenroeder, above n217, no. 195; *Sloggett v Taranaki Health Care Ltd*, above n226, 568.
[272] BAG, 14 September 1994 - 2 AZR 164/ 94; Janet November, above n 263, 7; *Honda NZ Ltd v NZ Boilermakers Union* [1991] 1 NZLR 392, 395 (CA).

criminal court.[273] The validity for dismissal on grounds of suspicion depends not on criminal issues, but rather on the employer's decision, procedural fairness and the damaged confidence between employer and employee.[274] The closing of official proceedings against an employee because of lack of evidence does not mean that the affected employee is innocent. As a result, the *presumption of innocence* is a criminal law principle, which is not applicable between employers and employees, and cannot be used in any relation to the termination of employment.

For German employment law there still remains the question - what happens if a lawful dismissal requires an acceptance of the relevant state authority first?[275] State authorities are definitively bound by the basic principle of the *presumption of innocence*.[276] Nevertheless, the *presumption of innocence* itself is entrenched in criminal law.[277] The employment relationship, in contrast, is a private law relationship and not a criminal law one.[278] Accordingly, only state authorities related to criminal law issues are bound by the *presumption of innocence*, like criminal courts, prosecution or police.

Nevertheless, the *presumption of innocence* is a basic principle that affects a legal system as a whole. One result of this effect in the area of private law is the burden of proof.[279] In terms of dismissal, the burden of proof lies strictly with the employer (see Chapter *II A*, page 9). Moreover, summary dismissal of pregnant, disabled or child-raising employees is an exception.[280] Even if the employer can provide appropriate reasons for dismissal, the requirements are still very high. The state authority would only accept a dismissal if the employer can provide adequate reasons for dismissal and fully complies with the burden of proof.[281] In other words, the state authority takes the civil law *presumption of innocence* (the burden of proof)

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[273] BAG, 20 August 1997 - 2 AZR 620/96; *Honda NZ Ltd v NZ Boilermakers Union*, above n272, 395.
[274] Ulrich Preis, above n217, § 66 IV 2c; *Sloggett v Taranaki Health Care Ltd*, above n226, 568.
[275] Acceptance by a state authority is required in the case of pregnant, disabled or child raising employees (see MuSchG (GER), s9 (3); BErzGG (GER), s18 (1); SGB IX (GER), s85).
[276] Gewaltenteilung *Die Rechtsstaatprinzipien im Kampf gegen den Terror* at http://www.gewaltenteilung.de/prokein.htm (accessed 10 Septemeber 2007).
[277] BVerfGE 19, 342 (347).
[278] Wilhelm Duetz, above n217, 50.
[279] Jura ABC *Die Unschuldsvermutung* at http://www.jur-abc.de/cms/index.php?id=831 (accessed 10 September 2007).
[280] Wilhelm Duetz, above n217, 132.
[281] Ulrich Preis, above n217, § 68.

into account before dismissal is accepted.[282] As a result, the argument that dismissal on grounds of suspicion would violate the presumption of innocence is not convincing.

VIII CONCLUSION

In a civil law system or a system with a statutory concept, the primary source of law is a code.[283] Although, this code is not merely a collection of statutes, or written laws, which have been enacted or adopted by the legislature, it is impossible to create one section or provision for every single case that might occur. Consequently, statutory concepts and legal codes like the *Employment Relations Act 2000* (NZ) or Section 626 BGB (GER) only constitute basic principles, guidelines and abstract provisions that reflect the intent of the legislator. Courts use, interpret and shape the content of these abstract sections while they are dealing with concrete or individual cases.[284]

Dismissal on grounds of suspicion is not constituted by law, neither in Germany nor in New Zealand. However, cases of possible dishonesty and criminal offences within the employment relationship and caused by employees exist. Therefore, the employment courts of Germany and New Zealand were forced to develop an approach that provides an adequate solution, for these special cases. In plain words, the development of dismissal on grounds of suspicion and its requirements was a duty and assignment that employment courts needed to take up.

Yet, the possibility to dismiss an innocent employee can never be eliminated completely. Thus, the criticism about dismissal on grounds of suspicion has to be taken seriously, and the requirements for a lawful dismissal in cases of possible dishonesty have to be quite high. German and New Zealand employment law are surprisingly similar according to the presented legal issues, and employment courts in both countries master these high requirements quite well. None of the presented arguments was absolutely convincing or able to confute the legitimacy of dismissal on

[282] The answer would be similar according to New Zealand state authorities, because the strictly separation between criminal law proceedings and civil law proceedings exists as well. See: Janet November, above n263, 7 or *Honda NZ Ltd v NZ Boilermakers Union*, above n272.
[283] Sharon Byrd *Introduction to Anglo-American Law* (Beck, Munich, 2001) 3.
[284] Sharon Byrd, above n283, 3.

grounds of suspicion. As a result, one can argue dismissal on grounds of strong suspicion related to possible dishonesty and criminal offences is acceptable and does not violate fundamental legal principles as long as it complies with the specially determined requirements.

BIBLIOGRAPHY

I PRIMARY SOURCES

A Legislation

Germany

Dismissal Protection Act 1995	(Kuendigungsschutzgesetz – KSchG)
Federal Child Raising Benefit Act 1985	(Bundeserziehungsgeldgesetz – BErzGG)
German Civil Code 1900	(Buergerliches Gesetzbuch – BGB)
German Constitution 1949	(Deutsches Grundgesetz – GG)
Mother Protection Act 1952	(Mutterschutzgesetz – MuSchG)
Social Security Act 2001	(Sozialgesetzbuch – SGB)
Works Constitution Act 1952	(Betriebsverfassungsgesetz – BetrVG)

New Zealand

Employment Contracts Act 1991
Employment Relations Act 2000
Employment Relations Amendment Act 2004
Industrial Relations Act 1973

Others

European Convention of Human Rights (Europaeische Menschenrechtskonvention – EMRK)

B Cases

England

HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] 1 All ER 550

Germany

Federal Constitutional Court (Bundesverfassungsgericht – BVerfG):

BVerfGE 19, 342

BVerfGE 41, 29

BVerfGE 77, 240

BVerfGE 81, 298

BVerfGE83, 130

BVerfGE 89, 214

BVerfGE 93, 1

BVerfGE 104, 92

BVerfGE 108, 282

Federal Labour Court (Bundesarbeitsgericht – BAG):

BAG, 10 May1957 – 1 AZR 249/56

BAG, 26 March 1992 – 2 AZR 519/61

BAG, 29 June 1962 – 1 AZR 343/61

BAG, 8 August 1963 – 5 AZR 395/ 62

BAG, 4 June 1964 – 2 AZR 310/63

BAG, 17 August 1972 – 2 AZR 415/71

BAG, 30 May 1978 – 2 AZR 630/ 76

BAG, 13 January 1980 – 7 AZR 757/ 79

BAG, 15 August 1984 – 7 AZR 536/ 82

BAG, 17 May 1984 – 2 AZR 3/83

BAG, 14 November 1984 – 7 AZR 474/ 83

BAG, 11 April 1985 – 2 AZR 239/84

BAG, 30 April 1987 – 2 AZR 283/ 86

BAG, 20 May 1988 – 2 AZR 682/ 87

BAG, 2 March 1989 – 2 AZR 280/ 88

BAG, 31 August 1989 – 2 AZR 8/ 89

BAG, 16 October 1991 – 2 AZR 332/ 91

BAG, 21 May 1992 – 2 AZR 10/92

BAG, 18 May 1994 – 2 AZR 626/ 93

BAG, 13 September 1995 – 2 AZR 587/94

BAG, 14 September 1994 – 2 AZR 164/94

BAG, 21 March 1996 – 2 AZR 455/ 95

BAG, 04 June 1997 – 2 AZR 526/96

BAG, 20 August 1997 – 2 AZR 620/96

BAG, 12 August 1999 – 2 AZR 923/98

BAG, 27 March 2003 – 2 AZR 51/02

BAG, 10 February 2005 – 2 AZR 189/04

Regional Employment Court (Landesarbeitsgericht – LAG)

LAG Cologne, 16 January 1990 – 11 Sa 853/89

New Zealand

A v B [1999] 1 ERNZ 613

Airline Stewards and Hostesses of NZ IUW v Air NZ Ltd [1990] 3 NZLR 549

Auckland City Council v Hennessey [1982] ACJ 699

Auckland Hotel Union v Bourke [1981] ACJ 491

BP Oil NZ Ltd v Northern Distribution Workers Union [1989] 3 NZLR 580

Central Clerical Workers Union v Taranaki Maori Trust Board [1989] 3 NZILR 612

Click Clack International Ltd v James [1994] ERNZ 15

Hati v Auckland Farmers Freezing Co-op Ltd [1988] NZILR 667

Honda NZ Ltd v NZ Boilermakers Union [1991] 1 NZLR 392

Mann v Alpinewear (NZ) Ltd [1996] 1 ERNZ 248

McPherson v Chloride Batteries Ltd [1983] ACJ 291

Moore v Commissioner of Police [2001] ERNZ 335
Mulder v Ocean Beach Freezing Co [1984] ACJ 487
New Zealand (with exceptions) Food Processing, etc, IUOW v Unilever New Zealand Ltd [1990] 1 NZILR 35
Northern Distribution Workers Union v BP Oil NZ Ltd [1992] 3 ERNZ 483
Phipps v New Zealand Fishing Industry Board (1996) 1 ERNZ 195
Sloggett v Taranaki Health Care Ltd [1995] 1 ERNZ 553
Smith v Armourguard Security Ltd [1993] 1 ERNZ 446
Wackrow v Fonterra Co-operative Group Ltd [2004] 1 ERNZ 350
Wellington Road Transport Union v Fletcher Construction Co [1983] ACJ 653

II SECONDARY MATERIALS

A Texts

Germany

Johannes Wessels *Strafrecht Allgemeiner Teil* (Mueller, Heidelberg, 2006)
Kurt W Hergenroeder *Muenchner Kommentar zum BGB* (Beck, Munich, 2005)
Reinhard Richardi *dtv Arbeitsgesetze* (65ed, Beck, Munich, 2007)
Sharon Byrd *Introduction to Anglo-American Law* (Beck, Munich, 2001)
Ulrich Preis *Arbeistrecht* (Verlag Dr. Otto Schmidt KG, Cologne, 2003)
Wilhelm Duetz *Arbeitsrecht* (CH Beck Verlag, Munich, 1999)

New Zealand

Alexander Szakats *Dismissal and Redundancy Procedures* (2ed, Butterworths, Wellington, 1990)
Gordon Anderson *Employment Law Guide* (5ed, Butterworths, Wellington, 2001)
Gordon Anderson *Mazengarb's Employment Law* (Buttherworths, Wellington, 2007)

Janet November *Burdens and Standards of Proof in Criminal Cases* (Butterworths, Wellington 2001)
Richard Rudman *New Zealand Employment Law Guide* (CCH New Zealand, Auckland, 2002)

United States of America

Joanne Conaghan *Labour Law in an Era of Globalization* (Oxford University Press, New York, 2002)

B Journals

Germany

Clemens Appel/ Doris Gerken "Pro und contra Verdachtskündigung" (1995) AuR 201
Klaus Moritz "Grenzen der Verdachtskuendigung" (1978) 9 NJW 402
Klemens Dörner "Abschied von der Verdachtskündigung?" (1993) NZA 873
Martin E Risak "Arbeitsrecht in Neuseeland" (2004) ZIAS 301
Mathias Busch "Die Verdachtskuendigung im Arbeitsrecht" (1995) MDR 217
Olaf Deinert "Die Verdachtskuendigung – Neues zum alten Thema?" (2005) 8-9 AuR 285
Oliver Luecke "Unter Verdacht: Die Verdachtskuendigung (1997) 36 BB 1842
Reinhard Schütte "Verdacht als Kuendigungsgrund" (1991) NZA-Beilage (2) 17

New Zealand

Clyde W Summers "Propter Honoris Respectum: Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries" [1995] Notre Dame Law Review 1
Nicola Whittfield "Employment law and police investigations" (2002) 2 ELB 28

United States of America

Paul Benjamin 'Who needs Labour Law?' in Joanne Conaghan (ed) *Labour Law in an Era of Globalization* (Oxford University Press, New York, 2002) 75

C Electronic Resources

Auswaertiges Amt (Department of Foreign Affairs)
https://www.auswaertiges-amt.de/
(last accessed 10 September 2007)

ESPN
http://espn.go.com/
(last accessed 10 September 2007)

Eurosport
http://www.eurosportpress.com/
(last accessed 10 September 2007)

Gewaltenteilung
http://www.gewaltenteilung.de/
(last accessed 10 September 2007)

Jura ABC
http://www.jur-abc.de/
(last accessed 10 September 2007)

Lexis Nexis
http://www.lexisnexis.com.helicon.vuw.ac.nz/
(last accessed 24 September 2007)

Sky Sports
http://www.skysports.com/
(last accessed 10 September 2007)

Sports Illustrated
http://sportsillustrated.cnn.com/
(last accessed 10 September 2007)

UCI Pro Tour
http://www.uciprotour.com/
(last accessed 10 September 2007)