One Last Demonstration of Judicial Independence . . .

Otto Kahn-Freund's Judgment in the 'Radio Case'

by Ulrich Mückenberger*

Part one sets out a translation of the judgment of the first instance labour court of Berlin on 14 March 1933, chaired by Otto Kahn-Freund, concerning the claim for unfair dismissal brought by three technicians against the state broadcasting company who had apparently been dismissed merely for their alleged membership of the communist party. Part two, composed by Professor *Mückenberger*, argues that, the light of the context, the legal reasoning in Kahn-Freund's judgment was intensely political in the complex shape it took, whilst proposing a practical solution to the dispute. The legal reasoning is finally placed in the context of Kahn-Freund's academic writing of the time and his criticisms of how the courts were functioning.

I. JUDGMENT OF THE (LOCAL) LABOUR COURT OF BERLIN

Delivered on 14th March 1933
sgd. Dorsdorf, judicial employee as clerk of the court.

In the Name of the People!

Between:

1. Senior and graduate engineer Günther Lubszynski,
   Berlin-Charlottenburg 9, Meerscheidtstr. 9,
2. Engineer Dr. Hans Weigt, Berlin-Spandau, Ruhlebenerstr. 125
3. Technician Max Uecker, Berlin-Reinickendorf-Ost, Wilkestr. 4,

CLAIMANTS

and

Reichs-broadcasting-private limited corporation *(Reichs-Rundfunkt-Gesellschaft mbH)*,
represented by its executive directors (*Geschäftsführer*)
Dr. Magnus and Gieseke,
Berlin-Charlottenburg 9, House of Broadcasting,
Masurenallee,

*This is a translation by Mara Schmidt-Klie and Hugh Collins from a publication in German, which appeared in Hans Bergemann Berliner Freundes- und Forderkreis Arbeitsrecht (Hg.), *Judische Richter in der Berliner Arbeitsgerichtsbarbeit 1933*: Idee und Gesamptleitung: Reinholt Gerken (Hentrich & Hentrich) 141. References to other literature in the judgment and the article have been excluded.

Published by John Wiley & Sons Ltd, 9600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA

DEFENDANT,
attorney of record/defence counsel: Lademann (employee of the defendant)

concerning: objection based on § 84 German Works Councils Act (*Betriebsrätegesetz 1920)*

Based on the hearing of 14th March 1933 the Labour Court of Berlin, formed by judge Dr. Kahn-Freund as chair and assessors Kersten and Nürnberg, holds:

I. Order the defendant to
   1. either continue to employ the claimant Lubszynski beyond the 31/5/1933 or pay him compensation amounting to 4815,- Reichsmark,
   2. either continue to employ the claimant Dr. Weigt beyond the 30/6/1933 or pay him a compensation amounting to 4245,- Reichsmark,
   3. either continue to employ the claimant Uecker beyond the 31/3/1933 or pay him a compensation amounting to 470,- Reichsmark.

II. The action is dismissed in all other respects.

III. The defendant bears three-quarters of the legal costs, the claimants Lubszynski and Dr. Weight bear one-eighth of the costs each.

IV. Amount in dispute: 12.550,- Reichsmark

V. Court fee: 378,- Reichsmark

Facts of the case:

The three claimants are technical employees of the defendant. Claimant Lubszynski has been employed as senior engineer since 1st June 1929, claimant Dr. Weigt as engineer since June 1929 and claimant Uecker as technician since 15th July 1931. Before starting their service for the defendant, Mr. Lubszynski and Dr. Weigt were employed by the German Reichspost, performing the same task in the same establishment, starting 1st July 1925 and 1st July 1927 respectively. The defendant is economically and technically responsible for the centralized administration of all public broadcasting in the German Reich.

On 9th February 1933 the defendant gave written notice of dismissal to all claimants, using the exact same wording: 'At the Reichs-Government's instance, we terminate your employment contract dated 14th May 1929 (/8th June 1929/15th July 1931) with effect from 31st May 1929 (8th June 1933/ 15th July 1933) in accordance with § 12 (of the contract) since you cannot any longer provide a necessary guarantee for working in this essential sector of the security of that broadcasting operation. Accordingly, we release you from your work for us with immediate effect and ask you not to access Broadcasting House in the future without having special permission. We have instructed our payment office to make your outstanding salary and pension allowance for your services till 31st May 1933 (/30th June 1933/31st March 1933) immediately available. Please provide us with the relevant payment instructions.

Reichs-Broadcasting-Corporation.
sgd. signatures'

On 10th February 1933, the three claimants filed an objection with Mr. Landemann, chairman of the works council, making the following representations:

> 'To the works council of the Reichs-Broadcasting-Corporation for the attention of Mr. Landemann:
> Dear Mr. Landemann!
> Enclosed I am sending you a copy of a written notice of dismissal addressed to me by the R.B.C. As the indicated reasons are definitely unfounded, I am hereby raising an objection against my dismissal in due form and kindly ask you to upphold my objection and conduct the negotiation with the directorate concerning the withdrawal of the notice, as regulated by § 84 *Betriebsrätegesetz BRG* (German Works Councils Act 1920), within the period prescribed.
> Thanking you in advance. Yours sincerely'

Thereupon, the works council held a meeting on 14/2/1933 and upheld the objection of the three claimants. The works council then invited the defendant to a further meeting on 15/2/33 and finally declared a failure of the negotiations after no representative of the defendant appeared at the meeting.

The claims are based on § 84 (1) No. 1 BRG.

The plaintiffs claim that there existed reasonable suspicion that the reason for the dismissal was political activity or membership in a political association, which readily appeared from the letter of termination and the protocol of the works council meetings. Apart from the fact that political activity or membership in a political party was no valid ground for dismissal, the claimants deny any political activity in the past or the present or membership in any political association. In particular, the claimants deny membership of the Communist Party or any sympathy for it. Claimant Dr. Weigt stresses that his past ruled out such a political attitude as he had been war volunteer and later an army officer and that he was always actively committed to patriotism.

Furthermore, the claimants invoke § 84 (1) No. 2 BRG and state that the reason indicated in the letter of dismissal was evidently a pretence, with the consequence that the dismissal should be deemed to have been carried out without giving reasons.

Lastly, the claimants refer to § 84 (1) No. 4 BRG. According to them, the undue hardship arose from the suddenness of the dismissal and its surrounding circumstances, as for example the prohibition to enter Broadcasting House. The nature of the dismissal in connection with its effects and reactions by other members of the public resulted in an alienation and discrediting of the claimants, which makes it hard if not impossible for them to find another employment and thus itself constitutes undue hardship.

In addition to this, the claimants have performed their duties blamelessly for quite some time, some of them for years; they have never given any reason for being suspected of having committed any dishonest action or having intended to do so and they are now deprived of their jobs without any reason. All three claimants point to the fact that they are married, Lubszynski further to the fact

that he has one child, Dr. Weigt to having a child that suffers from a bad illness since last year and Uecker to having to feed his own plus an adopted child. All declare that they have no relevant private means.

The claimant Lubszynski seeks an order against the defendant either to continue to employ the claimant beyond the 31/5/1933 or pay him a compensation amounting to 6000,- Reichsmark,

The claimant Dr. Weigt seeks an order against the defendant either to continue to employ the claimant beyond the 30/6/1933 or pay him a compensation amounting to 6000,- Reichsmark,

The claimant Uecker seeks an order against the defendant either to continue to employ the claimant beyond the 31/3/1933 or pay him a compensation amounting to 550,- Reichsmark.

The defendant pleads for a dismissal of the action.

In its opinion, neither the conditions for application of § 84 (1) No 1 BRG nor for application of § 84 (1) No. 4 are fulfilled. The sole reason for the dismissals of the claimants was the educated guess that they were members of the communist party or were at least close to it. In times of political high-tension like the present one, this suspicion put the essential broadcasting operation at risk. If it was correct that the claimants are members of or associate with the communist party, this must lead without further ado to the suspicion that they might sabotage the broadcasting operation or at least tolerate such an action; this would be especially easy for the claimants as they were fully familiar with all the details of the technical operation and as the claimant Lubszynski was even deputy chief engineer. Since the government had lately increased its use of broadcasting for its purposes, it constituted a risk if employees like the claimants had an attitude that led them not to approve the actions of the government. In the opinion of the defendant, the character of claimants could thus pose a risk to the security of the broadcasting operation as the defendant was not convinced that a further employment of the claimants in the exposed position of technical operation of all broadcasting could guarantee the security necessary in the tense political situation. Admittedly, the claimants had not committed any wrong in the past; neither had they provided any concrete evidence for an intention to sabotage or to interrupt the broadcasting operation in any other way in the future. However, the educated guess of the defendant regarding the claimants' political attitude did in itself justify the relevant suspicion. Considering the whole situation, this suspicion had necessitated an immediate dismissal in the chosen form as well as a prohibition on the claimants having any access to the premises with immediate effect in order to ensure uninterrupted operation.

Concerning the question whether the defendant could rely on § 85 (1) BRG since it was an enterprise serving ideological purposes (*Tendenzbetrieb*) as in the sense of § 67 BRG, the defendant stated that it did not want to add to its earlier statement in which it had denied that it was serving any political purpose. With regard to the claimants' denial of any party membership or political activism or link to the communist party, the defendant stated that it did not want to provide any evidence for its claim that the claimants were members with the communist party or sympathetic to it.

Judicial reasons for decision:

I. The objection against the dismissal dated 9/2/1933 has been filed in all three cases in due time and in writing with the chairman of the works council and thus also in due form as specified in § 84 (1) BRG.

II. A condition for the admissibility of the objection is the existence of a legally effective dismissal. A dismissal is ineffective in law if it infringes a statutory prohibition (§ 134 BGB). Hence, the court must first assess whether the three dismissals are effective in law. In particular, it has to consider whether the dismissals are void because they violate Art. 118 (1) *Weimarer Reichsverfassung WRV* (the constitution of the German Reich). According to Art. 118 (1) WRV, every German enjoys 'subject to the limits set by general law the right to freely express his opinion in words, writing, print, images or in any other form. The right must not be restricted by any employment relationship and nobody must discriminate against him if he exercises his right.' If there exists proof that a dismissal had the purpose of hindering a German to freely express his political opinion, Art. 118 (1) Sentence 2 WRV in connection with § 134 BGB determine that the dismissal was void, provided that no 'general law' justifies the dismissal. In a case where only the existence of a reasonable suspicion that the dismissal was '. . . based on . . . political activity or membership or non-membership in a specific political . . . association . . .' can be proved, the dismissal is effective in law, but the objection under § 84 (1) No. 1 BRG is well founded. The court has to consider the application of Art. 118 WRV even though the provision has been abrogated for the present by § 1 of the regulation for protection of people and state of the president of the German Reich dated 28th February 1933 (*Reichsgesetzblatt* (Reich's Law Gazette) Part 1 Page 83), because on the 9th February 1933, the date of dismissal, Art. 118 (1) RV was still in operation. Accordingly, the question whether the abrogation of Art. 118 (1) WRV only affects public law or also affects private law is irrelevant. The court is of the opinion that the three dismissals are effective under Art. 118 (1) WRV since it has not been proved that the defendant dismissed the claimants based on their political opinions and since the claim of the defendant that she did not base the dismissal on the political opinion itself but rather on the derived suspicion of readiness to sabotage has not been fully rebutted. The mere suspicion that in reality the crucial reason for the dismissal was the suspected political opinion of the claimants cannot make the dismissal void. Therefore the dismissal was effective in law and thus the objection is admissible.

III. The objection is also well founded, first of all based on § 84 (1) No. 1 BRG. There exists reasonable suspicion that the dismissal was based on political activity or membership in a political association. The defendant states indeed that it reasonably suspects the claimants to be members of or sympathetic to the communist party and that this puts the operation at risk. However, the defendant explicitly declares that it has no concrete evidence supporting an intention of the three claimants actually to disrupt the operation. Thus, the dismissals can only be based on the endangerment of the operation if the defendant infers a criminal mind from the mere membership or closeness to

a political party – even if the persons concerned have never showed any indications of dishonest intentions. The assumption that one can infer criminal intentions without more from a specific political attitude cannot be accepted. The idea that someone is capable of acts of sabotage as a result of his 'attitude towards specific political questions' alone is so implausible that there is reasonable suspicion about whether the defendant did in fact draw such a connection. Even if, contrary to their denial, the claimants were members of or sympathetic to the communist party, the defendant could not infer any readiness to sabotage from this fact alone; to argue to the contrary would entail an assumption that every single person voting for the communist party was capable of criminal attacks, an opinion that is unlikely to be held by the defendant, regardless of what the plans of the leaders of the communist party actually were. Consequently, there exists reasonable suspicion that the political attitude of the claimants as suspected by the defendant has been the reason for the dismissal and this suspicion is strengthened by the fact that the defendant could not make any argument in support of a finding of an intention by the claimants to be disruptive favour against the background of their long-time faultless service.

Hence, the conditions of § 84 (1) No. 1 are fulfilled and the court has to investigate further whether the application of this provision is hindered by the exceptional provision of § 85 (1) BRG, which is the case if the defendant is a political *Tendenzbetrieb* (an organisation serving a specific ideological purpose), in which politically motivated dismissals are not subject to the objection of political motivation as far as the specific nature of the operation calls for it. The court has answered the question whether the defendant is a political *Tendenzbetrieb* in the negative. It is true that, in recent weeks, the government has increasingly used broadcasting for sharing its political announcements and speeches. However, the court assumes that, by doing so, the government did not serve any party-political purpose and that the usage of the broadcasting operations by the government can have no other objective than helping all Germans regardless of their political preference to participate in the public life of the nation. That the broadcasting organisation was turned into a political Tendenzbetrieb as a result of the actions of the government could only be assumed if one imputes to the government an intention to give a party political character to broadcasting, which is out of question given Art 109 (1) WRV as well as Art. 130 (1) WRV. Hence, the defendant could not rely on § 85 (1) BRG.

However, even if one might characterize the defendant as a *Tendenzbetrieb*, the objection would still be justified. § 85 (1) BRG only hinders the objection as far as the nature of the *Tendenzbetrieb* necessitates an ideologically motivated dismissal. Hence, the objection is only inapplicable if, based on the nature of the employment relationship, the employees can influence the ideological orientation of the organisation. In the broadcasting sector this is only the case for employees who have influence on the programme content, either directly at a single broadcasting organisation or at the defendant through influencing one of the individual broadcasting organisations (*references*). The politically motivated dismissal of the claimants

was not necessitated by a potential ideological character of broadcasting as the claimants only dealt with its technical aspects.

The objections based on § 84 (1) No. 1 were thus well founded.

IV. The objections are not justified in so far as they are based on § 84 (1) No. 2 BRG, regardless of whether the reasons given for the dismissal in the letter dated 9/2/1933 were true or untrue. If the employer gives any – true or untrue – statement of grounds at all, § 84 (1) No 2 does not apply. The provision only applies if the notice of dismissal does not give any reasons at all (*references*).

V. The objections are justified on grounds of § 84 (1) No. 4 BRG though. An undue hardship, within the meaning of this provision, exists if the hardship contained in the dismissal is neither necessary with regard to the behaviour of the employee at the workplace, nor with regard to operating conditions *(references)*. Here, the dismissal constituted hardship for the claimants based on their long duration of service, their family status and financial circumstances. This hardship was neither necessitated by the defendant's affairs nor by any behaviour on part of the claimants. The defendant cannot make any personal accusations against the claimants. It can neither claim that operational requirements justify the dismissal; quite the contrary: when asked the defendant stated that the suspected communistic opinion of the claimants was the only reason for dismissal. However, the outstanding undue hardship contained in the dismissal results from its surrounding circumstances. To begin with, based on a mere suspicion and without being able to provide any evidence for it, the defendant has imputed a communist opinion to the claimants, which is according to the latter's unrefuted statement totally improbable. By doing this, the defendant has possibly caused the claimants a severe moral detriment and has damaged the claimants' reputation in their (social) circles. This constitutes a severe undue hardship. The burden of proof with regard to the defendant's contested claim that the claimants were members of or sympathetic to the communist party lies with the defendant; the fact that the defendant expressly did not attempt to adduce evidence demonstrates that the claim was merely a suspicion or maybe a rumour in the operational unit; however, such an unprovable suspicion shall by no means justify the defendant's accusation that the claimants held a specific political opinion that they do not approve of.

A further factor of hardship lies in the articulation of the discrediting suspicion that the claimants could make or tolerate an attempt of sabotage or disruption. This is particularly severe hardship given that it was impossible to accuse the claimants of any dishonest behaviour in the past or of any intention to commit one in the future. Even though they had a clean record, the defendant stated that their characters were such that they could not guarantee the security of broadcasting to the extent necessary for being employed in this essential sector. This accusation alone constitutes a most severe undue hardship, a defamation for which the defendant could name no cause whatsoever.

Lastly, the form of the dismissal and the immediate prohibition of further work and access to the premises constitute another aspect of undue hardship; this form of dismissal must be interpreted by the public and future potential employ-

ers of the claimants as implying that the claimants were guilty of severe misconduct. Even the situation of political tension does not justify such behaviour towards the claimants; once again the long duration of impeccable service renders the undue hardship particularly serious.

§ 84 (1) No. 4 thus also justifies the objections.

VI. Under § 87 BRG the court has to specify an amount payable as compensation in the case of refusal of further employment. The court is compelled to grant to the three claimants the highest damages possible under § 87 (1) S. 2 BRG, since this was the only way to create an equivalent to the unjustified allegation of a suspicion of an intention to disrupt broadcasting and since the severe undue hardship of the dismissals required compensation. For the claimants Lubszynski and Dr. Weigt the maximum compensation amounted to six months of salaries, as they will have been employed by the defendant and her predecessor German Reichspost for six or more years when the employment relationship will be terminated, i.e. after the end of the notice period. For the claimant Uecker, who will have been employed by the defendant for one year and eight and a half months when his contract expires, the maximum compensation amounts to one and eight-and-a-half twelfths monthly salary.To the extent to which the claimants have claimed a higher compensation as granted based on wrong calculations, the action has to be dismissed.

For the rest, the claim had to be upheld.

VII. The court order as to costs is based on § 92 ZPO (German Civil Procedure Code), the decision on the amount in dispute and the court fees on §§ 12, 611 AGG (German Labour Court Act).sgd. Dr Kahn-Freund

II. COMMENT

1.

In the year preceding his death, 1978, during a conversation with Wolfgang Luthard, Otto-Kahn Freund gave information about his judicial activity for the (Local) Labour Court Berlin between 1929 and 1933, inter alia about the – as he named it – 'radio-case'. In doing so, he articulated the belief that a judge must be able to strictly separate between himself as political committed person and as an administrator of justice who is bound by statutory law – an observation that was probably not limited to his own past activity. 'I am a positivist' he said in that conversation and gave reasons for his conviction: 'The only democratic hope you could still have in the Weimar Republic, in which the whole judiciary was politically biased – it is impossible to put it differently -, not in a monetary sense but in a ideological one, was that the judge was always bound by the law.' In retrospect, Kahn-Freund saw the 'radio-case' as one of the last demonstrations of judicial independence and free expression of opinion. 'It was a dramatic case, the proceeding took the whole day. In this moment, I really had the opportunity to manifest the independence of the courts through my own action.' And: 'I gave an unambiguous judgment and ordered the broadcasting corporation to pay the maximum compensation. I may have been one of the last persons in Germany who could still express their opinion freely .'

And yet, the judgment given under his chairmanship delivered on 14th March 1933 was a deeply 'political' judgment. By a chain of circumstances Kahn-Freund had been given a task, which was only soluable with extreme political tactfulness. During a time when observance of the rule of law was by no means reliable, the task of securing justice to a wrongfully dismissed person was by no means straightforward.

It is necessary to bring the circumstances of this time to one's mind. On the 30th January of the same year, Hitler had become *Reichskanzler* (Chancellor of the German Reich). A chain of legal and 'extralegal' repressions against the left had started; the faked '*Reichstagsbrand*' (the burning of the building of the German Parliament) had provided false pretences for further persecutions. In the elections of the 5th March, the Nazis won the highest ever-attained number of votes – almost 44% (*reference*). Just about ten days after the judgment, on the 23th of March, parliament passed the *Ermächtigungsgesetz* (Enabling Act; *an amendment to the constitution*). A few days later, on the 4th of April 1933, the Nazis enacted the '*Gesetz über Betriebsvertretungen und wirtschaftliche Vereinigungen*' (Act on establishment representatives and economic unions) which withdraw the dismissal protection of § 84 BRG – from which the claimants in the case decided by Kahn-Freund had still benefited – in cases in which 'the dismissal was based on suspected subversive attitudes' (cf. Art. 2, *reference*).

The organised workers movement, in particular the trade unions, had already passively accepted the '*Preußenschlag*' and had reacted to the repressions after the takeover merely with letters of complaint to the *Reichspräsident* (president of the German Reich). On 25th of March, the magazine of the trade unions published the dizzying 'declaration' of the managing-committee of the ADGB (General German Trade Union Confederation), which ended with the sentence: 'The social tasks of the trade unions must be fulfilled regardless of the nature of the state government.' *(reference)* The declaration of loyalty by the Federal Executive Committee of the ADGB on 9th April 1933 *(reference)* was followed by the meeting between delegates of the ADGB managing committee and the National Socialist Factory Cell Organization on the 13th of April during which Wilhelm Leuschner summarized the opinion of the ADGB as follows: 'Among your proposals, we are interested in the unified trade union and your declaration of the absence of an intention to smash the trade unions.' *(reference)* Finally there was the dishonourable call by the Federal Committee to 'willingly participate' in the celebration of the 1st May which the Nazis had upgraded to a national holiday *(reference)*. All the events form part of the chain of demonstrations of humility towards the Nazis.

However, it was not just the general circumstances of its time that shaped the judgment of the (Local) Labour Court Berlin of 14th March 1933. Additionally, the specific circumstances of the particular single case gave the judgment an exemplary character. That 9th February on which the claimants had been dismissed 'at the Reichs-government's instance' was – as we learn from the conversation with Otto Kahn-Freund in 1978 – the day on which Hitler addressed the German people for the first time via broadcasting. In conformity with the technical conditions at that time, he had to personally visit the broadcasting studios for doing so. This was the cause for the pre-emptive dismissal of the claimants (Kahn-Freund 1981, 199). Due to the concurrence of Hitler's

address and the dismissal of the claimants, the individual private-law dismissal dispute, which was the only one that had to be decided, was suddenly supplemented by a – as we would name it today – Media Law debate about the legitimacy of the use of the broadcasting organisation for propaganda purposes. In my view, it had been the actual judicial masterstroke of the judge Kahn-Freund that he pointedly-democratically commented on this debate without making the decision in favour of the radio engineers in the specific case dependent on it – he achieved this effect by giving a brilliant 'obiter dictum' concerning the '*Tendenz*-protection-provision' of the German Works Councils Act (§§ 67 and 85 (1) BRG).

One last factor (finally) turns Kahn-Freund's decision– even though he himself so sincerely wanted to hold up the separation between judge and political human being – into a political one. This is the fact that it was he who had to decide in the first place. The Labour Law Court Berlin had more than fifty judges back then. 'Several colleagues ducked out of this difficult case. It then came to me', Kahn-Freund stated laconically in 1978 *(reference)*. Read between the lines, and it becomes clear that the sentence 'came to me' is full of sarcasm. This sarcasm can be interpreted in two ways. You could think about how such a 'coming to me' is compatible with the principle that the deciding judge must be legally (pre-) determined (*Gebot des gesetzlichen Richters*, Art. 105 S. 2 WRV). This would be the more harmless interpretation. Way more bitter is the following notion: 'Several' judges of the Labour Court considered themselves too good to handle this 'hot potato'. One or the other had perhaps thought that the judge Kahn-Freund could burn his fingers on this case as he had anyway not much to lose; as a Jew, outsider, oppositionist, was it not the case that he would in any case sooner or later not be able to sustain his position anymore, regardless of whether he decided the radio-case or not?

In the described situation, which – whether desired or unwanted – called for a political decision, Otto Kahn-Freund made one. The judgment is of course legally neatly worked through. And yet, I believe that I am able to show that all of this precise legal work aimed at making a – admittedly in this historic situation barely still achievable – practical-political decision that was as cast-iron as possible, or as it is sometimes put in the juristic jargon 'watertight'. In March 1933 even the attempt to practically enforce only the formally still valid law required profound political weighing and sensitivity. Three aspects of Otto Kahn-Freund's judgment manifest this. To order the defendant to further employ the claimants might have been legally possible but would have been politically so unpromising that such a blatant judgment would have been close to foolishness. Thus, the aim of the decision – as narrowed down to a 'realistic' degree – was at the outset to award the claimants the highest compensation possible under the BRG. This intended result was – and this is the second aspect –with great effort safeguarded against submitted or even just expected counter-arguments by arguing in the alternative. Thirdly and finally, Otto Kahn-Freund's decision contains an attempt to indicate the proper restraints on the government's use of media for political purposes. This statement was not relevant to the decision itself and for that very reason unlikely to jeopardize the aim of preserving the claimants' compensation.

2.

Understanding the printed judgment and putting it into the outlined context requires a brief presentation of the 5-stage dismissal protection procedure under §§ 84 et seq BRG (*reference)*. The dismissed employee could file an objection against the dismissal with the group works council (*in these times there formally still existed two work councils, one for manual and one for non-manual workers)* within five days following the dismissal. This objection had to be based on one of the grounds specified in § 84 BRG. The group council had to review the validity of the objection. If it considered the objection justified, the council had to conduct negotiations with the employer within five days. In the case of failure of the negotiations or lack of agreement with the employer, the group works council or the individual employee could take legal action in the Labour Court within a period of 5 days. For an ordinary dismissal *(i.e. dismissal with notice period as opposed to an extraordinary dismissal based on a severe cause and usually possible with immediate effect)*, the action aimed at further employment or compensation; the latter could amount to one month's salary per year of employment capped at 6 months' salaries (§ 87 BRG, *reference*). If the group council rejected the objection, the individual employee could not take legal action. The two main differences between the legal situation back then and today are that the support by the group council was a condition for the admissibility of a court action against the dismissal and that the employer had a free choice between further employing or paying compensation in the case of success on part of the employee.

The context set by the outlined legal situation explains the judgment's order of argument. First, the formal correctness of the objections is affirmed. It follows, under II., a test which becomes plausible under the sketched political circumstances, namely the test whether the dismissals are not already challengeable on grounds other than the ones named in § 84 BRG, in particular whether they are already void based on a violation of the freedom of expression (Art. 118 (1) WRV) in connection with § 134 BGB. If the latter were the case, the employer would have been forced to further employ the claimants regardless of the reasons named in § 84 BRG and the procedures specified in §§ 84 et seqq BRG. It is not remarkable that the judgment deals with a potential violation of Art. 118 WRV – after all this issue determined whether the defendant could pay compensation as a way out of the further employment or not. What is remarkable is how the judgment handles the potential violation. Given the facts of the case as brought forward, the court could have considered it as proven or could have at least reached certainty during the daylong proceedings that the dismissal was indeed based on the (supposed) opinion or party membership of the claimants. That the chamber did not arrive at this conclusion is, in my opinion, due to the fact that the consequential result would have been unrealistic if not foolish – the crucial consideration was thus rather a meta-legal than a constitutional one. I perceive this section of the judgment less as an exact legal analysis but rather as a hint of the fact that constitutional law is relevant here at all – a hint that prepares the subsequent media-political statement in III.

As outlined in the judicial reasoning under III., the reasonable suspicion of a political dismissal gives rise to a ground for objection under § 84 (1) No. 1 BRG. Impressive – and still up-to-date nowadays – is the insistence on the differen-

tiation between political attitude and actual behaviour (or intention for such). Indeed, the defendant had not explained the dismissal based on the (claimed) closeness to the communist party but with the 'lack of a guarantee for the security of the broadcasting operation' – a wording with which we are today unfortunately quite familiar due to the occupational ban case law. However, the defendant could (tautologically) only refer to the (merely asserted) communist opinion as basis for the lack of guarantee. The chamber unerringly exposes and rejects this manner of persecution and punishment. This pointed argumentation alone already justifies the claim for further employment or compensation. The rest of section III contains safeguarding, sometimes alternative arguments and the already highlighted media-political statement.

The defendant had (in statements that were conspicuously vague and unsubstantiated) asserted the *Tendenz*-protection under §§ 85 (1) and 67 BRG. The chamber could have chosen the easy way. It could have left it open whether the broadcasting organisation was an establishment serving an ideological purpose and could have just denied the applicability of § 85 (1) BRG based on the fact that at least the claimants – as only participating in the technical but not the programme shaping – were no *Tendenz*-related employees (*Tendenzträger).*

The judgment of Kahn-Freund features a different, artistic architecture. The formal legal reasoning (that the claimants were no *Tendenz*-related employees) functions merely as supporting argument – granting priority to the political-institutional argument (that the broadcasting is not or should not be an ideological establishment) and at the same time safeguarding the stability of this argument by demonstrating that the correctness of the judgment does not exclusively depend on it. Thereby, the political-institutional reasoning is given importance as well as argumentative freedom in a way nearly unthinkable in any other judicial composition.

Understanding fully this reasoning requires the reader to rehearse the line of thought at least three or four times – and then to smile admiringly. The drafter of the judgment succeeds – by using an offensive-ironic Palmström-logic: 'that cannot be, what must not be' – in offering the defendant the alternative either to confess an unconstitutional publicity practice by insisting on the *Tendenz*-protection or to better not ask for this protection in the first place. The court begins with noting (purely empirically) the increasing use of broadcasting by the Reichs-government. It follows the (normative) statement that a party-political instrumentalisation of broadcasting would violate the principle of equality (Art. 109 WRV) as well as the requirement of impartiality (Art. 130: 'Public officers are servants of the collectivity, not of one party.') as laid down in the Weimar constitution. Finally, there is the disarming deduction from the normative to the empirical: if party-political instrumentalisation of broadcasting is (normative) unconstitutional, then the government could not have had any (empirical) intention to give broadcasting the character of a ideological operation; thus the defendant cannot rely on the 'Tendenz'-protection.

Reality derided this line of thought – particularly the inference on the constitutional intention of the government – and nobody would have known this better in that very moment than Otto Kahn-Freund himself. Still, to hold on to the fiction of the government's loyalty to the constitution in that moment offered two

advantages. The obligation of the media to adhere to the principles of equality and impartiality could be pointed out with unbeatable clarity to the defendant, the government and also to the public interested in the case. And the defendant – who let its illegal party-political instrumentalisation happen – could be denied the authorization to even obtain a benefit from this illegal instrumentalisation through the *Tendenz*-protection. Presumably, for Otto Kahn-Freund, the first advantage was crucial as, in this case, the application of the *Tendenz*-protection would have failed anyway due to the supporting reasoning.

Subsequently, the argument under V. analyses the particular case with respect to the undue ('disproportionate' as we would call it today) hardships that had been inflicted on the claimants by the dismissals. This reasoning is as well skilfully constructed with regard to its strategy. Basing the objection additionally on No. 4 of § 87 (1) BRG was relevant in two regards. One the one hand, the judgment in favour of the claimants wins a totally independent second justification that cannot be challenged by any objection directed against the aforementioned arguments. On the other hand, the limited dismissal protection for ideological establishments applied only to objections based on No 1 but not to those based on No. 4 (*reference*). The intended result in this specific case would hence even promise to stand its ground if the reasoning related to the ideological establishment was rejected in all respects. At the same time, the demonstration of the undue hardship suffered by the claimants also serves as case-related justification for awarding the claimants – in section VI. – the highest compensation possible under § 87 (1) S. 2 BRG.

This judgment does not only bear witness to the developed legal-political art-like argumentation skills of Otto Kahn-Freund. It is also exemplary record of a second 'strand' of his academic work in the sunset of the Weimar Republik that lies nowadays in the shadow of his famous function-analytic papers 'The social ideal of the Reichs Labour Court ' from 1931 and 'The functional change of the Labour Law' from 1932. Both strands clearly differ in methodology as well as in their political implications. The function-analytic papers are free from any normative optimism; they extrapolate from the most progressive case law and legislative acts the overall concept of a social regime that renders the erosion of prevailing norms and institutions inevitable. They take it to an exaggerated extreme and just hereby prove its truth. 'Many ways lead to dictatorship. In our social conditions, the next path to fascism is not violence but the worship of quiet and order, of welfare and discipline and most of all the integration of the fighting organisation into a dimly national community.', are the last sentences of 'The social ideal . . .' (*reference*). Don't these sentences appear to us today as extremely clear-sighted and more understated than exaggerated? In contrast, the dogmatic legal work – for which the judgment of 14th March 1933 stands as an exemplar – holds unflinchingly and – as one is inclined to say – against all real life experience on to the normative standards of the law and the constitution. In a time like the one outlined above one wants to label the judgment almost brave and undaunted; but at the same time one might point out ironically that the court tries to make a stand against the developments of reality and hereby try to stop the process of erosion, but the very same author had already demonstrated that such erosion was inevitable and consistent with the functions of the law.

And yet, the relation between the two strands of Kahn-Freund's academic work in the period described was more than just a mere contradiction. It was also one of bundling and radicalisation of the problem. To the same degree that Otto Kahn-Freund diagnosed the increasing '*Verbeamtung* of the employment relationship' *(the alignment of normal employment relationships to the status of public officials) by* referring to the extension of the employee's duty of loyalty in 'The social ideal . . .' (*reference)*, he could simultaneously attack the persecution of opinions by using a liberal-democratic judicial practice that was centred around constitutional principles. To the same degree that he detected subordination and integration as meta-constitution *(reference)*, he could dogmatically radicalize the liberal standards of the equality and impartiality principles. It was probably his function-analytical competence that made Otto Kahn-Freund more resistant than most of his colleagues, who just shirked the particular case, to everyday adaptive processes, to the willingness merely to observe the fast changing power distribution and to only express one's own opinions if they happened to be beneficial in the respective situation. The same perspective may have made him more resistant than some representatives of the workers movement, who tried to escape the rising catastrophe through withdrawing and adopting an illusion of neutrality, thereby even removing their own defences to their repression. That Otto Kahn-Freund had, in a situation like the one of 14th March 1933, the courage to make such a judgment was for sure also due to fact that he knew what was at stake, that he understood that the fascistic takeover was not a spook, a temporary phenomenon, but a bitter, long-lasting reality.

However, it is unlikely for the very same reason that he hoped the judgment would bring an extensive change in events. Not even what he tried to safeguard by his great art of argumentation – namely to ensure that the claimants got their compensation – could be enforced under the power relations of that time. 'Later,' Kahn-Freund let us known 1978 *(reference)* 'not very much later, the claimants got arrested until they had waived their [rights arising from the] judgment.' Resulting from his judgment, Otto Kahn-Freund was dismissed from his judicial office and just avoided arrest by an escape abroad with his wife Elisabeth. The radio-case accompanied him beyond the state's borders. 'In Holland I met one of the claimants again and he expressed his delight about the fact that I was still free and hadn't been arrested.'