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**Termination of Employment
at the Initiative of the Employer**

Eighth Item on the Agenda



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PREFACE

At its 211th (November 1979) Session the Governing Body of the International Labour Office decided to place on the agenda of the 67th (1981) Session of the International Labour Conference an item entitled "Termination of employment at the initiative of the employer".

International standards on this question are at present set forth in the Termination of Employment Recommendation, 1963 (No. 119), adopted by the Conference at its 47th Session. This instrument lays down basic standards relating to the requirement of a valid reason for termination of employment by the employer, to the right of a worker to appeal against a termination to a body empowered to award appropriate remedies in case of a finding of unjustified dismissal, to notice periods, to severance allowance and other forms of income protection and to certificates of employment; it also lays down supplementary standards on workforce reductions.

Since 1963, when the Recommendation was adopted,*¹ the law and practice on termination of employment at the initiative of the employer have undergone very substantial development in a number of countries, sometimes as a result of the influence of the Recommendation itself. Since that year many States have adopted new legislation on the subject, or revised existing legislation, and a substantial body of case law has grown up interpreting this legislation. Collective agreements in a number of countries deal with various aspects of the question. Particular attention has been devoted in many countries to the special problems arising from economic, technological and similar changes.

The developments up to 1974 were reviewed in that year by the Committee of Experts on the Application of Conventions and Recommendations in its general survey of the reports submitted under article 19 of the Constitution on the Termination of Employment Recommendation, 1963,² and by the Conference Committee on the Application of Conventions and Recommendations when it discussed the general survey. The Conference Committee, while recognising the important role that the Recommendation had played in promoting protection of security of employment, concluded that the question should again come before the Conference with a view to framing another suitable instrument on the subject which would take account of national developments since the Recommendation was adopted.³ The Workers' members and some Government members of that Committee felt that consideration should be given to adopting a Convention on the subject.

Later, in the context of its in-depth review of international labour standards, the Governing Body decided that the Termination of Employment Recommendation, 1963, should be considered both as an instrument to be promoted on a priority basis and as an instrument to be revised.⁴

It is in the light of the views expressed by the Conference Committee on the Application of Conventions and Recommendations in 1974 and the results of the

* The notes will be found at the end of each chapter.

in-depth review of international labour standards that the Governing Body decided to place the question of termination of employment at the initiative of the employer on the agenda of the Conference again.

The subject is to be discussed under the double-discussion procedure provided for in article 39 of the Standing Orders of the Conference. Accordingly, the Office has drawn up the present law and practice report, with a view to the first discussion by the Conference. It seeks, without being exhaustive, to cover a wide spectrum of countries. It is based on the continuing research of the Office on the subject, including studies of systems governing workforce reductions in a certain number of countries, which it is hoped to publish this year and next year. Because of the large number of countries covered and the even larger number of legislative texts consulted, it has not been felt practicable to give citations to the texts in question.

The report includes a questionnaire to which governments are asked to reply, giving the reasons for their replies. On the basis of these replies, the Office will draw up a second report indicating the main questions that the Conference may wish to consider.

It has been found in the past that Members whose law and practice are in conformity with the essential provisions of an international instrument are sometimes unable to ratify or accept that instrument formally by reason of comparatively minor divergences between its precise terms and national law or practice. These divergences may relate to the scope of the instrument: the scope of the relevant legislation may not completely coincide with the instrument or may define differently the sector or sectors covered by it. Alternatively, they may relate to details of application of the basic principles. It is clearly desirable for difficulties of this nature to be taken into account at the time of the drafting of the instrument, with a view to determining whether it can be rendered sufficiently flexible to meet these difficulties without detriment to its substantive effect. A question has accordingly been included at the end of the questionnaire inviting Members to indicate any particularities of national law and practice concerning the subject under discussion which in their view are liable to create difficulties in the implementation of the international instrument(s) as conceived in this report, and to make specific suggestions as to how these difficulties may be met.

In accordance with the provisions of article 39(1) of the Standing Orders of the Conference, the present preliminary report is being communicated to governments not less than 12 months before the opening of the 67th Session of the Conference in 1981. In order that the Office may have time to examine the replies to the questionnaire and to prepare a second report, which, in accordance with the provisions of article 39(3) of the Standing Orders, must be communicated to governments not later than four months before the opening of the 67th Session of the Conference, governments are requested to send their replies so as to reach the International Labour Office in Geneva not later than 30 September 1980.

In this connection the attention of governments is drawn to the recommendation addressed to them by the Governing Body at its 183rd Session in June 1971, on the basis of the resolution concerning the strengthening of tripartism in the over-all activities of the International Labour Organisation, adopted by the Conference at its 56th Session, "that they consult the most representative organisations of employers and workers before they finalise replies to ILO questionnaires relating to items on the agenda of sessions of the General

Conference". Governments are requested to indicate in their replies which organisations have been so consulted. It is assumed that the results of the consultation will be reflected in the government's reply; under the Standing Orders of the Conference, only replies of governments are taken into account in the preparation of the subsequent report.

Notes

¹ National law and practice before the adoption of Recommendation No. 119 were reviewed in ILO: *Termination of employment (dismissal and lay-off)*, Report VII (1), International Labour Conference, 46th Session, Geneva, 1962.

² *idem*: *Termination of employment: General survey by the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4B), International Labour Conference, 59th Session, Geneva, 1974.

³ *idem*: *Record of proceedings*, International Labour Conference, 59th Session, Geneva, 1974, p. 527.

⁴ *idem*: doc. GB.209/PFA/5/3, Appendix II B; *idem*: doc. GB.209/7/24, para. 29.

INTRODUCTION

The present report is concerned with the law and practice of ILO member countries regarding termination of employment at the initiative of the employer. It does not cover other methods of termination, such as termination by the worker or by mutual agreement. This limitation on the scope of the item placed on the agenda of the Conference is the same as that observed at the time of adoption of the Termination of Employment Recommendation, 1963 (No. 119). The fact that only this method of termination of employment appears on the agenda of the Conference is clearly due to the great importance attached, then and now, to the problem of security of employment and thus to the protection of the worker in connection with termination of employment by the employer.

This concern to provide workers with some protection in this regard has guided the approach followed in a great many countries, in which the considerable legislative activity undertaken in recent times relating to contracts of employment, which was already under way well before the adoption of Recommendation No. 119 but which has occurred at an accelerated pace since then, has introduced the most innovations with respect to the rules governing termination of employment by the employer.

This concentration of attention on the protection of security of employment has resulted in many countries in the upsetting, over a number of years, of the traditional symmetry of the rights and obligations of the worker and those of the employer in respect of termination of the contract of employment.

What might today be called the traditional rules governing the contract of employment, which were elaborated in various countries during the nineteenth century, were generally equivalent in result if not always in form. They involved essentially an adaptation of the rules governing contracts generally to the contract of employment in particular. These rules included a prohibition of engagement for life as a protection against a return to conditions of servitude; a rule that contracts for a specified period of time or a specified task should terminate on the expiry of the period or completion of the task; a rule in some countries, where many contracts of employment were seen as periodic contracts by analogy with periodic tenancy, that such contracts were automatically renewed in the absence of prior notice of termination by one of the parties; and a rule that contracts of employment of indefinite duration (a concept that came to be widely applied to the normal employment relationship) could be terminated at the will of either party by prior notice. The requirement of prior notice was a formal requirement, applicable to and at the entire discretion of each party, neither of which had to motivate that notice. Motivation was relevant only in connection with failure to give the required notice, which came to be accepted if certain grounds for termination without notice existed.

This formal symmetry of the rights of either party to terminate the contract of employment of indefinite duration (or the periodic contract of employment) at his discretion, by giving prior notice, was attuned both to concepts of freedom of labour and to the growing mobility of labour in societies which were rapidly being

transformed from agricultural to industrial. The discretionary right to terminate the contract of employment of a worker subject only to a notice requirement permitted employers to manage their workforce in accordance with the needs of the undertaking as they saw them, with the labour force seen as a variable factor of production. Employers were also largely free to exercise their disciplinary authority as they saw fit, since the only sanction against arbitrary disciplinary dismissal was generally an obligation to pay wages for the notice period if a worker had been summarily dismissed. On the worker's side, the discretionary right of the worker to terminate the contract with notice gave expression to the fundamental principle of freedom of labour. While thus giving formal expression to these interests of the parties, the symmetry of rights in respect of discretionary termination of the contract of employment was generally seen as inherent in the very concept of the contract.

However, the consequences of this equivalence of rights were profoundly different for the parties. The exercise by the worker of his right to terminate the contract was at most an inconvenience for the employer, who generally could readily replace the worker from a large pool of unemployed persons, with the exception perhaps of certain skilled workers. On the other hand, the consequences to the worker of the exercise by the employer of his right to terminate the contract were of an entirely different order, since the loss of his employment could reduce the worker and his family to a state of misery, particularly in conditions of massive unemployment.

Inevitably, with the growth of the organisation and the political power of the working man, this disparity of consequences could not but impinge, in time, upon the formal symmetry of rights in this respect, as customs, contractual terms and eventually collective agreements and legislation restricted the rights of the employer with a view to extending a greater degree of protection to the worker.

At first, this development consisted of an extension of the notice period, sometimes for both employer and worker, but more frequently for the employer alone. Next, provision came to be made for payment by the employer of a severance allowance on termination of employment, in recognition of past service; this allowance could serve to support the worker while he was looking for other employment. When the allowances became an obligatory rather than a voluntary payment, whether as a result of custom, contract, collective agreement or legislation, it was of course an obligation incumbent only on the employer and as such a clear departure from the traditional symmetry of rights and obligations of the parties.

While these developments provided them with some protection, workers remained subject to arbitrary loss of employment, since the right of the employer to terminate the employment relationship remained an entirely discretionary one. As long as notice was given and severance allowance paid, the employer remained entirely free to terminate the relationship for any reason or for none, a situation which was at the core of the basic insecurity of the worker's employment and livelihood. Efforts to limit that discretion began in certain countries, where theories based on the civil law concept of "abuse of right" were put forward; according to this concept, the right to terminate the contract of employment, if exercised in an abusive manner, could be deemed to be an abuse of this right entitling the injured party to claim damages. Generally, however, these theories had little or no

practical application in the countries in which they were put forward, with some exceptions in recent times. Consequently, the legislatures of certain countries decided to incorporate this general concept explicitly in the rules governing termination of employment by providing that "abusive" termination of employment could give rise to damages. These provisions led to an abundant case law in certain countries, the courts of which developed over time a conception of "abusive" termination of employment which was essentially applicable to the employer and which, to a certain extent, restricted his discretionary power to terminate the employment relationship. Since it hardly restricted the right of the worker to resign, this involved a further incursion into the formal symmetry of rights of the parties.

However, the most decisive development in this respect has occurred only in more recent times, with the adoption of legislation (or in some countries collective agreements) requiring justification for the termination of the contract of employment by the employer. Already implemented in a certain number of countries before the adoption of Recommendation No. 119, a requirement of justification for termination of employment by the employer has since then been incorporated in the legislation of a great many countries throughout the world. Provisions of this kind are now found both in countries which previously sought to limit the discretionary power of the employer through concepts of abuse of right or abusive dismissal and in other countries, in all regions of the world, at all stages of economic development and of all political complexions. With the introduction of the requirement of justification, the exercise by the employer of his right to terminate the contract of employment has been subordinated to the need to have justification for the termination; consequently, this right has been brought within the contours of the management function which it serves and which must justify it. On the other hand, the right of the worker to terminate his contract of employment remains almost always discretionary, since the imposition of a requirement of justification upon the worker is generally viewed as an infringement of the fundamental right of freedom of labour which is not warranted by any higher interest.

Apart from these various developments regarding termination of employment generally, there has been a widespread introduction of specific rules applicable to workforce reductions. In recent years, with the economic difficulties experienced in many countries and the growing public sensitivity to employment security questions, developments in this regard have occurred in a large number of countries.

As a result of these various developments, the physiognomy of the law governing termination of employment at the initiative of the employer has been radically changed in many countries. Instead of consisting essentially of the rules governing notice periods and severance allowance, and the conditions under which these may be withheld, the requirement of justification for termination of employment by the employer has become the centre of legal attention, analysis and decisions by the courts or tribunals, principally as a result of frequent recourse to this protection by workers who consider that they have lost their employment without justification. Thus, today the justification principle has become the centrepiece of the law governing termination of employment by the employer in many countries, and has given rise to a complex field of legal study, while the rules

governing periods of notice and severance allowance have fallen to a position of lesser relative importance. The particular question of workforce reductions has become differentiated from termination of employment generally, with highly important rules being laid down involving both procedural and substantive guarantees.

The present report has been organised in consequence. After reviewing the question of the scope of coverage of the various guarantees in Chapter I, the report turns successively to the justification principle (Chapter II), procedural guarantees designed to secure respect for this principle (Chapter III), the period of notice and certificates of employment (Chapter IV), severance allowances and the various social security benefits available in case of termination of employment (Chapter V) and workforce reductions (Chapter VI).

While seeking to review the law and practice on the subject, the report inevitably concentrates on the legislation that exists on this matter, and only occasionally refers to collective agreements. The concentration on legislation results from the fact that in a great number of countries the various aspects of the subject have now come to be regulated by legislation, which generally sets forth minimum standards which can be improved upon by collective agreements or individual contracts of employment; it is also due to the great difficulty of obtaining any representative sampling of collective agreements dealing with this question. However, the chapter on workforce reductions is in part based on studies carried out for the ILO on the systems governing workforce reduction in a number of countries; these studies contain certain information on collective bargaining practice in this particular area.

It should finally be pointed out that this is an area of law and practice in which comparative study is beset with terminological difficulties. Certain terms, such as "dismissal" or "discharge", are used with different meanings in different countries, sometimes referring only to disciplinary termination of employment by the employer, sometimes referring to all cases of termination of employment by the employer. Dismissals in connection with workforce reduction are sometimes called retrenchment or redundancy, defined essentially by the reason for the dismissals, or referred to as dismissal for economic, structural, technological or similar reasons. In some countries recourse is had to concepts of collective dismissal defined by the numbers involved. In certain countries workforce reductions are effected by means of terminations of the employment relationship, while in others workers are "laid off", a concept which may be similar to suspension of employment when the layoff is temporary but which may be assimilated to termination of employment if it becomes permanent.

To avoid confusion and the cumbersomeness of having always to refer to "termination of employment at the initiative of the employer", the present report uses the term "dismissal" to refer to this general concept, and more specific variations of this term to refer to termination of employment for particular reasons, such as "disciplinary dismissal" or "dismissal for reasons of an economic, technological or similar nature", or "individual" or "collective" dismissal when the number is at issue.

CHAPTER I

SCOPE OF APPLICATION

SCOPE OF NATIONAL LEGISLATION

In most countries with legislation on the subject, the relevant legislative provisions regarding unjustified dismissal, periods of notice, severance allowance and workforce reductions are general in scope, applying to all branches of economic activity and to all categories of workers. However, such legislation often makes provision for specific exclusions from coverage. These restrictions on the scope of application derive either from limitations on the scope of the comprehensive legislation within which the relevant provisions are contained (for example, limitations on the scope of labour codes or laws governing contracts of employment) or from specific restrictions applicable to the provisions on termination of employment.

As far as branches of activity are concerned, some countries exclude certain branches from the scope of application of the legislation. Thus, public servants are often excluded from the scope of the labour codes or other relevant legislation in, for example, Burundi, the United Republic of Cameroon, Denmark, Egypt, Finland, Gabon, Iraq, Italy, the Libyan Arab Jamahiriya, Madagascar, Mexico, the Netherlands, Norway, Panama, Senegal and Sri Lanka. They are, of course, generally covered by civil service rules which provide protection of security of employment. Occasionally, agricultural workers are excluded from coverage by the general legislation governing termination of employment, as in Austria, the Libyan Arab Jamahiriya and Norway. Such workers are sometimes subject to separate legislation. Agricultural undertakings are sometimes excluded only when they employ fewer than a certain number of workers (ten in, for instance, the Dominican Republic and Honduras). In certain countries, such as Denmark, the Libyan Arab Jamahiriya, Madagascar, Mauritania, Norway and Panama, seamen (who are also sometimes subject to special legislation) are excluded from the scope of the general legislation.

Restrictions on the scope of application of the relevant legislative provisions more frequently relate to the kind of contract of employment under which a worker is employed. In countries in which a distinction is made between contracts for a specified term or task and contracts of indefinite duration, the general rules on unjustified dismissal, notice periods, severance allowance, and so on, usually apply to the termination of contracts of indefinite duration. The termination of a contract for a specified term or task before its expiry is generally subject to distinct rules governing breach of contract, which would entitle the worker to his remuneration for the remainder of the contract period unless he was dismissed for serious misconduct. The expiry of a contract for a specified term or task, according to its terms, is not usually considered to be termination by the employer subject to the rules governing such termination. However, in a number of countries the expiry of

such contracts is assimilated under certain conditions to termination of employment by the employer for purposes of protection against unjustified dismissal, notice periods, severance allowance, and so forth. This has apparently been done with a view to ensuring that fixed-term contracts are not used to avoid the guarantees applicable to contracts of indefinite duration, in cases in which the employment relationship is not a truly temporary one.

In some countries the legislation prohibits recourse to fixed-term contracts for work which is not of a casual or temporary nature. This is the case, for example, in Italy, Mexico, Peru, Portugal, Spain and Sweden. In other countries, such as Ireland and the United Kingdom, the expiry of a fixed-term contract is deemed, with certain exceptions, to be a dismissal for the purpose of protection against unfair dismissal. In a number of other countries the legislation or the courts treat the continuation of the employment relationship after the expiry of the term, or the renewal of a fixed-term contract, as an act transforming the contract from a fixed-term contract into a contract of indefinite duration. This appears to be the case, for example, in Bulgaria, Burundi, the United Republic of Cameroon, the Congo, Cyprus, Egypt, France, Gabon, Hungary, Madagascar, Panama, Rwanda and Senegal. Sometimes several renewals are allowed before a contract is so transformed.

The situation appears to be similar in, for instance, Kenya and Tanzania, where the legislation uses the concept of the periodic contract which is automatically renewed at the end of the term for which it was concluded in the absence of prior notice of termination. The provisions regarding unjustified termination of employment would appear to apply to termination during the contract period as well as at the end of that period by notice.

In some countries, for instance Egypt and Panama, workers engaged on a casual or temporary basis are excluded from the scope of the relevant legislative provisions, on the condition, however, that the work does not last longer than a specified period.

Workers serving a probationary period of employment are frequently excluded from coverage of the relevant provisions, subject often to specified conditions. Sometimes the legislation stipulates that a contract for a probationary period must be made in writing (as, for example, in Belgium, Burundi, the United Republic of Cameroon, the Congo, Ireland, Madagascar, Rwanda and Senegal). Frequently it is stated that a probationary period must not exceed a specified period (as, for example, in Belgium, Czechoslovakia, Finland, Honduras, Hungary, Ireland, Italy, Portugal and Turkey) or must not be longer than necessary to judge the worker's qualifications, which may not be longer than a given period (as, for example, in Burundi, the United Republic of Cameroon, the Congo, Madagascar and Senegal); such maximum periods may be, for instance, two weeks, one month, six months or one year.

In some countries certain kinds of protection, such as protection relating to unjustified dismissal, to the right to a period of notice or to severance allowance, are subject to a qualifying period of employment. In connection with provisions on unjustified dismissal, for example, this period may be six months (as, for instance, in Cyprus and the Federal Republic of Germany), 12 months (as, for instance, in Denmark, France (in respect of certain procedural rights), Ireland and the United Kingdom) or two years (as, for instance, in France (in respect of specified remedies

in case of unjustified dismissal) and Panama). Different qualifying periods may apply, for example, to entitlement to a period of notice or to severance allowance or redundancy payments.

Other restrictions on the scope of application of the relevant provisions relate to the category of worker. In several countries the legislative protection applies only to one category, as in Denmark, where the legislation applies to salaried employees only, with manual workers being covered by collective agreements, or in Belgium, where the protection against unjustified dismissal applies to manual workers while salaried employees are protected essentially by longer periods of notice.

In some countries where the legislation is general in scope, specified categories of worker are excluded from the relevant protection, such as persons employed in managerial positions or positions of trust (differently defined) (as, for example, in Panama, Sweden and Trinidad and Tobago), domestic workers (as, for example, in Egypt, the Libyan Arab Jamahiriya, the Netherlands, Panama, Sweden and Trinidad and Tobago) and apprentices (as, for example, in Denmark, Ireland, Panama and Trinidad and Tobago). In a number of countries, including Ireland, the Libyan Arab Jamahiriya, Sweden and the United Kingdom, close relatives of the employer or persons working in family undertakings are excluded. In the United Republic of Cameroon persons working within the traditional framework of the family who are governed by customary law are excluded from coverage. The staff of foreign embassies may apparently be excluded from the coverage of the legislation under general principles of international law to which reference is made in the legislation of some countries, as in Guatemala.

In some countries workers employed in small undertakings are excluded from the scope of application of the provisions governing unjustified dismissal. Such exclusions apply, for example, to undertakings employing fewer than four workers (in the United Kingdom), fewer than six workers (in the Federal Republic of Germany) or fewer than 16 workers (in Italy). In France certain procedural guarantees and remedies in case of unjustified dismissal are not applicable to workers employed in undertakings employing fewer than 11 workers.

Workers who have reached the age of retirement are also sometimes excluded from various kinds of protection. In Italy, for example, workers who are entitled to an old-age pension or who have reached the age of 65 are excluded from protection against unjustified dismissal generally, but not from protection against discriminatory dismissal based on political opinion, religion, trade union membership or activities, nor from entitlement to severance allowance. In Ireland and the United Kingdom a worker who has reached the normal retirement age, or (in Ireland) the age of 70 or (in the United Kingdom) 65 if a man and 60 if a woman, is excluded from protection against unfair dismissal; in the United Kingdom this exclusion does not apply to protection against dismissal for specified reasons stated to be inadmissible, such as trade union membership or activities. Older workers are also sometimes excluded from entitlement to severance allowance or redundancy benefits (see below, Chapter V). Whilst in these countries the attainment of the age of retirement, the age of entitlement to an old-age pension or a given age excludes the persons concerned from the protection of the provisions concerned, in some countries the attainment of such an age is deemed rather to be a valid reason for termination of employment. This question is further discussed in the next chapter.

EXISTING INTERNATIONAL STANDARDS

Paragraph 18 of Recommendation No. 119 provides that the Recommendation applies to all branches of economic activity and all categories of workers. However, it stipulates that the following may be excluded from its scope: “(a) workers engaged for a specified period of time or a specified task in cases in which, owing to the nature of the work to be effected, the employment relationship cannot be of indeterminate duration; (b) workers serving a period of probation determined in advance and of reasonable duration; (c) workers engaged on a casual basis for a short period; and (d) public servants engaged in the administration of the State to the extent only that constitutional provisions preclude the application to them of one or more provisions of the Recommendation”.

Since these possibilities of exclusion correspond to important kinds of exclusion found in national legislation, they are included in the questionnaire at the end of this report. Having regard to certain other limitations of scope sometimes found in national legislation, the questionnaire also asks whether the possibility of a qualifying period should be envisaged, apart from a period of probation, and whether any other kinds of limitation of the scope of a new instrument should be envisaged, such as for family undertakings, small undertakings, managerial employees or workers having reached retirement age.

CHAPTER II

THE REQUIREMENT OF JUSTIFICATION FOR DISMISSAL

As far as can be ascertained, the first legal statements of the requirement of justification for dismissal are found in the Mexican Constitution of 1917 (more fully elaborated in the Federal Labour Act of 1931), in the Labour Code of the Russian Soviet Federated Socialist Republic adopted in 1922, and in Cuban legislation of 1934 and 1938. While legislation on this question was enacted in several countries in the 1940s and 1950s, the greatest legislative activity has occurred during the years since 1960, which have witnessed the adoption of legislative protection against unjustified dismissal in a large number of countries in all regions of the world. Most of these developments have occurred since the adoption by the International Labour Conference of Recommendation No. 119,¹ in 1963.

While protection against unjustified dismissal, where it exists, is now provided mainly by legislation, in some countries it was initially instituted through collective bargaining. In Canada and the United States, by the early 1960s, the great majority of collective agreements included provisions for the submission of complaints of unjust dismissal to private arbitration, while in Cyprus, Denmark, Finland, Italy and Sweden basic agreements between the central organisations of workers and employers incorporating such protection were concluded during the same decade.² In Italy and Sweden protection under collective agreements has now been superseded by legislative protection, while in Canada (in the federal jurisdiction, Nova Scotia and Quebec), Cyprus and Denmark it has been supplemented by legislative protection—in Canada for workers not protected by a collective agreement, in Cyprus for all workers and in Denmark for salaried workers. In the United States collectively bargained protection against dismissal without just cause is still, in private employment, the sole protection.

Today a great number of countries in all regions of the world offer legislative protection against unjustified dismissal in one form or another. Such protection may now be found in almost all Western and Eastern European countries, in most Asian, African and Arab countries and in a number of countries in the Americas. The following paragraphs will seek to describe the ways in which the justification requirement has been introduced in the legislation of these countries.

All systems incorporating a requirement that dismissals be justified comprise several elements. First, there must be a substantive rule requiring justification for dismissal, usually stated explicitly, but sometimes elaborated by the courts, tribunals or other bodies empowered to settle disputes regarding dismissal. This requirement involves some conception of the kinds of reason deemed to justify dismissal. Second, there must be a procedure or procedures whereby respect for the requirement of justification may be ensured, including remedies for unjustified dismissal.

The present chapter considers the first question, the requirement of justification, including the definition of what constitutes a valid reason for dismissal as well

as of invalid grounds for dismissal. The second question, concerning procedures and remedies, will be discussed in the next chapter.

THE JUSTIFICATION REQUIREMENT

The requirement of justification for dismissal is here understood to consist of a requirement that an employer must have a valid reason in order to be entitled to dismiss a worker; or, in other terms, a right of the worker not to be dismissed without justification. The violation of this right may be sanctioned by reinstatement or compensation or both, following a procedure of appeal to be discussed in the next chapter. For a country to be considered to incorporate in its legislation the justification principle, this requirement must apply both to dismissal with advance notice and payment of severance allowance (where provision for these exists) and to dismissal without advance notice or severance allowance.

Legislative provisions which limit to a greater or lesser degree the right of an employer to dismiss a worker without justification may be classified in four categories: (a) provisions which explicitly or by clear implication require justification for dismissal; (b) provisions which, while not explicitly so requiring, provide powers to certain bodies in respect of prior authorisation of, or appeal against, dismissals which seem to require for their exercise recourse to criteria of justification; (c) provisions regarding "abusive" dismissal; and (d) provisions on "abuse of right".

The great majority of countries discussed in this chapter have adopted legislative provisions which fall into the first category. It should be noted that the legislation of certain countries falls into several categories, for example where the legislation explicitly requires justification of disciplinary dismissals while other dismissals are subject to a procedure of prior authorisation by administrative bodies.

These four categories of legislative provision will now be discussed.

Explicit Justification Requirements

Legislative provisions explicitly requiring justification for dismissal may be found in a large number of countries. Among these are, in Western Europe: Austria, Belgium, Cyprus, Denmark, the Federal Republic of Germany, Finland, France, Ireland, Italy, Malta, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom; in Eastern Europe: Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, Romania, the Union of Soviet Socialist Republics and Yugoslavia; in Africa and the Arab countries: Algeria, Benin, Burundi, the United Republic of Cameroon, the Congo, Egypt, Ethiopia, Gabon, Iraq, the Ivory Coast, Kenya, the Libyan Arab Jamahiriya, Madagascar, Mauritania, Mauritius, Morocco, the Niger, Rwanda, Saudi Arabia, Senegal, Somalia, the Sudan, the Syrian Arab Republic, Togo, the Upper Volta and Zaire; in Asia and the Pacific region: Bangladesh, Malaysia, New Zealand, Singapore, the Philippines and Sri Lanka; and in the Americas: Antigua, Canada (in the federal jurisdiction, Nova Scotia and Quebec, for workers not protected by collective agreements), Colombia (for workers with at least ten years of service), Dominica, Mexico, Panama, Peru, Trinidad and Tobago and Venezuela.

The above-mentioned countries appear to fall into four separate groups, depending upon the approach adopted in introducing a requirement of justification of dismissal into the legislation. There are, first, those countries whose legislation incorporates a comprehensive statement of the justification requirement, either in general terms or by referring to the different kinds of reason which may justify dismissals. This legislation treats separately the specific reasons which authorise the employer to dismiss a worker without notice or (where provided for) severance allowance, reasons which consist principally of serious misconduct and fall conceptually within the comprehensive definition of justification.

The second approach is followed in countries whose legislation divides the reasons justifying dismissal into several general categories, one of which—consisting mainly of serious misconduct—justifies dismissal without notice or (where provided for) severance allowance, while the other category or categories consist of reasons of other kinds, such as incapacity, incompetence, operational requirements of the undertaking, for which a period of notice of dismissal must be given and (in some countries) severance allowance paid. The main practical difference between these two approaches appears to relate to the treatment of a kind of conduct not falling within the category of serious misconduct justifying summary dismissal. The legislation following the first approach might permit, under the comprehensive concept of justification, dismissal with notice and severance allowance for misconduct less serious than that authorising summary dismissal, while under the second approach such misconduct would either not authorise dismissal at all or would have to be assimilated to the kind of misconduct justifying summary dismissal.

The third approach is similar to the second in that the reasons deemed to justify dismissal are not included in a comprehensive definition but are separated into several categories; however, in place of a notice requirement applicable to reasons falling in one of these categories, there is a requirement to obtain the prior authorisation of a public authority or tribunal.

The countries following the fourth approach require neither a notice period nor prior authorisation by a public authority for any particular kind of dismissal. The legislation of these countries simply spells out the various reasons considered to justify dismissal.

Of the many countries whose legislation contains a comprehensive statement of the concept of justification, supplemented by a separate definition of the specific reasons warranting summary dismissal, a number define the justification concept in only the most general terms. Thus, in many French-speaking African countries the labour codes of which provide protection against “abusive” dismissal, this term is expressly defined to include dismissal “without legitimate grounds” (Benin, the United Republic of Cameroon, the Congo, the Ivory Coast, Madagascar, Mauritania, the Niger, Rwanda, Senegal, Togo and Upper Volta). Other countries provide protection against “unjustified” dismissal or dismissal which is without “just cause”, “valid reason” or “justification” (Egypt, India, the Libyan Arab Jamahiriya, Malaysia (to workers not members of trade unions), Mauritius, New Zealand, Poland, Saudi Arabia, Singapore, Somalia, the Syrian Arab Republic and Venezuela) or against dismissal which is without “good and sufficient cause” (Canada: Quebec), “objective cause” (Sweden). “specified serious grounds” (Finland) or “a real and serious reason” (France and Gabon) or against dismissal

which is "unjust" (Canada: federal jurisdiction and Nova Scotia), "manifestly unjust" (the Netherlands) or "harsh and oppressive or not in accordance with the principles of good industrial relations practice" (Trinidad and Tobago). In all these countries the legislature has contented itself with a brief statement of the general principle that dismissal must be justified, either explicitly or by clear implication, leaving it to the bodies responsible for ensuring the observance of the legislation to elaborate, in the course of deciding individual cases, a conception of the kinds of reason justifying dismissal.

In a number of other countries the comprehensive definition of the concept of justification spells out different types of reason which justify dismissal, sometimes as a specification of a general concept of a "valid reason", "just cause" or "justified reason" (Burundi, Italy and Zaire) or an indication of the grounds required for a dismissal not to be deemed "unfair" (Ireland and the United Kingdom), "socially unjustified" (Austria and the Federal Republic of Germany) or "abusive" (Belgium and Burundi).

These reasons or grounds are defined in terms of varying generality. In Austria, Denmark, the Federal Republic of Germany and Norway the legislation refers in general terms to reasons related to the worker and to the undertaking. With respect to reasons related to the worker, the reference is to the "conduct" of the worker (Denmark), "the circumstances of the worker" (Norway), "reasons connected with the person or conduct of the worker" (the Federal Republic of Germany) or "circumstances attributable to the worker's person adversely affecting the interests of the establishment" (Austria). With respect to reasons related to the undertaking, mention is made of "the circumstances of the undertaking" (Denmark and Norway) or of operating requirements that preclude continued employment of the worker (Austria and the Federal Republic of Germany).

Definitions on a similar level of generality may be found in Belgium, Burundi and Zaire, whose legislation specifies the valid grounds for dismissal in a manner very similar to Recommendation No. 119, referring to reasons connected with the capacity or conduct of the worker or based on the operating requirements of the undertaking, establishment or service, and in Italian legislation, which refers to an obvious failure to fulfil contractual obligations and to reasons inherent in production, work organisation or the proper operation of the undertaking.

A somewhat fuller enumeration of the reasons justifying dismissal is contained in the legislation of the United Kingdom, which refers to capability or qualifications, conduct, redundancy, statutory restrictions which make it illegal to continue to employ a worker and "other substantial reasons of a kind justifying dismissal", as well as in that of Ireland, which contains an almost identical definition.

A more detailed definition of the kinds of reason which justify dismissal may be found in the legislation of Czechoslovakia, where mention is made of breaches of labour discipline or work obligations (including breaches serious enough to warrant summary dismissal and less serious breaches which authorise dismissal with notice after warning), lack of occupational qualifications for the post, unsatisfactory performance, permanent incapacity due to health reasons (subject to certain guarantees), redundancy or closure of the unit.

As previously indicated, the above-mentioned provisions are supplemented by separate provisions which authorise dismissal without notice for certain specific

reasons (principally serious misconduct) falling conceptually within the scope of the comprehensive definition of justification.

In a number of other countries the legislation on the subject has split the justification concept into two or more distinct categories. In all these countries one of these categories consists of summary dismissal for reasons defined either generally or in great detail, sometimes under the denomination of "just cause", "serious fault" or "serious breaches of labour discipline" and usually (but not always) limited to various acts constituting serious misconduct. The other categories refer to dismissal for other reasons and require a period of notice, often together with prior authorisation of an administrative authority.

In Algeria, Peru and Portugal the legislation provides, on the one hand, for summary dismissal in case of serious misconduct (and in Algeria in case of less than serious misconduct after other disciplinary sanctions have been applied) and, on the other hand, for collective dismissal based on reasons of an economic, technological or structural nature, which is subject to the obligation to give advance notice to the workers concerned and to obtain the prior authorisation of the public authorities.

Spanish legislation distinguishes between summary dismissal on disciplinary grounds and dismissal based on objective reasons (which include lack of qualifications, failure to adapt to technological change, abolition of the individual post and prolonged absence) for which advance notice must be given and, in case of abolition of the posts of a number of workers, prior authorisation by the public authorities must be obtained. In Iraq the legislation provides for summary dismissal in case of serious misconduct and dismissal for other reasons which is subject to a notice requirement and prior authorisation.

The legislation of the Sudan makes provision for three categories of dismissal: dismissal for serious misconduct, which is subject to a procedure of prior authorisation by the labour administration; dismissal on account of disability, prolonged illness, completion of the work contracted for and closure, which requires a period of advance notice; and dismissal on grounds of inefficiency and as part of a workforce reduction, which requires both prior authorisation and advance notice to the worker or workers concerned.

In Bangladesh the legislation stipulates four kinds of dismissal: summary dismissal for misconduct; discharge with severance allowance (but without notice) in case of physical or mental incapacity or similar reasons; retrenchment for redundancy with notice and severance allowance; and termination of employment for other reasons with notice and severance allowance.

Under Bulgarian legislation there are two categories of dismissal: dismissal without notice as a penalty for breaches of labour discipline and in case of detention for more than two months; and dismissal with notice on account of incompetence, suspension of work for more than 30 days, reduction of staff, closure, refusal to be transferred to another workplace where the undertaking is moved, entitlement to an old-age pension and reinstatement of an unjustifiably dismissed worker who formerly performed the work in question. Romanian legislation provides, on the one hand, for dismissal without notice in case of serious misconduct or repeated breaches of work obligations, imprisonment for more than 60 days, conviction for an offence related to work which makes the worker unsuitable for the post, prohibition from carrying out the worker's occupation by a

criminal court, and receipt of an old-age pension or invalidity pension ; and, on the other hand, for dismissal with notice in case of lack of qualifications for the job, closure, reduction of staff, transfer of the unit to another locality or reinstatement (on a decision by the competent bodies) of a worker who formerly held the post. The legislation of the German Democratic Republic distinguishes between dismissal without notice in case of a serious breach of socialist labour discipline or civic obligations and termination with notice if the worker is not suitable for the agreed job or if it is rendered necessary by a change in production, structure or the staffing or manpower plan. In Cuba a distinction is made between disciplinary dismissal and dismissal resulting from rationalisation measures or merger or closure of the work unit ; each is subject to a different procedure.

Several countries make provision for different categories of dismissal, one of which is subject to a requirement of prior authorisation which apparently replaces advance notice obligations. Under Mexican labour legislation the reasons for dismissal fall into several categories: justified dismissal, which concerns various types of misconduct (defined in detail) and imprisonment preventing the worker from fulfilling his contractual obligations ; physical or mental incapacity or obvious disability, making it impossible for the worker to perform the work for which he was engaged ; and collective termination of employment due to various defined reasons which requires prior authorisation by the labour tribunals. Panamanian legislation provides for three categories of dismissal: dismissal for disciplinary reasons (defined in detail) ; other reasons not involving fault (such as inability or inefficiency, imprisonment, receipt of a pension, physical or mental incapacity making performance of the contract impossible, prolonged illness, *force majeure*) ; and dismissal for financial and similar reasons which (except in case of bankruptcy) must be justified before the labour authorities whose prior authorisation is required before dismissals can be carried out.

Finally, in several countries the legislation sets forth the different reasons which justify dismissal, without requiring advance notice or prior authorisation by public authorities for particular types of dismissal. In the Philippines the legislation provides that a worker may be dismissed in cases of serious misconduct, wilful breach of trust, commission of a crime or offence against the employer, his family or representatives, closure, reduction of the workforce for various reasons and other analogous causes. In the USSR the legislation authorises dismissal on grounds of regular failure to fulfil obligations under the contract of employment or works rules, absenteeism, prolonged disability, unfitness for the post because of either inadequate skill or state of health, closure or reduction of staff, or reinstatement of a worker who previously held the post. Ethiopian legislation authorises dismissal in cases of commission of a fault by the worker which justifies dismissal under the collective agreement, inadequate performance in carrying out the work, absence of more than six months, closure, redundancy or retirement with pension.

Powers Which Appear to Require for Their Exercise Recourse to Criteria of Justification

In several of the afore-mentioned countries the powers of prior authorisation conferred upon the competent authorities with regard to certain categories of dismissal require for their exercise (either explicitly or implicitly) recourse to

criteria based on justification. In several other countries where the legislation does not explicitly impose a requirement of justification for dismissals, powers are granted with regard to prior authorisation of dismissals or the award of remedies on appeal against dismissal, which also appear to require for their exercise recourse to criteria of justification.

In Indonesia all dismissals are subject to prior authorisation by a regional or central committee, the principal task of which appears to be to determine whether there is a valid reason for the dismissal. This also seems to be the basis for the decisions of the employment offices in the Netherlands, to which all dismissals must be referred for authorisation (as mentioned above, workers also have the right to appeal to the courts against any dismissal considered to be "manifestly unjust").

In Malaysia (in the case of trade union members, non-members having the benefit of an explicit requirement of just cause) a worker may appeal through a disputes settlement procedure against his dismissal to a body competent to award reinstatement, and the competent bodies doubtless must base their judgement on considerations of justification. This also appears to be the case in Hungary, where reinstatement may be awarded if the reasons given by the employer for dismissal do not conform to the facts or if the dismissal is unlawful.

In India, Kenya, Pakistan and Sri Lanka, where the legislation does not appear to contain an explicit requirement of justification for termination of employment by the employer (the reference to unjustified dismissal in Indian legislation appears to refer only to disciplinary dismissal), the powers granted by the legislation on labour disputes to the labour courts or tribunals in case of appeal against dismissal, as interpreted by the courts or tribunals, entitle them to review the justification of a dismissal (whether with or without notice) and award appropriate remedies, including reinstatement.

"Abusive" Dismissal

A number of countries first sought to limit the discretionary power of employers to dismiss workers in their employment by including in their legislation protection against "abusive" dismissal, an application to the question of dismissal of the civil law concept of abuse of right. Most of these countries have now modified these provisions so as explicitly to require justification for dismissal, either by defining "abusive" dismissal as dismissal without a valid or legitimate reason (as in a number of countries mentioned above) or by replacing the concept of "abusive" dismissal by an explicit requirement of justification for dismissal (as in France). However, in some countries, including Guinea, Luxembourg, Mali and Tunisia, the legislation appears still to be limited to providing protection against "abusive" dismissal. This has been defined in Luxembourg as including dismissal for illegitimate reasons and dismissal which constitutes an economically or socially abnormal act and in Mali to include dismissal in respect of which the reasons given are inexact. Whether these definitions are relied on to require justification for dismissal can be determined only from an investigation of the court decisions interpreting them.

While providing a certain minimal protection, the concept of "abusive" dismissal alone has apparently not generally been considered to provide sufficient protection against unjustified dismissal, as can be seen from the tendency to define

this concept to include, or to replace it by, an explicit requirement of justification for dismissal. This tendency may result from the fact that, in systems which relied solely on the general concept of "abusive" dismissal, dismissal seems generally to have remained an essentially discretionary right of the employer, the abuse of which had to be proven by the worker.

Abuse of Right

In certain other countries, including Greece, Japan and Switzerland, in which the legislation places no general substantive limitation on the right of employers to dismiss individual workers at their discretion, mention has sometimes been made of the civil law concept of "abuse of right" as providing workers some protection in this regard. However, it appears that in practice it is only in Japan that this concept has been systematically applied by the courts to dismissal cases. In that country a dismissal will be deemed by the courts to be an abuse of right if a "reasonable" or "just" cause for dismissal is not shown by the employer. This interpretation of the law by the courts appears to have been influenced by a constitutional provision making job security a matter of public order, as well as by the prevailing lifetime employment system applicable to regular workers.³

Requirement of Just Cause for Summary Dismissal Not Equivalent to Justification Requirement

Finally, in a number of other countries, particularly in Latin America, the legislation makes provision for advance notice and compensation in case of dismissal without "just cause" or "justification", defined to include essentially misconduct. The reasons other than misconduct that are generally considered to justify dismissal in other countries (although usually with prior notice and severance allowance), such as incapacity or redundancy, are not included among the reasons "justifying" dismissal in these countries. Dismissal for such reasons other than misconduct in these countries is deemed to be "unjustified" dismissal entitling the worker concerned to advance notice and compensation. In the present report this compensation is considered to be equivalent to the severance allowance provided for in other countries, rather than to be a sanction for unjustified dismissal. The requirement of a "just cause" in these countries for exemption from the obligation to pay this compensation is likewise not considered in this report to be equivalent to the justification requirement elsewhere; it is considered to be essentially equivalent to the provision found in other countries exempting the employer from the obligation to pay severance allowance in the case of serious misconduct (see below, Chapter V).

TYPES OF VALID REASONS FOR DISMISSAL

Although there is considerable variation in the ways in which the various countries have expressed the reasons deemed to justify dismissal, most of these reasons fall into a limited number of classes, well reflected by the terms "capacity or conduct of the worker" and "operational requirements of the undertaking,

establishment or service” used in Recommendation No. 119. It may be relevant to discuss these reasons briefly, under the headings “conduct of the worker”, “capacity of the worker” and “operational requirements of the undertaking”.

Conduct of the Worker

The types of conduct for which a worker may be dismissed, frequently referred to under the general term of “misconduct” or “breach of discipline”, are sometimes the subject of attempts to establish a more detailed definition. The kinds of misconduct thus defined generally fall into two categories: the first usually involves improper performance of the duties contracted to be performed; the second usually refers to various types of improper behaviour which can disrupt the workplace or affect the performance of work. The first category, improper performance of contractual obligations, includes such misconduct as neglect of duty, violation of work rules (particular mention is sometimes made of those related to safety and health), disobedience of lawful orders and absence or lateness without good cause. The second category, improper behaviour affecting the workplace, consists of such behaviour as disorderly conduct, violence, assault, using insulting language, disrupting the peace and order of the workplace; appearing for work intoxicated or under the influence of narcotic drugs, or consuming alcohol or such drugs during working hours; committing various acts related to honesty and trustworthiness, such as fraud, deceit, breach of trust, theft and various disloyal activities (such as divulging trade secrets or undertaking activities in competition with the employer); and causing material damage to the property of the undertaking. National legislation frequently requires certain misbehaviour, such as absence or lateness without good cause or appearing for work in a state of intoxication, to be habitual or repeated if they are to warrant dismissal.

As previously mentioned, the legislation of a number of countries appears to envisage two degrees of misconduct: serious misconduct which justifies summary dismissal (in some countries subject to the condition that the misconduct must be such as to make it impossible to permit even temporary continuation of the employment relationship); and misconduct of a less serious nature which may in certain circumstances justify dismissal with notice or which may justify dismissal only if repeated after one or more warnings have been given. Often a procedure to allow the worker to defend himself against the charges against him must be followed before dismissal and the penalty of dismissal must be applied within a given period of time following knowledge of the act complained of. These procedural requirements will be further discussed in the next chapter.

Capacity of the Worker

A number of reasons commonly included in various definitions of valid grounds for dismissal relate to a worker’s capacity to carry out his duties under the contract of employment. These include: (a) lack of qualifications for or capability to perform the job for which he was hired; (b) inadequate performance of that job (wilful substandard performance or negligence in performance would rather be

considered to be misconduct); and (c) absence from or inability to perform work owing to illness or accident.

As in the case of misconduct, certain guarantees are often available to the worker in connection with dismissal for these reasons. With respect to the first two, concerning lack of qualifications and inadequate performance, these guarantees are of a procedural nature, designed to provide the worker with an opportunity to demonstrate his qualifications or improve his performance before being dismissed.

In the case of the third reason, concerning absence from or inability to perform work because of illness or accident, many countries provide guarantees of a substantive type, designed to ensure that a worker retains his job while he is recovering. National legislation frequently provides for the suspension of the contract of employment or prohibits dismissal for given periods of time in such cases. These periods vary: three months in Saudi Arabia and Somalia, four months in the Libyan Arab Jamahiriya and the USSR, six months in Benin, the United Republic of Cameroon, Chad, the Congo, Egypt, Ethiopia, Madagascar, Mauritania, Norway (in case of a worker with fewer than five years' service), Rwanda, Senegal, the Syrian Arab Republic, Togo and Zaire, one year in Algeria, Hungary, Indonesia and Norway (in case of a worker with five years' service or more) and two years in the Netherlands. In some countries, for example Algeria, Hungary and the USSR, the period is extended for certain illness, such as tuberculosis. In Poland the period during which dismissal is prohibited is the period during which the worker receives benefits, while in Mexico it is the period fixed by the national social insurance institution. In Egypt, the Libyan Arab Jamahiriya, Saudi Arabia and the Syrian Arab Republic the period given is in respect of consecutive days of absence from work, a longer period of non-consecutive days of absence also authorising the employer to terminate the relationship. In Italy the Civil Code prohibits dismissal based on absence due to illness or accident for a given period of time; this period has been extended by collective agreements. In France and the United Kingdom protection against dismissal on these grounds derives from decisions of the courts or tribunals which, in France, authorise dismissal only when the replacement of the worker has become necessary to the proper running of the undertaking and, in the United Kingdom, require the employer to show that the absence was sufficient to justify dismissal.

Stricter rules exist in a number of countries concerning absence from work due to an occupational accident or disease. In some cases the legislation provides for the suspension of the contract of employment during the whole period of incapacity resulting from such injury or disease (Algeria, Benin, Burundi, the United Republic of Cameroon, Chad, the Congo, Mauritania, Rwanda, Senegal, Togo and Zaire). This prohibition presumably ends if it is determined that the incapacity is permanent. This is clearly stated in Algeria, where the legislation provides for suspension of the employment relationship until the date of recovery or stabilisation (with an obligation to reinstate the worker in his job thereafter), unless the worker has become entitled to a pension for 66 per cent incapacity, and in Chad, where the contract of employment is suspended until recovery or the certification of permanent disability excluding employment. In Mexico the employer is obliged to reinstate the worker in his job if he becomes able to perform work and reports for work within one year following the beginning of the incapacity, unless he receives compensation for permanent total incapacity. In the USSR the post must

be held for the worker until his complete recovery or until his incapacity is held to be unchangeable. In Hungary and Poland the legislation provides that dismissal is unlawful for the entire period of incapacity during which the worker is entitled to a benefit.

Several countries have special rules regarding termination of employment because of permanent incapacity, whether or not this is caused by an occupational injury or disease. Thus, in Romania only grade I and II disabilities for which the worker receives a pension are grounds for termination, while grade III disabilities entitle the worker to be transferred to suitable work if he cannot be retained in his previous job. In the USSR permanent unfitness for the worker's post due to his state of health is a ground for dismissal only if it is impossible to transfer the worker to another job.

Generally, in the above-mentioned cases, conditions are imposed by the legislation regarding appropriate medical certification of the illness or injury preventing the worker from performing his work.

Operational Requirements of the Undertaking

The reasons for dismissal related to the operational requirements of the undertaking, enterprise or service are variously defined but generally include reasons of an economic, technological, structural or similar nature. Dismissals resulting from these reasons may be individual or collective and may involve reduction of the workforce or closure of the undertaking. These will be further discussed in Chapter VI.

Other Reasons

In a number of countries several other reasons which are enumerated as justifying dismissal might seem somewhat more difficult to classify among the three kinds of reason mentioned above. These include imprisonment of a worker, sometimes for a specified minimum period (as in, for example Bulgaria, Czechoslovakia, Mexico, Panama and Romania), reinstatement of another worker whose employment had previously been terminated (as in, for example, Bulgaria, Romania and the USSR), statutory requirements prohibiting the employment of a worker in the work for which he was engaged (Ireland and the United Kingdom) and the attainment of a given age, the age of retirement or entitlement to an old-age pension (as in, for example, Bulgaria, Cyprus, Panama, Romania, Sweden and Yugoslavia). With regard to the last-mentioned reason, under the legislation of Ireland, Italy and the United Kingdom the attainment of a given age or pensionable age is not stated to be a valid reason for dismissal but excludes the persons concerned from the protection of the legislation.

SUFFICIENCY OF REASON

In countries implementing a justification requirement it appears to be widely accepted, either expressly in the legislation itself or by the courts or tribunals in deciding on the justification of dismissal in individual cases, that, to be justified, not only must a dismissal be based on a valid kind of reason but the reason must be sufficiently serious to justify dismissal. Thus, minor faults such as occasional

lateness, transitory problems of performance, and so on, are not deemed to be sufficient to justify the employer's dismissing the worker concerned; nor are minor operational problems of the enterprise which call for measures other than workforce reduction.

This requirement is sometimes expressed in the legislation in a general way, as in France and Gabon, where there must be a "real and serious reason" for dismissal, and in the United Kingdom, where the employer must show that he acted reasonably in treating the reason given as a "sufficient reason" for dismissing the worker. Sometimes, as previously noted, the rules governing specific kinds of dismissal reflect this requirement, particularly where they authorise dismissal for various faults or shortcoming only if habitual or repeated or if one or more warnings are given to the worker concerned. Guarantees of this latter kind will be considered in Chapter III. More frequently, the requirement of sufficiency is not stated as such in the legislation but is implicit in the general concept of justification and is applied by the courts or tribunals in deciding on the justification of dismissals, having regard to all the circumstances of each case.

It should perhaps be added that, in many countries which provide for appeals against unjustified dismissal, the competent courts or tribunals appear generally to allow the employer a certain degree of discretion in deciding whether a valid kind of reason is sufficient to justify dismissal in a particular case and they will declare a dismissal to be unjustified only when they consider that the exercise of that discretion was unreasonable. Moreover, it would seem that, in some countries at least, the courts or tribunals are reluctant to involve themselves in an evaluation of the sufficiency of economic, technological or similar reasons as grounds for dismissal and apparently limit themselves to determining whether they are real and whether they are the true cause for the dismissal.

PROHIBITION OF DISMISSAL FOR PARTICULAR REASONS

In a number of countries which have enacted legislation requiring justification for dismissal, as well as in some countries not adopting such a requirement, certain specified reasons have been explicitly stated to constitute invalid grounds for dismissal, or dismissal for such reasons has been prohibited or deemed to be abusive. Among these invalid grounds for dismissal are those listed in Paragraph 3 of Recommendation No. 119: (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; (b) seeking office as, or acting or having acted in the capacity of, a workers' representative; (c) the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violation of laws or regulations; and (d) race, colour, sex, marital status, religion, political opinion, national extraction or social origin.

These prohibitions have generally been established within the context of policies designed to guarantee effectively such matters as trade union rights, the integrity of a system of workers' representation in the undertaking, the right to invoke the protection of the laws governing work and employment, or equality of treatment. Sometimes certain of these guarantees were instituted before the incorporation in the law of more general protection against unjustified dismissal,

and in some countries they remain the only type of legislative protection against such dismissal.

Where a more general system of protection against unjustified dismissal is available, it is rare for one of the above-mentioned reasons to be deemed to be a valid reason for dismissal. Nevertheless, these specific guarantees can be useful even in such countries, particularly where the legislation enunciates the justification requirement in general terms. Moreover, in some countries which do not provide for compulsory reinstatement in case of unjustified dismissal generally, these specific guarantees sometimes serve as the basis for nullifying a dismissal based on such grounds and awarding reinstatement. Of course, in countries which have not adopted a general system of protection against unjustified dismissal, specific guarantees against dismissal for the above-mentioned reasons are of particular importance.

Of the previously mentioned reasons, those most widely incorporated in national legislation as invalid reasons for dismissal are trade union membership and activities. Dismissal for such reasons is prohibited, for example, in Argentina, Bangladesh, Benin, the United Republic of Cameroon, Canada, the Congo, Cyprus, Egypt, El Salvador, Finland, France, Gabon, Italy, the Ivory Coast, Japan, Madagascar, Mali, Mauritania, Mauritius, the Niger, Pakistan, Panama, Rwanda, the Sudan, Sweden, Trinidad and Tobago, the United States and Zambia, while in Belgium, Brazil, Guatemala and Mexico more generally worded provisions prohibiting attempts by the employer to influence workers with regard to union membership or participation in union activities may provide equivalent protection. In a number of countries, including Brazil, Bulgaria, Finland, India, New Zealand, Romania, Spain and the USSR, protection of trade union officers, delegates or activists is afforded by prohibiting the dismissal of such persons without prior authorisation or in the absence of certain specified conditions.

A certain number of countries provide special protection against dismissal to elected workers' representatives, such as works council members. The legislation stipulates variously that seeking office or serving as a workers' representative shall not constitute a valid ground for dismissal (as in Cyprus and Mauritius), or that such persons shall not be dismissed unless there are serious reasons justifying summary dismissal or the undertaking closes down (the Federal Republic of Germany), or unless the worker has been guilty of a serious fault or the competent joint committee has recognised that there are economic or technical reasons requiring dismissal (Belgium), or in the absence of prior authorisation by the competent administrative authorities, a works council or a court (as, for example, in Austria, Benin, the United Republic of Cameroon, the Central African Republic, the Congo, France, Gabon, the Ivory Coast, Luxembourg, Madagascar, Mali, Mauritania, the Netherlands, the Niger, Rwanda, Tunisia and the Upper Volta).

Prohibition of the dismissal of a worker in retaliation for having filed a complaint or participated in proceedings against the employer involving alleged violations of laws or regulations may be found in a number of countries, including Argentina, Canada, Cyprus, El Salvador, Japan, Mauritius, New Zealand, Panama, Trinidad and Tobago, the United States and Zambia.

Lastly, dismissal motivated by one or more of such grounds as race, colour, sex, marital status, religion, political opinion, national extraction or social origin is

explicitly prohibited in several countries. There are prohibitions of dismissal on all or most of these grounds in Cyprus, Mauritius, New Zealand, the United Kingdom, the United States and Zambia; on grounds of race, colour or sex in Canada; because of a worker's opinions in, for instance, Benin, the Central African Republic, the Congo, Gabon, the Ivory Coast, Madagascar, Mauritania, the Niger, Rwanda and the Upper Volta; and on grounds of political or religious discrimination in Italy.

Apart from the above-mentioned grounds deemed to be invalid reasons for dismissal or in respect of which national legislation provides particular protection against dismissal, special protection against dismissal for several other reasons may be found in some countries.

One of these is temporary inability to work due to illness or accident referred to above in connection with the question of capacity. Another is pregnancy or absence from work due to confinement or maternity leave, on account of which dismissal is prohibited in a number of countries, including Algeria, Austria, Belgium, Denmark, Czechoslovakia, the German Democratic Republic, the Federal Republic of Germany, Hungary, Italy, Norway, Tunisia, the USSR and the United Kingdom. In several of these countries, in addition, the worker concerned may not be dismissed for a given period after delivery, for example during breast-feeding for up to six months after confinement (Hungary), while nursing or until the child is 1 year old (the German Democratic Republic and the USSR) or if permanently looking after (Czechoslovakia) or solely responsible for (the German Democratic Republic) a child under 3 years of age.

Special protection is sometimes provided against dismissal on grounds of age as such, apart from the question whether attainment of the age of retirement should be deemed a valid reason for dismissal or whether persons having attained that age should be excluded from the protection of legislation requiring dismissals to be justified. Thus, the legislation of Norway and the United States prohibits the dismissal on grounds of age of workers up to 70 years old. In the German Democratic Republic the dismissal of a worker within five years of pensionable age is prohibited without the consent of a district council. In Poland the dismissal of a worker who is within two years of pensionable age is prohibited, except for serious misconduct.

A number of countries make provision for the prohibition of dismissal or suspension of the contract of employment during military service. These include Belgium, Benin, Burundi, the United Republic of Cameroon, Chad, the Congo, Czechoslovakia, Denmark, Egypt, Gabon, Hungary, Indonesia, Madagascar, Mauritania, Rwanda, Senegal, Somalia, Switzerland, Togo and Zaire.

WORKER'S RESIGNATION DUE TO CERTAIN CONDUCT OF THE EMPLOYER ASSIMILATED TO UNJUSTIFIED DISMISSAL

In many countries which have enacted legislation to protect workers against unjustified dismissal, certain acts or omissions by an employer with respect to a worker are deemed by the legislation or by the courts to constitute grounds authorising the worker to terminate the employment relationship but to claim compensation from the employer at the rate payable in case of unjustified dismissal. The acts or omissions by the employer which entitle the worker to put an

end to the employment relationship and claim compensation for unjustified dismissal are various; sometimes they are laid down by legislation but more frequently they are determined by the courts in the light of the circumstances of each case. They consist essentially of various types of serious misconduct on the part of the employer toward the worker, such as immoral acts, insults, violence, unlawful withholding of wages, endangering of the safety or health of the worker, as well as other serious failures to fulfil the employer's statutory or contractual obligations toward the worker.

EXISTING INTERNATIONAL STANDARDS

The principle that there must be justification for an employer to be entitled to dismiss a worker is laid down in Paragraph 2 (1) of Recommendation No. 119 as follows: "Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."

The definition contained in Recommendation No. 119 of the kinds of reason deemed to justify dismissal is framed at a level of generality midway between the most generally formulated definitions of the justification requirement in national legislation (referring, for example, to a "just cause" or an "objective" or "real and serious" reason) and the definitions specifying in considerable detail the various reasons justifying dismissals, while corresponding in good measure to the level of generality of the definitions found in a number of countries. As, moreover, the concepts of capacity and conduct of the worker and operational requirements of the undertaking, establishment or service seem to cover well almost all the reasons specifically deemed to be valid reasons for dismissal in national legislation, it has been considered appropriate to retain this terminology in the questionnaire appearing at the end of this report.

Nevertheless, as the legislation of some countries refers to certain reasons apparently different than those stipulated in Paragraph 2 of the Recommendation, the question arises whether any additional categories of reason should be included in the questionnaire. Those reasons which might be considered in this regard include deprivation of liberty as a result of a conviction in a court of law, reinstatement of a previously employed worker in the post concerned, statutory provisions prohibiting the employment of a worker in the work for which he was engaged and attainment of the age of retirement.

It would appear that the deprivation of liberty as a result of the sentence of a court of law could be subsumed under the concept of capacity of the worker, since the enforced absence from work makes the worker incapable of fulfilling his contractual obligations. Having regard to the importance of providing for the reintegration of the prisoner in social and productive life following his release from imprisonment, a number of countries stipulate in their legislation that the employment relationship is to be suspended in the case of imprisonment for a restricted period of time, to the extent that the offence for which the worker was convicted is not an offence affecting the appropriateness of employing the worker in his previous job.

The reinstatement of a worker in his previous job as a result of a decision by the competent body, as a reason justifying the dismissal of the worker who was

appointed to that job to replace him, would seem to be a necessary consequence of any scheme of protection against unjustified dismissal including reinstatement as a remedy, to the extent that the latter worker cannot be transferred to another post. As it is implicit in such a system of protection, it may not be necessary to include this specific reason explicitly in the definition of the valid reasons for dismissal.

As concerns statutory prohibitions of employment of a worker in the work he was engaged to perform, as a ground for dismissal, while under national law this will inevitably constitute a valid ground for dismissal (at least if the worker concerned could not be transferred to other employment), from the point of view of international standards the decision whether such statutory prohibitions should be deemed to justify dismissal must depend upon the substance of the particular prohibition. For example, a statutory prohibition of employment of a worker employed as a driver who is disqualified from driving might be deemed to justify the dismissal of the person concerned, at least to the extent that the worker could not be transferred to other suitable employment; this, of course, could in any case be assimilated to a reason related to the capacity of the worker. On the other hand, a discriminatory statutory prohibition based on race or political views, for example, would clearly not be acceptable under international standards.

Whether attainment of the age of retirement or pensionable age should be a valid ground for dismissal is a considerably more difficult problem. The basic issue is whether it should be permissible to oblige a worker to terminate his employment at a given age or whether retirement should be voluntary. This matter is being considered by the Conference in connection with its discussion of the item "Older workers: work and retirement", on the agenda of its 65th and 66th Sessions (1979 and 1980).⁴ The principle approved by the Conference during the first discussion as part of a proposed Recommendation on older workers is as follows: "Wherever possible, measures should be taken with a view to—(a) ensuring that, in a framework allowing for a gradual transition from working life to freedom of activity, retirement is voluntary; (b) making the pensionable age more flexible."⁵ How this issue might be dealt with in any new instrument on termination of employment will have to be carefully considered in the light of the outcome of the second discussion on older workers by the Conference in 1980. For the purpose of the present report it has been thought best to treat this problem as one of the scope of coverage of any new instrument, rather than in the context of the definition of reasons deemed to justify dismissal. It has thus been raised in the part of the questionnaire dealing with scope.

With regard to the element of sufficiency for dismissal of the various reasons which are of a kind justifying dismissal, it appears that this requirement is explicitly enunciated in the legislation of only a few countries, being rather implicit in the legislation, and that it is enunciated mainly by the courts or tribunals in the application of the legislation to specific cases. For this reason it has not been felt appropriate to include questions on this matter in the questionnaire. It would seem that any requirement in a new instrument that there should be a valid reason for dismissal would also implicitly include a requirement that the reason for dismissal should not only be of a valid kind but should also be sufficiently serious to justify termination of the employment relationship. Whether the bodies to which dismissals may be appealed should be authorised to review the sufficiency of

reasons related to the operational requirements of the undertaking is a question that might best be left to each country to determine.

Paragraph 2(2) of Recommendation No. 119 specifies that the definition or interpretation of such valid reason should be left to the methods of implementation set out in Paragraph 1 of the Recommendation. This has not been incorporated in the questionnaire, as it would in any case be for each country to determine the extent to which national law or regulations should themselves define such valid reasons or should leave their definition or interpretation to the courts, tribunals or other agencies through which it is sought to give effect to the instrument or instruments.

As already indicated, Paragraph 3 of the Recommendation sets forth a number of considerations which should not constitute valid reasons for termination of employment: “(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; (b) seeking office as, or acting or having acted in the capacity of, a workers’ representative; (c) the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violation of laws or regulations; or (d) race, colour, sex, marital status, religion, political opinion, national extraction or social origin”. Protection against dismissal on certain of these grounds is also included in the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers’ Representatives Convention (No. 135) and Recommendation (No. 143), 1971, and the Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111). The relevant provisions of these instruments are reproduced in the Appendix to this report.

Since protection against dismissal on certain other specified grounds is provided for in the legislation of many countries, the questionnaire asks whether other grounds should be included in any new instrument or instruments as reasons which should not constitute valid reasons for dismissal. These include age, pregnancy, absence from work during maternity leave and absence from work due to compulsory military service or other civic obligations, as well as temporary absence from work because of duly certified illness or injury.

It should be recalled in this connection that the Maternity Protection Convention (Revised), 1952 (No. 103) (Article 6), prohibits the giving of notice of dismissal to a woman during her absence from work on maternity leave in accordance with the Convention or which would expire during such absence and that the Maternity Protection Recommendation, 1952 (No. 95), provides that “wherever possible” the period of protection from dismissal referred to in the Convention should “be extended to begin as from the date when the employer of the woman has been notified by medical certificate of her pregnancy and to continue until one month at least after the end of the period of maternity leave provided for in Article 3 of the Convention”. Although the question of the protection against dismissal of pregnant women and women on maternity leave has thus been treated in other instruments (as indeed had certain other matters included in Paragraph 3 of Recommendation No. 119), it appears appropriate to raise the question of the inclusion of pregnancy and absence on maternity leave as invalid reasons for dismissal, in any new instrument on termination of employment.

Provisions regarding the justification of dismissal may be found in other international instruments. The Arab Labour Standards Convention, approved on

18 March 1967 by the Council of the Arab League, provides that "A worker who considers that he has been dismissed without a valid reason shall be entitled to appeal within a reasonable time against the decision to dismiss him to an impartial body, such as a board or court, for which purpose he may, if he so requests, be assisted by a representative. The appeals body shall have the right to examine the reason for which the worker was dismissed and any related circumstances. It shall also have the right to take a decision on the legality of his dismissal" (Article 29).⁶

The Inter-American Charter of Social Guarantees, adopted by the Ninth International Conference of American States in Bogotá in 1948, incorporates the principle of stability of employment.⁷

The Recommendation concerning the status of teachers, adopted by the Special Intergovernmental Conference on the Status of Teachers in Paris on 4 October 1966, stipulates (Paragraphs 45-46) that "Stability of employment and security of tenure in the profession are essential in the interests of education as well as in that of the teacher and should be safeguarded even when changes in the organisation of or within a school system are made" and that "Teachers should be adequately protected against arbitrary action affecting their professional standing or career."⁸

Notes

¹ See ILO: *Termination of employment: General survey by the Committee of Experts on the Application of Conventions and Recommendations*, op. cit.; and E. Yemin: "Job security: Influence of ILO standards and recent trends", in *International Labour Review* (Geneva), Jan.-Feb. 1976, pp. 17-33.

² See ILO: *Basic agreements and joint statements on labour-management relations*, Labour-management relations series, No. 38 (Geneva, 1971). The Basic Agreement of 1962 in Cyprus has been replaced by an industrial relations code, concluded by the central organisations of employers and workers on 25 April 1977. The Main Agreement of 1960 in Denmark has been replaced by a general agreement of 31 October 1973.

³ See T. A. Hanami: "Japan", in R. Blanpain (ed.): *International encyclopaedia for labour law and industrial relations* (Deventer, Kluwer), Suppl. 6, Aug. 1978, pp. 79 and 82.

⁴ See ILO: *Older workers: Work and retirement*, Report VI(1), International Labour Conference, 65th Session, 1979.

⁵ *idem*: *Older workers: Work and retirement*, Report IV(1), International Labour Conference, 66th Session, 1980, p. 58 (Paragraph 21 of the proposed Recommendation).

⁶ See *idem*: *Legislative series*, 1967-Int. 1.

⁷ See *idem*: *The International Labour Code 1951* (Geneva, 1952), Vol. II, pp. 1022-1030.

⁸ See *idem*: *Official Bulletin* (Geneva), Vol. L, Jan. 1967, p. 131.

CHAPTER III

PROCEDURAL SAFEGUARDS AND REMEDIES

An effective system of protection against unjustified dismissal involves not only a substantive requirement that dismissals be justified but also procedures through which respect for that requirement may be ensured. Such procedures fall into two categories: procedures to be followed either before or at the time of dismissal and procedures of appeal against that decision, including remedies if it is found that a dismissal was unjustified. These will be considered in turn in this chapter.

PROCEDURES BEFORE OR AT THE TIME OF DISMISSAL

In many countries employers are subject to one or more kinds of procedural obligation before taking a final decision to dismiss a worker. The principal objective of such procedures is to ensure that the decision is well founded and that the interested parties have the opportunity to present their views regarding the dismissal. The procedures relating to individual dismissals will be discussed in the following paragraphs, while those relating specifically to workforce reductions will be discussed in Chapter VI.

These procedures are often provided for in legislation, collective agreements and works rules or followed by personnel practices.

Several kinds of procedural obligation are provided for. In respect of disciplinary dismissal, the employer is frequently obliged to follow a disciplinary procedure and in the case of certain disciplinary offences to give a warning before dismissal. In certain countries the right to a hearing before dismissal, which is one essential phase of disciplinary procedures, is a more generally applicable requirement to be followed in all cases of dismissal. Other procedures, also applicable in most cases to all types of dismissal, consist of the reference of dismissals to workers' representatives or to public authorities, whose powers in connection with dismissals vary from country to country. A different sort of procedural obligation which is found in several countries concerns the search by the employer for alternative employment for a worker before the termination of his employment.

Once a decision to dismiss is made, there may be requirements of notification of the dismissal, of the reasons therefor and of the right of appeal, as well as grievance procedures to which a worker may have recourse.

Disciplinary Rules and Procedures

The establishment of disciplinary procedures to be followed before a decision is taken to dismiss a worker for fault is based on basic concerns of justice. Inherent in these procedures is the view that disciplinary dismissal involves the imposition of a penalty—the most serious of disciplinary penalties (others being, for example, warning, reprimand, suspension, demotion or degrading)—for an alleged fault and

that such a sanction should not be applied without due process to ensure the right of defence and proportionality of the sanction to the fault. Such procedures were often first applied in government employment, but have now spread in many countries to the economy as a whole.

These procedures appear to be generally applicable to all disciplinary dismissals (including dismissal for misconduct and for unsatisfactory performance), irrespective of whether a dismissal is effected with or without notice, although in many countries disciplinary dismissal is usually without notice. Indeed, in several countries where this was perhaps not clear from the terms of the legislation (for instance India and Pakistan) the courts have ruled that an employer is not absolved from following an appropriate disciplinary procedure by giving advance notice of dismissal, since under the requirements of natural justice such a procedure must be followed in all cases of disciplinary dismissal, irrespective of whether a period of notice is given.

In some countries the legislation imposes a general obligation upon employers to establish (sometimes in negotiated collective agreements or in works rules) appropriate rules and procedures in respect of disciplinary dismissals. This is the case, for example, in Czechoslovakia, the German Democratic Republic, India, Italy, Norway, Somalia and Zambia. In some countries the employer is obliged to post these rules in an accessible place (this is the case in, for instance, India, Italy and Pakistan) or notify such rules to each worker (Ireland and the United Kingdom).

The disciplinary procedure (called "domestic inquiry" in several countries) provided for in the legislation of a number of countries (or by court interpretation of such legislation) usually includes one or more of the following phases, but almost always the second and third: (a) an investigation of the facts; (b) notification in writing to the worker of the allegations made against him; (c) the worker's right to a hearing to present his defence (and in some countries to cross-examine any witnesses to the alleged fault), usually with the right to be accompanied by a fellow worker, trade union officer or other person to assist him; and (d) the communication in writing of the results of the investigation and the decision taken (as in Bangladesh, the Congo, Czechoslovakia, Egypt, the German Democratic Republic, Hungary, India, Italy, Mauritius, Pakistan, Portugal, Singapore, Tanzania, the USSR, the United Kingdom and Yugoslavia). In addition to these requirements, certain countries make provision for the involvement of workers' representatives at a particular stage of the disciplinary procedure or in all dismissal cases, including disciplinary dismissals (see below).

Where such a disciplinary procedure is required the employer frequently has the faculty of suspending the worker concerned with full or part pay during the procedure in cases in which serious misconduct is alleged.

Prior Warning of Dismissal in Case of Certain Disciplinary Breaches

Apart from requirements of procedures of investigation and hearing in disciplinary cases, a separate requirement often found in the legislation, or laid down by court decisions interpreting or applying the legislation, consists of an obligation incumbent on the employer to give a worker guilty of a breach of discipline which is not sufficiently serious to warrant dismissal appropriate warning

that a subsequent breach may be sanctioned by dismissal. This requirement commonly relates both to misconduct and to unsatisfactory performance. The number of warnings (or other sanctions short of dismissals) required before dismissal is justified depends upon the nature and seriousness of the disciplinary breach, with very minor breaches requiring a certain number of warnings while important breaches may justify dismissal after a single warning. Normally, the last warning must be in writing and indicate the misconduct or unsatisfactory performance complained of and the penalty which the worker risks incurring if it is repeated. The purpose of such requirements is to ensure, except where the breach of discipline is such that the employment relationship cannot be expected to continue, that the worker is given an opportunity to improve his conduct or performance before suffering so drastic a penalty as dismissal.

Such warning requirements are laid down in the legislation or by the courts interpreting the legislation in a number of countries, either as such or through a requirement that the worker must have incurred a lesser penalty before dismissal. These include Algeria, Antigua, Czechoslovakia, Egypt, Dominica, the German Democratic Republic, Iraq, the Libyan Arab Jamahiriya, Romania, the Syrian Arab Republic, Tanzania, the USSR and the United Kingdom.

Often, where a prior warning must be given or a lesser penalty applied before dismissal is permissible, a warning given or penalty imposed which is not followed by a second offence within a specified period of time is removed from further consideration, and any later offence will be considered as a first offence.

Moreover, the applicable rules commonly specify that disciplinary sanctions may be applied by the employer only within a limited period of time following his becoming aware of the breach of discipline. Although in some countries this requirement appears to be limited to summary dismissal as a disciplinary penalty (see Chapter IV), in such countries the courts might consider excessive delay in dismissing a worker with advance notice for a disciplinary offence as evidence that the offence was not serious enough to merit dismissal and that the dismissal was thus unjustified.

Right to a Hearing in All Cases of Individual Dismissal

In several countries, including France, the Federal Republic of Germany and Sweden, workers to be dismissed are entitled to a hearing by the employer in all cases of individual dismissal, whether or not imposed as a disciplinary penalty. In countries in which works councils or trade union committees are involved in decisions concerning dismissal (see below), the workers concerned are generally entitled to be heard by the competent works council or trade union committee.

Prior Consultation or Consent of Workers' Representatives

Workers' representatives are called upon to play a defined role in connection with all or certain kinds of dismissal in a number of countries. The prerogatives of these representatives in dismissal cases are of two types: prior consultation and prior consent.

In some countries the employer is obliged to notify and consult with workers' representatives (works council or trade union representatives, depending upon the country) before dismissing a worker. This obligation applies to all kinds of

dismissal in Austria, the Federal Republic of Germany, Norway, Poland, Romania, Sri Lanka (in state enterprises) and Sweden and to disciplinary dismissals in Portugal and Tanzania. Usually the employer is free to proceed with the dismissal after hearing the views of the works council or trade union representatives, but in several countries opposition expressed by such representatives will suspend the effects of a dismissal (as in the Federal Republic of Germany) or entitle the worker concerned to request the courts to suspend the effects of the dismissal (as in Portugal) pending a decision on appeal (see below).

In several other countries the management of the undertaking or work unit is obliged, before dismissing a worker, to obtain the prior consent of the competent trade union committee (as in Czechoslovakia, the German Democratic Republic, Romania and the USSR), a joint committee in the undertaking (as in Algeria, in disciplinary cases), a tribunal elected by the workers of the work centre (as in Cuba, in disciplinary cases) or an elected disciplinary commission of the work unit (as in Yugoslavia, in disciplinary cases). In Czechoslovakia and the German Democratic Republic the management may appeal to the next highest trade union authority if the trade union committee in the undertaking refuses to approve the proposed dismissal.

Powers of Bodies External to the Undertaking

The legislation of several countries requires that proposed dismissals for whatever cause be submitted to an authority external to the undertaking for approval. This is the case in Indonesia, where tripartite regional or central disputes settlement committees must authorise dismissals, in Iraq and the Syrian Arab Republic, where dismissals must be approved by tripartite dismissals boards, and in the Netherlands, where all dismissals must be authorised by employment offices.

A different sort of procedure—judicial termination of the employment relationship—may be available under certain conditions in some countries, for example France. Under this procedure an employer who does not wish to run the risk of a later challenge to a contemplated dismissal has the faculty of requesting the competent courts or tribunals to decide whether there is proper justification for dismissal and to terminate the employment relationship judicially.¹

Obligation to Seek an Alternative Job for Worker before Dismissing Him

The legislation of some countries seeks to ensure that, where the dismissal of a worker is contemplated for non-disciplinary reasons, the employer must first seek suitable alternative employment for the worker. The legislation differs, however, in the extent to which the employer's right to dismiss is restricted in this respect.

In several countries there is an absolute requirement for the undertaking or work unit to offer the worker alternative employment within the undertaking or in another undertaking (with its agreement) in case of dismissal for various reasons other than disciplinary offences. This is the case in the German Democratic Republic, Romania and Yugoslavia. Dismissal is valid in these countries only if such an offer was made by the undertaking and refused by the worker.

In several other countries dismissal for other than disciplinary reasons is valid only if it is impossible to transfer the worker concerned to another post with his

consent (as in Czechoslovakia and the USSR) or if the employer cannot reasonably be expected to transfer the worker to some other work (as in Sweden) or does not have other suitable work to offer (as in Norway).

Notification of the Dismissal

For a summary dismissal to take effect or an advance notice period to begin to run, it is necessary that the decision of the employer to dismiss the worker concerned be notified to him in some manner. While the essential requirement is notification of intent (which may be done in any unambiguous way), a number of countries have established more formal requirements in their legislation.

Many countries now require the employer to notify the worker of his dismissal (whether with or without a period of advance notice) in writing. This is the case, for example, in Benin, the United Republic of Cameroon, Chad, Colombia, the Congo, Czechoslovakia, France, the German Democratic Republic, Hungary, Italy, Norway, Panama, Peru, Romania, Spain, Sweden, Togo, Yugoslavia and Zaire. In Belgium and Mexico the worker must be notified in writing of summary dismissal for "serious reasons" or "just cause" (essentially, serious misconduct), while in Mauritania, Rwanda and Senegal dismissal must be notified in writing only in case of dismissal with a period of advance notice (and thus not in case of summary dismissal for serious misconduct). Occasionally it is indicated that the employer has a short period following a dismissal within which to communicate this notification (in Togo the dismissal must be confirmed in writing within eight days). In several countries the legislation explicitly states that the written notification must indicate the date on which the employment relation is to be terminated, a requirement which in any case would seem to be implicit in the need to make known the employer's intention with regard to the dismissal.

Notification of Reasons for Dismissal

One of the problems confronted by a dismissed worker in deciding whether to appeal against his dismissal, and in preparing his case for appeal if he decides to do so, is the absence of any clear indication by the employer of the reasons for which he was dismissed. Because of this, as well perhaps because of simple considerations of propriety, the employer is bound in a number of countries to provide a dismissed worker with a written statement of the reason or reasons for his dismissal. In some countries the employer must inform the worker of the reasons for dismissal only if requested (as in Canada, under legislation in the federal jurisdiction protecting workers not covered by collective agreements, and in France, Ireland, Italy, Norway, Sweden and the United Kingdom), but more frequently the employer is obliged to provide such a statement even without request by the worker (as in Bangladesh, Belgium, Benin, the United Republic of Cameroon, Chad, Colombia, the Congo, Czechoslovakia, the German Democratic Republic, the Federal Republic of Germany, Hungary, India, Mexico, the Netherlands, Pakistan, Panama, Peru, Poland, Portugal, Romania, Spain, Tanzania, Yugoslavia and Zaire).

In most of these countries this obligation applies irrespective of the reason for dismissal. However, in Belgium, Mexico, the Netherlands, Peru, Poland and Portugal it applies only to summary dismissal for serious misconduct and

assimilated reasons, while in Mauritania, Rwanda and Senegal it applies to dismissal with advance notice only (and thus not to summary dismissal for serious misconduct). In the Federal Republic of Germany the employer must notify the worker of the reasons for his dismissal under a general obligation of care and fidelity elaborated by the tribunals; in addition, the legislation obliges the employer to inform a worker who has been dismissed because of urgent operating requirements of the reasons for his selection for dismissal.

In some of these countries the legislation stipulates that, in case of appeal against a dismissal, the employer may not invoke or prove another reason than that notified to the worker in accordance with the above-mentioned requirement (as in Belgium, Colombia, Italy, Panama and Peru), while in others the question whether the employer may show another reason will depend upon how these provisions are applied by the courts or tribunals. Occasionally it is provided that a dismissal effected without compliance with the obligation of written notification of the dismissal and the reasons therefor is null and void (as in Czechoslovakia and Italy) or "abusive" (as in Chad), while in other countries the consequences of such failure would be determined by the courts.

Notification of Right of Appeal and Appeals Procedure

Several countries include provisions in their legislation obliging the employer to inform the worker at the time of dismissal of his right of appeal or of the procedure whereby he may appeal against his dismissal. This is the case in Norway (the worker must also be informed of his right to request negotiation with respect to his dismissal), Romania, Sweden and Yugoslavia.

Grievance Procedures

In some countries a worker who objects to a decision by his employer to dismiss him, where the right to dismiss is governed by collective agreement or works rules, is entitled to have that decision reconsidered under a grievance procedure within the undertaking established by such agreement or works rules. These procedures, by permitting the reconsideration of a decision regarding dismissal at higher levels of management, may help to ensure the settlement of a certain number of disputes within the undertaking and thereby to improve labour-management relations within the undertaking. The importance of grievance procedures was recognised by the International Labour Conference when it adopted the Examination of Grievances Recommendation, 1967 (No. 130). In some countries provision is often made in collective agreements for the arbitration of grievances which are not settled within the undertaking, as a last stage of the grievance procedure.

A number of countries make provision in their legislation for the inclusion in collective agreements of procedures for the settlement of grievances arising out of the application or interpretation of such agreements, which may include provisions on dismissal. This is the case, for example, in Canada, Jamaica, Malaysia, New Zealand, the Philippines and Zambia.

Recourse to grievance procedures ending in arbitration in case of disputes over dismissal is commonly provided for in collective agreements in Canada and the United States.

PROCEDURES OF APPEAL AGAINST DISMISSAL AND REMEDIES

In all countries in which protection against unjustified dismissal has been introduced, provision has been made for the possibility of appeal against dismissal to a body competent to decide on the justification of the dismissal and to award appropriate remedies if it is found to be unjustified.

There are, however, a number of aspects of such procedures of appeal which may be differently resolved in different countries. Does the right of appeal belong solely to the individual worker or is the trade union or works council or the labour administration entitled or required to decide which claims will be submitted for decision? What kind of body is responsible for deciding on the appeal? What are the time-limits within which an appeal must be brought? May the dismissal be suspended pending a final decision on the justification of the dismissal? Must the dispute be submitted to preliminary conciliation? May the worker be assisted or represented by another person in the proceedings? What rules govern the burden of proof? What kind of remedies are available in case of a finding that the dismissal was unjustified?

Right of Appeal

In almost all countries with protection against unjustified dismissal the right of appeal is vested either solely or principally in the individual worker. This is clearly so in those countries (the great majority) in which the right not to be dismissed in the absence of proper justification is incorporated in the legislative provisions governing individual contracts of employment or in separate legislative provisions on termination of employment, which lay down the rights and obligations of the individual employer and worker the violation of which it is for the individual who is injured thereby to complain of. The right of appeal also belongs to the individual worker in most of the countries (a minority) in which the protection against unjustified dismissal has been incorporated in legislation on trade or industrial disputes, although the main objective of such legislation is the settlement of disputes between groups of workers or their trade unions and the employers. In these countries disputes over the dismissal of an individual worker are expressly stated to be subject to the disputes settlement procedures. In most of these countries the legislation has come to specify that the individual worker, as well as the trade union, is entitled to bring a claim against dismissal, as a dispute, under the legislation. This is the case, for example, in Bangladesh, India, Malaysia, Pakistan and Sri Lanka.

In some countries it appears that the trade union representing the worker concerned has a concurrent right to present a complaint against the worker's dismissal to the competent body for decision. This appears to be the case, as mentioned above, in those countries in which the protection against unjustified dismissal is laid down in the legislation governing trade disputes, under which trade unions are entitled generally to submit disputes to which they are a party to the applicable disputes settlement procedure, as well as in certain socialist countries of Eastern Europe, where the trade union committee of the undertaking or work unit would seem to be entitled to represent a worker in an appeal against dismissal.

Although, in almost all countries providing protection against unjustified dismissal, the right to appeal against a dismissal as unjustified belongs either solely

to the individual worker concerned or both to the worker and to his trade union, in a few countries (Kenya, Singapore and Trinidad and Tobago) in which the protection is afforded by legislation on trade disputes it appears that the trade union must present or approve the presentation of a dispute on this issue for it to be heard by the competent body. This, of course, serves to reinforce the position of the trade union as it provides a powerful incentive to membership; it also helps to ensure that frivolous complaints are filtered out. On the other hand, making the right of appeal against a dismissal dependent upon trade union presentation or approval presents a risk that workers may be deprived of the right to have their complaint heard, for reasons extraneous to the merits of the case.

It should also be recalled in this connection that the position taken by a works council consulted on the dismissal may affect the right of the worker to appeal. Thus, in Austria a worker may not appeal against a dismissal expressly consented to by the works council. Where it did not expressly consent to the dismissal (and where there is no works council in the undertaking), the worker may himself appeal against his dismissal, although if the works council objected to a dismissal with notice the worker must first request the works council to institute the appeal.

In several countries it is provided that the submission of the dispute to the body competent to take a final decision must be made or authorised by the appropriate administrative authority to whom such disputes must be reported in the first instance. This seems to be the case in Canada (with respect to workers not covered by collective agreements, in the federal jurisdiction), India, Kenya and Malaysia, where the minister decides whether to submit a dispute to the competent body for decision.

The same issues as arise in respect of the right to appeal under legislative protection against unjustified dismissal arise in respect of protection under collective agreements. Thus, in Canada and the United States, where such protection is provided by the vast majority of collective agreements and is enforceable under grievance procedures which may end with arbitration of a dispute, it appears that generally it is the union which must invoke the arbitration procedure where the grievance has not been settled during the earlier stages of the procedure, although a worker may be able to complain against a failure by the union to do so.

Bodies with Jurisdiction over Appeals against Dismissal

In the great majority of countries with legislative protection against unjustified dismissal an appeal may be brought against a dismissal to a judicial body, sometimes an ordinary civil law court (which may, however, have a labour chamber) but more often a labour court or tribunal (usually composed of representatives of workers and employers, often with an independent president, but sometimes constituted by independent persons versed in labour and labour relations questions). These bodies are competent to decide on individual disputes over rights and obligations arising under the legislation. In other countries, where the protection against unjustified dismissal derives from the legislation governing trade disputes, the competent body is usually a labour or industrial court or tribunal established principally to deal with collective disputes under this legislation.

In some countries the competent bodies which hear these cases are more difficult to categorise. This is the case in countries in which it is an arbitration board, labour appeals committee, judicial commission, labour relations commission or other board or committee, often of tripartite composition, that decides these questions (for example in Hungary, Indonesia, the Philippines, Poland, Romania, Tanzania and Venezuela). In some cases these boards or committees are clearly administrative in character. A similar status may be imparted to the adjudicators in Canada (in the federal jurisdiction) and the rights commissioners in Ireland (to whom dismissal cases may be presented as well as to labour courts).

Lastly, in several countries the legislation provides for appeals against dismissal to be made to the labour administration itself, for example in Singapore (where the Minister of Labour decides such questions), Sri Lanka (where termination of employment other than disciplinary dismissal may be appealed to the Commissioner of Labour) and in the Sudan (where appeal may be made to the Commissioner of Labour).

A different system exists under collective agreements in Canada and the United States, the great majority of which make provision for disputes regarding dismissal to be submitted for decision to private arbitrators, chosen by the parties in accordance with the terms of the agreement, as the last stage in a grievance procedure.

Time-limits for Filing Appeal

The right to appeal against dismissal as unjustified is generally subject to a period of prescription, either specific to claims regarding dismissal or generally provided for all claims arising out of the contract of employment. Such time-limits are imposed, first, because of difficulties of establishing proof of facts essential to a proper decision after a certain time has passed (in particular where the testimony of witnesses is necessary); and second, because of the need for security with regard to the legality of past actions. However, such time-limits should be sufficiently long to allow the worker to ascertain his rights under law, collective agreement and contract, to decide whether he believes they have been violated and if so whether to appeal against the dismissal.

The time-limits laid down by legislation specifically for appeal against unjustified dismissal vary considerably: one week in Mauritius, Poland (for dismissal with notice) and Tanzania, as well as in Egypt and the Syrian Arab Republic (for an appeal beginning with a request to suspend the dismissal); two weeks in the German Democratic Republic, Hungary, Iran, the Libyan Arab Jamahiriya (for an appeal beginning with a request to suspend the dismissal), Poland (in case of dismissal without notice) and Spain; three weeks in the Federal Republic of Germany; four weeks in the United Kingdom; one month in Bangladesh, Malaysia, Peru, Romania, Singapore and the USSR; two months in Italy, Mexico and Pakistan; three months in Czechoslovakia and Panama (for requests for reinstatement); six months in Cyprus and Ireland; and one year in Tunisia. These periods of prescription begin to run either from the date of receiving notification of dismissal or from the date the employment relationship was to have terminated, depending upon the country. They will usually be suspended during any period of prior conciliation.

Very short periods of prescription may be inadequate to permit some workers (particularly those without immediate trade union assistance) to ascertain their rights and to decide whether they believe they have been violated, and will eliminate many an appeal. Many workers without immediate trade union assistance do not learn of their legal rights and the possibility of appeal until they discuss the matter with someone else some time after the dismissal. For this reason, as indicated previously, several countries require the employer to notify the worker of his right of appeal, at the time of dismissal. Also, in some countries the competent court or tribunal may allow an appeal filed after the period of prescription has run, if the worker presents an adequate reason for the delay.

Suspension of Effects of Dismissal during Appeals Procedure

In some countries provision is made for suspension of the effects of a dismissal (and thus for continuation of the employment relationship) during the procedure of appeal against the dismissal, pending a final decision on the merits of the case. These systems seek to make the employer bear the burden of continuing the employment relationship rather than to make the worker bear the burden of a break in that relationship, pending a decision by the competent courts or tribunals on whether dismissal is justified, at least in certain types of case.

Two systems have been established to this effect. One provides for the automatic suspension of the effects of a dismissal upon the institution of proceedings of appeal against the dismissal under certain conditions; the other for the possibility for the courts or tribunals to order the suspension of the effects of a dismissal on request by the worker during these proceedings. These two systems co-exist in certain countries, one applicable to dismissal with prior notice, the other to summary dismissal.

Automatic suspension of the effects of a dismissal is provided for in respect of dismissal with advance notice in the Federal Republic of Germany, Norway and Sweden. In the Federal Republic of Germany this depends upon the position taken by the works council, to which dismissals must be notified. If the works council objects to a dismissal within a given time-limit and the worker institutes legal proceedings against the dismissal, the employment relationship must be continued pending a final decision by the courts. In such cases, however, the employer may request the court to release him from the obligation to continue the employment relationship. In Norway and Sweden suspension of the dismissal does not depend upon the position of workers' representatives respecting the dismissal, but solely upon the worker. If the worker institutes legal proceedings against his dismissal within a given period following receiving notice thereof, the dismissal is automatically suspended and the employment relationship must be continued pending a final decision by the courts. Here, too, the employer is entitled to request the court to release him from this obligation. In these two countries, in case of summary dismissal, the worker is entitled to request the court to suspend the effects of the dismissal and order continuation of the employment relationship pending a final decision on the justification of the dismissal.

In Egypt, the Libyan Arab Jamahiriya, Portugal, Saudi Arabia and the Syrian Arab Republic a dismissed worker is entitled to request the suspension of the dismissal and the continuation of the employment relationship pending a final

decision on appeal against the dismissal. In Portugal this right depends upon the position of the works council, where such exists. If the works council takes exception to the dismissal, the worker may request the courts to suspend the effects of the dismissal pending a decision on the justification thereof (he may also request this in undertakings in which provision is not made for works councils). The court is required to decide on such requests under an urgent procedure, and the suspension of the dismissal may be ordered only if there is no serious probability that there was a just cause for the dismissal. Failure to institute a legal challenge to the dismissal within 30 days thereof nullifies the suspension and the dismissal may then take effect.

In Egypt, the Libyan Arab Jamahiriya, Saudi Arabia and the Syrian Arab Republic a worker may request the suspension of his dismissal by applying to the competent administrative authority within a given period following receipt of notice of the dismissal. If following an initial attempt at conciliation a settlement is not reached, this authority must submit the case to the judge of summary jurisdiction (to a board in Saudi Arabia) for an urgent ruling on the suspension of the dismissal. If the judge or board rules that the dismissal is to be suspended, the employer must pay the worker's wages from the date of dismissal and the case is turned over to the competent court for a decision on the merits.

Preliminary Conciliation

Conciliation by a third party, before consideration by the competent body of a dispute over dismissal with a view to a decision on its justification, has resulted in some countries in the settlement of a good proportion of such disputes, thus substantially reducing the number of cases which must be heard by the competent bodies. Conciliation offers the parties an opportunity to review, with an impartial third party, the question of the justification of dismissal in the light of the legal standards applicable, the likelihood of winning or losing the case before the competent court or tribunal and the possibilities of reaching an agreed solution (which may involve a withdrawal of the complaint, reinstatement in the job or agreement on compensation).

National legislation frequently provides for conciliation as a first stage in the procedure of appeal against unjustified dismissal (often as part of a procedure applicable to all cases of individual disputes). Recourse to conciliation may be voluntary or obligatory. The body responsible for conciliation may be the labour administration or the court, tribunal, committee or board that is itself competent to decide the case in the event of failure of conciliation.

In many countries either party may request the appropriate officials of the labour administration (conciliators, inspectors or other officials) to conciliate individual disputes (including disputes over dismissal) before the dispute is brought before the competent court or tribunal. In some countries (including Benin, Burundi, the United Republic of Cameroon, Mauritius, Trinidad and Tobago, the Upper Volta and Zaire) such a dispute must be presented for conciliation to the appropriate administrative authorities before application may be made to the competent court or tribunal. Submission of a dispute for conciliation will generally suspend the running of the period of prescription.

In certain countries an appeal against a dismissal must be submitted as a dispute to the ministry of labour, which is itself responsible, after it has attempted to

conciliate the dispute, for determining whether the dispute should be presented to the competent court or tribunal for a decision on the merits (as in India, Kenya and Malaysia). Also, in Egypt, the Libyan Arab Jamahiriya, Saudi Arabia and the Syrian Arab Republic a worker wishing to request the suspension of a dismissal as a first step in an appeals procedure must apply to the labour administration, which must first attempt to conciliate the dispute, before referring it to the appropriate judge or board.

In a number of countries, whether or not the dispute has already been subject to an attempt at conciliation by the appropriate officials in the labour administration, the competent court, tribunal, committee or board to which it is presented must make an attempt at conciliation as a first phase of the procedure (as, for example, in Austria, Belgium, Benin, Brazil, Chad, the Congo, Ethiopia, France, the Federal Republic of Germany, Gabon, Mauritania, Mexico, Togo, Trinidad and Tobago, Tunisia and the Upper Volta).

Right to Be Assisted or Represented by Another Person

In almost all countries it would appear that the rules governing procedure before the body competent to hear appeals against dismissal entitle the worker to be assisted or represented by another person in the course of the proceedings. Where the competent body is a labour court or tribunal or similar body, the applicable rules frequently stipulate that the worker may be assisted or represented by another worker, a trade union representative or a lawyer.

Burden of Proof and Powers of Investigation

In deciding whether a dismissal was justified, the competent body must determine the reasons for the dismissal, whether the reasons are valid and if so whether they are sufficient to justify dismissal (it has previously been indicated that the courts or tribunals in some countries appear to leave the employer a much greater amount of discretion in evaluating the sufficiency of reasons related to the operational requirements of the undertaking than in respect of reasons related to the worker, such as misconduct, inadequate performance and lack of capacity).

The usual rule in adversary proceedings before the courts places the burden on the complainant to prove the facts he alleges. If, pursuant to this rule, the burden were placed upon the worker to prove the absence of a valid reason for dismissal, the effectiveness of protection against unjustified dismissal might be considerably reduced, inasmuch as it is often very difficult or impossible for the worker to produce evidence concerning the motives of the employer and whether they are well founded. If this rule were applied with full rigour, the silence of the employer regarding the reasons for dismissal would often be sufficient for the worker to lose his case. For this reason, the courts in some countries, for example Japan, have, even in the absence of legislative action, modified the rules on burden of proof by shifting the burden to the employer, if the worker first makes some initial showing of circumstantial or prima facie proof of the absence of a valid reason.

In many countries, however, the legislature has intervened to remove the burden of proof from the worker and to place it explicitly upon the employer in case of a complaint of unjustified dismissal. Thus, in some countries the legislation stipulates that the employer must prove the existence of a legitimate reason for

dismissal (as in Burundi, the Congo, Madagascar, Mauritania and Senegal), the legitimate character of the reason alleged (as in the United Republic of Cameroon) or the real and serious character of the reason alleged (as in Gabon). In other countries the employer must prove a just cause, justified reason or valid reason for the dismissal (as in Italy, Mexico, Panama, Portugal, Romania, Saudi Arabia (in case of appeal with a request for suspension of the dismissal) and Spain), entitlement to dismiss (as in Dominica), the reasons invoked for the dismissal (as in Belgium and Peru), the facts on which the dismissal was based (as in the Federal Republic of Germany) or a "substantial ground" for dismissal (as in Ireland). In the United Kingdom the employer must show the reason for the dismissal, that the reason was a fair reason and that he acted reasonably in treating it as a sufficient reason. In France the burden of proof is placed on the employer only in case of summary dismissal for serious misconduct (*faute grave*), while in case of appeal against another kind of dismissal neither party bears the burden of proof. In Ethiopia the employer bears the burden of proof in case of dismissal due to lack of capacity or inadequate performance. In Austria the burden is placed on the employer to show that the dismissal was due to circumstances attributable to the workers' own person adversely affecting the interests of the undertaking or due to the operating requirements of the undertaking, apparently only after the worker has shown that the dismissal is detrimental to his vital interests (evaluated in the light of the likelihood of unemployment or loss of income, age, length of service and size of family).

In a large number of countries, including many of those mentioned above, the competent courts, tribunals, boards or committees have extensive powers of inquiry and investigation which enable them to require the production of the evidence necessary to arrive at a decision on the justification of a dismissal, if such evidence is not furnished voluntarily by the parties. These powers derive either from the general rules governing the procedure before these bodies or from the specific rules governing appeals against dismissal. In many countries the legislation requires the competent bodies to use these powers where necessary to establish the facts required for a decision.

Thus it would seem that in many countries which have instituted protection against unjustified dismissal the burden of proving that dismissal was unjustified tends to be removed from the worker, either by explicitly placing the burden upon the employer to prove a valid reason for dismissal or by enabling or requiring the competent bodies to inquire into or investigate the reasons for dismissal.

Remedies in Case of Unjustified Dismissal: Nullity of Dismissal, Reinstatement, Compensation

If the competent body, after considering the evidence and testimony regarding the dismissal, concludes that it was unjustified, it must then decide what remedies to award the worker. These are essentially of two types: remedies involving the continuation of the employment relationship (which may take the form of an order annulling the dismissal or an order of reinstatement or both), and remedies involving compensation for unjustified dismissal.

An increasing number of countries make provision in their legislation for the continuation of the employment relationship either as the sole or principal remedy

or as a possible remedy in case of unjustified dismissal. In a certain number of countries the annulment of an unjustified dismissal and/or reinstatement is the only remedy provided for by the legislation, and thus the competent body must award this remedy if it finds a dismissal to have been unjustified. This is the situation in Algeria, Austria, Bulgaria, Czechoslovakia, Ethiopia, the German Democratic Republic, Hungary, Indonesia, Iraq, Italy, the Philippines, Romania, Somalia and the USSR.

In several other countries, including the Libyan Arab Jamahiriya, Peru and Portugal, the courts or tribunals must also annul the dismissal and/or order reinstatement in case of unjustified dismissal if requested by the worker, but the latter is entitled to request compensation in lieu of reinstatement. This appears also to be the position in Japan under court decisions.

Under the legislation in a number of other countries the competent courts or tribunals may either annul the dismissal (and/or order reinstatement) or award compensation, or sometimes award both reinstatement and compensation, at their discretion, although in some of these countries the legislation stipulates the circumstances in which reinstatement should be replaced by compensation. These two remedies are provided for in Antigua, Bangladesh, Canada (in respect of persons not protected by collective agreements in the federal jurisdiction and in Quebec), Colombia (for workers with at least ten years seniority), Dominica, the Federal Republic of Germany, India, Ireland, Kenya, Mexico, New Zealand, Norway, Pakistan, Singapore, Sri Lanka and Trinidad and Tobago. In certain of these countries (Bangladesh, India, Kenya, Pakistan and Sri Lanka) court decisions seem to indicate that, if requested by the worker, reinstatement is the normal remedy to be awarded in case of unjustified dismissal, but that the court or tribunal may award compensation in lieu of reinstatement in certain circumstances where it deems reinstatement to be inappropriate. In others the legislation provides for the award of compensation in lieu of reinstatement where the court deems, on request by the employer, that it is clearly unreasonable that the employment relationship should continue (as in Norway); where, having regard to the circumstances of the case, it appears that reinstatement is not appropriate because of incompatibility resulting from the dismissal (as in Colombia); where the worker concerned is a confidential or domestic worker or where the employment relationship involves a direct and permanent contact between worker and employer making the continuation of the employment relationship impossible (as in Mexico); and where the court finds, on request by the employer, that the continuation of the employment relationship is not likely to serve the purposes of the undertaking (as in the Federal Republic of Germany).

In several countries a finding that a dismissal was unjustified will annul the dismissal and/or result in an order to reinstate the worker concerned (as in the Congo, Spain and Venezuela) or entitle the competent body to propose reinstatement (as in France) or to award reinstatement or compensation at its discretion (as in the Netherlands and the United Kingdom), but if the employer refuses to reinstate the worker the competent body must award compensation instead. In Panama, in case of a finding that a dismissal was unjustified, the employer has the option of reinstating the worker or of paying compensation.

Finally, there is one country, Tanzania, in which a distinction is made with regard to the remedies available according to whether the dismissal was with or

without notice. In Tanzania the legislation provides for reinstatement or re-engagement (with payment of lost wages) in case of unjustified summary dismissal, while it provides for special compensation (apparently additional to severance allowance) in case of unjustified dismissal with notice. The grounds for this distinction are unclear.

In a certain number of countries compensation alone may be awarded in case of unjustified dismissal generally (the courts may sometimes be authorised to award reinstatement in case of certain unjustified dismissals, as for example in Egypt, in case of dismissal due to trade union membership or activities). This is the case, for example, in Belgium, Benin, Burundi, the United Republic of Cameroon, Chad, Gabon, Iran, Madagascar, Mauritania, Mauritius, Rwanda, Senegal, Togo and Zaire.

The annulment of a dismissal or reinstatement usually involves an obligation to place the worker as far as possible in the position he would have been in if he had not been dismissed. This entails reinstatement in the post previously held under the previously applicable conditions of employment, although some countries the competent bodies are authorised to order reinstatement (sometimes called "re-engagement") in another post. It also generally entails an entitlement to the payment of arrears in wages, usually for the entire period of absence from work but occasionally subject to a given maximum, often less any wages earned in the meantime in other employment (or which might have been earned in suitable alternative employment which a duly diligent worker would have been able to obtain), as well as continuity of service. In some countries the competent body is authorised to award compensation additional to arrears in wages, together with reinstatement.

Compensation for unjustified dismissal, whether in lieu of reinstatement or as the sole possible remedy, involves the payment of an amount of money intended to compensate the worker for unjustified dismissal, often stated to be for the loss or prejudice incurred as a result thereof, as determined either at the discretion of the competent court or tribunal (sometimes in the light of certain defined factors) or in accordance with objective rules laid down by law. Such compensation is generally distinct from any other sums due in connection with the dismissal, such as wages in lieu of a period of notice and severance allowance, and may be additional to these allowances or include amounts corresponding to these allowances plus an additional amount of compensation.

In a considerable number of countries the legislation indicates that compensation for unjustified dismissal is to be determined by the competent bodies at their discretion (as in Antigua, Bangladesh, Cyprus, Denmark, Dominica, France, the Federal Republic of Germany, India, Iran, Kenya, the Netherlands, Norway, Pakistan, Sri Lanka, Trinidad and Tobago and the United Kingdom (for the compensatory portion of the indemnity)) or that damages are to be awarded at the discretion of the competent authority (as in Benin, Burundi, the United Republic of Cameroon, Chad, the Congo, Egypt, Gabon, the Libyan Arab Jamahiriya, Madagascar, Mauritania, Senegal, Spain, Togo and Zaire). In a number of these countries the legislation specifies a number of factors that are to be taken into account in determining the amount of the compensation or the extent of damages awarded—factors such as custom, the nature of the employment, length of service, age and acquired rights (as in Benin, the United Republic of Cameroon, Chad, the

Congo, Gabon, Madagascar, Mauritania, Senegal, Togo and Zaire) and, in some countries, such additional factors as the circumstances of the case, wages, the possibility of finding other suitable employment, career prospects and the circumstances of the employer and the worker, including the size and nature of the undertaking and the worker's personal and family situation (as in Cyprus, Dominica, Egypt, the Libyan Arab Jamahiriya, Norway and Spain).

In certain of the above-mentioned countries a minimum amount of compensation is stipulated (in Cyprus it is two weeks wages for each year of continuous service up to six; one week's wages for each year thereafter up to a total of 20 years service; in France, the last six months wages; in Portugal, three months wages; in Spain, two months wages for each year of service, which may be reduced for small undertakings). The legislation of a number of countries stipulates a maximum amount of compensation (in Cyprus, one year's wages; in Denmark, one-half of the wage for the applicable notice period, which increases with length of service up to a maximum of six months; in the Federal Republic of Germany, 12 months wages, increasing to 15 or 18 months wages after given ages and lengths of service; in Iran, three years wages; in Kenya, one year's wages; in Spain, five years wages).

In a number of countries the legislation itself specifies the amount of compensation due to an unjustifiably dismissed worker. This is occasionally a fixed amount (in Belgium it is six months wages unless another amount is specified by collective agreement; in Mexico, three months wages where the worker requests compensation in lieu of reinstatement; in Peru, 12 months wages in addition to arrears in wages up to six months between the date of appeal and the date of judgement). More frequently it is an amount increasing with length of service (in Mauritius it is six times the severance allowance of two weeks wages per year of service; in Mexico, 20 days wages for each year of service, plus three months wages, in addition to arrears in wages from the date of dismissal to the date on which the compensation is paid; in Panama, wages for a varying number of weeks for each year of employment, depending upon the length of service; in Portugal, one month's wages per year of service; in Tanzania, an amount equal to the severance allowance of 15 days wages per year of service, or 500 shillings, whichever is higher, apparently payable in addition to the normal severance allowance; in Venezuela, double the wages for the notice period and the severance and length-of-service allowances, each of which is equivalent to 15 days per year of service). In the United Kingdom, in addition to the compensatory award determined at the discretion of the competent tribunal (mentioned above), the tribunal must order payment of a basic award which is equal to the amount (increasing with length of service) which would have had to be paid if the worker had been dismissed for redundancy and, in cases in which the employer refuses to implement an award of reinstatement or re-employment, an additional award of 13-26 weeks wages (26-52 weeks wages if the grounds for dismissal were trade union membership or activities, sex or race discrimination).

EXISTING INTERNATIONAL STANDARDS

The Termination of Employment Recommendation, 1963 (No. 119), makes provision for certain procedural guarantees before dismissal and in connection with appeal against dismissal. The only procedural guarantees in connection with the

dismissal itself concern a period of advance notice, time off during the period of notice and a certificate of employment, matters discussed separately in Chapter IV.

Procedures Prior to or on Dismissal

Several procedural guarantees before dismissal are provided for in Paragraph 11(3) and (5) of Recommendation No. 119. These relate to dismissal for serious misconduct, with respect to which Paragraph 11(1) stipulates that "a period of notice or compensation in lieu thereof need not be required, and the severance allowance or other types of separation benefits paid for by the employer, where applicable, may be withheld". This substantive provision will be considered in the next two chapters. Because of the harshness of the consequences of dismissal for serious misconduct (loss of entitlement to a period of notice and any severance allowance otherwise payable), Paragraph 11(3) and (5) sets forth certain specific guarantees designed to protect the worker against this sort of dismissal.

Paragraph 11(3) states: "An employer should be deemed to have waived his right to dismiss for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct." Paragraph 11(5) states: "Before a decision to dismiss a worker for serious misconduct becomes finally effective, the worker should be given an opportunity to state his case promptly, with the assistance where appropriate of a person representing him."

National legislation makes provision for three kinds of procedural guarantee applicable before dismissal. The first consists of the obligation incumbent upon the employer to give one or more warnings (dependent upon the nature of the breach) to a worker who is guilty of a disciplinary breach that would justify dismissal only if repeated, before dismissing him, including an indication of the conduct complained of and of the penalty the worker risks incurring if it is repeated. This requirement frequently applies to dismissal for both misconduct and unsatisfactory performance. The purpose of this guarantee is to provide the worker with the opportunity to improve his conduct or performance before incurring so serious a sanction as dismissal, except where the employer cannot reasonably be expected to do so.

The second kind of procedural guarantee (referred to in Paragraph 11(5) of Recommendation No. 119 only in connection with serious misconduct) consists of an obligation for the employer to follow a disciplinary procedure before dismissal for misconduct or unsatisfactory performance involving most essentially an investigation of the facts, notification to the worker of the allegations made against him and according the worker a hearing to enable him, with the assistance of another person if he wishes, to answer any allegations made against him.

The third kind of procedural guarantee (referred to in Paragraph 11(3) of Recommendation No. 119) consists of the rule according to which, as indicated above, the employer is deemed to have waived his right to dismiss a worker for misconduct if such action has not been taken within a reasonable period of time after he has knowledge of the misconduct.

The questionnaire addresses itself to these three types of procedural guarantees.

Another kind of procedure applicable prior to dismissal is provided for in Paragraph 10 of Recommendation No. 119, which states: "The question whether

employers should consult with workers' representatives before a final decision is taken on individual cases of termination of employment should be left to the methods of implementation set out in Paragraph 1." Because only a limited number of countries make it obligatory for the employer to consult (or in some countries obtain the prior consent of) workers' representatives before dismissals generally, the approach of Recommendation No. 119 on this matter has been retained in the questionnaire. Prior consultations of workers' representatives before dismissal or layoffs based on the operational requirements of the undertaking, establishment or service are dealt with in Chapter VI.

Recommendation No. 119 contains no procedural guarantee applicable at the time of dismissal of a kind that is often found in national legislation, which requires the employer to provide the worker with written notification of dismissal (in case of both summary dismissal and dismissal with advance notice) and of the reason or reasons for dismissal (sometimes only on request, more often even in the absence of request by the worker). The questionnaire makes reference to these two kinds of notification.

With respect to grievance procedures, Paragraph 4 of the Recommendation mentions the possibility that a dispute over dismissal may be "satisfactorily determined through such procedures within the undertaking, establishment or service, as may exist or be established consistent with this Recommendation", thus precluding appeal against the dismissal. It has not been thought appropriate to include in the questionnaire such a reference to grievance procedures as precluding, when they are successful, the right of appeal against dismissal. No other mention is made of such procedures in the questionnaire, although such procedures are important in dismissal cases in several countries, because of the lack of information on the applicability of such procedures to complaints of unjustified dismissal in a significant number of countries.

Procedures of Appeal

Recommendation No. 119 provides, in Paragraph 4, that "A worker who feels that his employment has been unjustifiably terminated should be entitled, unless the matter has been satisfactorily determined through such procedures within the undertaking, establishment or service, as may exist or be established consistent with this Recommendation, to appeal, within a reasonable time, against that termination with the assistance, where the worker so requests, of a person representing him to a body established under a collective agreement or to a neutral body such as a court, an arbitrator, an arbitration committee or a similar body."

As in the Recommendation, in most countries it is the worker himself who is entitled to bring an appeal against a dismissal he considers to be unjustified. This approach has been retained in the questionnaire.

The bodies to which an appeal may be made under national legislation include ordinary courts, labour tribunals, tripartite committees, the labour administration and arbitrators, while under collective agreements in several countries an appeal may be made to an arbitrator or arbitration committee. This is an institutional matter which it seems necessary to leave for determination by each country in the light of national institutions and traditions. The questionnaire includes a question based on the principle of the right of appeal to an impartial body, already set forth

in Recommendation No. 119, leaving it to the discretion of each country to determine what sort of body should be competent to hear such appeals.

Paragraph 4 of the Recommendation provides for the right of a worker to appeal "within a reasonable time" against dismissal generally, while Paragraph 11 (4) provides that a worker "should be deemed to have waived his right to appeal against dismissal for serious misconduct if he has not appealed within a reasonable time after he has been notified of the dismissal". In countries in which the legislation incorporates time-limits for appeal specific to dismissal cases, such time-limits vary from one week to one year. Because of the variety of such time-limits, the questionnaire has retained the concept of a "reasonable time", as in Paragraph 4 of the Recommendation. Since this applies to all kinds of dismissal, it has not been thought necessary to repeat this in the questionnaire in respect of appeals against dismissal for serious misconduct.

No provision is included in Recommendation No. 119 regarding the possibility of suspension of the effects of a dismissal in case of an appeal, pending a final decision by the competent body on whether the dismissal was justified. Since a number of countries make provision for suspension of dismissal in such circumstances, either automatically or by order of the competent body on request by the worker concerned, the possibility of including a provision to this effect in a new instrument has been raised in the questionnaire.

Similarly, although Recommendation No. 119 makes no provision on the matter, the legislation of a large number of countries authorises or makes obligatory the conciliation of disputes over dismissal before they are decided by the body competent to determine the question of justification. Because of this fact and the importance of conciliation in reducing the number of cases that have to be heard and decided by the competent body, the possibility of the inclusion of a provision on prior conciliation has also been raised in the questionnaire.

The right of a worker to be assisted or represented by another person in any procedure of appeal, already included in Paragraph 4 of Recommendation No. 119 and in most national systems, has also been referred to in the questionnaire.

Paragraph 5(1) of the Recommendation stipulates that the bodies to which appeal may be made "should be empowered to examine the reasons given for the termination of employment and the other circumstances relating to the case and to render a decision on the justification of the termination". This appears to reflect accurately the situation in the many countries with protection against unjustified dismissal. The questionnaire includes a question framed in accordance with this Paragraph.

Paragraph 5(2) of the Recommendation provides that the preceding subparagraph "should not be construed as implying that the neutral body should be empowered to intervene in the determination of the size of the workforce". This provision seeks to reconcile the powers provided for in the preceding subparagraph with the limitation on the powers of the competent bodies in some countries in case of termination of employment based on the operational requirements of the undertaking; in such cases the competent bodies of some countries appear to be empowered to determine whether such a reason was the true reason for termination of employment but not to review the business judgement of the employer as to whether such a reason is sufficient to warrant the termination of the worker concerned or of the number of workers concerned. The questionnaire

includes a question asking whether such limitations on the powers of the competent bodies should be left to national laws or regulations.

Paragraph 6 of Recommendation No. 119 provides that the competent bodies "should be empowered, if they find that the termination of employment was unjustified, to order that the worker concerned, unless reinstated, where appropriate with payment of unpaid wages, should be paid adequate compensation, or afforded such other relief as may be determined under the methods of implementation set out in Paragraph 1, or granted such compensation and other relief as may be so determined". Since a large number of countries now make provision for the possibility of reinstatement, subject however to the possibility of awarding compensation where reinstatement is impracticable, the questionnaire asks whether a provision conceived in this way should be included in a new instrument. Since the legislation of a number of countries refers to the "annulment" of a termination rather than to reinstatement or uses both terms, both annulment of termination and reinstatement are mentioned in the questionnaire.

Note

¹ With regard to judicial termination of the contract of employment in France, see Jean Savatier: "La résiliation judiciaire des contrats de travail des salariés non protégés", in *Droit social* (Paris), Nov. 1979, pp. 414-419.

CHAPTER IV

PERIOD OF NOTICE AND CERTIFICATE OF EMPLOYMENT

The practice of imposing on a party to an employment relationship the obligation to give advance notice of termination to the other party has its historical foundation in the legal principle that contracts establishing relationships of indeterminate duration, such as leases, can be terminated only with advance notice. This principle, which was embodied in the various civil and commercial codes adopted by different countries during the last century and later, is now to be found in most labour laws and in many collective agreements. A principle of similar origin, under which the employment contract, by analogy with periodical leases is automatically renewed at the end of each period unless notice of termination is given, is embodied in the labour legislation of some countries.

Although under the concepts determining the relevant national regulations and principles in many countries, the observance of a notice period is understood as a reciprocal obligation, sometimes with variations in the length between employer's notice and worker's notice and often longer for the former, the present report is concerned only with the notice given by the employer.

The obligation to be complied with by an employer who intends to terminate the services of one of his workers is designed to obviate the often painful surprise of instant dismissal and to mitigate resultant hardship. Advance notice enables the worker to adjust more easily to the situation created by the termination of his employment, and to look for another job.

In the vast majority of countries—including those applying the principle of justification of dismissal as well as those where the right to dismiss is a discretionary one—the observance of a period of notice is required in one way or another by legislation, collective agreements, arbitration awards or usage.

In most countries in which a period of notice is required before a contract of employment may be terminated, this requirement is applicable only to contracts of indeterminate duration, while contracts of specified duration, or for the performance of a specified task, are generally deemed to terminate without notice being required upon expiration of the specified period or upon performance of the given task. However, in some countries a period of notice is required for termination of certain contracts of specified duration, which are deemed to be renewed by the parties in the absence of notice. This appears to be the position as a result of arbitration awards and collective agreements in Australia and legislation in some provinces of Canada, in Kenya, Mauritius, Tanzania and Zambia. Moreover, in certain countries the fact that some contracts of employment of specified duration have been renewed or extended converts the contract into one of indeterminate duration, requiring notice of termination.

LENGTH OF PERIOD OF NOTICE

As between countries, the provisions concerning notice vary greatly. In those countries where the contract of employment is the subject of legislative provisions,

the latter usually also prescribe a notice period. The notice periods thus stipulated by law are minimum periods and may be increased by collective agreement, individual contract of employment, or usage. In some cases the law provides for periods of notice only in the absence of contractual provisions, which implies that the parties may agree upon shorter or longer periods than those fixed by law. This is the case in Finland, for instance, where contracts may stipulate that they may be terminated without notice or with any period of notice up to six months, Malaysia, where the notice period prescribed by law is applicable in the absence of provisions in the contract of service or when the period specified in the contract exceeds one month, and Mali, where the notice periods set out in the Labour Code are applicable in the absence of collective agreements or decrees. In Mauritius and Singapore the notice period specified by law is applicable only in the absence of specific provision in the individual contract. In Norway and Switzerland the notice period specified by law is applicable, unless otherwise provided by contract or collective agreement, under certain conditions, while the legislation in some provinces of Canada merely states that reasonable notice must be given and leaves the duration to be determined by collective agreements, individual employment contracts, usage or the courts.

As regards the length of the period of notice, the solutions adopted in various countries (and sometimes within a given country for various occupations and branches of the economy) vary considerably. The length may also differ according to the type of contract, the pay period or the category of worker ; in all these cases, as well as where no such distinctions are made, the notice period may or may not increase with length of service.

Occasionally, but increasingly seldom, the length of the period of notice varies according to the duration of the contract. In Australia, for instance, arbitration awards and collective agreements apparently provide for a notice period equal to the hiring period, which is generally one week. Some countries following this system have revised their laws so as to provide for a notice period increasing with the duration of the employment, a system linked more closely with the idea of employment of indeterminate duration.

In other countries the length of the notice period varies according to the pay period. Frequently in these countries a worker paid by the month is entitled to two weeks or one month's notice and a worker paid by the day, week or fortnight to one or two weeks notice. However, longer notice periods are sometimes provided for. In Bangladesh, for instance, permanent workers are entitled to 90 days notice if monthly rated, to 45 days notice if paid on another basis, and in case of retrenchment, to one month's notice ; temporary workers are entitled to one month's notice if monthly rated and 14 days notice in other cases unless termination is due to cessation of temporary work. In Brazil a worker is entitled to one month's notice if paid on a fortnightly or monthly basis, or if employed for more than 12 months, and to eight days notice if paid weekly or daily. In Canada the law in Manitoba and Newfoundland stipulates that where the period of employment is not fixed notice shall be equal to the pay period if it is monthly or more often ; if the pay period is less frequent, reasonable notice has to be given. In the Central African Republic, the Ivory Coast, the Niger and Tunisia, there is one month's notice for workers paid monthly and eight days notice for workers paid hourly, daily or weekly. In Egypt, the Libyan Arab Jamahiriya and the Syrian Arab

Republic workers paid monthly are entitled to one month's notice and workers paid on another basis to 15 days. In Mali workers paid monthly are entitled to one month's notice, while other workers are entitled to one to eight days notice, depending on length of service. In Malawi contracts of unspecified duration with wages paid at monthly rates are terminable on one month's notice and those paid fortnightly, weekly, daily or hourly are terminable on a fortnight's, a week's or a day's notice respectively; the notice period increases in the latter three cases with length of service, to a minimum of one month's notice after five years service. In the Sudan workers paid monthly are entitled to one month's notice and those paid weekly, fortnightly or daily to a period of notice increasing with length of service up to one month after five years service. In Democratic Yemen the notice period is in all cases the same as the pay period; this is also the case in Suriname, but with a minimum of one week.

In certain countries where the notice period differs according to the pay period, it increases with the length of service (Malawi, Mali, Qatar and the Sudan).

In a number of countries longer notice periods are specified for salaried or highly skilled workers than for manual workers. In some countries a fixed notice period is prescribed for each category of worker. This is the case in Bulgaria (30 days notice for highly skilled workers, 15 days for others), Liberia (four weeks for salaried employees, two weeks for wage earners), the Niger (three months for senior managers and engineers, one month for supervisors and technicians).

In other countries the notice period applicable to each category of worker increases with length of service. This is the case in the Federal Republic of Germany (six weeks to six months notice, depending on length of service, for salaried employees, two weeks to three months notice for wage earners), in Denmark (where the minimum notice period under a law applying only to salaried workers is one month during the first six months employment, three months notice after six months employment, with an additional one month's notice for every three years employment up to a maximum of six months, the notice periods applicable to manual workers being left to collective agreement); in Greece (ranging from one month's notice for private-sector employees with under two years service to three months for employees with five years service or more, with an additional month's notice for each year of service over ten up to a maximum of one-and-a half year's notice, and, for manual workers, from five days notice during the first year's service to 60 days after ten years service); in Italy (from 15 days to four months notice depending upon the category of employee and the length of service); in Luxembourg (for manual workers, four to 12 weeks according to length of service and for private employees two to six months notice according to length of service). In Belgium the statutory notice period to be given by the employer to manual workers ranges from 28 to 56 days according to period of service; for salaried workers with an annual remuneration not exceeding a certain amount, the notice period is at least three months for an employee with less than five years service, increasing by three months for each additional five-year period of service; when the remuneration exceeds that amount the length of notice is to be fixed by agreement or the court. Where the employee has reached retirement age, the period of notice is six months, or three months if the employment has lasted less than five years.

In other countries the minimum notice period is uniform for all categories of workers and is either fixed or of a length which increases with length of service or age. The notice period is fixed at one week in Canada (Saskatchewan and Prince Edward Island) and New Zealand, two weeks in Canada (federal jurisdiction), Guyana, Iran, Jamaica, Romania, Trinidad and Tobago, and one month in Iraq, Japan, Malaysia, Nicaragua and Pakistan.

In other countries the minimum notice period increases with the length of service. In Argentina the notice period is one month for a worker employed up to five years and two months for a worker employed for more than five years. In Canada (Nova Scotia and Ontario) the notice period ranges from one to eight weeks. In Cyprus the notice period ranges from one week for 26 to 51 weeks service to four weeks for at least 104 weeks service.

In France the minimum notice period is one month for six months to two years service and two months for two years or more. In Hungary the notice period ranges from 15 days to six months according to length of service and type of work, and in accordance with rules established by collective agreement. In Ireland the notice period ranges from one week for under two years service to eight weeks after 15 years service. In Malta the notice period ranges from three days for one to six months service to four weeks after two years service. In the Netherlands the number of weeks of notice is equal to the number of years of service up to 16 weeks, but cannot be less than the pay period. The minimum notice period in the United Kingdom is one week for less than two years service, with a week's notice for every year's service after two years up to 12 years service, and 12 weeks for 12 years service or more. In Singapore the notice period ranges from one day for up to 26 weeks service, to four weeks for five years service or more. In Switzerland the notice period ranges from one to three months between the first and tenth year of service. In Zaire the minimum notice period is 14 working days plus six working days per full year of service.

Sometimes the minimum notice period increases with age, as in Sweden, where after six months continuous service a worker is entitled to a notice period increasing from two months at 25 years of age to six months at 45 years of age (other workers have the right to one month's notice), and in Czechoslovakia, where workers under 30 years of age are entitled to one month's notice, workers between 30 and 40 years of age to two months notice and workers over 40 years of age to three months notice.

Statutory notice periods are generally minimum periods, and in practice the actual notice periods may be increased by collective agreements and thus differ for different categories of workers.

In many countries, including the Congo, Gabon, Guinea, Madagascar, Mauritania, Morocco and the Upper Volta, the legislation requires a period of notice to be given, the length to be specified by regulations or collective agreements.

COMPENSATION IN LIEU OF NOTICE

In most countries in which a period of notice is required before termination of employment, it is provided that the employer failing to give such notice must pay the worker compensation equivalent to the amount of remuneration he would have

received if he had been employed during the whole period of notice. While in many countries the employer may in principle terminate the worker's employment before expiry of the notice period if he pays compensation in lieu of notice, in others he is not free to choose between notice and compensation: if he does not observe the period of notice he must pay damages which are fixed by the court. This is the case, for instance, in the Federal Republic of Germany and Italy. Under the law in Turkey an employer who fails to comply with the notice requirements must pay, in addition to the remuneration due for the notice period, special compensation of an amount to be fixed by the judge according to the nature of the employment.

It should be noted that the compensation in lieu of notice is distinct from the compensation for unjustified dismissal or dismissal in abusive conditions, and from a severance allowance or allowance for years of service.

TIME OFF TO SEEK OTHER EMPLOYMENT

As mentioned above, one of the main purposes of the notice period is to provide an opportunity for the worker, although still in the service of his undertaking, to prepare for the change in his situation and, in particular, to look for a new job. But since under normal circumstances the worker will have to work full time during the notice period, it has been considered advisable in a great many countries for the regulations to grant him a certain amount of paid time off to look for another job.

A number of countries (the Federal Republic of Germany, Greece, Mauritius, Qatar and Sweden) make provision in their legislation for such time off, granting the worker "reasonable", "appropriate" or "necessary" time off to seek new employment, while the legislation in other countries, including Argentina, Benin, the United Republic of Cameroon, the Central African Republic, the Congo, Cyprus, Gabon, the Ivory Coast, the Libyan Arab Jamahiriya, Luxembourg, Madagascar, Mali, Mauritania, Morocco, Nicaragua and the Niger, specifies that one or two hours per day or one or two days per week during the notice period, or on occasion a longer amount of time off, must be afforded to the worker. In most cases the worker retains entitlement to his full pay for the period of time off.

LOSS OF RIGHT TO NOTICE: SUMMARY DISMISSAL

In all countries where provision is made for the right to a notice period, the right may be forfeited in certain circumstances. The reasons justifying dismissal without notice are more or less the same in the countries which have a general system of protection from unjustified dismissal and in those which have not and where the main protection against dismissal is the right to notice and sometimes also to compensation.

In a number of countries the legislation provides that a worker may be summarily dismissed for "serious fault" (for instance in Benin, the United Republic of Cameroon, the Central African Republic, France, Gabon, the Ivory Coast, Luxembourg, Mali, Mauritania, Morocco, the Niger, Rwanda, Tunisia and the Upper Volta) or for reasons attributable to the worker's fault (Japan). In these countries it is left to the courts to determine what constitutes a fault justifying termination without prior notice. In other countries, including Bangladesh,

Bulgaria, Cyprus, Czechoslovakia, Finland, India, Jamaica, Liberia, the Libyan Arab Jamahiriya, Malawi, Malaysia, Morocco, the Netherlands, Nicaragua, Pakistan, Peru, Qatar, Romania, Singapore, the Sudan and Sweden, conduct deemed to justify summary dismissal is more fully defined, sometimes in great detail. It includes, most frequently, theft, fraud or dishonesty, assaulting, threatening or insulting superiors (or sometimes fellow-workers), habitual violation of applicable rules (particularly those relating to safety), wilful failure to fulfil essential obligations under the contract of employment, disobedience of lawful orders, habitual negligence, acts causing serious damage to property, absence without leave or habitual unpunctuality, habitual attendance at work in a state of drunkenness or under the influence of narcotic drugs, and conviction for a crime or an offence involving moral turpitude. Definitions of the conduct justifying summary dismissal include also, but somewhat less frequently, breach of trust (including disclosure of industrial or commercial secrets), misleading the employer at the time of conclusion of a contract by submitting false information, and working for one's own benefit to the detriment of the employer. Certain of these actions or circumstances would appear to involve, by their very nature, serious misconduct. Others, such as disobedience of lawful orders, drunkenness, negligence or absence without leave, may or may not constitute serious misconduct, depending on the circumstances, and are frequently stated to constitute grounds for dismissal only if habitual or repeated.

In some countries, such as the Federal Republic of Germany, Finland, Italy, the Netherlands and Switzerland, the employment relationship may be terminated without prior notice or compensation in lieu thereof if it would be unreasonable to expect the relationship to be maintained for the duration of the notice period.

In other countries the legislation provides that a worker's employment may be terminated without prior notice if there is "good and sufficient cause" (as in Malta) or "lawful cause" (Zambia), terms whose meaning would seem to be left for definition by common law or court decisions. In several other common-law countries, employers may summarily dismiss an employee for misconduct, malinger, inefficiency or neglect of duty. In several of these countries, including Cyprus and the United Kingdom, the legislation concerning termination of employment appears to reserve to the employer the right to dismiss a worker summarily for reasons defined by common law. In New Zealand many arbitration awards and industrial agreements provide for summary dismissal in case of "wilful" misconduct.

In some countries the legislation provides for termination of the employment relationship without a period of notice for reasons other than those previously mentioned, such as illness or accident resulting from the worker's wilful or blameable action, contracting a communicable disease or prolonged illness (Turkey); entitlement to an old-age or invalidity pension or being sentenced to at least six months imprisonment (Romania); incompetence (Liberia and Morocco); impossibility of performance due to *force majeure* (France, Greece, Japan, Morocco, Tunisia and Turkey). In the latter case it appears that in certain countries the employment contract ends *ipso jure* and not as a result of dismissal.

In a number of countries the employer loses the right to dismiss a worker without prior notice for serious misconduct if such action has not been taken within a given period after he has become aware of the serious misconduct (as soon as the

fault is known or established in Peru; within three days in Belgium or Luxembourg; within six days in Turkey; within 15 days in Czechoslovakia and the Federal Republic of Germany; within one month in Romania and Sweden; within three months in Bulgaria) or within a reasonable period (Cyprus). In the United Kingdom in cases where a significant interval has elapsed between the misconduct and dismissal, the tribunals have often found that the misconduct was not the main reason for dismissal.

CERTIFICATE OF EMPLOYMENT

To help a dismissed worker to find new employment, the employer is in principle required to issue him with a certificate containing particularly important information which might be of interest to a new employer. The information should include the dates of his engagement and termination and the type of work on which he was employed. Such a certificate, containing nothing unfavourable to the worker, may be of use to him in seeking new employment as well as for other purposes for which a record of his previous employment may be required.

In many countries, such as Algeria, Bangladesh, Benin, the United Republic of Cameroon, the Central African Republic, the Congo, Czechoslovakia, Egypt, Ethiopia, France, Gabon, the Federal Republic of Germany, Greece, Guatemala, the Ivory Coast, India, Iraq, Italy, the Libyan Arab Jamahiriya, Luxembourg, Madagascar, Mali, Malta, Mauritania, Mauritius, Mexico, Morocco, the Netherlands, New Zealand, the Niger, Panama, Qatar, Tunisia, Turkey, the Upper Volta and Zambia, legislative provisions require the employer to provide to a worker, on termination of his employment, a certificate indicating the dates of entry into and termination of the employment, and the nature of the work undertaken, and occasionally also the rate of remuneration paid. In several of these countries, including the Federal Republic of Germany, Greece, Guatemala, Malta and the Netherlands, indications concerning the conduct of the worker or the reasons for termination must be included in the certificate if requested by the worker. In other countries in which provision is made for work books the legislation requires employers to give the worker his work book, drawn up in due and proper form, on termination of employment; this is the case in Bulgaria, Mali, Romania and the USSR. In some of these countries, as in the USSR, while sanctions may not be mentioned in the work book, the reasons for termination of employment are to be entered therein with mention of the applicable provisions of the law; in addition, a certificate of employment stating the work performed, skills, duration of employment and the rate of remuneration must be given to the worker if requested by him. In Mali a certificate of employment stating only the nature and duration of employment must be delivered in the absence of the work book.

When handing the certificate to the dismissed worker, it is customary in some countries for the employer to ask him to sign a receipt in final settlement, i.e. a declaration that he has no further claims against the employer. Whether or not such a document is valid is a problem which has led to different solutions in different countries. Apart from the possibility, provided by general legal principles in many countries, that the worker may denounce the receipt if his signature was based on error, threat or deceit, the signing of the statement may also involve a waiver of acquired rights which is sometimes not permitted or is restricted by law. In a

number of African countries, for instance, the worker's signature on a final settlement of this kind does not prevent him from pursuing further claims against his employer. In Argentina a receipt given in final settlement does not prevent the worker from presenting further claims against the employer, provided that they are made within the time-limit prescribed by law. In the Federal Republic of Germany the receipt is valid in principle but does not cover rights arising out of a collective agreement because these may not be renounced. In France a receipt in final settlement is valid only if the words "Received in full settlement", etc., are written entirely in the worker's handwriting, followed by his signature, if it is clearly stated that the worker can denounce the receipt within two months, and if it is indicated that a duplicate copy of it was handed to the worker.

EXISTING INTERNATIONAL STANDARDS

Recommendation No. 119 makes provision for notice periods, compensation in lieu of notice, time off from work, loss of entitlement to a period of notice in case of serious misconduct and certificates of employment. Paragraph 7 (1) provides that "A worker whose employment is to be terminated should be entitled to a reasonable period of notice or compensation in lieu thereof." Subparagraph (2) of this Paragraph provides that "During the period of notice the worker should, as far as practicable, be entitled to a reasonable amount of time off without loss in pay in order to seek other employment." Paragraph 11 (1) states that "In case of dismissal for serious misconduct, a period of notice or compensation in lieu thereof need not be required...". Paragraph 8 stipulates "(1) The worker whose employment has been terminated should be entitled to receive, on request, at the time of the termination, a certificate from the employer specifying the dates of his engagement and termination and the type or types of work on which he was employed. (2) Nothing unfavourable to the worker should be inserted in such certificate."

These provisions in Recommendation No. 119 reflect fairly well the state of national law on the subject. The questionnaire follows the terms of the Recommendation fairly closely, although it omits the words "as far as practicable" from the provision on entitlement to a reasonable amount of time off from work to seek other employment since this is not a usual condition in national law. The part of Paragraph 11 (1) of the Recommendation providing for an exception to the requirement of a period of notice in case of serious misconduct has been brought together in the questionnaire with the provision in Paragraph 7 (1) of the Recommendation regarding the period of notice, to provide a more logical presentation.

It should perhaps be noted that, although Paragraph 8 (2) of the Recommendation provides that nothing unfavourable to the worker should be inserted in a certificate of employment, workers may sometimes wish to request their employer to include an evaluation of their work in this certificate even if that evaluation may be negative in some respects. The question arises whether Paragraph 8 (2) as presently drafted would authorise this.

CHAPTER V

SEVERANCE ALLOWANCES AND SOCIAL SECURITY BENEFITS PAYABLE ON DISMISSAL

Apart from any sums that may be due as compensation in lieu of a period of notice or which may have been awarded as compensation for unjustified dismissal, a worker may be entitled on termination of his employment to a severance allowance paid by his employer or to some kind of social security benefit such as unemployment insurance, invalidity or old-age pension, or to several kinds of benefit. This chapter will describe these various entitlements. Entitlements provided by social security systems will be reviewed in a general way only, since this is not the occasion for a full-scale review of these latter types of system.

SEVERANCE ALLOWANCES

Severance allowances, whether called such or referred to as dismissal indemnities, length-of-service allowances, termination bonuses, gratuities, and so forth, are sums of money usually payable by the employer to the worker on dismissal (sometimes also on resignation) for reasons other than serious misconduct (sometimes for any reason, including misconduct; sometimes only for specified reasons, such as redundancy); generally, they increase with length of service and are payable as a lump sum.

First instituted in some countries by custom, contract of employment or collective agreement, or several of these, provision for entitlement to such allowances has come to be included in the legislation of a considerable number of countries. Such provision is generally for a minimum amount of severance allowance which may be improved upon by contract of employment or collective agreement.

Legislative provision for severance allowances of one kind or another are found in all regions of the world: in Europe (Austria, Bulgaria, Cyprus, Denmark, France, Ireland, Italy, Luxembourg, Portugal, Spain, Switzerland, Turkey, the USSR and the United Kingdom); in Latin America (the great majority of countries, including Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Peru and Venezuela); in Africa and the Arab countries (Algeria, Burundi, Egypt, Ethiopia, the Ivory Coast, Kuwait, the Libyan Arab Jamahiriya, Mali, Morocco, Qatar, Saudi Arabia, Somalia, the Sudan, the Syrian Arab Republic, Tanzania and Tunisia); in Asia (Bangladesh, India, Indonesia, Iran, Mauritius, Pakistan and the Philippines). In a number of other countries the matter appears to be left to collective bargaining, arbitral award or individual contract of employment. In some countries, such as in Canada, New Zealand, Trinidad and Tobago and the United States, many collective agreements or awards make provision for such allowances.

Conditions for Entitlement

The conditions for entitlement to a severance allowance vary considerably from one country to another. In certain countries only workers employed under contracts of indefinite duration are entitled to severance allowance on termination of employment although, under certain conditions, the courts may, for this purpose, assimilate non-renewal of fixed-term contracts to termination of a contract of indefinite duration, as in France. In other countries entitlement is expressly extended by the legislation both to termination of an indefinite-term contract and to expiration of a fixed-term contract (e.g. Argentina (right to half the normal severance allowance), Egypt, the Libyan Arab Jamahiriya, Saudi Arabia and the Syrian Arab Republic). In those countries in which contracts of indefinite duration are not recognised by law, non-renewal of fixed-term contracts would also generally entitle the workers concerned to a severance allowance.

The legislation of some countries makes the right to severance allowance dependent upon completion of a qualifying period of service, usually continuous but occasionally, as in Iran, cumulative, which may be six months (Tunisia), one year (Algeria, Bangladesh, Ecuador and India (for entitlement to compensation in case of retrenchment), Iran, Mauritius and Somalia), two years (France), three years (Austria, the Sudan and Turkey), five years (Bulgaria and India (for entitlement to a "gratuity")), or ten years (Panama). Occasionally, the worker must not only have completed the qualifying period but also have attained a specified age (21 in the Sudan, 40 for men and 35 for women in Panama).

In many countries with legislation on the subject, severance allowance is payable only in case of dismissal, i.e. termination of employment by the employer and not in case of resignation by the worker, termination by mutual agreement, termination resulting from the death of the worker or *force majeure*. However, resignation by the worker because of misconduct by the employer is often assimilated to dismissal for the purpose of entitlement to severance allowances, whether explicitly by the legislation, as in Argentina, Burundi, Egypt, Guatemala, the Libyan Arab Jamahiriya, Mexico, Saudi Arabia, Switzerland, the Syrian Arab Republic, Turkey and Venezuela, or by the courts.

In some countries a worker who resigns for whatever reason is entitled to a severance allowance (Bolivia, Egypt and India (entitlement to a "gratuity" but not to retrenchment compensation), the Libyan Arab Jamahiriya, Mexico, Pakistan, Panama, Saudi Arabia, the Syrian Arab Republic, Somalia, the Sudan and Venezuela), sometimes subject to a special qualifying period of service (e.g. six months in Pakistan; two years in Egypt, Saudi Arabia and the Syrian Arab Republic; five years in Bolivia, 15 years in Mexico), sometimes only to part of the allowance in case of resignation before a given period of service (e.g. in Egypt, Saudi Arabia and the Syrian Arab Republic, entitlement to one-third of the allowance if the worker has worked from two to five years, two-thirds if he has worked from five to ten years, and the full allowance after ten years service).

In a number of these countries severance allowance is also payable in case of termination of employment resulting from *force majeure* or from the worker's death; in the latter case provision is sometimes expressly made for payment of the allowance to his heirs or dependants.

The question of entitlement to severance allowance on retirement due to old age raises particular problems. Where retirement is not compulsory, it does not

occur automatically on attainment of a given age, and the termination of employment results either from a dismissal or a resignation, in which case the rules regarding entitlement to severance allowance in these contingencies will presumably apply in the absence of contrary indication. Where retirement is compulsory under a contract of employment or collective agreement, entitlement to severance allowance will depend upon how this allowance is perceived. If it is conceived of as an indemnity for injury resulting from premature loss of employment not caused by the worker, formulated as due only in case of dismissal by the employer, it will generally not be payable. Thus, for example, in France the "dismissal indemnity" is not payable in case of compulsory retirement although a number of collective agreements replace it with a leaving or end-of-career indemnity, while in the Ivory Coast and Mali the legislation stipulates that the "dismissal indemnity" is to be replaced by a leaving indemnity on retirement with entitlement to an old-age pension or grant. Likewise, redundancy payments under legislation in Ireland, Jamaica and the United Kingdom are not payable in case of attainment of the age of retirement or retirement with old-age pension. If, on the other hand, severance allowance is conceived of as an acquired right to compensation related to previous service, the allowance will apparently be payable even in case of compulsory retirement. Severance allowance appears to be payable on retirement whether voluntary or compulsory in Austria (for workers with at least ten years service), India (after the generally applicable five-year qualifying period for a "gratuity"), Mauritius, Mexico, Panama and Turkey.

While, as indicated above, most countries make provision for payment of severance allowance in case of dismissal for whatever reason (subject, in many countries, to the exception of serious misconduct, to be discussed below) in several other countries the entitlement depends upon dismissal for certain specified reasons, as in Ireland, Jamaica and the United Kingdom, where provision is made for payments in case of redundancy; in Ethiopia, where compensation must be paid in case of closure or redundancy; in Portugal, where the employer must pay severance allowance in case of collective dismissal caused by closure or redundancy; in Spain, where severance allowance must be paid in case of dismissal for reasons based on the worker's ability and the operating requirements of the undertaking; and in Bulgaria, where compensation is payable if the worker is dismissed on account of illness, retirement with a pension, reduction of staff or liquidation of the undertaking.

Loss of Entitlement in Case of Serious Misconduct

In most countries with legislative provision for severance allowance, entitlement thereto is lost in case of dismissal for serious misconduct (usually as defined for the purpose of summary dismissal) (e.g. Austria, Argentina, Bangladesh, Burundi, Chile, Colombia, the Dominican Republic, Egypt, El Salvador, France, Guatemala, Pakistan, Portugal, Spain and the Sudan, the Syrian Arab Republic, Tunisia and the USSR). In India the right to a "gratuity" is lost in case of termination of employment because of riotous or disorderly conduct, other acts of violence or acts constituting the offence of moral turpitude, and in Somalia entitlement to severance allowance is lost in case of conviction for an offence involving damage to the employer. It should be noted that in a number of Latin

American countries entitlement to a severance allowance for termination of employment for reasons other than serious misconduct results from provisions concerning "unjustified" dismissal under which the concept of justification is limited to serious misconduct. In these countries the liability of the employer to the worker in case of dismissal for reasons which would be considered valid elsewhere but do not constitute serious misconduct (e.g. incapacity, redundancy) is the same as in the case of dismissal without any acceptable reason whatsoever, whereas in other countries a severance allowance would be payable in the first case and an additional or higher compensation (in the absence of reinstatement) in the second. For this reason, the compensation provided for "unjustified" dismissal in these countries is assimilated for present purposes to severance allowance rather than to compensation for unjustified dismissal as understood in the present study.

On the other hand there are a number of countries in which severance allowance appears to be payable in case of dismissal for whatever reason, including serious misconduct (e.g. Algeria, Ethiopia, Mexico, Panama, Peru, Somalia and Venezuela).

Amount of Allowance

Although in a few countries the severance allowance specified by legislation is a fixed amount (two weeks wages in the USSR, one month's wages in Bulgaria), in most countries with legislative provision on the subject it increases with length of service.

Generally, the minimum amount of severance allowance due to a worker on termination of employment is calculated at a given amount of wages for each year of employment with the same employer. This varies widely. It may be, for example, the equivalent of half a week's pay for each year of service in France (i.e. 20 hours of wages if the worker is paid by the hour, one-tenth of the monthly salary if paid by the month), one week's wages per year of service in Panama and Spain, one-third of a month's wages per year of service (except for the first year, in respect of which a full month's wages in due) in Ethiopia, 12 days wages per year of service in Mexico and Tunisia (in the latter stated as one day's wages per month worked), 14-15 days wages per year of service in Bangladesh, India, Iran, Mauritius, 20 days wages per year of service in Pakistan and one month's wages per year of service in Algeria, Argentina, Bolivia, Chile, Colombia, Ecuador, Guatemala, Italy, Peru, Portugal, Somalia and Venezuela (composed of two components in Venezuela, a length-of-service allowance of 15 days wages per year of service and a severance allowance (*auxilio de cesantía*) calculated in the same way, with some variation in calculation of the allowance for the first year's service).

In some countries the minimum severance allowance, which also increases with length of service, is calculated at a variable rate or by blocks of years. Thus in Egypt, the Libyan Arab Jamahiriya, Saudi Arabia and the Syrian Arab Republic the severance allowance provided for by legislation is one-half a month's wages per year of service for the first five years of employment, and one month's wages for each year of service afterwards, while in the Sudan it is half a month's wages per year of service from the third to the tenth year of employment and one month's wages for each year of service thereafter. The legislation in Mali entitles a worker to 20 per cent of the average monthly wages for each of the first five years of service, 25 per cent for each of the next five years and 30 per cent for each year

after the tenth. In Indonesia the legislation provides for a severance allowance of one month's wages for up to one year, two months wages for from one to two years service, three months wages for from two to three years service and four months wages for service of three years or more, as well as an additional "service pay" of one month's wages after five years service, increasing by one month's wages for each additional five-year period of employment. The legislation in Austria makes provision for a severance allowance increasing from two months wages after the third year of service to 12 months wages after 25 years of employment. In Burundi a worker is entitled to an allowance of one month's wages if he has been employed from three to five years, two months wages if he has worked from five to ten years and three months wages if he has worked longer than ten years. Under Danish legislation salaried employees are entitled to a severance allowance ranging from one month's wages after 12 years of employment to three months wages after 18 years of service.

In Ireland the redundancy payment is equal to the sum of half a week's pay for each year of service between the ages of 16 and 41, one week's pay per year of service over the age of 41 and an additional week's pay. In the United Kingdom redundancy pay consists of half a week's pay for each year of service under the age of 22, one week's pay for each year of service between the age of 22 and 41, and two-and-a-half weeks pay for each year of service after 41 years of age.

Usually, where the severance allowance increases for each year of service fractions of a year of employment are taken into account, for example by providing for a pro rata amount of severance allowance for the part of the year during which the worker was employed (e.g. Egypt, Mali, Saudi Arabia, Somalia and the Syrian Arab Republic), or by providing that the amount of severance allowance for a full year's employment shall be paid for any part of a year worked above three months (Argentina and Peru), six months (Bangladesh, Chile, India and Pakistan) or eight months (Venezuela).

Sometimes the calculation of the severance allowance according to the above rules is subject to a given minimum or maximum amount. A minimum allowance is specified, for example, in Argentina (two months wages) and Portugal (three months wages), while a maximum amount is imposed, for example, in Tunisia (three months wages), Indonesia (nine months wages), Austria and Ethiopia (one year's wages), India (20 months wages, in case of "gratuity") and the Sudan (two years wages). In the United Kingdom redundancy pay is due in respect of a maximum of 20 years service, counted back from the time of dismissal.

The wage used as the basis for the calculation of severance allowance varies among the different countries. In Colombia, Iran, Italy and Pakistan the basis for calculation of severance allowance is the last monthly wage received, although in Colombia, if this wage is variable, the basis is the average wage over the year preceding dismissal and in Pakistan, if a piece rate is paid, the basis is the highest pay received in the course of the year preceding termination of employment. In Argentina the basis is the highest normal monthly wage paid during the year preceding termination of employment (subject to a maximum of three times the minimum monthly wage), in France the average of the last three months wages before dismissal, in Algeria the average monthly pay during the last year of employment, in the Sudan the average wages paid during the last three years of employment, and in Panama the average wages paid during the last five years

of employment. In Mexico the wage used to calculate the severance allowance must not be less than the minimum wage nor more than twice that wage. The wage used to calculate severance allowance is often stated to include the basic wage together with other elements of remuneration including cost-of-living allowances.

Method of Payment

Generally the legislation governing severance allowance makes no specific provision regarding the method by which it is to be paid. As these allowances are usually payable on termination of the employment relationship, they must doubtless be paid, in the absence of a stipulation to the contrary, in full at that time. In several countries failure to pay severance allowance when due nullifies the dismissal. In Spain if the allowance due is not paid at the time notice of dismissal is given, such notice is null. In India compensation for retrenchment must be paid at the time of retrenchment, failing which the worker may not be retrenched.

Brazilian legislation makes provision for a "length-of-service guarantee fund", consisting of deposits which the employer is obliged to make in the name of each worker in an escrow account amounting to 8 per cent of the monthly wage. The deposits in these accounts bear interest and may be recovered on termination of employment, or in certain other contingencies by a worker opting for this scheme in preference to the system of protection of security of employment established in the consolidated labour laws.

In several other countries in which legislative provision is made for payments to workers whose employment has been terminated for reasons of redundancy, and in Ireland and the United Kingdom a fund has been constituted by employers' contributions which serves to guarantee the payments due to a worker in case the employer does not fulfil his obligations directly, and to reimburse employers who do comply with their obligations a part of the amounts paid out. In Cyprus the redundancy payment is payable to the worker directly by the redundancy fund.

Relationship with Other Entitlements

Severance allowances are generally payable in addition to such other entitlements on termination of employment as compensation in lieu of a period of notice and any compensation which may be awarded by a court or tribunal for unjustified dismissal. This is often explicitly stated in the legislation.

In several countries, if a worker is entitled to benefits from a provident fund or pension scheme, entitlement to severance allowance may be reduced or lost under certain conditions. This seems to be the case in Egypt, Ethiopia, Jamaica, Mauritius, Pakistan, Switzerland, Tanzania and the United Kingdom. On the other hand, entitlement to unemployment insurance on termination of employment does not generally affect the right to a severance allowance.

Nature of Severance Allowances

In some countries much discussion has been devoted to determining the nature of severance allowances. Such allowances have variously been considered to be an element of wages the payment of which has been postponed, a kind of compulsory savings, a share in the value of the undertaking which has increased partly as a

result of the worker's efforts or an indemnity for loss suffered as a result of termination of employment. They also serve to provide the worker with some income protection during a period of unemployment. The method of calculation of the severance allowances and the contingencies in which it is paid or withheld determine in part its nature.

The resolution of this question may have certain practical consequences, regarding, for example, entitlement to unemployment insurance (if the severance allowance were considered to be earnings intended to provide income protection during any consequent unemployment, the worker might lose for a time his entitlement to unemployment benefits), taxation (where these allowances are taxable they may be taxed at a different rate if considered as a wage rather than as a capital payment) and bankruptcy proceedings (in some countries such allowances may be privileged claims only if considered to be "wages", while other countries have amended the relevant provisions to grant this status to severance allowances as such).

These issues are complex and the answers often depend upon the specific terms of the various legislative and regulatory provisions concerned. It is not possible to summarise the various arguments and considerations in the present report.

SOCIAL SECURITY BENEFITS ON TERMINATION OF EMPLOYMENT

The branch of social security most obviously related to loss of income due to termination of employment is that providing unemployment benefits. Due to the difficulties of organising, financing and administering unemployment benefit programmes, such programmes have been introduced mainly in industrialised countries. Most programmes are compulsory unemployment insurance schemes, usually financed by contributions from employers and insured persons (the workers covered by the scheme), sometimes with government subsidies, but there are a small number of schemes financed by contributions from employers only; some schemes are not compulsory and are operated by funds established voluntarily by trade unions and financed principally by contributions of insured persons and subsidies by governments. Some countries have established unemployment assistance schemes, financed out of public funds, either to supplement the insurance programmes or as the sole programme providing unemployment benefits; allowances under these schemes are subject to a means or income test.

At present 39 countries provide for cash benefits to unemployed workers: 31 have compulsory unemployment insurance schemes;¹ three have subsidised voluntary unemployment insurance schemes;² four rely entirely on unemployment assistance;³ and one provides unemployment benefits through its statutory provident fund scheme.⁴ In some countries, however, both compulsory insurance and assistance schemes exist to provide unemployment benefits. Special unemployment insurance schemes for employees in the construction industry, dockworkers, railway workers and seafarers exist in several countries in parallel with their general schemes.⁵

Not all unemployment benefit schemes cover all kinds of unemployment. In general, the contingency for which unemployment benefits are paid is suspension of earnings due to involuntary separation from employment and inability to obtain a suitable job in the case of a worker who is capable of, and available for, work.

Some schemes also cover the need for income maintenance in cases of partial unemployment due to shorter working hours, days or weeks.

The salient features of the contingency normally covered by unemployment benefit schemes are thus reflected in the scope of their application. As a general proposition, they aim to protect wage earners and salaried employees, although the scope of some existing schemes is still confined to those employed in industry and commerce. For technical or administrative reasons, workers belonging to certain special categories are often excluded: for example, public employees, salaried employees earning more than a prescribed amount, agricultural workers, domestic servants, home workers, family workers, employees engaged in seasonal employment, casual workers, and new entrants to the labour force. In recent years, however, there has been a general trend towards extension of the scope of application to persons who formerly did not enjoy the protection of an unemployment benefit scheme. For example, in some countries—particularly those where an unemployment assistance scheme exists—school-leavers are now entitled to unemployment benefits if certain specific conditions are satisfied.

In order to ensure that benefits are paid to workers who are regular, bona fide members of the labour force and are involuntarily unemployed, unemployment benefit schemes normally provide for three kinds of conditions to be satisfied by a claimant, namely conditions relating to: (1) the claimant's previous wage-earning experience; (2) the cause of unemployment; and (3) the claimant's situation during the period in which benefits are paid. The purpose of imposing these conditions is to show that the claimant has been in regular wage-earning employment to support himself and his family, that he is involuntarily unemployed, and that he is capable of, and available for, work.

Many unemployment benefit schemes require a specified minimum qualifying period, expressed by the duration of insured employment or by the number of contributions paid (in the case of an insurance scheme), or by a period of residence (in the case of an assistance scheme). The length of the qualifying period is usually six months of employment in the course of the 12 months preceding the claim. The period of residence prescribed by some unemployment assistance schemes is 12 months.

The condition that termination of employment must have been against the will of the worker concerned, i.e. the unemployment must be involuntary, is usually required by unemployment benefit schemes: the worker must not have given up his job in order to look for a better position or have been dismissed for misconduct. Most schemes relax this condition by admitting voluntary separation for good cause, such as unsafe or unhealthy working conditions, or the fact that a married woman left a job because her husband's work took him to some other part of the country. Under many schemes a worker who strikes to secure better conditions of employment is not considered as being unemployed against his will. In such cases unemployment benefit is usually withheld for a prescribed period of disqualification.

Unemployment benefit schemes require a person receiving benefit to hold himself capable of, and available for, work. Capability of, and availability for, work are verified by registration and regular reporting by the worker at an employment exchange and by the offer of suitable employment, with disqualification provisions for refusal to accept such an offer. In defining the term "suitable employment", unemployment benefit schemes normally take into account a number of factors,

such as wage rates and location of the employment offered, the claimant's previous occupation and training, safety and health, etc. The majority of such schemes expressly designate as unsuitable any vacancies arising out of work stoppages due to labour disputes. Some unemployment benefit schemes expressly disqualify workers for benefit if they receive payment of any kind during the period of unemployment; others have provisions for reducing or adjusting benefits in respect of earnings from part-time employment.

Where the rate of unemployment benefit is related to the claimant's previous wages, it is in many cases 50 to 60 per cent of such wages subject to a ceiling for a person without dependants. The rate varies in most cases according to the family responsibilities of the beneficiary. Under some unemployment benefit schemes, higher rates of benefits are available to claimants in the lower wage brackets. In a few countries flat-rate benefits are payable. In many countries the rate of unemployment benefit is identical to that of cash sickness benefit. Waiting periods, i.e. the initial few days of the contingency, for which unemployment benefit is not payable, are usually longer than for sickness benefit. The objectives of waiting periods are to eliminate the work and expense involved in establishing title and paying benefits for only brief intervals of unemployment and to give the employment exchange service the time to find another job for the claimant during the initial days of his unemployment. With the exception of unemployment assistance schemes and of very few schemes based on social insurance criteria, many unemployment benefit schemes provide for a maximum duration of benefit payment; the prevailing maximum duration is some six months in the course of 12 months. Where the right to an unemployment insurance benefit has expired, further protection is often extended by social assistance, subject to a means and/or income test.

Under some unemployment benefit schemes, the maximum amount or duration of benefit is adjusted to particular circumstances in which unemployed persons find themselves or to their particular need for further protection. In some countries, in addition to the basic benefit, a special allowance is payable to workers who have been dismissed for economic reasons. Sometimes the maximum duration of benefit is extended for older workers or for other persons who are hard to place in new employment, such as handicapped workers.

Unemployment benefit schemes in some countries are administered by government departments, while in others they are run by autonomous public bodies comprising representatives of the government, the employers and the workers. It is, however, usual for a close administrative relationship to exist between the unemployment benefit scheme and the employment exchange service, in order to ensure that benefits are paid to workers who are registered at such service for re-employment. In many countries unemployment benefit claims are received and benefits are paid by the local office of the employment exchange service. Where the unemployment benefit scheme and the employment exchange service are not merged for the purpose of administration, unemployed workers are first registered with the local office of the employment exchange service and are then referred to a separate social security office for the processing of their claim and actual payment of benefit.

In several countries there has been increasing recognition of the need to deal with the problem of a reduction in earnings on re-employment in a different

occupation or establishment. Methods which have been adopted include the introduction of a kind of compensatory benefit into an unemployment benefit scheme. One example of this is the system of supplementary payment of wages which meets, either fully or partly, for a prescribed period, the difference between the former and the new wages, within the framework of an unemployment benefit scheme. Such a system may be appreciated in the light of the provision usually contained in unemployment benefit schemes that a job is considered as suitable for an unemployed worker only if the wages and other terms of employment attain a certain level, and, if not, refusal of such a job offer does not disqualify the worker for unemployment benefit.

Where a worker's employment is terminated because of disability for work or of retirement, social security benefits other than unemployment benefit are provided, often subject to qualifying conditions prescribed by the scheme concerned. Such benefits include invalidity, old-age or retirement pensions, as well as employment-injury pensions the entitlement to which does not require the claimant to satisfy any qualifying conditions relating to his employment record. Some employment-injury benefit schemes do not allow the employer to dismiss an injured worker while he is in receipt of temporary incapacity benefits. In order to protect older unemployed workers, the normal pensionable age under some social security schemes is lowered, so as to enable them to receive early retirement pensions. In some developing countries statutory and non-statutory provident-fund schemes provide a lump-sum benefit to workers whose employment is terminated because of invalidity, old age, emigration, or withdrawal from the covered employment.

EXISTING INTERNATIONAL STANDARDS

Recommendation No. 119 contains several provisions relevant to the subject-matter of this chapter. According to Paragraph 9, "Some form of income protection should be provided for workers whose employment has been terminated; such protection may include unemployment insurance or other forms of social security, or severance allowance or other types of separation benefits paid for by the employer, or a combination of benefits, depending upon national laws or regulations, collective agreements and the personnel policy of the employer." Paragraph 11 (1) provides: "In case of dismissal for serious misconduct...the severance allowance or other types of separation benefits paid for by the employer, where applicable, may be withheld."

International standards regarding relevant social security benefits are contained in the Unemployment Provision Convention (No. 44) and Recommendation (No. 44), 1934, the Income Security Recommendation, 1944 (No. 67), the Social Security (Minimum Standards) Convention, 1952 (No. 102), the Employment Injury Benefits Convention, 1964 (No. 121), and the Invalidity, Old-Age and Survivors' Benefits Convention (No. 128) and Recommendation (No. 131), 1967.

Paragraph 9 of Recommendation No. 119 considers both severance allowances and unemployment benefits or other social security benefits in the same context, from the point of view of income protection after termination of employment. It provides that these allowances and benefits may be either alternative or cumulative entitlements. However, under the legislation of most countries with provision for

severance allowances paid by the employer, such allowances seem not to be conceived of essentially as income protection upon termination of employment (although they may, of course, serve such a function where a new job is not immediately found), since their payment is due even if the worker enters immediately into new employment and since their calculation is usually based on length of service.

Since their purpose apparently differs from that of social security benefits, and having regard to the fact that a limited number of countries make provision for unemployment benefits while a very large number of countries make provision for the payment of severance allowances, the question arises whether any new instrument should be limited to providing for severance allowances or other separation benefits alone, without referring to social security benefits as an alternative entitlement.

With this in mind, the questionnaire presents two alternatives. The first asks whether any new instrument should provide for severance allowances or other types of separation benefits paid by the employer; the second asks whether any new instrument should provide for severance allowances or other types of separation benefits paid by the employer, or unemployment benefits or other social security benefits, or a combination of such allowances or benefits, as in Recommendation No. 119.

With regard to severance allowances and other separation benefits, the questionnaire takes into account that, while in most countries these are paid for directly by the employer, in others they may be paid out of a fund constituted by employer contributions. It also takes into account the fact that in the great majority of countries in which there is legislative provision for severance allowances or other separation benefits, these allowances or benefits increase with length of service. The possibility that such allowances may be withheld in case of serious misconduct, provided for in Recommendation No. 119 and in many countries, is also referred to in the questionnaire.

Limitations on entitlement to severance allowances due to requirements of a qualifying period of employment or to attainment of the age of retirement are dealt with in the part of the questionnaire concerning scope of coverage.

Notes

¹ Argentina (construction workers only), Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Cyprus, Egypt, Ecuador (lump sum only), France, the German Democratic Republic, the Federal Republic of Germany, Greece, Iceland, Ireland, Israel, Italy, Japan, the Libyan Arab Jamahiriya, Luxembourg, Malta, the Netherlands, Norway, Portugal, South Africa, Spain, Switzerland, the United Kingdom, the United States and Uruguay.

² Denmark, Finland and Sweden.

³ Australia, Hungary, New Zealand and Yugoslavia.

⁴ Ghana.

⁵ For example, in Austria (construction workers), Belgium (construction workers, miners and seafarers), France (construction workers, dockworkers, seamen and aviators), the Federal Republic of Germany (miners, construction workers and dockworkers), Japan (day labourers and seamen) and the United States (railroad workers).

CHAPTER VI

WORKFORCE REDUCTIONS

Although usually the general system of protection in case of individual dismissal applies to termination of employment in the context of a workforce reduction, such termination is often subject to special rules. Several factors appear to underly this special treatment. First, although the economic causes of workforce reductions are generally deemed to be valid reason for termination, termination for such reasons is not due to the fault of the individual worker or to reasons over which he has control. Second, workforce reductions may affect sizeable numbers of workers whose loss of employment may give rise to industrial conflict and create serious social and economic problems for the community, apart from the difficulties faced by the workers themselves; the solution of these problems and difficulties may require sizeable community resources. The growing general awareness of these problems, as well as the difficult economic circumstances of recent years in a number of countries, have led to the introduction of special rules governing workforce reductions in many countries.

Various reasons related to the operational requirements of the undertaking can result in a reduction of the workforce of an undertaking. Such reasons may derive from market conditions, such as cyclical, seasonal or structural fall in demand; they may result from competitive factors leading an undertaking to lose its customers to competitors within the country or abroad; they may be based on a decline or change in demand for manpower in the undertaking due to changes of an organisational, structural or technological character, or to changes in product, work methods or processes. These various causes may interact with each other—for example, a decline in demand may exacerbate competition—and result in measures of reorganisation or technological change with a view to increasing efficiency.

In recent years economic crisis, competition and technological change have had particularly serious effects on employment in many countries. In addition, competition and technological changes have had a serious impact on employment in particular industries in certain countries. With respect to new technologies, it is widely expected that the many future applications of microelectronics will cause considerable redundancy in a number of economic sectors and the main questions appear to relate to the speed of introduction of this technology and whether the employment creation effects will match the loss of employment.¹

In a number of centrally planned economies where labour shortages are generally reported, changes in production plans, rationalisation measures and technological change sometimes lead to the existence of excess labour in particular sectors or undertakings, which needs to be redeployed elsewhere.

In the great majority of countries workforce reductions which do not rely on voluntary departures are effected by dismissals, that is, termination of employment by the employer, and the rules governing such termination apply. In some countries, however, recourse is had to the concept of “layoff” in order to bring about such reductions. In several countries, in particular Canada and the United

States, "layoff" appears to be the principal method, provided for by collective agreements, for carrying out a workforce reduction, whether the reduction is of short-term duration to meet temporary business problems, or of a permanent nature. "Layoff" apparently involves essentially a suspension of the employment relationship, with maintenance of certain rights regarding seniority and certain fringe benefits such as health and accident insurance, and the right to recall when work again becomes available, but no right to wages. After a certain period of time, sometimes specified in the collective agreement, a worker "laid off" will generally no longer be considered to be entitled to these rights and the employment relationship will be considered to be ended. In a number of other countries, such as certain Scandinavian countries, India and the United Kingdom, "layoff" appears to be restricted in use to temporary workforce reductions, while dismissal or termination is the usual method of effecting a permanent reduction. In these countries special rules may apply to each of these techniques.

The special rules applicable to workforce reductions in different countries are of various kinds. They are essentially intended to ensure that the interests of the workers and of the community, as well as those of the undertaking, are taken into account in decisions on these questions. They appear in large measure to be intended to give effect to two principles that are growing in acceptance: first, that various measures should be considered to avert or minimise workforce reductions as far as possible; second, where such reductions cannot be averted, measures should be taken as far as possible to attenuate the adverse consequences of loss of employment for the workers concerned.

Since measures which might be taken to avert or minimise workforce reductions and to attenuate their effects depend in large part on the particular circumstances of each situation, these principles are usually formulated as objectives to be pursued through certain types of procedures. It is on these procedures that provisions on the matter in legislation and collective agreements frequently concentrate.

The following paragraphs will review, in turn, the various procedural obligations relating to workforce reductions, including procedures involving workers' representatives and procedures involving public authorities; measures which may be taken to avert or minimise workforce reductions; criteria for the selection of workers to be affected by such reductions and rules regarding priority of re-engagement if the employer again seeks to engage workers having the same qualifications; and various measures intended to attenuate the effects of workforce reductions, including measures of compensation, training and placement.

PROCEDURES INVOLVING WORKERS' REPRESENTATIVES

Provision for advance notification to trade union representatives or other workers' representatives of planned workforce reductions, or of changes in the undertaking liable to result in such workforce reductions, are now found in legislation or collective agreements, or both, in many countries. These provisions are intended to ensure that the workers' representatives are aware of impending measures and of the reasons for them, so that such events are not sprung upon the workers without adequate warning, and to give the workers' representatives a sufficient opportunity to present their point of view, make proposals on or

negotiate with regard to the planned reductions, particularly in respect of the reasons for them, whether they might be avoided or limited, and if not, the measures that might be taken to mitigate the consequences thereof.

While most provisions on the subject refer to prior notification of workforce reductions *per se*, some countries seek in addition to ensure that the workers' representatives are consulted, before the issue of reductions arises in concrete fashion, in case of important changes in the undertaking which are liable to result in a reduction. The latter procedures will be discussed first, followed by those regarding workforce reductions themselves.

Notification to Workers' Representatives of Major Changes in the Undertaking

Prior information regarding major developments in the organisation, structure, operations or technology of an undertaking which may affect employment prospects must be provided to workers' representatives in the undertaking under two types of provisions. The first are the general provisions found in most schemes of workers' participation in the undertaking requiring periodic information to be supplied to the workers' representatives on the operation of the undertaking and on management plans. If properly presented, such information should give the workers' representatives an early indication of problems which are arising and of company plans regarding the structure and operations of the undertaking which might affect employment.

However, in some countries management is subject to more specific obligations to inform the workers' representatives of such changes liable to affect the workforce. In some countries this information is to be provided to the works council concerned, while in others it must be furnished to the relevant trade union or trade union representatives. In Austria, for example, the legislation provides for notification of the works council of alterations to the establishment, such as a reduction, transfer or closure of the establishment or a part thereof, a merger with another establishment, changes in the purpose, organisation of work or operations, the introduction of new working methods, significant rationalisation or automation schemes, and changes in ownership or legal form. In the Federal Republic of Germany the law requires the employer to inform the works council of alterations in the establishment, defined in a similar fashion, if they may entail substantial prejudice to the staff or a large sector thereof. The legislation in Luxembourg obliges the employer to inform the works committee of any major decision regarding the introduction of new equipment or new working methods or production techniques as well as any economic or financial decisions that are liable to have a major effect on the level of employment. Under legislation in the Netherlands the works council must be informed in advance of intended closure, transfer of control, substantial reduction or change of activities, major changes in organisation or a transfer of location.

In Denmark a basic agreement on co-operation provides that co-operation committees must be informed of important reorganisations of the undertaking, while in Finland the legislation requires workers' representatives to be notified of major changes in work methods, the introduction of new machinery, rationalisation measures and the closure or transfer of all or part of an undertaking. In Norway a basic agreement requires management to inform the shop stewards in the

undertaking of anticipated reduction of output or changes in operation which are important to the staff. The legislation in Sweden provides that the employer must inform the appropriate workers' organisations of any important change in activity, working conditions or conditions of employment. Under Indian legislation the employer must provide notification to the workers concerned and to their trade union of any planned change consisting of rationalisation, standardisation or improvement in plant or technique which is likely to lead to retrenchment.

In Canada a commission of inquiry into redundancies and layoffs concluded, in March 1979, that redundancy should be recognised to be a shared responsibility from the point in time when the employer makes a decision to implement a change that will give rise to redundancy, and therefore that a notice of intent to introduce a change should be then given to all interested parties with a view to joint consultation in which the interested parties may express their objections and concerns.²

These obligations of notification sometimes apply only to undertakings of a given size, for example when they are laid down in legislation on works councils that applies only to undertakings employing more than a minimum number of workers (e.g. five workers in Austria and the Federal Republic of Germany, 30 workers in Finland or 150 in Luxembourg).

Usually the employer must provide the information required as soon as possible (Austria, the Netherlands and Norway) or in due time (the Federal Republic of Germany) or before taking a decision on the matters at issue (Finland, Luxembourg and Sweden). Occasionally, as in the Netherlands, the employer is relieved of the obligation if he can show that there are major interests of the undertaking or the interested parties militating against the consultation.

Sometimes the legislation stipulates the kind of information which must be supplied on the above matters; this may include reasons for the proposed changes, the consequences anticipated for the staff and the measures intended to be taken in this connection.

Generally, the role of the workers' representatives in respect of these matters is one of consultation—that is, the workers' representatives are entitled to study the measures proposed, to give their views thereon and to discuss the matter with management. In Denmark the employer must give the bipartite co-operation committee a sufficient opportunity to exchange views and make proposals which may enter into the final decision on the matter. In the Federal Republic of Germany the employer must consult with the works council on the proposed alterations. In Finland there must be a discussion between the employer and the trade union delegates. In the Netherlands the employer must give the works council an opportunity to state its views. In Norway the employer must confer with the stop stewards on the matter at issue, and must give reasons for not accepting their views.

In some countries the rights of the workers' representatives go somewhat further. Thus in Sweden the employer is obliged to negotiate with the relevant trade union on these matters under the system of co-determination enacted by 1976 legislation. In Austria in undertakings employing more than 200 persons, if the works council objects to the proposed alterations, a mediation procedure before a joint disputes committee may be engaged, and if this is unsuccessful, a procedure before the state economic commission may be instituted. In the Federal

Republic of Germany a failure of agreement may give rise to mediation with a view to reconciliation of the interests of the parties and the adoption of a social compensation plan; in the absence of agreement, a conciliation committee may decide on a social compensation plan.

In some countries special agreements have been concluded with regard to the introduction of technological change, sometimes on an economy-wide basis, sometimes in specific industries. The threat to employment resulting from the introduction of new technology, and in particular new microelectronic technology, has led trade unions in a number of countries to place great emphasis on the need for prior information and negotiation on the introduction of such technology.³

Examples of collective agreements providing for prior information on the introduction of new technology are growing in number. Negotiation over the introduction of specific new technology is frequent, and many agreements have been adopted in recent times in particular industries or undertakings to safeguard the interests of workers in connection with the introduction of new technology. A few examples of the former type of agreement may be mentioned here. A noteworthy example is the agreement concluded in 1975, and revised in 1978, in Norway between the central organisations of employers and workers, which requires employers to inform the workforce, in clear and easily understood language, of the introduction of computer-based systems. In Italy national agreements were concluded in the metal trades, construction and banking industries in 1979, which provide for informing the trade unions of the introduction of new technology, while in the United States an agreement was concluded in the same year between General Motors and the United Auto Workers, providing for the union to be informed in advance of all planned technical changes.⁴ Recommendations to inform and consult with workers and their representatives on the introduction of technological change were made in Australia in 1972 by the Tripartite National Labour Advisory Council.

Notification to Workers' Representatives of Workforce Reductions

Provision for notification to workers' representatives of planned workforce reductions themselves, whether or not resulting from changes in the organisation, technology, work processes, etc., of the undertaking or from other economic causes, is found in a larger number of countries. Obligations of this kind are now widespread, laid down by legislation or collective agreement or both. They may be found for example, in the legislation of Belgium, the United Republic of Cameroon, Canada (the federal jurisdiction and Manitoba), the Federal Republic of Germany, France, Gabon, Indonesia, Ireland, Kenya, Madagascar, the Netherlands, Norway, Portugal, Senegal, Spain, Sweden, the United Kingdom, Zambia and Zaire. Prior notification to trade unions of planned workforce reductions is provided for in collective agreements or industrial awards in a number of countries, including Australia, Belgium, Canada, New Zealand and the United States. In Italy provision for prior notification to the appropriate trade union is included in the 1965 interconfederal agreement on dismissals due to workforce reduction. Recommendations to this effect were made in India in 1957 by the Indian Labour Conference, and in Switzerland by an agreement concerning closure of undertakings or parts of undertakings or workforce reductions due to economic reasons, concluded by the central organisations of employers and

workers in 1975. Sometimes, national employers' organisations, such as the New Zealand Employers' Federation, have made recommendations to their member employers to inform or consult with the appropriate workers' representatives on anticipated redundancies.

The obligation to inform the workers' representatives of planned workforce reductions is sometimes limited to undertakings of a given size, for example, undertakings employing 20 or more persons in Belgium or 21 or more in the Federal Republic of Germany and in Ireland.

The definition of what constitutes a workforce reduction to which the obligation of notification applies differs considerably from country to country. In some countries the terms of the legislation clearly refer to a single dismissal for economic, technological or similar reasons. Thus, in Gabon and Zaire one or more dismissals due to economic reasons resulting in a reduction of activity or reorganisation must be notified to the appropriate workers' representatives. In Spain the suspension or termination of an individual employment relationship for economic or technological reasons must be notified to the trade union concerned. In Sweden the employer must notify the appropriate workers' organisation of any and all terminations due to a shortage of work or layoffs that are not of an isolated or temporary nature, or due to the seasonal or intermittent nature of the work. In the United Kingdom the employer is obliged to consult representatives of the appropriate recognised trade union regarding a proposed dismissal of an individual worker on grounds of redundancy.

In other countries the terms of the legislation are less precise, but appear to be susceptible of application to individual dismissals for such reasons, although they might be interpreted as applying only to termination of more than a single worker. Thus, in Kenya and Zambia notification is required in case of "redundancy". The legislation in the United Republic of Cameroon and Senegal requires the employer to inform the workers' representatives of dismissals due to reduction of activity or reorganisation, while in France and Madagascar such notification must be made in case of reduction of staff. In Italy the previously mentioned interconfederal agreement refers also to notification of reduction of the workforce.

In a number of countries the applicable provisions indicate that the obligation to inform the workers' representatives concerned applies to cases of collective dismissals affecting specified numbers or percentages of persons, sometimes combined with a reference to the reason for the dismissals. Thus, for example, in Belgium, dismissals for economic or technical reasons affecting at least 10 per cent of the staff over a 60-day period, or in undertakings employing between 20 and 59 workers affecting six or more workers, must be notified to the workers' representatives. In the Federal Republic of Germany workers' representatives must be informed of dismissals over a 30-day period of more than five workers in undertakings employing between 21 and 59 workers, 10 per cent of the workforce or more than 25 workers in those employing 60 to 499 workers, and 30 or more workers in those employing 500 or more.

In Ireland the appropriate workers' organisation must be informed of dismissals of five or more workers in undertakings employing 21 to 49 persons, ten or more if employing 50 to 99, 10 per cent if employing 100 to 299, and 30 or more if employing 300 or more. In the Netherlands the obligation applies to dismissals of 20 or more persons in the area of a regional employment office. In Portugal it

applies to dismissals of two or more workers in undertakings employing between two and 50 workers, and five or more in those employing over 50, which are caused by closure of one or more departments of the undertaking, or redundancy due to structural, technical or economic grounds. In Indonesia the information obligations apply to termination of ten or more workers during a one-month period, or to a series of terminations which indicate an intent to carry out such a mass dismissal.

In some countries specific provision is made for informing the workers' representatives of closures of an undertaking or a division thereof. This is the case, for example, in Belgium, where a closure is defined as a definitive cessation of the principal activity of the undertaking or division, involving a reduction of the workforce to less than one-quarter of what it was previously, and in Gabon, where the notification requirements apply to suppression of activity.

The workers' representatives concerned must often be notified at least a given time before a workforce reduction is carried out. Sometimes the legislation states that this notification must be given before notification to the public authorities, and the dismissals may be effected only after a given period has elapsed. In France, for example, the legislation requires that the workers' representatives must be informed 15 days before authorisation is requested of the public authorities in the case of undertakings employing 50 or more workers, while provisions of the 1969 and 1974 national inter-occupational agreements on security of employment provide for periods of prior notification varying with the numbers to be dismissed and also depending on whether the dismissals are due to conditions regarding demand or to structural reasons. The legislation in Senegal stipulates that the workers' representatives must be informed before the employer requests the labour inspector to authorise the dismissals. In Belgium the workers' representatives must be informed of the planned dismissals before notification is made to the public authorities.

In other countries the time interval for notification of the workers' representatives refers to the dismissals themselves. In the United Republic of Cameroon the workers' representatives must be informed of a planned workforce reduction at least 15 days before notice of dismissal is given to the workers concerned. In the Federal Republic of Germany, Ireland and Sweden the workers' representatives must be notified at least 30 days before notice of dismissal (in the Federal Republic of Germany and Sweden), or before the dismissals take effect (in Ireland). In Portugal advance notification of collective dismissals must be given to the workers' representatives at least 60 days before the intended date of the dismissals in undertakings employing up to 50 workers, and at least 90 days beforehand in those employing more than 50 workers. The workers' representatives must be informed of collective dismissals in the United Kingdom at least 60 days before the first dismissal, if it is planned to dismiss ten or more workers over a 30-day period, or at least 90 days before the dismissals if it is planned to dismiss 100 or more within a 90-day period. In Italy the notification requirement under the interconfederal agreement is linked to a conciliation procedure which may last up to 25 days and be extended 15 days by agreement.

In those countries with works councils or similar systems, it is usually the works council which must be informed of planned workforce reductions (e.g. Belgium, France, the Federal Republic of Germany, Portugal and Zambia). In some countries, such as Belgium and France, it is provided that in the absence of a works

council in the undertaking the relevant trade union or staff delegate in the undertaking must be so informed. In Gabon a bipartite committee for economic and social co-operation as well as the staff delegates must be informed of workforce reductions. The legislation in the United Republic of Cameroon, Gabon, Madagascar and Senegal provides that the appropriate information must be provided to the staff delegates. In other countries, such as Indonesia, Ireland, Italy, the Netherlands, Spain and the United Kingdom, the employer must notify such workforce reductions to the appropriate trade union or trade union officials.

Frequently the provisions regarding notification of workforce reductions to workers' representatives specify the kind of information that must be furnished. Generally, reference is made to the reasons for the planned dismissals, the numbers of workers to be affected, the normal size of the undertaking, the occupational classifications of the workers concerned and the period of time over which the dismissals are to be carried out.

The prerogatives of the workers' representatives under the notification procedure vary. In some countries the relevant provisions specify little more than the obligation to provide the workers' representatives with the information referred to. However, this obligation would seem to have little purpose if it did not give rise to at least an exchange of views on the matter. In Gabon it is stipulated that the workers' representatives have one week to formulate their suggestions. In some countries the objectives of the procedure are specified. Thus in Belgium, France the Federal Republic of Germany, Ireland and Portugal the employer is to consult the works council (or trade union delegation in the undertaking) regarding the possibilities of avoiding or minimising collective dismissals, or attenuating the consequences of such dismissals. In the United Kingdom the legislation stipulates that the employer must consider any representations made and give reasons for not acting on them.

In some countries the purpose of notification of workforce reductions appears to be to permit negotiation on the matter. This appears to be the case in Italy, under the above-mentioned interconfederal agreement, and in Sweden, under 1974 legislation; in both cases the appropriate workers' representatives may request discussions within one week. Occasionally the prerogatives of the workers' representatives go further, as in Zambia, where the works council must approve the proposed redundancies, and a refusal to do so may be appealed against by the employer to a tripartite board of review, and then to the Industrial Court.

It should be recalled in this connection that certain procedures applicable to all dismissals are of particular importance in connection with workforce reductions. Thus, for example, the consultation requirements in Austria, the Federal Republic of Germany, Norway, Poland and Sweden, where workers' representatives must be consulted on all individual cases of dismissals, are applicable to workforce reductions as well. Also, in a number of countries, procedures requiring the prior consent of the trade union committee of the undertaking for dismissals generally, apply to dismissals in connection with workforce reductions (Czechoslovakia, the German Democratic Republic, Romania and the USSR).

Lastly, it should be recalled that workforce reductions are an important cause of industrial disputes, and that, whether formally notified of them or not, trade unions may in some countries seek to negotiate thereon and, in the absence of agreement, bring them before a disputes settlement procedure.

THE ROLE OF PUBLIC AUTHORITIES

In recent years there has been a tendency for public authorities to become more involved in the problem of workforce reductions, usually under legislative provisions requiring the employer to inform such authorities of impending reductions. Notification of workforce reductions to these authorities enables them to offer their assistance to the parties and to seek conciliation in any dispute which may arise. However, the legislation often also provides such authorities with more substantial powers regarding such reductions.

In a large number of countries the competent administrative authorities (or sometimes disputes settlement bodies) must be notified of workforce reductions. These include, for example, Algeria, Austria, Belgium, Canada (in the federal jurisdiction and a number of provinces), Chile, Colombia, the Congo, the Federal Republic of Germany, France, Gabon, India, Indonesia, Ireland, Iraq, Italy, Kenya, Luxembourg, Madagascar, Mauritius, Mexico, the Netherlands, Norway, Panama, Peru, Portugal, Senegal, Spain, Sri Lanka, the Sudan, Sweden, Turkey, Venezuela and Zaire.

The authority which must be informed of workforce reductions is generally a public employment office, a labour inspector or the Ministry of Labour. Occasionally a disputes settlement body or an industrial or labour court must be informed.

The role of these bodies with regard to planned workforce reductions varies. Sometimes the legislation does not indicate what role the public authorities are to play when notified of impending workforce reductions; these bodies may use this information simply for statistical and information purposes, or seek more actively to assist the parties concerned. In other countries, such as Belgium, the Federal Republic of Germany and Luxembourg, the employment offices are empowered to extend the period of time during which the workers concerned may not be dismissed or, on the contrary, to authorise earlier dismissal. Sometimes it is indicated that the employment office is to discuss the planned dismissals with the employer, works council and the parties to the collective agreement covering the undertaking (Austria), to consult with the employer with a view to seeking solutions to the problems arising (Ireland), or to conciliate between the parties (Italy, Kenya and Peru). In a number of countries the powers of the competent authorities go beyond the above-mentioned powers. Thus, in Mauritius, the matter is submitted to a tripartite board which is charged with determining whether the workforce reduction is justified; if it finds that it is not justified and the employer carries it out, he must pay six times the normal severance allowance.

In Portugal the competent authority is entitled to prohibit a workforce reduction if it considers that sufficient justification is lacking, or to order the transfer of the workers concerned to other establishments of the employer. In a number of countries the legislation explicitly requires that workforce reductions be authorised by the competent administrative body or official (in Algeria, Chile, Colombia, France, India, Iraq, the Netherlands, Panama, Portugal, Peru, Senegal, Sri Lanka, Spain, the Sudan and Zaire). In others the employer is required to obtain the prior authorisation of a disputes board (the Congo), a tripartite central committee for the settlement of disputes (Indonesia), a tripartite committee specially responsible for dismissal questions (Venezuela), or a conciliation and arbitration board (Mexico). In Kenya and Pakistan, in the absence of agreement,

the workforce reduction must be authorised by an industrial or labour court. In certain of these countries it is specified that, if the body competent to authorise the dismissals has not replied within a given period of time, the dismissals are to be deemed authorised (e.g. France, India and Senegal).

The kind of workforce reduction that must be notified to the appropriate public authority in accordance with the above-mentioned provisions varies considerably from country to country. Sometimes it appears to apply to individual dismissals for economic reasons; elsewhere to collective dismissals also for such reasons; and sometimes explicitly to closures of all or part of an undertaking. In those countries mentioned previously, in which workers' representatives are required to be informed of workforce reductions, the same kinds of reduction are generally reportable to the public authorities. In other countries, or in those in which different rules apply to notification to public authorities, the employer must sometimes notify the competent authority of individual dismissals (the Netherlands) or all non-disciplinary dismissals (which require prior authorisation by the labour commissioner in Sri Lanka). In several other countries, such as Iraq, Italy, Madagascar, Mauritius, Mexico, Peru and the Sudan, where the legislation requires notification (and in some prior authorisation) of a reduction of the workforce, or a reduction in activities, whether this refers to a reduction involving the dismissal of a single worker will depend upon the interpretation of the terms of the legislation. In other countries the legislation refers to collective dismissals (Algeria and Colombia), to dismissal of a minimum number of workers, such as at least five (Sweden), at least ten during a one-month period (Norway), at least 11 (Chile), one-twentieth of the workforce if at least ten workers (Turkey), retrenchment of more than 50 per cent of the workforce (Pakistan), or closure of all or part of an undertaking (the Libyan Arab Jamahiriya).

Where only notification is required, this must usually be as soon as possible, or a given period of time before carrying out the workforce reduction, for example, four weeks, 30 days or one month (Austria, Belgium, Ireland, the Federal Republic of Germany) or two months (the Libyan Arab Jamahiriya and Norway); this period may sometimes be shortened or lengthened. In some countries the time for notification varies with the size of the anticipated workforce reduction, as in Sweden, where the authority must be notified two months before the dismissals if up to 25 workers are to be affected, four months beforehand if more than that are to be affected, and six months beforehand if over 100 are to be dismissed, and in the United Kingdom, where the competent authority must be notified 60 days before the first dismissals if ten workers are to be dismissed during a 30-day period, and 90 days before the first dismissals if 100 are to be dismissed within a 90-day period. In others it varies with the size of the undertaking, as in Portugal, where the competent authority must be notified 60 days before the planned reductions in undertakings employing up to 50 workers, and 90 days beforehand in those employing a higher number.

Where prior authorisation of a workforce reduction is required, the time-limits frequently refer to the period of time within which the competent authority must take a decision. In France the inspector must reach his decision within seven days (extendable to 14 days) where fewer than ten dismissals are planned during a 30-day period, or within 30 days if ten dismissals or more are envisaged during such period. In other countries the equivalent periods are: 15 days (Algeria), 30 days

(Venezuela), 45 days (Chile), 60 days (Panama), two months (Zaire) or three months (India, in undertakings employing 300 workers or more).

Usually the employer is obliged to supply the competent public authority with the same kind of information as must be supplied to the workers' representatives, that is, the numbers of workers to be dismissed, often classified by sex, age group, occupational category; the numbers normally employed; the reasons for the dismissals; and the dates over which they are to be carried out. In addition certain other information regarding the activities of the undertaking must usually be supplied. Occasionally, as in Belgium, France, the Federal Republic of Germany and Senegal, the employer must include information regarding consultation with the workers' representatives and the views of such representatives. In Ireland and the United Kingdom he must indicate the workers' representatives who have been notified of the impending reductions. Sometimes, as in Chile and Venezuela, the competent authority or committee is entitled to have access to the books and records of the company.

MEASURES TO AVOID OR MINIMISE WORKFORCE REDUCTIONS

It seems to be a widely accepted principle that when confronted with difficulties of an economic nature or the need to introduce technological or other changes, an employer should have recourse to dismissals to meet these problems only as a last resort, and that all other measures which might obviate the need for dismissals or limit their extent, consistent with the economic health of the undertaking, should be considered beforehand. In many circumstances it is in the interest of the undertaking to pursue such efforts, with a view to safeguarding its sometimes considerable investment in the qualifications and experience of its staff.

This objective, which is followed by many employers as a matter of good personnel management, has been incorporated in legislation or in collective agreements in a number of countries. In such countries, for example, as Austria, Belgium, France, Ireland, Italy and Portugal, the legislation or generally applicable collective agreements between central organisations of employers and workers, regarding consultation of workers' representatives, stipulates that one of the objectives of such consultation is to consider what measures may be taken to avoid or limit the extent of workforce reductions. In others, such as Algeria and Indonesia, the legislation lays an obligation on the employer to take all measures likely to avert or minimise a workforce reduction.

Measures capable of reducing or eliminating the need to resort to dismissals for economic, technological or similar reasons are of different kinds. They include, first, measures designed to provide additional work, for example by stimulating demand for the products or services offered by the undertaking, building up of stocks, reducing subcontracting, undertaking maintenance work in advance of the normal schedule for such work, or carrying out training activities in advance of planned programmes. These measures, which are essentially a matter of good business practice, will not be further reviewed here.

Where measures to stimulate demand for products or services are inadequate to meet the problems faced by the undertaking, two other kinds of measures are often resorted to with a view to avoiding involuntary terminations. The first kind, which is the most frequently employed, consists of a reduction of the staff size by

voluntary means, that is, through measures of attrition including restrictions on hiring, internal transfers to fill vacant posts, with training where necessary, and facilitating or stimulating voluntary departures. The second kind of measure consists of work-sharing, that is, spreading the available work over the existing workforce, although this is usually considered in combination with attrition measures where these are not sufficient.

Elimination of Excess Staff without Dismissals

In most cases it appears that measures of attrition are those most frequently resorted to in order to meet problems of excess staff without recourse to dismissals or layoffs. The most frequently reported measure is a freeze on, or restriction of, new hiring, and spreading the reduction over a period of time to allow natural departures to reduce the staff to the levels desired. This appears to be a matter of course in many undertakings faced with an excess of staff due to demand problems but is also resorted to in cases of reorganisation or rationalisation. As in many cases natural departures will not necessarily take place in the jobs which are considered to be redundant, this measure is often combined with a policy of internal transfer within the establishment or undertaking with a view to filling internal vacancies. Training on the job will often suffice to enable the persons concerned to carry out their new tasks, but where particular qualifications are required special training may be provided to such persons. In some countries, as in Japan, the employer considers possibilities of transfer not only within the establishment or undertaking but also in other related undertakings.

Measures of attrition and internal transfer are often adopted on an ad hoc voluntary basis, but they are also sometimes provided for in collective agreements in some countries, and are frequently the subject of ad hoc discussions or negotiations between the employer and the workers' representatives when the need to cut staff arises.

In some countries the need to consider the possibility of internal transfer has become a matter of legislative policy. Thus, as indicated in Chapter III, in some countries, such as the German Democratic Republic, Romania and Yugoslavia, the undertaking is obliged to find and offer the worker alternative employment, either within the undertaking or in another undertaking, and dismissal is valid only if such an offer has been refused. In other countries, such as Czechoslovakia and the USSR, dismissal is valid only if it is impossible to transfer a worker to another post with his consent. In Norway and Sweden a worker may be dismissed for reasons related to the operational requirements of the undertaking only if the employer is unable to transfer him to other suitable employment.

A policy of internal transfer and training is sometimes negotiated between the employer and the workers' representatives in the context of reorganisation, rationalisation or technological change, where excess workers are given a first opportunity to train and qualify for any new tasks that may be created.

Under some agreements special provision is made for safeguarding, in case of transfer to other posts of a lower classification, the previous wage level, or a high percentage of that wage, for a given period of time.

Since restriction on hiring and natural departures may not be sufficient to produce a sufficiently rapid decline of staff numbers, consideration is sometimes

given to stimulating voluntary departures by offering severance allowances higher than those normally provided for and by providing financial incentives to early retirement. These measures are sometimes subject to negotiation and agreement between employers and workers' representatives. In some countries provision has been made in such agreements for workers taking early retirement to receive compensation for the period between early retirement and the date of entitlement to a full pension, to make up the gap between the former wage level and benefits received under early retirement and unemployment entitlements.

Reduction of Time Worked

Work-sharing, that is, spreading the available work over the existing workforce by reducing the number of hours worked, as a method of cutting production and costs without resorting to dismissals, has often been used in situations of a temporary fall in demand. It is sometimes also resorted to where staff changes of a more permanent nature are necessary as a method of providing more time in which to carry out the changes required through attrition and transfer. What is of concern here is the reduction of time worked as an ad hoc measure to meet particular problems of excess staff in a given undertaking. The present discussion is not concerned with the more general proposals regarding work-sharing being considered, in particular in Western Europe in recent years, with a view to providing more jobs globally in the economies concerned so as to absorb persistently high levels of unemployment.

A reduction in working time with a view to averting or minimising dismissals may be accomplished in several ways, including a reduction in overtime or extra shifts, reduction in the normal weekly hours of work, additional holidays or short-term layoffs or suspensions. Where a reduction of the number of hours worked goes below the working hours provided for by contract or agreement, and it is wished to withhold all or part of the wages for the hours not worked, this involves a change in terms and conditions of employment that requires the agreement of the workers or trade union concerned and sometimes the authorisation of a public authority, unless provision for such reductions is already made in the contract or agreement.

One or more of these types of measures to reduce time worked has frequently been used in periods of difficulty. Such measures are sometimes taken unilaterally by the employer, at least where they do not involve a change in terms of employment. Often they are agreed to between the employer and the workers' representatives: sometimes provision for work-sharing in certain circumstances is included in an already existing collective agreement which is applicable when the problem arises; more frequently, work-sharing arrangements appear to be negotiated on an ad hoc basis when the particular problem requiring their consideration arises. Often consideration is first given to reduction of overtime and then to one or more other measures, such as reduction of normal hours of work. Such measures were apparently frequently resorted to during the 1974-75 recession in a number of countries, including Canada, France, the Federal Republic of Germany, Italy, Japan, the United Kingdom and Zaire. In Japan it seems that preference is given to providing "rest days" rather than to reducing hours of work.

In certain of these countries the employer is obliged to pay part of the wages for the normal hours not worked. This is the case, for example, in India, where the legislation requires an employer laying off workers to pay 50 per cent of the wages and cost-of-living allowance for the days during which a worker is laid off ; in Japan, where an employer must pay 60 per cent of the wages during "rest days"; and in the United Kingdom, where an employer putting a worker on short time or laying him off is obliged to provide a guaranteed minimum weekly pay under certain conditions. In France the employer must in such cases pay benefits for partial unemployment under the previously mentioned inter-occupational agreement.

In a number of countries central funds (either special funds or unemployment insurance funds) have been used to subsidise payment of part of the wages for normal hours not worked under work-sharing schemes. This is the case, for example, in Austria, Canada, France, the Federal Republic of Germany, Italy, Japan and the United Kingdom. In Canada, under a pilot project begun a few years ago, agreements between employers, trade unions and the federal Government with regard to reduction of working hours as an alternative to layoffs provide for part-payment of lost wages from the unemployment insurance funds for up to 26 weeks. In France agreements regarding short-time work may be concluded between the employer and the public authorities whose authorisation is required for recourse to short-time work ; under these agreements the part-wages that employers are obliged to pay for hours not worked are partly reimbursed from central funds. In the Federal Republic of Germany the Federal Employment Institute pays 68 per cent of the net wages lost through short-time working. In the United Kingdom the temporary employment subsidy scheme in force between 1975 and 1979, which subsidised employers for retaining excess workers in employment, was transformed in 1979 into a temporary short-time working compensation scheme under which central funds reimburse half of the 75 per cent of normal pay which employers have to pay for each day without work (or of the weekly guarantee payments if these are higher).

Generally, where wages lost due to short-time work are to be partially made up from public funds, the eligibility of an undertaking for such assistance depends on a number of conditions designed to ensure that the undertaking is economically viable, that the assistance is truly needed, that it will assist the undertaking to maintain the employment of the workers concerned and that the problems confronted by the undertaking are of a relatively temporary nature that can be resolved in a reasonable period of time.

CRITERIA FOR SELECTION OF THE WORKERS TO BE AFFECTED BY A REDUCTION OF THE WORKFORCE

When measures of the above-mentioned kinds are not sufficient to meet the difficulties faced by the undertaking and terminations of employment must be carried out, it is important that the selection of the workers whose employment is to be terminated be made in accordance with clear criteria, so as to avoid the possibility of arbitrary action. Such criteria usually take into account both the needs of the undertaking and the interests of the workers.

Rules regarding the selection of workers for dismissal in connection with a workforce reduction are frequently laid down by legislation, collective agreements

and works rules. However, in some countries they are sometimes negotiated between the employer and the workers' representatives or decided unilaterally by the employer on an ad hoc basis when a need to reduce the workforce arises.

Rules regarding the selection of workers for dismissal are included in the legislation of such countries as Algeria, Argentina, Bangladesh, Benin, the United Republic of Cameroon, the Congo, Democratic Yemen, France, Gabon, India, Madagascar, Mali, Malta, Mexico, Morocco, the Niger, Pakistan, Panama, Portugal, Senegal, Spain, Sweden, the USSR and Zaire. Rules on the matter are found in collective agreements in a number of countries, such as Belgium, Canada, France, Italy, the Netherlands, the Niger, the United Kingdom and the United States. In some countries they are frequently included in works rules; in France, for example, the legislation requires employers to include provisions on this question in works rules if it is not covered by collective agreement. Criteria for selection may also be established by administrative authorities or boards responsible for authorising dismissals in some countries, such as in Iraq and the Netherlands.

In some countries the legislation explicitly provides that, in case of complaint by a worker, the courts or tribunals are entitled to determine whether the selection of a worker for dismissal was unfair (Ireland and the United Kingdom) or socially unjustified (Austria and the Federal Republic of Germany). In other countries which also have protection against unjustified dismissal an employer will be able better to defend himself against a complaint of unjustified dismissal by a worker dismissed in the context of a workforce reduction if he can show that objective criteria were followed in the selection of the worker concerned.

The criteria referred to most frequently in legislation, collective agreements and works rules are length of service, occupational qualifications and ability, and family responsibilities. Also sometimes mentioned are nationality, age, and being in a protected category of workers, such as veterans, handicapped workers or workers' representatives.

In a number of countries the primary criterion specified by legislation or collective agreement is length of service or seniority. This is the case, for example, in Algeria, Argentina, Bangladesh, India, Malta, Mexico, Pakistan, Panama, Spain, the United Kingdom and the United States (under many collective agreements); it is sometimes stated to be applicable within the category to be affected by the workforce reduction. Occasionally seniority is supplemented by other criteria under which, in case of equal length of service, priority for retention is given to those with the largest number of family dependants and those who are veterans or handicapped workers (Algeria), to nationals, trade union members, workers who have shown the greatest efficiency, expectant mothers and those holding trade union office (Panama) or to the oldest workers (Sweden). The legislation sometimes states that the employer may use a criterion other than length of service if he has a reason for doing so and records it in writing (Bangladesh and India) or if he obtains the authorisation of the public authorities, after consultation with the workers' representatives, in special circumstances (Spain).

In other countries the primary criterion appears to be occupational qualifications or ability, as in the Congo, Kenya (under collective agreements), Mauritania, the Niger, the USSR, the United States (under a number of collective agreements), Venezuela and Zaire. Frequently, in case of equal abilities, this criterion is supplemented by other criteria, such as length of service (Kenya and the United

States), length of service combined with family responsibility (the Congo, Mauritania, the Niger and Zaire), or family responsibilities, length of service, having suffered an industrial accident or occupational disease in the undertaking, or being a disabled veteran (USSR).

In some countries several criteria are mentioned, such as length of service, occupational qualifications or ability and family situation, without any preference seeming to be stated in their application (Benin, the United Republic of Cameroon, Democratic Yemen, Gabon, Italy, Madagascar, Mali, Portugal and Senegal); in such cases it appears to be for the employer, perhaps in consultation with the workers' representatives and subject to any powers which the public authorities may have in this regard, to determine the weight to be given to each of these criteria.

PRIORITY OF RE-ENGAGEMENT

Inasmuch as an employer who has been obliged to reduce his workforce for reasons of an economic nature may, at a later date, need to hire workers with the same qualifications as those whose employment was terminated, it has been considered in a number of countries to be just to give the former workers priority for re-engagement in these jobs.

Provision for priority of re-engagement is found in the legislation of a number of countries, for example, in Algeria, Bangladesh, Benin, the United Republic of Cameroon, Colombia, the Congo, Cyprus, Gabon, India, Iraq, Luxembourg, Malta, Mauritania, Mexico, Morocco, the Niger, Pakistan, Peru, Portugal, Sweden and Turkey. A similar right is often laid down in collective agreements or industrial awards, for example, in such countries as Belgium, Finland, France, Italy, Madagascar, the Netherlands, New Zealand and the Niger. Priority of recall is a normal feature of the system of "layoff", used in Canada and the United States to carry out workforce reductions.

Sometimes the provisions governing the matter indicate that priority of re-engagement or recall is to be accorded to workers who were previously employed in the category of employment in which job openings have occurred, or who have the skills required by the new jobs, or if the post formerly held again becomes available.

In some countries for the worker to benefit from this priority he must notify the employer within a given period after dismissal of his desire to be re-engaged when the employer again hires workers. In a number of countries the priority granted the worker is limited in time; the period of entitlement to priority of re-engagement under legislation varies from three months to two years. Sometimes it is stated that workers who have lost their employment are entitled to priority of re-engagement in the reverse order of their termination, or occasionally in accordance with certain other specified factors.

The legislative provisions governing the matter rarely indicate what rules are to govern the question of retention of seniority and entitlement to previous terms and conditions of employment on re-engagement. In countries using the system of layoff, collective agreements frequently stipulate that workers who are recalled to service retain or accumulate seniority rights.

ATTENUATING THE CONSEQUENCE OF DISMISSAL

Just as the increased priority given in recent times to the need for job security has led to a widespread acceptance of the need to explore all possibilities of averting or minimising workforce reductions, so has this need led to the development of policies which give a high priority to measures to attenuate the effects of loss of employment on the workers affected. This objective also is one of the principal subjects for consideration in the context of consultation with workers' representatives and discussions with public authorities.

The underlying policy consideration behind the considerable developments in this area in recent years is that workers who lose their jobs for reasons beyond their control should not have to suffer unduly from the adverse consequences of loss of employment and that the community should bear a large part of the burden of ensuring that they do not so suffer. It involves, essentially, a shouldering by the community of a larger portion of the risks of economic change and of the costs of the redeployment of workers resulting from such change. A fundamental feature of these developments is that much greater resources have been devoted to providing for such redeployment than in the past. Consequently, some of these developments have been restricted to the more industrialised countries.

Generally speaking, policies aimed at attenuating the effects of dismissals due to economic, technological, structural or similar causes provide for two kinds of measures: compensatory measures and measures to assist in redeployment of the workers affected. These will be considered in the following paragraphs.

Compensation

Schemes for compensating workers who lose their jobs as a result of workforce reductions are of two kinds. The first kind is akin to severance allowance, almost always payable in a lump sum and increasing with length of service. Severance allowances to which workers are entitled on termination of their employment generally, and on termination of employment for economic or similar reasons, have been reviewed in the preceding chapter. It might be added here that in particular cases, in connection with a workforce reduction, additional severance allowances are often negotiated between the employer and workers concerned or between the employer and the trade union or other workers' representatives, or are paid voluntarily by the employer. Also, in some countries not imposing statutory obligations regarding severance or redundancy payments, such allowances may be negotiated with the workers concerned or their representatives or paid voluntarily by the employer. While being available to the worker for purposes of income maintenance during any period of unemployment following loss of his job, these payments often seem to be more in the nature of an indemnity for the loss suffered as a result of a dismissal not due to the fault of the worker, or to be in recognition of past services.

The second kind of compensation often provided in wealthier countries to workers losing their employment for reasons of an economic and similar nature is clearly stated to be for the purpose of income maintenance. It generally includes periodical payments which are supplementary to unemployment benefits, or which are intended to support a worker during periods of retraining. These latter

payments, together with grants paid to cover training costs and costs of transport and removal to a new place of employment, are intended to promote the occupational and geographical mobility that may often be necessary for the workers concerned to find suitable new employment.

Supplementary unemployment benefits are provided for either under legislation or by collective agreement in a number of countries, including Belgium, Canada, France, the Federal Republic of Germany, Italy, the United Kingdom and the United States. In Belgium, for example, a national inter-occupational collective agreement provides for an allowance additional to unemployment insurance benefits, for workers who are unemployed following a collective dismissal equal to half the difference between the unemployment insurance benefits and the previous monthly wage (subject to a maximum and to certain deductions). In France, under the system currently in force, a worker dismissed for reasons of an economic nature is entitled, if he meets the qualifying conditions, to a percentage of his former gross salary for up to one year of unemployment, decreasing from 65 per cent during the first quarter of the year to 50 per cent during the last quarter, plus 22 francs per day; this amount is subject to a guaranteed minimum which is calculated as a given percentage of the minimum wage, and to a ceiling of 90 per cent of the former gross salary. The normal rules governing unemployment insurance apply after one year of unemployment. In Italy, where special unemployment benefits are available for up to six months to workers dismissed in connection with a workforce reduction who have served the necessary qualifying period, the level of benefit was recently raised from two-thirds of former wages to 80 per cent of those wages. In some countries the amount of unemployment benefit is not increased, but the duration of entitlement to such benefit may be increased in case of loss of employment under certain conditions; for example, in Japan, in case of workers from depressed industries or in areas with mass unemployment.

Finding Alternative Employment

The most urgent task facing a worker who is confronted by the prospect of losing his job, or who has already lost his job, is finding new employment. This is so irrespective of the availability of income protection schemes, since even the most generous of schemes do not make up fully the loss of the previous wage, and most workers will be obliged to take a serious cut in living standards during periods of unemployment, not to speak of the emotional problems frequently arising from being unemployed.

Growing emphasis has been placed in a number of countries on providing assistance to workers in finding new employment and on improving programmes to this end. A number of countries have adopted new legislation in this area in recent years and have sought to improve the administrative services offered to employers and workers. These efforts are of different kinds.

First, some countries have placed emphasis on early contact between the employment services and the workers who are to lose their jobs in connection with a workforce reduction. This depends largely on prior notification by the employer to the employment services of the impending workforce reduction. In some countries this early contact with the workers occurs in the context of arrangements between the employer and the appropriate public authorities or training institu-

tions, such as in France, where employers may enter into agreements with the training institutions and the competent administrative authorities with a view to the retraining of workers who are to lose their employment in connection with a reorganisation or restructuring of an undertaking; in Italy in connection with employers' requests for assistance by the public authorities in situations of economic crisis or in case of restructuring or reorganisation of the enterprise; and in Japan in connection with submission by the employer of plans for employment adjustment measures to the public employment security offices with a view to obtaining assistance to this end. In the United Kingdom the employment services have sent employment teams to visit undertakings planning large-scale workforce reductions, with a view to interviewing and registering the workers concerned and providing them with relevant information.

A second kind of effort made by national employment services in recent years is to improve their knowledge of job openings and the rapidity with which such information is distributed to the workers seeking new employment. In several countries the employment services now make a special effort to seek out such information: for example in France, where the *prospecteur-placeur* visits undertakings in order to prospect for vacancies and provide information about persons seeking jobs, and in the United Kingdom, where employment officers, when confronted with a planned workforce reduction in a given area, prospect employers in the area by letter, telephone and personal visits with a view to determining what job openings exist.

Other developments in recent years have related to the promotion of occupational and geographical mobility. Considerable emphasis has been placed in a number of countries on improving vocational training opportunities, particularly for those persons displaced from employment in declining industries or industries undergoing reorganisation, restructuring or significant technological change, as in Austria, Belgium, Canada, France, the Federal Republic of Germany, Italy, Japan, the USSR and the United Kingdom. Usually these programmes provide the workers concerned with grants in connection with a course of training, for a given period. These grants may take the form of special training grants, extension of unemployment compensation during periods of training or payment of wages, and may consist of varying percentages of previous wages. Workers involved will generally benefit from vocational guidance prior to embarking on such courses of training.

Measures to promote geographical mobility are provided for in a number of countries. These may consist of grants intended to cover part or all of the costs of travel to apply for a job in another locality, as well as the costs of travel to take up such a job, removal of household effects and installation, when it is necessary for a worker to change residence in order to take up new employment. Assistance of this nature is available, for example, in Austria, Canada, France, the Federal Republic of Germany, Italy, Japan, the USSR and the United Kingdom.

In some countries, such as France and the Federal Republic of Germany, a worker taking up a new job at a lower wage level may be entitled, in certain circumstances, to a grant to compensate for the difference in wage for a certain period of time.

EXISTING INTERNATIONAL STANDARDS

Recommendation No. 119 contains a number of standards regarding workforce reductions. Paragraph 12 sets forth the basic principle that positive steps should be taken by all parties concerned to avert or minimise as far as possible reduction of the workforce by the adoption of appropriate measures, without prejudice to the efficient operation of the undertaking.

Paragraph 13 of the Recommendation provides for consultation with workers' representatives, as early as possible, when a workforce reduction is contemplated, on all appropriate questions, including measures to avoid the reduction, measures for minimising the effects of the reduction on the workers concerned and the selection of workers to be affected by the reduction; the possibility of assistance by public authorities in such consultation is referred to.

Paragraph 14 provides for advance notice to public authorities in case of large scale reductions of the workforce.

Paragraph 15 lays down standards regarding the selection of workers to be affected by a workforce reduction, while Paragraph 16 refers to priority of re-engagement of workers whose employment has been terminated in this connection.

Paragraph 17 refers to full utilisation of employment agencies to ensure that workers whose employment has been terminated in connection with a workforce reduction are placed in alternative employment without delay.

Standards on workforce reductions have also been laid down by the European Communities. These standards are contained in the Directive adopted by the Council of the European Communities on 17 February 1975 on the approximation of the laws of the member States relating to collective redundancies.⁵ This Directive provides for a procedure of consultation of workers' representatives in connection with such redundancies and notification to the competent public authorities of each member State. The collective redundancies to which these obligations apply are defined as dismissals, for one or more reasons not related to the individual workers concerned, of given numbers or percentages of workers.⁶

According to the Directive, employers contemplating collective redundancies must consult the appropriate workers' representatives with a view to reaching an agreement, at least on means of avoiding the redundancies or reducing the number of workers affected, and mitigating the consequences. The employer must supply the workers' representatives with all relevant information, including information in writing on the reasons for the redundancies, the number of workers to be affected, the numbers normally employed and the period over which the redundancies are to be effected; copies of this information are to be forwarded to the competent public authority.

The Directive also requires the employer to notify the competent public authority in writing of any projected collective redundancies; this notification is to include all relevant information on the redundancies and the consultations with workers' representatives, including the information referred to above. Copies are to be supplied to the workers' representatives, who are to be entitled to send any comments they may have to the competent public authority. A minimum 30-day period is provided for between the notification to the competent public authority and the date on which the projected redundancies may take effect, which is to be used by the authority to seek solutions to the problems raised. Member States are authorised to grant the competent public authority power to reduce this period. If

the period stipulated in national law is shorter than 60 days, the competent authority must be empowered to extend the period to a total of 60 days following the notification, where the problems raised by the redundancies are not likely to be solved within the initial period.

The Council of the European Communities also adopted, on 14 February 1977, a Directive on the approximation of the laws of the member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses.⁷ This Directive provides for informing workers' representatives of such transfers before they are carried out and consulting such representatives on any measures envisaged in relation to the workers concerned.

It is apparent from the present chapter that national law and practice on workforce reductions in many countries have undergone considerable development. In the first place, certain basic principles applicable to workforce reductions now seem to be widely accepted. These include, first, the principle that termination of employment in connection with a workforce reduction should, as far as possible, be avoided or minimised by recourse to appropriate measures; second, that where such terminations cannot be avoided, measures should, as far as possible, be taken to attenuate the consequences of termination for the workers concerned.

The questionnaire refers to these general principles.

Since the possibilities of giving effect to these principles and the ways in which they may be implemented depend largely on the circumstances surrounding each case, national law and practice generally place emphasis on the procedures through which the implementation of these principles may be considered. These include, in the first place, consultation of workers' representatives. A large number of countries make provision in law or collective agreement for prior consultation of workers' representatives regarding planned workforce reductions. Since the workforce reductions sometimes result from other major changes in the organisation, structure, technology, work methods, etc., of an undertaking, and since the prospects of successful solution of the problems arising in respect of a workforce reduction are usually greater the earlier the underlying problems are considered, legislation or collective agreements in a number of countries make provision for prior consultation of workers' representatives regarding such changes, independently of consultation regarding planned workforce reductions themselves.

The second kind of procedural obligation in connection with workforce reductions concerns prior notification to public authorities, usually certain administrative authorities competent in the field of labour. The role of these authorities varies considerably; in some countries they may provide advice and assistance to the parties in considering the problems arising from a projected workforce reduction, while in others they are responsible for authorising or refusing to authorise such reductions.

The questionnaire refers to these different kinds of procedures. Since such consultations and notifications must usually be undertaken a given period of time before the measures contemplated are implemented, this is referred to in the questionnaire. A question is also included on whether the obligations regarding consultation of workers' representatives and notification of public authorities with respect to planned workforce reductions may be limited to planned termination of a minimum number of workers, since such limitations are frequently found in national legislation.

Different kinds of measures are often considered with a view to averting, or minimising the extent of, workforce reductions. These include restrictions on hiring, spreading of the reduction over a certain period to allow a natural reduction of the workforce, internal transfer, training and retraining, early retirement, restriction of overtime or extra shifts, restriction of normal hours of work and extra days off from work. Financial assistance is available in a number of countries in connection with some of these measures, for example, with a view to subsidising short-time work and to making up the loss in income which might result from early retirement. These measures are referred to in the questionnaire.

National law and practice in many countries also give effect to the principle that selection for termination in connection with a workforce reduction should be made in accordance with certain precise criteria, such as occupational qualifications or ability, length of service and family responsibilities, as well as to the principle that workers whose employment has been terminated in this connection should have priority of re-engagement when the employer again seeks to hire new personnel. The questionnaire follows the terms of Recommendation No. 119 closely in these matters.

Measures to mitigate the adverse consequences of termination of employment in connection with a workforce reduction have undergone considerable development in a number of countries in recent years, although certain of these developments seem largely confined to the industrialised countries. Measures of this kind include improved income maintenance during any periods of unemployment following termination, special assistance in obtaining training and in finding suitable alternative jobs, as well as financial assistance in connection with training courses and travel and change of residence to take up new employment in another locality. The employer, the workers' representatives and the public authorities are often closely involved in elaborating measures of these kinds. Having regard to the importance of these measures in policies designed to deal with the problems caused by workforce reductions in a certain number of countries, it has been felt appropriate to make reference to them in the questionnaire.

Notes

¹ See ILO: *Growth, structural change and manpower policy; the challenge of the 1980s*, Report of the Director-General, Report I, Third European Regional Conference, Geneva, 1979, Ch. 5.

² See *Report of the Commission of Inquiry into redundancies and lay-offs*, March 1979 (Labour Canada, 1979), pp. 255-259.

³ See, for example, European Trade Union Institute: *The impact of microelectronics on employment in Western Europe in the 1980s* (Brussels, 1979), p. 111.

⁴ See ILO: *Social and Labour Bulletin*, No. 4, 1979, p. 326, and No. 1, 1980, pp. 43-47 and 52-53. Examples of agreements on technological change are regularly reported in this publication.

⁵ See *Official Journal of the European Communities*, No. L.48/29, 22 Feb. 1975.

⁶ Member States of the Communities are entitled to choose between two definitions of collective redundancies: dismissals, over a period of 30 days, of ten or more workers in establishments normally employing more than 20 and fewer than 100 workers, of 10 per cent or more of the number of workers in establishments normally employing at least 100 but fewer than 300 workers, or of 30 or more workers in establishments normally employing 300 workers or more; or dismissals, over a period of 90 days, of at least 20 workers, whatever the numbers normally employed in the establishment.

⁷ See *Official Journal of the European Communities*, No. L.61/26, 5 Mar. 1977.

CONCLUDING REMARKS

The analysis of national law and practice in the present report has shown that the basic principles of the Termination of Employment Recommendation, 1963 (No. 119), have been implemented in a very large number of countries. These principles include the requirement of justification for termination of employment by the employer, the right of appeal against such termination to a body empowered to order appropriate remedies in case of a finding that the termination was unjustified, the right to a period of notice and a certificate of employment, the right to severance allowance or social security benefits, and special guarantees in case of workforce reductions. Many of the provisions in legislation and collective agreements giving effect to these principles have come into being since the adoption of Recommendation No. 119. This is indeed a remarkable achievement.

In addition, this report has shown that a number of important improvements in the protection provided to workers in this field have been introduced in the law and practice of many countries. These relate, in particular, to the establishment of procedural guarantees applicable before termination of employment or at the time of termination, to the procedure of appeal against termination of employment, including the rules governing the burden of proof and remedies available in case of unjustified termination, to entitlement to severance allowances or similar benefits payable on termination, and to rules, procedures and programmes applicable in case of termination of employment for reasons of an economic, technological, structural or similar nature.

These various developments, and the existing standards on the matter, have been summarised and compared in the final sections of each of the foregoing chapters.

The existing provisions of Recommendation No. 119 together with these developments in national law and practice have served as the basis for formulating the questionnaire which follows.

Although as indicated in the introduction, the term "dismissal" has for the sake of convenience been generally used in this report to refer to termination of employment at the initiative of the employer, it has been felt appropriate, with a view to avoiding any possible misunderstanding arising from different national usage of this term, to use the words "termination of employment" in the questionnaire.

QUESTIONNAIRE

In accordance with article 39 of the Standing Orders of the International Labour Conference, governments are requested to send their replies to the following questionnaire, indicating their reasons for each reply, so as to reach the International Labour Office in Geneva not later than 30 September 1980. In this connection, the attention of governments is drawn to the recommendation on pages 2-3 of this report concerning the consultation of the most representative organisations of employers and workers.

I. Form of International Instrument

1. Should the International Labour Conference adopt an international instrument or instruments concerning termination of employment at the initiative of the employer?

2. If so, should the instrument(s) take the form of:

- (a) a Convention;*
- (b) a Recommendation; or*
- (c) a Convention supplemented by a Recommendation?*

3. If you consider that the International Labour Conference should adopt a Convention supplemented by a Recommendation, which of the provisions to be included in these instruments should appear in the Convention and which in the Recommendation?'

II. Preamble

4. Should the Preamble of the instrument(s) refer to the existing international standards contained in the Termination of Employment Recommendation, 1963?

5. Should the Preamble of the instrument(s) note that while the Termination of Employment Recommendation, 1963, has had an important influence on national law and practice, many developments have occurred since that date that have made it appropriate to adopt new international standards on the subject?

III. Methods of Implementation

6. Should the instrument(s) provide that the provisions of the instrument(s) should, except in so far as they are otherwise made effective by means of collective agreements or arbitration awards or in such other manner as may be consistent with national practice, be given effect by laws or regulations?

¹ In reply to this question governments might wish to consider whether, for instance the provisions referred to in the following questions might be included in a Convention: 4-15, 18-23, 26(1) and (2), 27-29, 30 or 31, 32, 33, 35, 36, 38-40 and 42 and the provisions referred to in the following questions might be included in a Recommendation: 16, 17, 24, 25, 26(3), 34, 37 and 41.

IV. Scope of the Instrument(s) and Definitions

7. *Should the instrument(s) apply to all branches of activity and all employed persons other than those who may be excluded under questions 8 and 9?*

8. *Should the instrument(s) provide that the extent to which the guarantees provided for in the instrument(s) should apply to the following categories of workers should be determined by national laws or regulations:*

- (a) *workers engaged for a specified period of time or a specified task who, owing to the nature of the work to be effected or the circumstances under which it is to be effected, cannot be employed under a contract of employment of indeterminate duration;*
- (b) *workers serving a period of probation, or during a qualifying period of employment, determined in advance and of reasonable duration;*
- (c) *workers engaged on a casual basis for a short period;*
- (d) *public servants engaged in the administration of the State to the extent only that constitutional provisions preclude the application to them of one or more provisions of the instrument(s)?*

9. *Should the scope of the instrument(s) be limited in any other respect, for example with respect to small undertakings (if so please indicate how such undertakings should be defined), family undertakings, managerial employees or workers who have reached the age of retirement and are entitled to an old-age pension?*

10. *Should the instrument(s) provide that for the purpose of the instrument(s) the terms "termination" and "termination of employment" should mean termination of employment at the initiative of the employer?*

11. *Should the instrument(s) provide that for the purpose of the instrument(s) its provisions should apply to the expiry of a contract of employment for a specified period of time or a specified task to the extent that a worker employed under such contract is not excluded, under question 8 (a) above, from the guarantees provided for in the instrument(s)?*

V. Standards of General Application

Justification for Termination

12. *Should the instrument(s) provide that the employment of a worker should not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service?*

13. *Should the instrument(s) provide that the following, inter alia, should not constitute valid reasons for termination:*

- (a) *union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;*
- (b) *seeking office as, or acting or having acted in the capacity of, a workers' representative;*

- (c) *the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violations of laws or regulations;*
- (d) *race, colour, sex, marital status, religion, political opinion, national extraction or social origin;*
- (e) *age;*
- (f) *pregnancy;*
- (g) *absence from work during maternity leave; or*
- (h) *absence from work due to compulsory military service or other civil obligations?*

14. (1) *Should the instrument(s) provide that temporary absence from work because of duly certified illness or injury should not constitute a valid reason for termination?*

(2) *Should the instrument(s) provide that what constitutes temporary absence from work for the purpose of paragraph (1) should be determined by the methods of implementation referred to in question 6?*

15. *Should the instrument(s) provide that any other reason should not constitute a valid reason for termination?*

Procedures Prior to or on Termination

16. *Should the instrument(s) provide that, in the event of misconduct that under national law would justify termination of employment only if repeated, the employment of a worker should not be terminated unless—*

- (a) *the employer has given the worker a warning describing the misconduct and the action that the employer intends to take if the misconduct is repeated; and*
- (b) *the worker is guilty of similar misconduct within a reasonably limited period of time, as determined by the methods of implementation referred to in question 6?*

17. *Should the instrument(s) provide that in the event of unsatisfactory performance, the employment of a worker should not be terminated unless—*

- (a) *the employer has given the worker a warning describing the unsatisfactory performance and the action that the employer intends to take if the unsatisfactory performance is continued; and*
- (b) *the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed, such period to be determined by the methods of implementation referred to in question 6?*

18. *Should the instrument(s) provide that the employment of a worker should not be terminated for reasons related to the worker's conduct or performance before being afforded a hearing by the employer at which he is given an opportunity to defend himself against the allegations made, and that a worker should be entitled to be assisted at such a hearing by another person?*

19. *Should the instrument(s) provide that the employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct?*

20. *Should the instrument(s) provide that the question whether the employer should consult with workers' representatives before a final decision is taken on individual cases of termination of employment should be left to the methods of implementation referred to in question 6?*

21. *Should the instrument(s) provide that the employer should notify a worker in writing of a decision to terminate his employment?*

22. *Should the instrument(s) provide that a worker who has received notification of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination?*

Procedure of Appeal against Termination

23. (1) *Should the instrument(s) provide that a worker who feels that his employment has been unjustifiably terminated should be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee, arbitrator or similar body?*

(2) *Should the instrument(s) provide that a worker may be deemed to have waived his right to appeal against the termination of his employment if he has not so appealed within a reasonable period of time thereafter, such period to be determined by the methods of implementation referred to in question 6?*

24. *Should the instrument(s) provide that recourse to a procedure of conciliation may be required or authorised by methods of implementation referred to in question 6 before or during a procedure of appeal against unjustified termination of employment?*

25. *Should the instrument(s) provide that national laws or regulations may provide that a worker who feels that his employment has been unjustifiably terminated should be entitled to request an impartial body, such as a body referred to in question 23, to suspend, and that such body should be empowered to suspend, the effects of the termination, pending decision by the competent body on his appeal against that termination?*

26. (1) *Should the instrument(s) provide that the bodies referred to in question 23 should be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on the justification of the termination?*

(2) *Should the instrument(s) provide that in cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in question 23 should be empowered to find whether the termination was indeed for these reasons, but the extent to which they should also be empowered to decide whether these reasons are sufficient to justify that termination should be determined by the methods of implementation referred to in question 6?*

(3) *Should the instrument(s) provide that in proceedings referred to in paragraph (1), a worker who has appealed against the termination of his employment should not bear the burden of proving that the termination was not justified, and that to this end—*

- (a) *the employer should bear the burden of proving that the termination was for a valid reason; or*
- (b) *the bodies concerned should be empowered to investigate the facts and circumstances of the case so as to be able to form a judgement regarding the justification of the termination; or*
- (c) *both (a) and (b) ?*

27. *Should the instrument(s) provide that the bodies referred to in question 23 should be empowered, if they find that the termination was unjustified, to—*

- (a) *annul the termination or order the reinstatement of the worker in his previous job or in another job, where appropriate with payment of unpaid wages from the date of termination, if the body considers reinstatement to be practicable; or*
- (b) *if reinstatement is impracticable, to order payment of adequate compensation for unjustified termination of employment or such other adequate relief as may be deemed appropriate.*

Period of Notice and Certificate of Employment

28. (1) *Should the instrument(s) provide that a worker whose employment is to be terminated should be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period?*

(2) *Should the instrument(s) provide that during the period of notice the worker should be entitled to a reasonable amount of time off without loss of pay in order to seek other employment, taken at times that are convenient to both parties as agreed to by them?*

29. *Should the instrument(s) provide that a worker whose employment has been terminated should be entitled to receive, on request, at the time of termination of his employment, a certificate from the employer specifying the dates of his engagement and termination of his employment and the type or types of work on which he was employed, but containing nothing unfavourable to the worker?*

Severance Allowance and Other Income Protection

30. (1) *Should the instrument(s) provide that a worker whose employment has been terminated should be entitled to a severance allowance or other separation benefits, increasing with length of service and paid directly by the employer or by a fund constituted of employers' contributions?*

(2) *Should the instrument(s) provide that, in case of termination for serious misconduct of the kind mentioned in question 28(1), the severance allowance or other separation benefits may be withheld?*

31. (1) *Alternatively, should the instrument(s) provide that a worker whose employment has been terminated should be entitled either to—*

- (a) *a severance allowance or other separation benefits, increasing with length of service and paid directly by the employer or by a fund constituted of employers' contributions; or*

- (b) *benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or*
- (c) *a combination of such allowances or benefits?*

(2) *Should the instrument(s) provide that in case of termination for serious misconduct of the kind mentioned in question 28(1), the allowance or benefits referred to in paragraph (1) (a) may be withheld?*

VI. Supplementary Provisions concerning Termination of Employment for Economic, Technological, Structural or Similar Reasons

32. *Should the instrument(s) provide that positive measures should be taken by all parties concerned, with the assistance of the competent public authorities where appropriate, to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned?*

Consultation of Workers' Representatives

33. (1) *Should the instrument(s) provide that, when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer should consult the workers' representatives concerned as early as possible on all appropriate questions, including measures to be taken to avert or minimise the terminations, the selection of the workers whose employment is to be terminated and measures to mitigate the adverse effects of any terminations on the workers concerned?*

(2) *Should the instrument(s) provide that the employer should notify the workers' representatives concerned with a view to the consultations referred to in paragraph (1) a specified minimum period of time before carrying out the terminations, such period to be determined by the methods of implementation referred to in question 6?*

(3) *Should the instrument(s) provide that the applicability of paragraph (1) may be limited by the methods of implementation referred to in question 6 to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or a specified percentage of the workforce?*

(4) *Should the instrument(s) provide that, to enable the workers' representatives concerned to participate effectively in the consultations referred to in paragraph (1), the employer should supply them in good time with all relevant information, including a written statement of the reasons for the terminations contemplated, the number and categories of workers liable to be affected and the period over which the terminations are intended to be carried out?*

34. (1) *Should the instrument(s) provide that when the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are liable to entail substantial terminations, the employer should*

consult the workers' representatives concerned, as early as possible, inter alia, on the introduction of such changes, the effects they are liable to have and the measures for averting or mitigating the adverse effects of such changes?

(2) Should the instrument(s) provide that what constitutes a major change for the purpose of paragraph (1) should be left for determination by the methods of implementation referred to in question 6?

(3) Should the instrument(s) provide that to enable the workers' representatives concerned to participate effectively in the consultations referred to in paragraph (1) the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are liable to have?

Notification of the Competent Public Authority

35. (1) Should the instrument(s) provide that when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he should notify the competent public authority thereof as early as possible, giving all relevant information, including a written statement of the reasons for the terminations, the number and categories of workers liable to be affected and the period over which the terminations are intended to be carried out?

(2) Should the instrument(s) provide that, where appropriate, the competent public authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated?

(3) Should the instrument(s) provide that the employer should notify the competent public authority of the terminations referred to in paragraph (1) a specified minimum period of time before carrying out the terminations, such period to be determined by national laws or regulations?

(4) Should the instrument(s) provide that national laws or regulations may limit the applicability of paragraph (1) to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce?

Measures to Avert or Minimise Terminations

36. Should the instrument(s) provide that the measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological, structural or similar nature, should include restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work?

37. Should the instrument(s) provide that where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment, consideration should be given to payment of part of the wages for the normal hours not worked and to the possibility of partial reimbursement of such payments from public funds such as unemployment insurance funds?

Criteria of Selection for Termination

38. (1) *Should the instrument(s) provide that the selection of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to precise criteria, which should be established wherever possible in advance, and which give due weight both to the interest of the undertaking, establishment or service and to the interests of the workers?*

(2) *Should the instrument(s) provide that these criteria may include—*

- (a) *need for the efficient operation of the undertaking, establishment or service;*
- (b) *ability, experience, skill and occupational qualifications of individual workers;*
- (c) *length of service;*
- (d) *age;*
- (e) *family situation;*
- (f) *such other criteria as may be appropriate under national conditions, the order and relative weight of the above criteria being left to be determined by the methods of implementation referred to in question 6?*

Priority of Re-hiring

39. (1) *Should the instrument(s) provide that workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given priority of re-hiring when the employer again hires workers?*

(2) *Should the instrument(s) provide that such priority of re-hiring may be limited to a specified period of time?*

(3) *Should the instrument(s) provide that the question of retention of seniority rights in case of re-hiring should be determined in accordance with the methods of implementation referred to in question 6?*

(4) *Should the instrument(s) provide that re-hiring should be effected as far as possible on the basis of the principles set out in question 38?*

(5) *Should the instrument(s) provide that the rate of wages of re-hired workers should not be adversely affected as a result of the interruption of their employment; this could be subject, however, to differences between their previous occupation and the occupation in which they are re-hired and to any intervening changes in the structure and level of wages in the undertaking, establishment or service?*

Mitigating the Effects of Terminations

40. (1) *Should the instrument(s) provide that in the event of terminations of employment for reasons of an economic, technological, structural or similar nature, the employer, the workers' representatives concerned and the competent public authority should actively assist the workers affected in the search for suitable alternative employment and, where appropriate, in obtaining training or retraining to this end?*

(2) *Should the instrument(s) provide that the competent public authority should provide such assistance as early as possible after being notified of these terminations?*

(3) *Should the instrument(s) provide that the full utilisation of the appropriate employment agencies and training institutions should be promoted with a view to ensuring that the workers affected are trained for and placed in alternative employment as soon as possible?*

(4) *Should the instrument(s) provide that in this connection regard should be had to the Human Resources Development Convention and Recommendation, 1975?*

41. (1) *Should the instrument(s) provide that the other measures which should be considered with a view to mitigating the adverse effects of terminations of employment for reasons of an economic, technological, structural or similar nature, should include income protection additional to that provided for in questions 30 or 31, income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence?*

(2) *Should the instrument(s) provide that consideration should be given by the competent public authority to providing financial resources to support in full or in part the measures referred to in paragraph (1)?*

VII. Effect on Earlier Recommendation

42. *Should the instrument(s) provide that the instrument(s) supersede(s) the Termination of Employment Recommendation, 1963?*

VIII. Special Problems

43. (1) *Are there any particularities of national law or practice which, in your view, are liable to create difficulties in the practical application of the international instrument(s) as conceived in this report?*

(2) *If so, how would you suggest that these difficulties be met?*

44. (Federal States only) *Do you consider that, in the event of the Conference adopting a Convention, its subject-matter would be appropriate for federal action, or in part for action by the state authorities or other constituent units of the federation?*

45. *Are there, in your opinion, any other pertinent problems not covered by the present questionnaire which ought to be taken into consideration when drafting the proposed instrument(s)? If so, please specify.*

APPENDIX

SUBSTANTIVE PROVISIONS OF RELEVANT INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS

Termination of Employment Recommendation, 1963 (No. 119)

I. METHODS OF IMPLEMENTATION

1. Effect may be given to this Recommendation through national laws or regulations, collective agreements, works rules, arbitration awards, or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions.

II. STANDARDS OF GENERAL APPLICATION

2. (1) Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

(2) The definition or interpretation of such valid reason should be left to the methods of implementation set out in Paragraph 1.

3. The following, *inter alia*, should not constitute valid reasons for termination of employment:

- (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
- (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
- (c) the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violation of laws or regulations; or
- (d) race, colour, sex, marital status, religion, political opinion, national extraction or social origin.

4. A worker who feels that his employment has been unjustifiably terminated should be entitled, unless the matter has been satisfactorily determined through such procedures within the undertaking, establishment or service, as may exist or be established consistent with this Recommendation, to appeal, within a reasonable time, against that termination with the assistance, where the worker so requests, of a person representing him to a body established under a collective agreement or to a neutral body such as a court, an arbitrator, an arbitration committee or a similar body.

5. (1) The bodies referred to in Paragraph 4 should be empowered to examine the reasons given for the termination of employment and the other circumstances relating to the case and to render a decision on the justification of the termination.

(2) Subparagraph (1) should not be construed as implying that the neutral body should be empowered to intervene in the determination of the size of the work force of the undertaking, establishment or service.

6. The bodies referred to in Paragraph 4 should be empowered, if they find that the termination of employment was unjustified, to order that the worker concerned, unless reinstated, where appropriate with payment of unpaid wages, should be paid adequate compensation, or afforded such other relief as may be determined under the methods of implementation set out in Paragraph 1, or granted such compensation and other relief as may be so determined.

7. (1) A worker whose employment is to be terminated should be entitled to a reasonable period of notice or compensation in lieu thereof.

(2) During the period of notice the worker should, as far as practicable, be entitled to a reasonable amount of time off without loss in pay in order to seek other employment.

8. (1) The worker whose employment has been terminated should be entitled to receive, on request, at the time of the termination, a certificate from the employer specifying the dates of his engagement and termination and the type or types of work on which he was employed.

(2) Nothing unfavourable to the worker should be inserted in such certificate.

9. Some form of income protection should be provided for workers whose employment has been terminated; such protection may include unemployment insurance or other forms of social security, or severance allowance or other types of separation benefits paid for by the employer, or a combination of benefits, depending upon national laws or regulations, collective agreements and the personnel policy of the employer.

10. The question whether employers should consult with workers' representatives before a final decision is taken on individual cases of termination of employment should be left to the methods of implementation set out in Paragraph 1.

11. (1) In case of dismissal for serious misconduct, a period of notice or compensation in lieu thereof need not be required, and the severance allowance or other types of separation benefits paid for by the employer, where applicable, may be withheld.

(2) Dismissal for serious misconduct should take place only in cases where the employer cannot in good faith be expected to take any other course.

(3) An employer should be deemed to have waived his right to dismiss for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct.

(4) A worker should be deemed to have waived his right to appeal against dismissal for serious misconduct if he has not appealed within a reasonable time after he has been notified of the dismissal.

(5) Before a decision to dismiss a worker for serious misconduct becomes finally effective, the worker should be given an opportunity to state his case promptly, with the assistance where appropriate of a person representing him.

(6) In the implementation of this Paragraph the definition or interpretation of "serious misconduct" as well as the determination of "reasonable time" should be left to the methods of implementation set out in Paragraph 1.

III. SUPPLEMENTARY PROVISIONS CONCERNING REDUCTION OF THE WORK FORCE

12. Positive steps should be taken by all parties concerned to avert or minimise as far as possible reductions of the work force by the adoption of appropriate measures, without prejudice to the efficient operation of the undertaking, establishment or service.

13. (1) When a reduction of the work force is contemplated, consultation with workers' representatives should take place as early as possible on all appropriate questions.

(2) The questions on which consultation should take place might include measures to avoid the reduction of the work force, restriction of overtime, training and retraining, transfers between departments, spreading termination of employment over a certain period, measures for minimising the effects of the reduction on the workers concerned, and the selection of workers to be affected by the reduction.

(3) As and when consultation takes place, both parties should bear in mind that there may be public authorities which might assist the parties in such consultation.

14. If a proposed reduction of the work force is on such a scale as to have a significant bearing on the manpower situation of a given area or branch of economic activity, the employer should notify the competent public authorities in advance of any such reduction.

15. (1) The selection of workers to be affected by a reduction of the work force should be made according to precise criteria, which it is desirable should be established wherever possible in advance, and which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.

(2) These criteria may include—

- (a) need for the efficient operation of the undertaking, establishment or service ;
 - (b) ability, experience, skill and occupational qualifications of individual workers ;
 - (c) length of service ;
 - (d) age ;
 - (e) family situation ; or
 - (f) such other criteria as may be appropriate under national conditions,
- the order and relative weight of the above criteria being left to national customs and practice.

16. (1) Workers whose employment has been terminated owing to a reduction of the work force should be given priority of re-engagement, to the extent possible, by the employer when he again engages workers.

(2) Such priority of re-engagement may be limited to a specified period of time ; where appropriate, the question of the retention of seniority rights should be determined in accordance with national laws or regulations, collective agreements or other appropriate national practices.

(3) Re-engagement should be effected on the basis of the principles set out in Paragraph 15.

(4) The rate of wages of re-engaged workers should not be adversely affected as a result of the interruption of their employment, regard being had to differences between their previous occupation and the occupation in which they are re-engaged and to any intervening changes in the structure of wages in the undertaking, establishment or service.

17. There should be full utilisation of national employment agencies or other appropriate agencies to ensure, to the extent possible, that workers whose employment has been terminated as a result of a reduction of the work force are placed in alternative employment without delay.

IV. SCOPE

18. This Recommendation applies to all branches of economic activity and all categories of workers: Provided that the following may be excluded from its scope:

- (a) workers engaged for a specified period of time or a specified task in cases in which, owing to the nature of the work to be effected, the employment relationship cannot be of indeterminate duration ;
- (b) workers serving a period of probation determined in advance and of reasonable duration ;
- (c) workers engaged on a casual basis for a short period ; and
- (d) public servants engaged in the administration of the State to the extent only that constitutional provisions preclude the application to them of one or more provisions of this Recommendation.

19. In accordance with the principle set forth in article 19, paragraph 8, of the Constitution of the International Labour Organisation, this Recommendation does not affect any provisions more favourable to the workers concerned than those contained herein.

20. This Recommendation should be considered as having been implemented in respect of workers whose conditions of employment are governed by special laws or regulations where those laws or regulations provide for such workers conditions which, in their entirety, are at least as favourable as the totality of those provided in this Recommendation.

Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

Article 1

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated to—

- (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
- (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Workers' Representatives Convention, 1971 (No. 135)

Article 1

Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.

.....

Article 3

For the purpose of this Convention the term "workers' representatives" means persons who are recognised as such under national law or practice, whether they are—

- (a) trade union representatives, namely, representatives designated or elected by trade unions or by the members of such unions; or
- (b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.

Article 4

National laws or regulations, collective agreements, arbitration awards or court decisions may determine the type or types of workers' representatives which shall be entitled to the protection and facilities provided for in this Convention.

Workers' Representatives Recommendation, 1971 (No. 143)

5. Workers' representatives in the undertaking should enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.

6. (1) Where there are not sufficient relevant protective measures applicable to workers in general, specific measures should be taken to ensure effective protection of workers' representatives.

(2) These might include such measures as the following:

- (a) detailed and precise definition of the reasons justifying termination of employment of workers' representatives;
- (b) a requirement of consultation with, an advisory opinion from, or agreement of an independent body, public or private, or a joint body, before the dismissal of a workers' representative becomes final;
- (c) a special recourse procedure open to workers' representatives who consider that their employment has been unjustifiably terminated, or that they have been subjected to an unfavourable change in their conditions of employment or to unfair treatment;
- (d) in respect of the unjustified termination of employment of workers' representatives provision for an effective remedy which, unless this is contrary to basic principles of the

law of the country concerned, should include the reinstatement of such representatives in their job, with payment of unpaid wages and with maintenance of their acquired rights;

- (e) provision for laying upon the employer, in the case of any alleged discriminatory dismissal or unfavourable change in the conditions of employment of a workers' representative, the burden of proving that such action was justified;
- (f) recognition of a priority to be given to workers' representatives with regard to their retention in employment in case of reduction of the work force.

7. (1) Protection afforded under Paragraph 5 of this Recommendation should also apply to workers who are candidates, or have been nominated as candidates through such appropriate procedures as may exist, for election or appointment as workers' representatives.

(2) The same protection might also be afforded to workers who have ceased to be workers' representatives.

(3) The period during which such protection is enjoyed by the persons referred to in this Paragraph may be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.

Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111)

1. (1) For the purpose of this Recommendation the term "discrimination" includes—

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

(2) Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof is not deemed to be discrimination.

2. Each Member should formulate a national policy for the prevention of discrimination in employment and occupation. This policy should be applied by means of legislative measures, collective agreements between representative employers' and workers' organisations or in any other manner consistent with national conditions and practice, and should have regard to the following principles:

- (b) all persons should, without discrimination, enjoy equality of opportunity and treatment in respect of—

- (iv) security of tenure of employment;

Maternity Protection Convention (Revised), 1952 (No. 103)

Article 6

While a woman is absent from work on maternity leave in accordance with the provisions of Article 3 of this Convention, it shall not be lawful for her employer to give her notice of dismissal during such absence, or to give her notice of dismissal at such a time that the notice would expire during such absence.

Maternity Protection Recommendation, 1952 (No. 95)

4. (1) Wherever possible the period before and after confinement during which the woman is protected from dismissal by the employer in accordance with Article 6 of the Maternity Protection Convention (Revised), 1952, should be extended to begin as from the date when the employer of the woman has been notified by medical certificate of her pregnancy and to continue until one month at least after the end of the period of maternity leave provided for in Article 3 of the Convention.

(2) Among the legitimate reasons for dismissal during the protected period to be defined by law should be included cases of serious fault on the part of the employed woman, shutting down of the undertaking or expiry of the contract of employment. Where works councils exist it would be desirable that they should be consulted regarding such dismissals.

(3) During her legal absence from work before and after confinement, the seniority rights of the woman should be preserved as well as her right to reinstatement in her former work or in equivalent work paid at the same rate.

