

International Labour Conference
68th Session 1982

Report V (2)

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

Fifth Item on the Agenda



International Labour Office Geneva

ISBN 92-2-102796-1
ISSN 0074-6681

First published 1982

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INTRODUCTION

The first discussion of the question of termination of employment at the initiative of the employer took place at the 67th (1981) Session of the International Labour Conference. Following that discussion, and in accordance with article 39 of the Standing Orders of the Conference, the International Labour Office prepared and communicated to the governments of member States a report¹ containing a proposed Convention and a proposed Recommendation, based on the Conclusions adopted by the Conference at its 67th Session.

Governments were invited to send any amendments or observations so as to reach the Office by 30 November 1981 at the latest, or to inform it, by the same date, whether they considered that the proposed texts constituted a satisfactory basis for discussion by the Conference at its 68th (1982) Session.

At the time the present report was prepared, the Office had received replies from the Governments of the following 68 member States: Algeria, Austria, Bahamas, Bahrain, Bangladesh, Belgium, Bulgaria, Burundi, United Republic of Cameroon, Canada, Cuba, Cyprus, Czechoslovakia, Democratic Yemen, Denmark, Dominican Republic, Egypt, Equatorial Guinea, Finland, France, Gabon, Grenada, Guyana, Honduras, Hungary, India, Ireland, Jamaica, Japan, Kuwait, Luxembourg, Malawi, Malaysia, Mauritius, Mexico, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Pakistan, Poland, Portugal, Romania, Rwanda, Saudi Arabia, Senegal, Singapore, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Trinidad and Tobago, Tunisia, Turkey, United Arab Emirates, United Kingdom, United States, Upper Volta, Zambia and Zimbabwe.

The Commission of the European Communities also communicated a reply indicating that it considers those parts of the proposed texts dealing with matters that are also subject to provisions of Community Directives to be a satisfactory basis for discussion, and referring to the individual replies from the member States of the Communities.

The first part of this report, which has been drawn up on the basis of the replies from governments, contains the essential points of their observations, whether of a general nature or relating directly to the provisions of the texts submitted in Report V (1); it also contains Office commentaries on these observations.

The second part contains the English and French versions of the proposed Convention and Recommendation, amended in the light of the observations made by governments for the reasons set out in the Office commentaries. Some minor drafting changes which appeared desirable have also been made. If the Conference so decides, these texts will serve as a basis for the second discussion, at the 68th Session, of the question of termination of employment at the initiative of the employer.

¹ ILO: *Termination of employment at the initiative of the employer*, Report V (1), International Labour Conference, 68th Session, 1982.

REPLIES FROM GOVERNMENTS AND COMMENTARIES

The substance of the replies received from the governments of member States with regard to the proposed Convention and Recommendation concerning termination of employment at the initiative of the employer is given below. These replies are followed, where appropriate, by brief Office commentaries.

The Governments of the following 34 countries stated that for the moment they had no observations to put forward or that they considered the proposed texts to constitute a satisfactory basis for discussion at the 68th Session of the Conference: Austria, Bahrain, United Republic of Cameroon, Czechoslovakia, Democratic Yemen, Dominican Republic, Equatorial Guinea, Gabon, Grenada, Guyana, Honduras, Iran, Ireland, Jamaica, Kuwait, Luxembourg, Malawi, Mauritius, Morocco, Nigeria, Poland, Rwanda, Saudi Arabia, Senegal, Spain, Sri Lanka, Sudan, Swaziland, Syrian Arab Republic, Tanzania, United Arab Emirates, Upper Volta, Zambia and Zimbabwe.

The Governments of the remaining 34 member States (Algeria, Bahamas, Bangladesh, Belgium, Bulgaria, Burundi, Canada, Cuba, Cyprus, Denmark, Egypt, Finland, France, Hungary, India, Japan, Malaysia, Mexico, Netherlands, New Zealand, Niger, Norway, Pakistan, Portugal, Romania, Singapore, Suriname, Sweden, Switzerland, Trinidad and Tobago, Tunisia, Turkey, United Kingdom and United States) made observations the substance of which is reproduced in the present report. As a rule, however, most of these Governments clearly stated their view that the proposed text constituted a satisfactory basis for discussion. Some Governments, in their replies, included information on the law and practice in their country. This information, though very useful for the work of the Office, has been reproduced only where essential to an understanding of the observations.

The Governments of the following member States informed the Office that employers' and/or workers' organisations had been consulted: Austria, Bahamas, Belgium, Canada, Cyprus, Czechoslovakia, Denmark, Egypt, Finland, Hungary, India, Ireland, Japan, Malaysia, Mauritius, Netherlands, New Zealand, Norway, Portugal, Romania, Spain, Sweden, Switzerland, Trinidad and Tobago, Turkey, United Arab Emirates, United Kingdom, United States, Zambia and Zimbabwe.

The Governments of Austria, Belgium, Cyprus, France, India, Netherlands, New Zealand, Portugal, Spain, Switzerland and United Kingdom transmitted with their replies the observations of employers' or workers' organisations on the proposed texts or on some of their provisions. These observations have not been reproduced in the present report. The Governments of Denmark, Finland, Japan, Malaysia, Mauritius, Norway, Sweden and Turkey have incorporated the observations of employers' and workers' organisations in their own replies. These opinions have been reproduced where appropriate.

General Observations

ALGERIA

The draft texts mark definite progress, particularly in relation to countries where workers are poorly protected and in relation to the Termination of Employment Recommendation, 1963 (No. 119). They constitute a good basis for discussion.

BULGARIA

The Convention should include a provision defining the criteria for priority of different categories of workers in the case of termination of employment.

BURUNDI

The Government refers to its reply to the questionnaire contained in Report VIII (1) prepared for the 67th (1981) Session of the Conference.

CANADA

The Government is in favour of the adoption of a Recommendation only. It would be unable to endorse or implement the proposed Convention in view of the diverse mixture of legislative and voluntary rules on the subject among all Canadian jurisdictions.

FINLAND

An ad hoc tripartite committee is considering the question of developing statutory protection of continuity of employment. Since the preparatory work is unfinished, the Government is not in a position to make a final statement on the proposed texts, which are, however, a satisfactory basis for discussion. It reiterates its preference for the adoption of a Convention, containing the main principles, supplemented by a Recommendation containing details and dealing with special aspects of the subject.

The Government indicates that the Finnish Employers' Confederation and the Confederation of Commerce Employers consider that a Recommendation—limited to basic principles and essential procedures—should be adopted, updating the principles laid down in Recommendation No. 119. Member countries should have sufficient discretion in respect of details and limits to the scope of the instrument. Discussion should concentrate on protection in cases of dismissal based on conduct, occupational skill or other, personal, reasons where a factual reason is lacking. Protection against dismissal cannot be used as a general means of employment policy. Priority should be given to collective agreements rather than legislation and regulations. The Government also indicates that public sector employers consider that member States should have extensive powers to restrict the scope of the instrument by national legislation. Municipal employers consider that the instrument should take the form of a Recommendation, since present provisions

governing public servants are not in accord with the provisions of the proposed instruments in all respects.

The Government indicates that the workers' organisations consider that the basic principles on the subject should be included in a Convention, including principles to prevent the abuse of contracts for a specified period of time and arrangements to mitigate the effects of termination of employment. They feel that the provisions concerning contracts for a specified period are too broad and that workers should be protected against discretionary termination during a period of probation. Unlawful notice of termination should not lead to loss of employment if the worker wishes to retain his job. The provision on continuity of the employment relationship pending a final decision in a case where an appeal has been made to a court should be transferred to the Convention. The proposed texts do not sufficiently emphasise the employers' responsibility in cases of workforce reduction and should contain general protective provisions of the kind included in national law or collective agreements.

FRANCE

The Government reaffirms its support for the adoption of a Convention supplemented by a Recommendation. The Convention should include essential principles consisting of the fundamental guarantees that a worker should have when he or she is threatened or affected by a termination. As regards methods of application, a certain flexibility should be provided so as to take account of national differences.

JAPAN

Termination of employment concerns complicated and diverse matters that are closely related to the social and economic conditions of each country. Although workers should be protected against unjustifiable disadvantages upon termination, an international instrument should fully respect existing laws, regulations and practices. The proposed text contains provisions applicable to a very limited number of countries; it would raise difficulties for member States intending to apply it immediately. Therefore, the Government considers that it should be flexible and take the form of a Recommendation. The Government indicates that the workers' organisations consider that the instrument should be a Convention supplemented by a Recommendation, while the employers' organisation considers that it should take the form of a Recommendation only.

MALAYSIA

The Government considers that the instrument should be in the form of a Recommendation which would provide the flexibility required for it to be meaningfully applied by a wide spectrum of countries with diverse national laws and practices. The flexibility of Recommendation No. 119 was an important reason for its considerable influence. A Convention, more rigid in nature, would present serious difficulties of application. Moreover, the standards contained in the proposed Convention should not be so heavily weighted against the employers. The Government also indicates that the Malaysian Employers' Federation supports the adoption of a Recommendation improving upon Recommendation No. 119 but

considers that detailed regulations on termination of employment would adversely affect the labour market as a result of reluctance by industry to engage new workers. It believes that the proposed texts are too heavily weighted against employers.

MAURITIUS

The Government indicates in its reply that the Mauritius Employers' Federation considers that the instrument should be in the form of a Recommendation only, updating Recommendation No. 119, that the proposed text involves numerous constraints and may seriously affect employment, and that the text would put an unbearable strain on the resources available for social security and would jeopardise the future of the prevailing system which is still in its infancy.

MEXICO

The instruments to be adopted should take into account the different levels of development of member States; the provisions should be sufficiently flexible to be incorporated in the legislation of member States, thereby benefiting all workers.

NETHERLANDS

The text of the proposed Convention contains, in addition to basic standards, very detailed provisions. It is generally very difficult to accommodate such Conventions to national legislation, even if the general principles embodied in such provisions are endorsed. The Government thus prefers a Recommendation only, to permit flexible assimilation to national legislation. If, however, a Convention supplemented by a Recommendation is adopted, the Convention should contain only general principles since otherwise few member States would be able to ratify it. It is not in the interests of workers to adopt a Convention, ratification of which is the exception rather than the rule.

Netherlands legislation on dismissal, which provides for a preventive check by the Director of the District Employment Office, offers workers good protection against dismissal. Introducing international provisions in national law is justifiable only if the amendments do not entail a deterioration of the protection of workers. A complete assimilation of national law to these provisions might entail such a deterioration. This cannot be the intention.

NEW ZEALAND

Although the proposed texts generally constitute a suitable basis for discussion at the Conference, many States would have difficulty in ratifying the proposed Convention, which is too detailed and lacks flexibility. The Convention should be brief and state general principles, with detailed guidelines in the Recommendation. Such instruments would be more widely accepted. As now drafted, there are many aspects at variance with national law and practice which would preclude ratification of the Convention.

NORWAY

The Government indicates that the Norwegian Employers' Confederation is of the opinion that the instrument should take the form of a Recommendation only.

PAKISTAN

The proposed Convention and Recommendation constitute a satisfactory basis for further discussion. As regards the scope of the proposed instruments, the Government refers to its observations under Article 2. Measures like the reduction of normal hours of work or the restriction of overtime to avert or minimise termination of employment are difficult to implement in developing countries. Provision for unemployment insurance will be difficult to implement. It would thus not be possible to ratify the proposed Convention.

The instruments should cover termination of employment at the initiative of the worker as well as of the employer. The worker should be required to give reasonable notice to the employer before termination and violation of this requirement should be subject to sanctions.

ROMANIA

The instrument or instruments should provide for the obligation, at least for public undertakings, to offer another appropriate job to a dismissed worker. The offer should specify the duration of its validity, as established by national law.

SINGAPORE

The Government supports in principle the objectives of the proposed Convention and Recommendation. However, it considers it inadvisable to list the invalid reasons for termination, as this would cause inflexibility. Safeguards must be provided in the law to prevent abuse or victimisation by employers. Aggrieved workers must be allowed by law to seek redress, either individually or through their unions, against wrongful dismissal. The main concern is to ensure that no worker is dismissed without just cause.

SWEDEN

The Swedish Tripartite ILO Committee expressed its view, at an earlier stage, that international regulations in this area should not be too detailed; it considers that the proposed texts, although relatively detailed, provide a suitable basis for discussion.

SWITZERLAND

The present state of national law on the subject would not permit ratification of the proposed Convention. Notwithstanding that the revision of certain legislative provisions concerning the contract of employment is being considered and that these provisions are the subject of popular or parliamentary initiatives, it may be asked whether such an instrument could be ratified in the foreseeable future. Consequently, the proposals should take the form of a Recommendation. Many of the questions can only be dealt with in collective agreements by the parties to negotiations.

TURKEY

The Government states that while the proposed texts are generally satisfactory, a number of amendments would be required to take into account the difficulties experienced by developing countries due particularly to their socio-economic circumstances.

The Government indicates that the Turkish Confederation of Employers' Associations considers that the proposed texts, while preserving the right of workers to work, practically abolish the right of employers to employ and that it will be impossible for developing countries to ratify and implement the proposed Convention, since it would impede the new investment needed for employment creation by frightening employers with its requirements. Instead of adopting the proposed instruments, Recommendation No. 119 should be updated and its scope restricted to undertakings in industry employing ten or more workers.

The Government indicates that the Turkish Confederation of Trade Unions, subject to certain amendments, favours the proposed texts which aim at providing workers with employment security by limiting termination to certain cases.

UNITED KINGDOM

The Government remains convinced, after the first discussion, that a Recommendation is the most appropriate form for the instrument. The proposed texts cover a wide range of situations, from procedures governing individual cases of dismissal to consultation with workers' representatives on the introduction of changes which may lead to large-scale redundancies, and they would be applied to the wide variety of employment conditions and practices in the member countries of the ILO. At the centre of the proposed Convention are the provisions on individual termination. The experience of legislation on this subject in the United Kingdom confirms the Government in its view that it is not appropriate to attempt to detail in law the exact procedures and practices that must be followed on each and every occasion of dismissal. Recommendation No. 119, adopted in 1963, commanded the widest degree of support among ILO member countries and played a valuable and necessary part in raising standards throughout the world. The Government believes that only a Recommendation will command the same support in 1982, exercise the same influence and have the same success in raising international standards in this important area.

UNITED STATES

The Government continues to favour a Recommendation, which would incorporate the advances that have been promoted by Recommendation No. 119 and would have the universal influence of that Recommendation, having regard to the great diversity of national systems and traditions. The proposed texts do not bridge the gaps in the positions of employers and workers and in the positions of nations with detailed labour codes and those which rely on collective bargaining and private methods of settling employment conditions. The Conference Committee at the 68th Session should seek to produce a final text having a broad tripartite consensus, with a view to having an effective instrument capable of

ratification and implementation by a broad range of countries with different systems. During the first discussion so many amendments were submitted that there was little time left for true discussion and negotiation.

The proposed Convention prescribes in excessive detail specific forms of implementation of workers' rights, elevating subsidiary procedures and guidelines appropriate to a Recommendation to the level of fundamental rights appropriate to a Convention. The instrument should set down simple basic principles. Most Government delegates at the Conference supported flexibility in the drafting of the instrument. In the present text, flexibility is expressed largely in partial or total exclusion of certain groups, which are a minority of those employed. But it is even more important that flexibility be provided for those covered. The proposed text is not truly comprehensive because it almost completely ignores guidelines for voluntary efforts by the parties to correct underlying problems which give rise to many terminations. The Government recalls in this regard a proposal it had made (paragraph 166 of Report V (I)) which was deferred until the 1982 discussion. It feels that voluntary efforts are perhaps even more important than mandatory ones and deserve recognition in the Recommendation.

OFFICE COMMENTARY

Most of the general observations relate to the form of the instrument or instruments to be adopted. Six governments, referring to the need for flexibility and difficulties of ratification and implementation, urge that a Recommendation only should be adopted. Two governments reiterate their preference for a Convention supplemented by a Recommendation. As a majority of the members of the competent Committee at the 67th Session of the Conference voted in favour of a Convention supplemented by a Recommendation, the Office has maintained the proposed instruments in their present form.

A number of governments emphasise in their general observations the need for the Convention to be limited to provisions setting forth general or fundamental principles, with less important provisions being included in the Recommendation. While not all have indicated which provisions should be transferred from one instrument to the other in accordance with this view, several governments, in their observations on particular provisions, have made proposals to transfer certain Articles from the proposed Convention to the proposed Recommendation. The Office has considered these general and specific suggestions carefully and has reviewed the texts of both instruments from this point of view. It has appeared from this review that several provisions now included in the proposed Convention, while important, are of a somewhat less fundamental nature than others, and could be transferred to the proposed Recommendation without affecting the basic guarantees afforded to workers by the proposed Convention, thereby somewhat facilitating ratification of the latter instrument. The Office has concluded that Article 6 (temporary absence from work), Article 7, paragraph 2 (worker's right to be assisted by another person when defending himself against allegations before termination), Article 8 (waiver by employer of the right to terminate) and Article 14 (certificate of employment) might be transferred to the proposed Recommendation (see the Office commentaries on these Articles). The proposed texts have been modified accordingly. The competent Conference Committee may

wish to consider whether it agrees that these provisions are indeed more appropriately placed in the proposed Recommendation.

Several governments have proposed transferring certain provisions set forth in the proposed Recommendation to the proposed Convention (e.g. priority of selection for termination) or to insert new obligations in the proposed Convention (e.g. obligation for the employer to offer a dismissed worker another job). The Office has carefully examined these proposals but does not consider that they relate to matters sufficiently fundamental or on which sufficient agreement can be reached for inclusion in the proposed Convention.

One government has suggested that the proposed instruments should also include provisions on termination of employment at the initiative of the worker, particularly in respect of a period of notice. The Office would point out in this connection that such provisions do not correspond to the item on the agenda of the Conference, which is "termination of employment at the initiative of the employer" and thus cannot be considered.

Observations on the Proposed Convention concerning Termination of Employment at the Initiative of the Employer¹

PART I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

Article 1

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

Observations on Article 1

Cuba. Effect should be given to the instrument first by national legislation and only in its absence by the other methods mentioned. The Government proposes amending this provision to read: "The provisions of this Convention shall be given effect by laws or regulations, collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice."

Japan. The Government proposes that this provision should be replaced by a provision such as Article 6 of the Workers' Representatives Convention, 1971 (No. 135), or Article 9 of the Workers with Family Responsibilities Convention, 1981 (No. 156), to permit member States to implement the instrument by methods other than laws and regulations.

Switzerland. The Government is not opposed to the principle stated, but considers it necessary to give collective agreements the primary role in the application of such an instrument.

¹ The observations are preceded by the text of the relevant provision as given in the proposed Convention set forth in Report V (1). Provisions on which no observations have been made are not reproduced.

United States. Replacement of this Article by paragraph 1 of the proposed Recommendation would create the option of a promotional Convention, such as the Workers with Family Responsibilities Convention, 1981.

Office Commentary

The terms of Article 1 are similar to provisions on methods of implementation found in many other international labour Conventions. They seek to make clear what is expected of member States which ratify a Convention, under Article 19, paragraph 5 (d), of the ILO Constitution. Under the Constitution a member State ratifying a Convention is obliged to "take such action as may be necessary to make effective the provisions of such Convention". It has been understood, under this provision, that if a Convention is not applied by means of collective agreements, court decisions, or otherwise, the State retains a residual obligation to apply the Convention by legislation or regulations. Provisions such as that in the proposed Article have been included in many international labour Conventions to make this residual obligation explicit.

The Government of Japan has proposed replacing the terms of this provision by those of Article 6 of the Workers' Representatives Convention, 1971 (No. 135), or of Article 9 of the Workers with Family Responsibilities Convention, 1981 (No. 156). The former provision states that "Effect may be given to this Convention through national laws or regulations or collective agreements, or in any other manner consistent with national practice", while the latter provision states that "The provisions of this Convention may be applied by laws or regulations, collective agreements, works rules, arbitration awards, court decisions or a combination of these methods, or in any other manner consistent with national practice which may be appropriate, account being taken of national conditions." The Office would recall that provisions in this manner are rarely found in Conventions; they are more frequently found in Recommendations. With respect to Convention No. 135, it may be recalled that the 56th Session of the Conference which adopted the Convention had initially before it a proposed Recommendation only; the terms of the Convention (including Article 6) finally adopted resulted from a compromise drafted by a working group which was designed to enable a Convention to be adopted. These terms do not affect the residual obligation of ratifying countries under the ILO Constitution to give effect to the Convention by legislation or regulations where it is not applied by other methods. It might also be noted that Convention No. 156 is essentially a promotional instrument enunciating objectives to be achieved and that provision is made for its implementation by stages; the proposed Article regarding methods of implementation was changed to the present wording with this in mind.

It should be pointed out in this connection that the provisions included in the present proposed Convention are not of a promotional type (with the exception of the last Article); they are specific provisions laying down concrete rights and obligations. A member State ratifying a Convention containing these provisions would be required, under the ILO Constitution, to ensure that effect was given to it. To the extent that the Convention was not applied by collective agreements, court decisions or by other means, the country concerned would be subject to a residual obligation to implement it by means of legislation or regulations.

Replacement of Article 1 by a provision similar to those found in Conventions Nos. 135 and 156 and in a number of Recommendations would not alter this situation; it would only make it less clear in the text of the Convention itself what was required of ratifying countries under the Constitution. For this reason, the Office has not adopted this proposal.

With regard to the suggestion of the Government of Switzerland that collective agreements should play the primary role in implementation of the instrument, the Office would point out that the proposed text would not preclude such a role being played by collective agreements in a country but that if the Convention were not implemented by collective agreements or other means, a ratifying country would be required to apply it by legislation or regulations.

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.

2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:

- (a) workers engaged under a contract of employment for a specified period of time or a specified task;
- (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
- (c) workers engaged on a casual basis for a short period.

3. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise.

5. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 3 and 4 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Observations on Article 2

Bahamas. (Paragraph 2) The words "reasonable duration" in subparagraph (b) should be defined by reference to a minimum and maximum period. The words "a casual basis for a short period" in subparagraph (c) should be defined so as to specify the meaning.

Bangladesh. (Paragraph 2) The question of the exclusion of any branch of economic activity should be decided by each member State, instead of being specified by this Article.

Belgium. (Paragraph 2) The Government proposes to replace, in the French version of subparagraph (b), the words "*ou la période d'ancienneté dans l'emploi requise*", the meaning of which is unclear, by the words "*les travailleurs n'ayant pas la période d'ancienneté requise pour bénéficier de la protection*".

Bulgaria. (Paragraph 4) This paragraph provides for the possibility of excluding from the scope of the Convention any category of workers if the organisations of employers and workers are consulted. The Government considers that this would permit member States to limit the scope of the Convention at their discretion and therefore proposes that the paragraph should be deleted.

Cyprus. (Paragraph 3) The Government proposes the deletion of this paragraph on the grounds that the flexibility provided may be used to exclude categories of persons who do not enjoy the protection regarding termination of employment intended to be provided by the Convention.

Denmark. (Paragraph 2) The Government does not consider it appropriate to provide a general possibility of excluding from protection the groups mentioned in subparagraphs (a) to (c), which often include the weakest marginal groups in the labour market.

The Government indicates that the Danish Employers' Confederation considers that employed persons who have not worked for a given time in the same undertaking and those under a certain minimum age should be excluded from the protection proposed in the instrument.

France. The Government considers acceptable the principle that the Convention should have a very wide scope with the possibility of total or partial exclusion of the workers mentioned in paragraphs 2 to 4. With regard to the last-mentioned workers, however, the Government considers the wording proposed in paragraph 4 to be lacking in precision and liable to give rise to different interpretations, as evidenced by the discussions at the Conference last June. It therefore proposes amending the second part of paragraph 4 to read as follows: "to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons because of their particular conditions of employment or the size or nature of the undertaking that employs them".

India. It would be difficult for a country like India, where a large number of employed persons are in the unorganised sector and are not covered by any protective legislation, to ratify a Convention applicable to all branches of economic activity and all employed persons, notwithstanding the possible exclusions under paragraphs 2 to 4. The Government therefore proposes amending Article 2 to read as follows: "This Convention should apply, by stages if necessary, to all branches of economic activity and to all employed persons."

Japan. The Government proposes inserting the following new paragraph, from the Collective Bargaining Convention, 1981 (No. 154): "As regards the public service, special modalities of application of this Convention may be fixed by national laws or regulations or national practice." A similar provision should be included in Paragraph 2 of the proposed Recommendation. In paragraph 3 of the present Article, the words "and where the consultation is appropriate" should be inserted after the words "where such exist" in order to take national situations into consideration and to ensure flexibility.

The Government indicates that the workers' organisations consider that a proviso should be added to subparagraph (c), stipulating that where a contract for a short period or on a casual basis is repeated the worker concerned "shall not be excluded from the Convention", while the employers' organisation considers that the workers referred to in subparagraph (c) include those employed daily or for a period of not more than two months or in seasonal work and that paragraph 3 covers workers engaged in the public service and seamen.

Malaysia. The public sector should be excluded.

Pakistan. The scope of the proposed Convention is very wide. In most developing countries the bulk of labour is engaged in the unorganised agricultural sector with its own characteristics; the requirements of the proposed instruments could not be met for that sector. The scope of the Convention should be left to be decided by the governments concerned, which should have power to extend it to such branches of economic activity as are deemed appropriate to national circumstances.

Portugal. The Government proposes to transfer Paragraph 3 of the proposed Recommendation to the Convention, with a view to giving this important provision greater force as a means of preventing the abusive use of fixed-term contracts to evade the guarantees contained in the Convention.

Sweden. The Swedish Tripartite ILO Committee recalls the views previously expressed regarding the scope of the instruments (see Report VIII (2) prepared for the 67th Session of the Conference, pp. 18 and 26). In view of the wish that this instrument should provide the widest possible coverage, it considers that the exceptions which may be made under this Article should be specified and it requests the Office to examine how the limits on such possible exceptions as are deemed justified can be defined from the purely technical point of view.

Switzerland. The Government supports the general conception of the scope of the instrument, with the possibility of making exceptions. It proposes replacing (in the French version) the word *travailleur* by the word *salarié* in this and other provisions.

(Paragraph 2) The Government supports the reservations in subparagraphs (a) and (b), which correspond to national law. Express provision might be made for the case of successive contracts of employment for a specified period, concluded with a view to avoiding the provisions of the instrument. Subparagraph (c) should be deleted, since it is already covered by (a). However, if it is intended to cover a special category of workers this should be indicated more precisely.

(Paragraph 3) The Government supports this possibility of excluding certain categories of workers but considers that this provision should state clearly that it refers to the civil service.

Tunisia. (Paragraph 4) The Government proposes amending the end of this paragraph to read: "in respect of which special problems of a substantial nature for the security of the State concerned arise."

Turkey. (Paragraph 2) The Government proposes amending this paragraph to read: "Member countries may, in accordance with national laws and regulations,

exclude certain categories of workers from all or some of the provisions of this Convention"; paragraphs 3 and 4 should be deleted.

The Government indicates that the Turkish Confederation of Trade Unions considers that, as the proposed Convention empowers governments to exclude certain economic activities from its scope, it should require governments to consult the most representative organisations of employers and workers before doing so.

United Kingdom. (Paragraphs 3 and 4) The Government considers that, although the Office indicated that the words "in respect of whose employment special problems of a substantial nature arise" (Point 6 (4) of the Proposed Conclusions) were intended to cater for various categories of workers whose exclusion had been requested by Governments, these general terms will create argument and controversy. Similar problems will arise in judging whether certain "terms and conditions of employment" are "at least equivalent to the protection afforded under the Convention" (paragraph 3). The Government would find it difficult to be sure that the exclusions that it had found necessary to introduce in its employment law, as it evolved, would meet the criteria set out in paragraphs 3 and 4, and believes that other member countries would have similar difficulties. For example, national legislation excludes those part-time workers who work less than eight hours a week and makes special provision for part-time workers who work eight or more hours but less than 16 hours a week by bringing them within the legislation after five years. Qualification for certain rights against an employer has been based on service and commitment to that employer and it has been considered that employees working for a few hours a week should not have the same rights as full-time employees. The Government asks if this exclusion would come under paragraph 4.

Office Commentary

As at present conceived, this Article provides for a Convention of general application (paragraph 1), with the possibility of excluding certain categories of workers subject to certain limits and conditions (paragraphs 2-5). Several Governments (France, Sweden, Switzerland) have approved of this general approach, although they have certain suggestions regarding the way in which the possible exclusions are drafted. These suggestions will be discussed in connection with the relevant paragraphs.

Several other Governments (Bangladesh, Pakistan, Turkey) call for the amendment of this Article to leave each member State the discretion to decide the scope of the instrument and the exclusions therefrom. The Government of Pakistan proposes that the decision as to scope should be left to each government, which should be empowered to extend it to such branches of economic activity as are deemed appropriate to national circumstances; the Government of Bangladesh proposes that the exclusion of any branch of economic activity should be left to each member State, while the Government of Turkey considers that each member State should be authorised to exclude certain categories of workers. The Government of India suggests that provision should be made for the Convention to be applied by stages. This in effect would leave it to each country to decide on the initial scope of the instrument and when that scope should be extended; it is thus very similar to the other proposals. As the present conception of this Article seems

to have been widely supported during the first discussion at the Conference, the Office has not given effect to these proposals.

With regard to the proposal of the Government of Switzerland to replace the word *travailleur* in this and other Articles of the French version of the text by the word *salarié*, the Office would call attention to the fact that the word *travailleur* is usually used in international labour Conventions and Recommendations. The word *salarié* has been used in paragraph 1 and the beginning of paragraph 2 of this Article to indicate that the present instrument applies to workers who are employed persons, not to the self-employed. Indeed this is self-evident from the subject-matter of the instrument, which could only apply to employed persons. To clarify the wording somewhat, the references in paragraph 1 and the beginning of paragraph 2, which relate to the scope of the instrument, have been modified to *travailleurs salariés*. It should be understood that these words are equivalent to "employed persons" in the English version and refer to all persons in an employment relationship; they are intended to cover also public servants who may, however, be excluded from the application of the instrument in accordance with paragraph 3.

Paragraph 2. The Government of Denmark is opposed to the general possibility of excluding the categories of workers mentioned in this paragraph. Since an amendment seeking to delete this paragraph was rejected by a substantial majority in the competent Conference Committee during the first discussion, this paragraph has been retained.

The French text of subparagraph (b) has been modified to take into account the suggestion of the Government of Belgium, with a view to making the French version clearer.

The Government of the Bahamas would like the words "of reasonable duration" in subparagraph (b) to be defined. As the periods considered reasonable for these purposes vary considerably from country to country and sometimes for different categories of workers, the Office has not found it possible to define this concept. It would be for each country ratifying the Convention to determine the periods that are considered reasonable, subject to the requirement that this determination be made in good faith.

The Government of Switzerland seeks the deletion of subparagraph (c), which it considers to be covered by subparagraph (a), or alternatively the clarification of the meaning of (c); the Government of the Bahamas would like the meaning of (c) to be defined. While it is true that in some countries the concept of casual employment does not exist, in some others it does correspond to a category of employment relationship. As this clause seems to be acceptable to most governments, it has been retained. It would be difficult to define the concept of casual employment in an international instrument, since this concept may differ among countries. It should be noted that this possibility of exclusion is subject to the limitation of the casual employment being "for a short period" (the duration of which has been left to each country to determine), so as to avoid the possibility of abuse.

Proposed New Paragraph. The Government of Portugal proposes to insert Paragraph 3 of the proposed Recommendation in the Convention, with a view to ensuring that recourse to fixed-term contracts is not used as a means of avoiding

the guarantees contained in the Convention. The competent Conference Committee at the 68th Session of the Conference may wish to consider this proposal.

Paragraph 3. The Government of Cyprus proposes deleting this paragraph, which it believes could be used to exclude categories of persons who do not enjoy the protection of the Convention. It should be noted in this connection that if a government of a ratifying country sought to exclude a category of employed persons under this paragraph it would have to show that that category was subject to terms and conditions of employment which were governed by special arrangements providing protection at least equivalent to that afforded under the Convention. As this paragraph was widely supported in the competent Conference Committee at the first discussion, it has been retained.

The Government of Switzerland considers that this paragraph should make explicit reference to the civil service, to which it relates, while the Government of Malaysia proposes that the public sector should be excluded. It should be recalled in this connection that the text initially proposed by the Office contained a reference to public servants as an illustration of the kind of category of employed persons that might fall within this paragraph, but that this illustration was deleted by the competent Conference Committee by a large majority on the grounds that this provision was general and such illustration unnecessary. The discussions in that Committee did not suggest that there would be substantial support for a total exclusion of the public service, or the public sector, from protection. The Government of Japan considers that a paragraph should be inserted stating that special modalities of application may be adopted for the public service. It would appear that the present wording of paragraph 3 would permit member countries to adopt special modalities of application for members of the public service, to the extent that such modalities "as a whole provide protection that is at least equivalent to the protection afforded under the Convention".

The Government of the United Kingdom expresses the view that it will be difficult to judge whether certain terms and conditions of employment are at least equivalent to the protection afforded under the Convention. The Office recognises that such a judgement will not necessarily be a simple task. However, it would be in the first instance for each government to determine, in good faith, whether a particular category of employed persons such as public servants benefited from protection different but on the whole at least equivalent to that afforded under the Convention. The Government of Japan proposes inserting the words "and where the consultation is appropriate" in this paragraph. As the existing terms of this paragraph seemed to be widely supported in the competent Conference Committee at the first discussion, the paragraph has been retained unchanged.

Paragraph 4. The Government of Bulgaria proposes to delete this paragraph, which it considers would authorise governments to limit the scope of the Convention at their discretion. The Office would point out in this connection that this paragraph would authorise the exclusion only of categories of employed persons in respect of which special problems of a substantial nature arose, that they would have to consult organisations of employers and workers concerned before making such exclusions, and that they would have to indicate such exclusions in their reports on the application of the Convention, giving reasons therefor, in accordance with paragraph 5 of this Article. As it appeared, from the replies of

governments to the questionnaire contained in the law and practice report on the subject (Report VIII (1)) and from the discussions at the 67th Session of the Conference, that some flexibility was required, in particular to permit member countries to exclude certain categories of employed persons to whom it was particularly difficult to extend certain aspects of the protection afforded by the instrument, the Office has felt it preferable to retain the present paragraph.

The Government of Sweden has suggested, with a view to ensuring the widest possible coverage, that the exceptions made under this Article should be specified and defined. This observation appears to relate more particularly to this paragraph. It should be recalled in this connection that, in their replies to the questionnaire contained in the law and practice report on the subject, governments had proposed the possibility of excluding a number of different categories of workers, including workers employed in small undertakings or in family undertakings, managerial employees, workers who have reached the normal age of retirement, the armed forces, the police, defined categories of workers in essential services, workers whose activities may entail considerable mobility (such as port or construction workers), agricultural workers, seafarers, home workers, apprentices, commercial travellers, domestic employees and part-time workers. While the Office had felt that coverage of certain of these categories might indeed present in a significant number of countries sufficient difficulties to warrant provision for their possible exclusion, there was not enough information to determine whether such difficulties applied in a significant number of countries to all these categories. Instead of seeking to determine the categories whose coverage presented sufficient difficulties in a sufficient number of countries for exclusion to be authorised, the Office considered it preferable to include a provision patterned after that found in the Holidays with Pay Convention (Revised), 1970 (Article 2 (2) and (3)), which would, in general terms, allow for the exclusion of limited categories of employed persons in respect of which special problems of a substantial nature arise. As indicated above, a country excluding a category of employed person under this provision would be required by paragraph 5 to justify such exclusion.

Several governments propose amendments to this paragraph designed to specify the kind of problems which would warrant exclusion from the scope of the Convention. The Government of France proposes to specify that such exclusions may be made because of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them. The Office has not retained this proposal, since, unless qualified, it might permit extensive limitations to the scope of the instrument at the discretion of each member State; there is no indication that the matters referred to must be such as to cause special problems of a substantial nature. On the other hand, consideration might be given to reference to conditions of employment or the size or nature of the undertaking as factors to be examined in determining whether special problems of a substantial nature arise. The competent Conference Committee might wish to consider whether words such as "in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them" should be added at the end of this paragraph.

The Office has not given effect to the proposal of the Government of Tunisia to limit the possibilities of exclusion under this paragraph to special problems of a substantial nature for the security of the State, as this would seem to limit unduly the exclusions that might be made.

The Government of the United Kingdom considers that the words “special problems of a substantial nature” will create difficulties of interpretation and it queries whether part-time workers, some of whom are excluded from certain protection in national legislation, might be excluded from the application of the Convention under these terms. The competent Conference Committee may wish to consider whether part-time workers, who work fewer than a specified number of hours per week, might be considered to be a category of workers whose terms or conditions of employment give rise to special problems of a substantial nature warranting exclusion under this provision, and, if not, whether specific provision should be made, for example in paragraph 2 of this Article, for the possibility of their exclusion.

Article 3

For the purpose of this Convention the terms “termination” and “termination of employment” mean termination of employment at the initiative of the employer.

Observations on Article 3

France. As this definition excludes voluntary or negotiated resignations, it makes it also possible to exclude closure of establishments due to *force majeure*.

Switzerland. The Government agrees with this definition but questions its utility, since it is clear that the matter dealt with is termination of employment at the initiative of the employer.

Office Commentary

The purpose of this provision is simply to make it possible to use “shorthand” terms in the course of the instrument (in the English version “termination” or “termination of employment”) to refer to the concept of “termination of employment at the initiative of the employer”, which is the item on the agenda of the Conference. It is the latter term which determines the substantive scope of the instrument. It follows that termination of employment at the initiative of the worker or termination by agreement are not covered by the instrument, to the extent that they do not mask what is in fact a termination by the employer. Likewise, it would seem that where termination of employment results, *ipso jure*, from *force majeure* rather than from the initiative of the employer, it may be considered that the termination does not fall within the scope of the instrument. The competent Conference Committee may wish to confirm this interpretation.

PART II. STANDARDS OF GENERAL APPLICATION

DIVISION A. JUSTIFICATION FOR TERMINATION

Article 4

The employment of a worker shall 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.

Observations on Article 4

Algeria. The Government proposes amending this provision to read “unless there is a valid and justified (proved) reason”.

Bangladesh. There may be exceptions also for “termination simpliciter” in exceptional cases to be determined by the national authority.

Japan. The definition of a valid reason should permit national circumstances and practice to be fully taken into account. The Government therefore proposes to insert a new paragraph similar to subparagraph (2) of Paragraph 2 of Recommendation No. 119.

Switzerland. The Government is not in favour of this provision since it does not conform to national law, which requires neither party to give reasons for termination of a contract of employment except in the case of summary dismissal for just cause.

United Kingdom. The Government remains of the view that the definition of a valid reason should be left to national law and practice.

Office Commentary

The Government of the United Kingdom considers that the definition of a valid reason should be left to national law and practice. As an amendment seeking to limit this provision to a reference to a valid reason and to remove the terms which seek to specify the kinds of reasons deemed to be valid was rejected by a substantial majority in the competent Conference Committee at the first discussion, the Office has felt it appropriate to retain the Article, which is identical to Paragraph 2 (1) of Recommendation No. 119, as at present conceived. The Government of Japan proposes inserting a new paragraph, similar to Paragraph 2 (2) of Recommendation No. 119, which would provide that the definition or interpretation of such valid reason should be left to the methods of implementation mentioned in the relevant provision. While fully understanding the reasons for this proposal, the Office considers that insertion of such a new paragraph is not required, since Article 1 of the proposed Convention, which applies to the whole of the instrument, would permit the concept of a valid reason of the kinds referred to in the present Article to be defined, for example, by court decisions, collective agreements or where necessary by legislation.

The Government of Bangladesh appears to propose that an exception should be made in cases of “termination simpliciter” (i.e. termination with notice) in certain exceptional cases, while the Government of Switzerland indicates that this Article is unacceptable since national law requires reasons to be given only in cases of summary dismissal. The Office has not modified the text in accordance with these views, as the present Article—which would require there to be a valid reason for termination of employment by the employer irrespective of whether the termination is with or without notice—appears to be very widely supported.

The Government of Algeria proposes to amend this Article to read “unless there is a valid and justified (proved) reason” for termination. The Office has not retained this suggestion, since the requirement of justification is already contained within the requirement of a valid reason and the matter of proof is dealt with elsewhere in the proposed instrument (Article 11, paragraph 2).

Article 5

The following, inter alia, shall 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 proceedings against an employer involving alleged violation of laws or regulations;
- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (e) absence from work during maternity leave.

Observations on Article 5

Bulgaria. The Government proposes that subparagraph (e) should be amended to read: "absence from work during maternity or other leave" and that a new subparagraph (f) should be inserted as follows: "absence due to the performance of civic obligations".

Cuba. The Government proposes to insert in subparagraph (e) the words "or during other leave granted in conformity with national legislation".

Cyprus. The Government proposes to reinsert in this Article of the Convention, among the non-valid reasons for termination, age and absence from work due to compulsory military service or other civic obligations, which have been included in the proposed Recommendation.

Denmark. The Government indicates that the Danish Employers' Confederation considers that the protection in (a) should be extended to include unorganised employees.

Hungary. The Government proposes inserting in this Article clause (b) of Paragraph 5 of the proposed Recommendation: "absence of work due to compulsory military service or other civic obligations".

Japan. The Government understands that the duration of absence from work during maternity leave depends upon national laws, regulations or practice in each member State. It indicates that the workers' organisations consider that a new subparagraph should be added, referring to participation by members of trade unions in "fair trade union activities such as strikes", that in subparagraph (c) the words "involving alleged violation of laws or regulations" should be deleted and that the words "age, subject to national law and practice regarding retirement at or after the age normally qualifying for an old-age benefit" should be added to subparagraph (d).

Niger. The Government proposes the addition of a new subparagraph (f): "occupational disease or accident".

Portugal. The Government proposes to insert a new subparagraph referring generally to all cases of absence from work justified under national law. This would be more logical than including only certain cases of justified absence while omitting others.

Switzerland. Although national law does not require the parties to give reasons for termination of the employment relationship, it does recognise the principle of "abuse of right" to which reference should be made when termination of the employment contract seems arbitrary. The reasons mentioned in (a) to (e) may be invoked, where necessary, in the context of the notion of abuse of right. National law also recognises the notion of termination at an inappropriate time according to which, *inter alia*, the employer may not terminate the contract of employment during the eight weeks preceding or following childbirth.

Tunisia. The Government proposes replacing the words "political opinion" in subparagraph (d) by the words "political or philosophical opinion".

Turkey. The term "family responsibilities" in subparagraph (d), which is ambiguous, should be clarified.

United Kingdom. The Government remains of the view that a list of reasons for termination that are not valid is more appropriate to a Recommendation.

Office Commentary

The Government of the United Kingdom expresses the view that this Article is more appropriate for inclusion in the Recommendation. The Office has carefully considered this view in connection with the opinions of a number of governments that the Convention should be limited to provisions stating fundamental principles. The Office is unable to conclude that this Article does not contain fundamental principles of a kind that should be included in the Convention and has therefore retained this provision in the proposed Convention.

The Government of Tunisia proposes replacing the term "political opinion" in subparagraph (d) by the words "political or philosophical opinion". This proposal has not been retained, since it appears that specific protection against dismissal is mainly needed in respect of political opinion; the same term has been used in Recommendation No. 119 and in the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111) of 1958.

The Government of Turkey requests clarification of the term "family responsibilities" in subparagraph (d). It will be recalled that this term was added to the text during the first discussion in the light of Article 8 of the text of the Workers with Family Responsibilities Convention, 1981 (later adopted by the Conference), which provided that "Family responsibilities shall not, as such, constitute a valid reason for termination of employment". According to Article 1 of that Convention, which defines the term "workers with family responsibilities", the term "family responsibilities" may be taken to refer to responsibilities of men and women workers "in relation to their dependent children" and "to other members of their immediate family who clearly need their care or support" (paragraphs 1 and 2).

The Governments of Bulgaria and Cuba propose the extension of subparagraph (e) to all leave in conformity with national law, while the Government of Portugal proposes the inclusion of a subparagraph referring to all absence justified under national law. The competent Conference Committee may wish to consider whether this subparagraph should be so extended. The present one has been

limited to maternity leave, since specific protection against dismissal because of maternity leave has seemed to be particularly necessary.

The Government of Japan understands that the determination of the duration of maternity leave to which subparagraph (e) refers is left to national law, regulations or practice. This is also the understanding of the Office.

The Government of Cyprus proposes the reinsertion in the Convention of a reference to "age" (now included in Paragraph 5 (a) of the proposed Recommendation), while the Governments of Bulgaria, Cyprus and Hungary propose reinserting in the Convention all or part of Paragraph 5 (b) of the proposed Recommendation ("absence from work due to compulsory military service or other civic obligations" or "absence of work due to the accomplishment of civic obligations"). The Office has not retained these suggestions, inasmuch as the competent Conference Committee decided by general consensus at the first discussion to transfer these items to the Recommendation.

The Government of Niger proposes to insert a reference to "occupational disease or accident" to the list of reasons that are not valid reasons for termination. As temporary absence from work for such a reason is covered by Article 6, the Office has not retained this suggestion.

Article 6

Temporary absence from work because of duly certified illness or injury shall not constitute a valid reason for termination, unless the operational requirements of the undertaking, establishment or service make it necessary to replace the worker concerned on a permanent basis.

Observations on Article 6

Bahamas. The term "temporary absence" should be defined.

Bangladesh. Frequent absence due to illness or ill health should be considered as a valid reason for termination of employment.

Egypt. The Government considers that there is a contradiction inherent in this provision and proposes the deletion of the words "unless the operational requirements of the undertaking, establishment or service make it necessary to replace the worker concerned on a permanent basis".

Japan. The Government indicates that the employers' organisation would like this provision to indicate the duration of temporary absence and to specify whether this includes repeated absences.

Mexico. The Government proposes amending this Article to read: "Temporary absence from work because of duly certified illness or injury shall not constitute a valid reason for termination. If the operational necessities of the undertaking, establishment or service make it indispensable to replace the worker concerned, he may be replaced on a temporary basis."

Suriname. The definition of what constitutes temporary absence from work should be left to national law or regulations.

Sweden. It is essential that a very brief absence from work should not be used as a pretext for dismissal. The phrase "duly certified illness" presumably refers to a medical certificate. However, workers absent from work for a day or a few days because of common complaints do not consult a physician. Removal of a worker from the job should be related to his or her ability to perform it in the future and not to the business of the company concerned. Moreover, the term "temporary absence" may result in considerable differences in the application of the Article in various countries.

Switzerland. The Government does not oppose this provision, which reflects that of national law.

Tunisia. It would be advisable to provide expressly in this provision that maternity leave does not constitute a valid reason for termination.

United Kingdom. The Government remains of the view that this Article would be more appropriate to a Recommendation as it is vaguely worded and makes no provision for a pattern of repeated absenteeism through illness.

Office Commentary

The wording of the present Article resulted from an attempt to balance the interest of workers in protection against dismissal because of absence due to accident or illness and the interest of the employer to ensure the efficient operation of the undertaking. The replies of several governments show how difficult it is to achieve an appropriate balance within a brief compass. The Government of Sweden calls attention to the fact that frequently very short absences do not require medical certification for the absence to be authorised and for there to be protection against termination. The observations of the Governments of Bangladesh and the United Kingdom refer to the problem of repeated or frequent absence due to illness and imply that the present wording of this Article might not permit termination when such repetition makes it justified. The observations of the Governments of Egypt, Mexico and Sweden question the appropriateness of limiting protection where the operational requirements of the undertaking make it necessary to replace the worker concerned on a permanent basis; the Government of Mexico considers that operational requirements could only justify temporary replacement of the worker, while the Government of Sweden considers that termination should depend solely on the ability of the worker to perform his duties in the future.

The Office has reviewed these considerations carefully. It has found it difficult indeed to draft a provision that takes them properly into account in a concise wording which is universally applicable. It has accordingly felt that this provision, somewhat modified with a view to trying to reflect these varying considerations, would be more appropriately placed in the proposed Recommendation. It has been supported in this conclusion by the decision taken during the first discussion by the competent Conference Committee to transfer to the Recommendation several items—initially included in the list of invalid reasons for termination contained in the Proposed Conclusions with a view to a Convention—that were not derived from previous international labour Conventions (see paragraph 198 of

Report V(1)). Although it did not then take a similar decision with respect to the present provision, the logic of its decision would apply also to the present Article.

The Government of the Bahamas considers that the term "temporary absence" should be defined, while the Government of Suriname feels that this should be left to national law or practice. Having regard to the diversity of national conditions and approaches, the Office believes that the definition of "temporary absence" must be left to be determined by national methods of implementation referred to in the provision on the subject.

With regard to maternity leave, referred to in the observation of the Government of Tunisia, attention is called to Article 5 (e).

As explained above, this Article, as modified, has been transferred to the proposed Recommendation, where it appears as Paragraph 6. Subsequent Articles have accordingly been renumbered.

DIVISION B. PROCEDURE PRIOR TO OR AT THE TIME OF TERMINATION

Article 7

1. The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is afforded a hearing by the employer at which he is given an opportunity to defend himself against the allegations made.

2. A worker shall be entitled to be assisted at such a hearing by another person; this right may be limited, by the methods of implementation referred to in Article 1 of this Convention, to assistance by another worker in the undertaking or a trade union representative.

Observations on Article 7

Bangladesh. The worker may be given the opportunity also to produce witnesses in support of his defence during a hearing.

Bulgaria. Termination of employment should be authorised only in the case of repeated violations, after a second warning. This provision does not contain such a requirement.

France. (Paragraph 2) The Government considers paragraph 2 to mean that each country may limit the right of a worker to be assisted during a hearing either to assistance by another worker in the undertaking or to assistance by a trade union representative external to the undertaking, this constituting an alternative. To remove any ambiguity, the Government proposes to amend the end of the sentence to read: "to assistance by another worker in the undertaking who may be a trade union representative".

Japan. (Paragraph 1) The Government proposes to add the words "in accordance with national laws or regulations or national practice" at the beginning of this paragraph, since it considers that it would be inappropriate to apply this provision uniformly to each member country. The Government indicates that the employers' organisation considers that the words "where possible" should be inserted at the beginning of this paragraph.

(Paragraph 2) The Government proposes to replace the words “shall be entitled to” by the words “may, where possible,” and to replace the words “this right” by the words “this assistance”.

Mexico. The Government proposes to insert at the end of paragraph 1 the words “in conformity with national law and practice”.

Netherlands. This provision should be subject to an exception in the case of serious misconduct, as in Article 13. Moreover, the opportunity to advance arguments in defence should be generalised. The Government proposes the following rewording of this provision: “The employment of a worker shall not be terminated for reasons related to the worker’s conduct or performance before he is given an opportunity to defend himself against the allegations made, unless he is guilty of serious misconduct of such a nature that it would be unreasonable to require the employer to continue his employment and that it would justify summary dismissal.”

Norway. The Government agrees to the text, but the requirement that the employer should discuss the termination with the worker concerned should apply only when this is practical and possible.

Switzerland. National civil law does not provide for the right to be heard, although the parties are free to provide for this, as well as for assistance by another person during such hearing, by contract or by collective agreement.

Turkey. The Government proposes to delete paragraph 1 since workers whose employment has been terminated may have recourse to other venues.

United Kingdom. (Paragraph 1) The word “hearing” adds an unwelcome quasi-judicial flavour to this provision and should be replaced by more suitable wording. The Government proposes deleting the words “afforded a hearing by the employer at which he is”.

(Paragraph 2) As this deals with a matter of procedure, rather than of principle, it would be more appropriate to place this in a Recommendation.

United States. (Paragraph 1) The words “afforded a hearing by the employer at which he is” should be deleted; this would preserve the principle while allowing different nations flexibility as to how it is to be implemented. The whole Article could be transferred to the Recommendation.

Office Commentary

The Government of Turkey proposes to delete this Article, since workers have the right to appeal against termination of employment. As this provision was widely supported during the first discussion of the Conference, the Office has not retained this suggestion.

The Government of the United States proposes that this Article should be transferred to the Recommendation, while the Government of the United Kingdom considers that paragraph 2 of this Article would be more appropriate in the Recommendation. The Office has carefully considered these suggestions, having regard also to the views of a number of governments that the Convention should only contain provisions setting forth fundamental principles. The Office is

unable to conclude that paragraph 1, which concerns the right of a worker to defend himself against allegations concerning his conduct or performance before a decision is taken to terminate his employment, is not such a fundamental principle. It has therefore retained the text of this paragraph (as modified for the reasons given below) in the proposed Convention. On the other hand, paragraph 2 of this Article, regarding the right of a worker to be assisted by another person in the course of such defence, does indeed seem to be more a subordinate matter, one of several procedural issues needing to be dealt with in implementing the principle laid down in paragraph 1, and which might be transferred to the proposed Recommendation. The proposed texts have been modified accordingly. The competent Committee at the 68th Session of the Conference may wish to consider whether it agrees with these conclusions.

Paragraph 1. The observations of the Governments of the Netherlands, United Kingdom and United States seek to remove the reference in this paragraph to a "hearing", considered to imply a quasi-judicial procedure, with a view to providing greater flexibility. Inasmuch as the word "hearing" in English might have such a connotation (the French text is equivalent to "be heard"), the Office has felt that this reference could well be deleted without affecting the substance of this provision, according to which a worker should not have his or her employment terminated for reasons of conduct or performance before being given an opportunity to defend him or herself against the allegations made. The text has been amended accordingly.

The Government of Bulgaria considers that termination for reasons of conduct or performance should be authorised only after repeated violation and following a second warning. Attention is called in this connection to Paragraphs 6 and 7 of the proposed Recommendation which include requirements of this kind.

The Government of the Netherlands considers that an exception should be made to this provision in cases of serious misconduct, while the Government of Norway is of the view that the requirement should apply only when it is practical and possible for the employer to discuss the matter with the worker concerned. Having regard to the wide support for this provision during the first discussion, the Office has not considered it appropriate to retain these suggestions.

The observations of the Governments of Japan and Mexico seek to insert in paragraph 1 of this Article words such as "in accordance with national law or practice", with a view to providing additional flexibility. The Office recalls in this connection that Article 1 of the proposed instrument, which permits implementation of the Convention by a variety of methods, applies to all provisions contained therein, including the present Article. It does not, therefore, consider it necessary to incorporate the terms suggested in this Article.

Paragraph 2. The Government of France considers that this paragraph should be interpreted to mean that each country is authorised to limit the persons who may assist a worker in his defence either to another worker in the undertaking or to a trade union representative external to the undertaking, this constituting an alternative. With a view to removing the ambiguity in the wording of this provision, the Government proposes to amend the end of the sentence to read "to assistance by another worker in the undertaking who may be a trade union representative". It was not the intention of the Office in drafting this provision to provide a strict

alternative between assistance by another worker in the undertaking and assistance by a trade union representative external to the undertaking. The wording of this paragraph reflects the kinds of limitation usually found in this connection: limitation to assistance by another worker in the undertaking (who may be a workers' representative of one kind or another) and limitation to assistance by a trade union representative (whether also employed in the undertaking or external to the undertaking). As the proposed wording might restrict the possibilities of limitation sought to be provided, the Office has retained the present wording unchanged.

The Government of Japan seeks to replace the words "shall be entitled to" in paragraph 2 by "may, where possible" and the words "this right" by "this assistance". As this amendment would make it unclear whether or not it was intended to provide a legal right, effect has not been given to this suggestion.

The Government of Bangladesh proposes that a worker should also be given the opportunity to produce witnesses when defending himself against the allegations made. The Office feels that this is a matter of procedural detail, inappropriate for inclusion in the proposed instrument, but which might be considered implicit in the right of defence.

For the reasons given previously, paragraph 2 has been included in the proposed Recommendation, with the drafting changes made necessary by its transfer to that instrument, and by the revision of paragraph 1 of this Article. It now appears as Paragraph 9 of the proposed Recommendation.

Article 8

The employer shall 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.

Observations on Article 8

Bahamas. The term "reasonable period of time" should be defined.

Japan. The Government indicates that the employers' organisation considers that this Article should be replaced by one which would leave the question dealt with to the methods of implementation referred to in Article 1.

Switzerland. The Government states that the principle laid down in this provision is applied by national law in respect of summary dismissal for just cause (particularly serious misconduct).

Turkey. The "reasonable period of time" mentioned in this Article should be made more specific.

United States. This Article seems more appropriate for a Recommendation.

Office Commentary

The Government of the United States considers this Article to be more appropriate for inclusion in a Recommendation. The Office has given careful

consideration to this suggestion, having regard also to the general views expressed by a number of governments that the Convention should contain only fundamental principles. It appears to the Office that this provision concerns a point of relative detail, although certainly of importance. While in some countries it has been reflected in legislative provisions on disciplinary procedures, more often it results from an evaluation by the competent appeals bodies of the evidence concerning justification for the termination. Unreasonable delay in terminating the employment of a worker for reason of misconduct, after the employer has knowledge thereof, is often considered as evidence that the misconduct was not sufficiently serious to warrant the sanction of termination or that the true cause for the termination was some other reason. What period is reasonable in this connection is often decided by such bodies in each case in the light of all the circumstances. For these reasons, the Office has concluded that this provision might better be placed in the proposed Recommendation; it now appears as Paragraph 10 of the proposed Recommendation. The competent Committee at the 68th Session of the Conference may wish to consider whether it agrees with this conclusion.

The Governments of the Bahamas and Turkey consider that the "reasonable period of time" mentioned in this Article should be defined. In the view of the Office this is a matter on which no uniform rule can be laid down. It would be for each country to determine, through the methods of implementation referred to in Paragraph 1 of the proposed Recommendation, what time was reasonable for the purpose of the provision.

Article 9

1. A worker who has been notified of termination of employment or whose employment has been terminated shall be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination.

2. The provisions of paragraph 1 of this Article need not be applied in the case of collective termination for the reasons referred to in Articles 16 and 17 of this Convention, if the procedure provided for therein is followed.

Observations on Article 9

Bangladesh. Reasons should be assigned in cases other than "termination simpliciter".

Hungary. (Paragraph 1) The Government proposes to delete the words "on request".

Switzerland. The Government cannot accept the principle mentioned in this provision, even though it seems logical that if protection against dismissal is established there should be an obligation to provide reasons for the dismissal. National law does not require the parties to notify termination of employment in writing. However, the Government has, during certain parliamentary discussions, paid particular attention to this problem in respect of termination of the contract of employment with immediate effect, by referring to the protection of the personality and dignity of the worker.

United States. This Article seems more appropriate for a Recommendation.

Office Commentary

The Government of the United States considers that this Article would be more appropriate for inclusion in the Recommendation. The Office has given careful consideration to this suggestion, having regard also to the views of a number of governments that the Convention should contain only fundamental principles. It is unable to conclude that this provision is not a fundamental principle, having regard to the importance of the worker's knowing of the reason for the termination of his employment in any system of protection against unjustified termination. The competent Conference Committee may wish to consider whether this Article sets forth an essential principle of a kind that should be included in the Convention, or a less basic principle that might be transferred to the Recommendation.

The Government of Hungary proposes to delete the words "on request". Inasmuch as an identical proposal failed, by a considerable margin, to be adopted during the first discussion, the Office has not given effect to this proposal.

The Government of Bangladesh considers that reason should be given for termination in cases other than "termination simpliciter", that is, termination with notice under national law. The Office has not retained this suggestion, since it believes that the principle set forth in this Article should apply irrespective of whether termination is with or without notice, as it does in most countries in which legislation requires a statement of reasons to be given for termination.

DIVISION C. PROCEDURE OF APPEAL AGAINST TERMINATION*Article 10*

1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.

3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

Observations on Article 10

Bahamas. (Paragraph 3) The words "reasonable period of time" should be defined.

France. (Paragraph 2) In connection with this paragraph, the Government states that under national law every dismissal for economic reasons requires a prior authorisation from the competent administrative authority and that the right to appeal against the dismissal and the ways of exercising that right are adapted to this situation. According to the principle of separation of judicial and administrative jurisdictions, appeal against an administrative authorisation of a dismissal may be made to the administration itself or to the administrative tribunal, while appeal to the judicial courts may be made in the case of disputes between employers and workers regarding private law relations at the time of termination of the contract ;

the latter courts remain competent when a worker is dismissed without prior authorisation having been requested or when that authorisation was refused or in the case of fraud on the part of the employer.

Japan. The Government states that the workers' organisations consider that paragraph 1 should be amended to ensure that a worker can appeal not only after his employment has been terminated but also when he has received notification of termination.

Netherlands. (Paragraph 2) The Government understands the text of paragraph 2, which differs from that adopted by the Conference at its 67th Session, to be a generalisation of the former text. It understands this paragraph as meaning that it will not be necessary for an independent appeals body to repeat the complete examination already performed by the competent authority. The appeals body could receive supplementary competence and check the decision of the competent authority against general standards of reasonableness.

Switzerland. The possibility provided by paragraph 2 seems to be superfluous.

Turkey. The term "reasonable period of time" in paragraph 3 should be defined.

The Government indicates that the Turkish Confederation of Employers' Associations considers that making termination consequent upon the decision of a court or arbitrator may give workers the wrong idea about their employment relationship and lead to low productivity and reduced output.

Office Commentary

Paragraph 2. The Governments of France and the Netherlands indicate in their observations the kind of considerations they consider to be covered by this paragraph. The former Government implies that it considers that this paragraph would apply to the situation where, following an administrative authorisation of a termination, appeal can only be made against the administrative decision to the appropriate administrative tribunal. The latter Government understands the text to mean that the competence of the appeals body could be limited to reviewing the decision of the competent authority with a view to checking its reasonableness. The Office would recall that the present paragraph, inserted in somewhat different wording during the first discussion by the competent Conference Committee, would allow the application of the first paragraph of this Article (that is, the exercise of the right of appeal against a termination) to be varied according to national law and practice where termination has been authorised by a competent authority; it would not allow the right itself to be modified. Thus, in any case, under paragraph 1, a worker would have to be entitled to appeal against the termination of his employment to an impartial body. It is to this point that the observation by the Government of Switzerland seems to be directed. The question arises whether the right to appeal against an administrative decision to authorise a termination of employment can be considered to be equivalent to the right to appeal against the termination itself. The competent Conference Committee may wish to state its understanding of the matter, and if necessary to modify or supplement this paragraph by a provision indicating that, for the purpose of

paragraph 1, the right to appeal against such a decision shall be considered equivalent to the right to appeal against the termination.

Paragraph 3. The Governments of the Bahamas and Turkey consider that the term "reasonable period of time" should be defined. In the view of the Office, since this is a matter that may vary considerably among countries, it should be left for determination to the methods of implementation referred to in Article 1.

Having regard to the views of a number of governments that the Convention should contain only fundamental principles, and not points of detail, the competent Conference Committee may wish to consider whether this paragraph, which derives from Recommendation No. 119, should be transferred to the proposed Recommendation or whether it is so closely linked to paragraph 1 that it needs to be retained in the Convention. The question also arises whether this paragraph could simply be deleted, the concept of limitation in time of the right to bring an appeal being included in all systems of labour law and implicit in paragraph 1 of this Article.

Article 11

1. The bodies referred to in Article 10 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

2. The burden of proving that the termination was for a valid reason shall rest on the employer.

3. 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 Article 10 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.

Observations on Article 11

Denmark. (Paragraph 2) The Government indicates that the Danish Employers' Confederation considers that this provision should be deleted, as the ordinary rules on the onus of proof should be applicable.

France. (Paragraph 2) The Government considers that the principle liable to obtain a large consensus is that the worker should not bear the burden of proof since in the majority of cases, particularly in case of dismissal for economic reasons, he does not possess the essential elements of proof. However, this principle should be applied flexibly so as not to create obstacles to ratification of the Convention and to take account of the juridical situation of each country. The Government therefore proposes to amend this paragraph to read: "In order for a worker who has appealed against termination of employment not to have to bear the burden of proving that the termination was unjustified, one or both of the following possibilities shall be provided for: (a) the employer shall bear the burden of proving that the termination was for a valid reason; (b) the bodies referred to in Article 10 above shall formulate their judgement on the reason for the termination having regard to the elements provided by the parties and, if necessary, after any

investigation that they deem appropriate." French law provides for the second possibility. If this amendment does not attract sufficient agreement, the initial proposal of the Office (Report VIII (2), Point 32) should be adopted and included in the Recommendation.

(Paragraph 3) Since dismissal for these reasons is subject to an administrative authorisation (see the observation in respect of Article 10, paragraph 2), there are two channels of appeal and the competence of the administrative and judicial courts is distinct. The administrative court which considers the legality of the administrative decision authorising or refusing to authorise an economic dismissal exercises a restricted review (absence of formal irregularities, errors of law, correctness of facts invoked, absence of manifest errors of appreciation). The judicial court is competent to review the economic character of the dismissal only if the dismissal occurred without a request for prior authorisation. If such authorisation was requested and granted or refused, the judicial court may not review the economic situation of the undertaking and the question must be returned to the administrative court. The judicial court may grant compensation for arbitrary termination (*rupture abusive*) if the dismissal occurred without authorisation having been requested or if the authorisation was refused.

Japan. (Paragraph 2) The Government proposes that this paragraph should be deleted since the question of burden of proof is closely related to the basis of the legislative system in each country. It indicates that the employers' organisation is of the same view.

Netherlands. (Paragraph 2) This paragraph, which establishes a compulsory division of the burden of proof, is not in accord with civil law in the Netherlands and in other countries. This provision could in any case only be included in a Recommendation.

Niger. The Government proposes adding the following paragraph 4: "Efforts should be made by the public authorities, workers' representatives and organisations of employers and workers to ensure that workers are fully informed of the possibilities of appeal at their disposal. Information facilities should in particular be provided at workplaces."

Norway. (Paragraph 2) In the event of a dispute concerning the legality of termination, the employers' endeavours to prove that the termination is well-founded should be made in such a way that the courts can test their submissions.

Switzerland. As previously indicated, the employer is not required to justify his decision to dismiss. It does not seem appropriate to reverse the burden of proof. National civil law provides that, in the absence of contrary provision, each party must prove the facts alleged as the bases for a right. With respect to contracts of employment, the law provides that the judge shall establish the facts of the case *ex officio* and freely appraise the evidence.

Turkey. The Government indicates that it considers this Article to be appropriate. It adds that the Turkish Confederation of Trade Unions favours, while the Turkish Confederation of Employers' Associations opposes, the Article.

United Kingdom. (Paragraph 2) The debate during the first discussion confirmed that the “burden of proof” is a particularly contentious and difficult area in appeals against termination. In practice, it does not remain static but shifts from party to party and different ILO members approach the issue in different ways. Because of this, the provisions on burden of proof would seem to be more appropriate in a Recommendation.

United States. (Paragraph 2) This provision should be reworded to read “The burden of proving that a valid reason existed for the termination of the worker’s employment shall rest on the employer”. This would enable the employer to meet the burden by presenting objective evidence, leaving it to the impartial body to determine whether termination was a proper course of action in the light of all the circumstances, which is a matter of judgement, not of proof.

(Paragraph 3) There should be explicit recognition that the employer has the right to determine the size of the workforce. This is implied in Article 4, which considers operational requirements to be a valid reason for termination. Yet Article 16, concerning consultation of workers’ representatives, is not specific on this question. The present paragraph adopts the position that the issue of justification of workforce reductions should be left to national law; this biases the Convention and invites opposition from those who fear that employers will minimise hiring in expansionary periods because they are not sure they will be able to reduce workforces in periods of contraction.

Office Commentary

Paragraph 2. The Governments of Japan, the Netherlands and the United Kingdom are opposed to the inclusion of this provision, on the grounds that the question of burden of proof is closely linked to each legal system and may be resolved in different ways. The Governments of the Netherlands and the United Kingdom consider that in any case the question should be dealt with in the Recommendation. In this connection, the Office recalls that this paragraph was inserted in the text of this Article by the competent Conference Committee during the first discussion at the proposal of the Workers’ members. The Office has carefully considered the suggestion of transferring this paragraph to the proposed Recommendation, having regard also to the views of a number of governments that the Convention should contain only fundamental principles. It is unable to conclude that this paragraph is not of such a nature. The question appears to be more whether there is sufficient agreement that the principle is an appropriate one or whether there is sufficient diversity of views on the principle for it to be amended and/or transferred to the Recommendation. The competent Conference Committee may wish to consider this matter, including the proposals of the Government of France to amend it so as to provide that a worker should not bear the burden of proof.

The Government of the United States proposes that this paragraph should be amended to read “The burden of proving that a valid reason existed for the termination of the worker’s employment shall rest on the employer”, so as to indicate clearly that the employer is required to present evidence regarding the reason for the termination, while it is the impartial body that is required to determine whether the termination was justified having

regard to all the circumstances. This suggestion seems appropriate and not in conflict with the arguments presented by the Workers' members in support of this provision during the first discussion (see paragraph 95 of the report of the competent Committee). The wording of this paragraph has been modified accordingly.

Paragraph 3. The Government of the United States observes that, although implied in Article 4 which considers the operational requirements of an undertaking to be a valid reason for termination, there should be an explicit recognition that the employer has the right to determine the size of the workforce. The Office would recall in this connection that the basic conception of Article 4, which is the key provision of the proposed Convention, entails a requirement in all cases for an employer to have a valid reason for termination. Under Article 4 an employer would be entitled to reduce the size of an undertaking by termination of employment for a valid reason of the kinds mentioned in the Article, including reasons based on the operational requirements of the undertaking. It is not clear what the consequences of inserting a provision of the type proposed would be: would it mean that an employer need not have a valid reason for termination in connection with a workforce reduction, that is, that he is entitled to carry out such a reduction arbitrarily? Or would it simply mean that an employer is entitled to terminate employment for reasons based on the operational requirements of the undertaking in a manner that reduces the size of the workforce? If the former is intended, this would not be in conformity with the basic conception of Article 4. If the latter, it would be already clearly authorised by Article 4. In the view of the Office, the real question that arises is not whether an employer must have a valid reason for terminations connected with workforce reductions (this appears to be widely recognised), but the extent to which the impartial bodies to which appeals against termination are made should be empowered to review the exercise by the employer of his business judgement, that is, as formulated in paragraph 3, the extent to which they are to be empowered to decide whether business reasons are sufficient to justify the termination. Since the response to this question varies widely among member States, it has been thought necessary to leave this matter to each State to decide by the methods of implementation referred to in Article 1 of the Convention.

Paragraph 4. The Government of Niger proposes that a new paragraph should be inserted in this Article, derived from Paragraph 11 of the proposed Recommendation, providing for efforts to be made to ensure that workers are fully informed of the possibilities of appeal at their disposal. While this is an important matter, the Office feels that it is the sort of detailed point that is best included in the proposed Recommendation.

Article 12

If the bodies referred to in Article 10 of this Convention find that termination is unjustified and if they are not empowered or do not find it possible, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

Observations on Article 12

Algeria. The bodies concerned should be empowered to decide on the reinstatement of the worker in the undertaking if they conclude that a dismissal was unjustified.

Bulgaria. The Government proposes that this provision should be amended to read: "The bodies mentioned in Article 10, if they find that termination is unjustified and if they find it possible, in accordance with national law and practice, may declare the termination invalid and/or order or propose the reinstatement of the worker".

Cyprus. The Government considers this Article, and in particular the reference to reinstatement, to be not altogether satisfactory and reserves the right to propose amendments to it during the second Conference discussion.

Switzerland. The Government can support this principle since national law provides that, unless a worker is reinstated in his job, the tribunal may require the employer, in the case of normal dismissal, to compensate the worker for the injury caused by the abuse of right, and in the case of summary dismissal, to pay wages until the normal expiry of the contract of employment, less the amount the worker has earned or could have earned elsewhere between the date of dismissal and the normal expiry of the contract.

United States. The proposed text goes beyond the point that in any event the impartial bodies must be empowered to order payment of compensation if they find a termination to be unjustified. It appears to imply that reinstatement must be preferred if possible. If the text cannot be rephrased to remove this implication, the original Office text should be adopted.

Office Commentary

The Governments of Algeria and Bulgaria make proposals apparently intended to give priority to the remedy of reinstatement where it is found that a termination was unjustified. The Office recalls in this connection that the text of this Article results from a decision taken at the first discussion by the competent Committee to replace a text that had been proposed by the Office. It does not feel that it can give effect at this stage to such an important change in the substance of the Article.

The Government of the United States observes that the present drafting of this Article implies that reinstatement must be preferred if possible and states that if this implication cannot be removed, the original text proposed by the Office is preferable. The Office points out in this connection that the proposed text is an elaboration of the text approved by the Conference at its first discussion; the Office replaced the word "cannot" in the initial text (if the bodies "cannot declare the termination invalid and/or propose reinstatement") by a reference to the two concepts of which it was apparently composed: lack of power to order reinstatement and impossibility of so ordering in a particular case. After further consideration, the Office believes that it might better reflect the intention of the competent Conference Committee if the words "do not find it possible" were replaced by the words "do not find it practicable". The Article has been modified accordingly.

DIVISION D. PERIOD OF NOTICE AND CERTIFICATION OF EMPLOYMENT

Article 13

1. A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

2. During the period of notice the worker shall, for the purpose of seeking other employment, be entitled to a reasonable amount of time off without loss of pay, taken at times that are convenient to both parties.

Observations on Article 13

Bahamas. The words "reasonable period of notice" in paragraph 1 and "reasonable amount of time" in paragraph 2 should be defined.

Denmark. (Paragraph 2) The Government states that the Danish Employers' Confederation considers that the payments mentioned should not be obligatory if the dismissal is motivated by matters attributable to the employee himself.

Japan. (Paragraph 1) The Government indicates that the employers' organisation considers that the words "other than when the continuance of the enterprise is made impossible by reason of some natural calamity or other inevitable cause" should be added after the words "in lieu thereof" and that the words "serious misconduct, that is," should be deleted.

(Paragraph 2) The Government considers that this provision is not generally applied by member States and should thus be amended in accordance with Paragraph 7 (2) of Recommendation No. 119 (which provides for this entitlement "as far as practicable"), to take account of national circumstances and practice. The Government states that the employers' organisation has expressed a similar view.

Norway. This Article should be included in the Recommendation.

Switzerland. National law provides for termination of a contract of indefinite duration by a period of notice. A period of notice is also required for termination during the probationary period. A contract may be terminated with immediate effect in case of "just cause". While legislation entitles a worker to the time off necessary to look for new employment, it does not state that the time so used must be paid. The Government cannot, therefore, accept this provision.

United Kingdom. (Paragraph 2) This paragraph does not have the same importance as paragraph 1 and would be more appropriate to a Recommendation. It would cause particular problems in the United Kingdom, where it has been found appropriate to provide reasonable time off with pay only for those employees who are being made redundant, i.e. those whose termination is not connected with their capacity or conduct. It has not been considered appropriate to require employers to provide reasonable time off to those workers who have been found to be unsatisfactory.

United States. Serious misconduct should not be defined for two different purposes (Article 13 (1) and Article 15 (3)) as relating only to "misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period". It is possible for conduct that justifies a forfeit of compensation on termination (the point of these two articles) not to require immediate removal from the job. For example, where an employee falsifies records to divert money, it is possible to continue the worker in employment during the notice period to check against continuation of this breach, but it would be justifiable to withhold the worker's severance benefits to compensate the employer for his losses.

Office Commentary

Paragraph 1. The Government of the Bahamas proposes that the term "reasonable period of notice" should be defined. As this is a matter that may vary widely among countries, the Office feels that it is best left to the methods of implementation referred to in Article 1.

The Government of the United States considers that serious misconduct should not be defined as only "misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period" for the purposes of both Article 13 (relating to notice) and Article 15 (relating to severance allowance and other benefits). It suggests that conduct which is not of such a nature that it would be unreasonable to require the employer to continue the employment of the worker during the notice period might nevertheless be sufficient to justify withholding severance benefits. The Office considers the point made to have validity in respect of severance allowance but not in respect of compensation in lieu of notice. This matter is therefore further pursued in connection with Article 15.

Paragraph 2. The Governments of Japan, Switzerland and the United Kingdom indicate that they cannot accept this paragraph as it is because of difficulties arising under national law on the subject or because the principle contained therein is considered not to be generally applied; the Government of Japan proposes the insertion of the words "as far as practicable", while the Government of the United Kingdom is of the view that this provision would be more appropriately placed in the proposed Recommendation. The competent Conference Committee may wish to consider whether this paragraph lays down a fundamental principle that should be included in the Convention or represents a provision of lesser importance that should be included in the Recommendation, and whether it should be qualified by the concept of practicability.

Article 14

A worker whose employment has been terminated shall be entitled to receive, on request, 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; on request, the worker may also be given another certificate providing an evaluation of his conduct or performance.

Observations on Article 14

Algeria. There appears to be a contradiction in this provision, since, on the one hand, the certificate of employment must contain nothing unfavourable to the worker and, on the other, another certificate giving an evaluation of his conduct or performance may be given to him. Such an evaluation, especially in the case of serious misconduct, can only be unfavourable. The apparent contradiction is attenuated by the fact that the second certificate may be provided only on the request of the dismissed worker.

Egypt. A reference to the amount of wages received should be inserted.

Japan. The Government states that the employers' organisation considers that the words "in order to seek other employment" should be inserted after the words "on request", to clarify the purpose of the certificate.

Netherlands. It is difficult to see how a statement containing merely factual information on dates and characteristics of work could contain remarks unfavourable to the worker. The words "but containing nothing unfavourable to the worker" can perhaps be left out, to prevent a misunderstanding of the nature of the statement.

Norway. The Government indicates that the Norwegian Employers' Confederation is of the opinion that a worker whose employment has been terminated should be entitled to receive a certificate, but that the employer may state that the worker's employment was terminated without giving reasons therefor.

Switzerland. The Government supports the principle contained in this provision, since national law authorises the worker to ask the employer for a certificate concerning the nature and duration of the employment relationship, as well as the quality of his work and conduct. At the express request of the worker the certificate mentions only the nature and duration of the employment relationship.

United Kingdom. National legislation approaches the issue of work records from a different direction than does this Article. Under national law employers are required to give their employees a written statement of their main terms and conditions of employment, including the job title, and are required to update this statement whenever there is a change. National law achieves the same results as this Article, but in a different way. This would seem to indicate that this provision would be more appropriate to a Recommendation and shows that international practice in less important areas of termination of employment can diverge.

United States. This Article seems more appropriate for a Recommendation.

Office Commentary

The Governments of the United Kingdom and the United States indicate in their observations that they consider this provision to be more appropriate for inclusion in a Recommendation, the former explaining that the purpose to be served by the certificate of employment is fulfilled in an entirely different way in the United Kingdom. The Office has given careful consideration to these views, having regard also to the views of a number of governments that the Convention should contain only fundamental principles. It has concluded that this is indeed a

matter of relatively secondary importance and could well be transferred to the Recommendation.

Several governments have commented on the requirement that the certificate should contain nothing unfavourable to the worker, while the worker may be provided on request with an evaluation of his conduct or performance. This latter clause was added to this provision by the competent Conference Committee at the first discussion. The proposal of the Government of the Netherlands to delete the words "containing nothing unfavourable to the worker", as being superfluous, has not been retained as this wording was generally accepted at the first discussion by the competent Conference Committee and seems to add a qualification that does not necessarily result from the previous words in the text.

The Government of Egypt proposes to insert in this Article a reference to the amount of wages received. This proposal has not been retained, as it does not seem appropriate to require the employer to include this information in the certificate in the absence of a specific request for its inclusion by the worker; the competent Conference Committee may wish to consider whether it should be included in the second part of this provision.

The Government of Algeria considers there to be an apparent contradiction between the first and second parts of this provision, an evaluation of conduct or performance being necessarily unfavourable to the worker. The Office does not believe that there is any necessary contradiction in this provision, which relates to termination whatever the reason. It recalls that the second clause was inserted during the first discussion to take into account the situation where a worker wished to have an evaluation by the employer of his work, in which case it was felt that the employer should be entitled to provide a full evaluation.

As stated above, this Article has been transferred to the proposed Recommendation, where it appears as Paragraph 16.

DIVISION E. SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

Article 15

1. A worker whose employment has been terminated shall be entitled to—

- (a) a severance allowance or other separation benefits, increasing with length of service and the level of wages, and paid directly by the employer or by a fund constituted by 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 allowance and benefits.

2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a) or (c), of this Article solely because he is not receiving a benefit under paragraph 1, subparagraph (b).

3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in case of termination for serious misconduct as defined in Article 13, paragraph 1, of this Convention.

Observations on Article 15

Algeria. Paragraph 1 (a) should refer to the level of wages received at the time of dismissal. With regard to (b), national law provides only for a severance allowance, not for unemployment benefits.

Bangladesh. The financial obligations envisaged in this Article may be too heavy for developing countries.

Japan. The Government indicates that the workers' organisations consider that the words "loss of" in paragraph 3 should be deleted.

Mexico. (Paragraph 3) The Government proposes to insert at the end of this paragraph the words: "except in the case of rights acquired as a result of length of service".

Portugal. The Government proposes to replace this Article by Paragraph 13 of the proposed Recommendation with a view to establishing in the Convention a right to a severance allowance which should not merely be a substitute for social security benefits. Particularly in the case of dismissal due to the operational requirements of the undertaking, it is only just that a worker with many years of service should be entitled to some compensation at the end of his contract. Moreover, protection of income security by social security is in many cases unsatisfactory since unemployment benefits are usually very low compared with the remuneration received by workers.

Suriname. (Paragraph 1) Provision under (a) for a severance allowance or other separation benefits, increasing with length of service and the level of wages, may create problems for countries in which legislative provisions for severance allowances do not yet exist.

Switzerland. The Government agrees with the principle mentioned in this provision, subject to a reservation resulting from the fact that national law limits the entitlement to workers over a given age (50 years) and with a given length of service (20 years). The principal function of this allowance is to replace, at least in part, the contribution of provident institutions when such bodies have not yet been set up.

(Paragraph 1) With regard to subparagraphs (b) and (c), it should be pointed out that dismissal does not in itself create an entitlement to old-age or invalidity benefits. However, dismissal of an older worker may, in the absence of an unemployment compensation scheme, create entitlement to retirement or early retirement benefit, if national law expressly so provides. On the other hand, dismissal cannot in principle be considered a reason for granting invalidity benefits. This might only occur in the case of the dismissal of an incapacitated worker, who had been rehabilitated for the job he held and who would have to retrain all over again because of his dismissal. For these reasons it must be asked whether it is appropriate to mention these two types of benefits as examples in a Convention which should only state general principles. Moreover, this paragraph should be in harmony with Paragraphs 24, 26 and 27 of the Older Workers Recommendation, 1980 (No. 162). The Government therefore proposes amending subparagraph (b) to read as follows: "benefits from unemployment insurance or assistance or other

benefits or forms of social security protection, it being understood that the acquisition of this right is subject to the conditions prescribed by or under national legislation." It proposes amending subparagraph (c) to ensure harmonisation with Recommendation No. 162, as follows: "a combination of such allowances and other forms of protection".

Tunisia. (Paragraph 1) The criteria for fixing a severance allowance in (a) should not be restrictively laid down. In certain countries like Tunisia, consideration may be given, in addition to length of service and the level of wages, to family situation and the effects of termination on old-age pension rights.

The Government also proposes that this paragraph should provide for compensation, in addition to severance allowance, in the case of arbitrary dismissal (*licenciement abusif*). The amount of such compensation could be left to the discretion of the competent tribunal.

Turkey. The matters covered by this Article should be left to national laws and regulations. The Government states that the Turkish Confederation of Employers' Associations considers that severance allowance in conjunction with unemployment benefit is against equity and beyond the capacity of the economy to pay.

United States. See observations on Article 13.

Office Commentary

Paragraph 1. The Government of Bangladesh observes that it would be difficult for developing countries to meet the financial obligations under this paragraph, while the Government of Suriname refers to the problem of countries in which there is no legislation on severance allowance and the Government of Turkey considers that these matters should be left to national law and practice. On the other hand, the Government of Portugal proposes replacing the present Article by Paragraph 13 of the proposed Recommendation with a view to ensuring that workers have a right to severance allowance in all cases, and not only as a substitute for social security benefit. The Office recalls in this connection that this Article seeks to accommodate widely differing systems and conditions; it could be applied by countries having general legislative provision for the payment of severance allowance but without social security systems, as in many developing countries; it could also be applied by countries with appropriate social security systems of general application which leave provision for severance allowance to collective bargaining, as in a number of industrialised countries; yet again, it could be applied in countries with both generally applicable systems of social security and severance allowance. In the absence of any widespread expression of disapproval of the basic approach of this Article, it has seemed to the Office that it should be retained as presently conceived.

The Government of Tunisia observes that other criteria than length of service and level of wages are used in its country for determining severance allowance under (a) and that the criteria to be applied should not be limitative. To take this observation into account, the term "inter alia" has been inserted in the text, with a consequential change in wording which also brings the English and French versions into line with each other.

The Government of Algeria considers that subparagraph (a) should specify that it is the level of wages at the time of dismissal that should be taken into consideration. As this question is variously resolved in different national systems (it is sometimes an average amount of wages during a given period before the termination that is taken into consideration), it has been thought preferable to leave this question to each country to determine in accordance with the methods of implementation referred to in Article 1.

The Government of Switzerland considers that it is inappropriate to mention in subparagraph (b) examples of forms of social security other than unemployment insurance or assistance that could meet the obligation laid down by this provision, inasmuch as entitlement to them (e.g. old-age or invalidity benefits) is not due to the termination of employment but to the meeting of qualifications as regards age or invalidity. It proposes to amend this subparagraph to refer to "benefits from unemployment insurance or assistance or other benefits or forms of social security protection, it being understood that the acquisition of this right is subject to the conditions prescribed by or under national legislation", and to amend subparagraph (c) in consequence with a view to conforming with Paragraphs 24, 26 and 27 of the Older Workers Recommendation, 1980 (No. 162). The Office would point out in this connection that, as this Article is at present drafted, its requirements could be met, for example, where a worker having reached the age of retirement or having been recognised as incapacitated was dismissed, by the granting of an old-age or invalidity benefit, even in the absence of entitlement to a severance allowance or to unemployment benefit. They could also be met, for example, where an older worker was dismissed and was entitled to unemployment insurance benefit followed by an early retirement benefit, in accordance with the Older Workers Recommendation. It does not, therefore, appear to the Office that there is a conflict between this provision and that Recommendation, and the text has therefore been left unchanged.

The Government of Tunisia suggests inclusion of a reference to compensation for unjustified termination. The Office calls attention, in this connection, to Article 12 which makes provision for such compensation, which is entirely distinct from the kind of income protection sought to be provided in the present Article.

Paragraph 2. The wording of this paragraph has been slightly modified with a view to clarifying the text, the meaning of which remains unchanged. The purpose of the paragraph is to ensure that a country choosing to implement this Article through an unemployment insurance or assistance scheme under paragraph 1 (b) would not be in violation of the Article simply because provision was not made in national law for persons who were not entitled to unemployment benefits, because they failed to meet the normal qualifying conditions for benefit, to be entitled to separation benefits under paragraph 1 (a). The reference to subparagraph (c) of paragraph 1 has been removed as superfluous (subparagraph (c) is relevant only in that it refers back to subparagraph (a) and a reference to (a) is therefore sufficient); the word "unemployment" has been inserted before "benefits under paragraph 1, subparagraph (b)" at the end of this paragraph, since the benefits referred to are only unemployment benefits.

Paragraph 3. The Government of Mexico proposes to insert at the end of this paragraph the words "except in the case of rights acquired as a result of length of

service". The Office calls attention in this regard to the fact that national systems differ widely on this question. In some countries, such as Mexico, national legislation provides for an absolute entitlement to a separation benefit on grounds of length of service, which is an acquired right and cannot be lost because of the reason for termination. In many other countries the separation benefit provided for by legislation does not have the character of an acquired right and may be forfeited in the case of dismissal for serious misconduct. It is for this reason that paragraph 3 has been included in this Article. However, it should be recalled in this connection that, in accordance with article 19, paragraph 8, of the ILO Constitution, in no case may the adoption or ratification of an international labour Convention be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned. In any case, this paragraph provides a faculty which need not be resorted to in countries in which a severance allowance is an acquired right.

The Government of the United States, in its observations regarding Articles 13 and 15, expresses the view that the definition of the term "serious misconduct" in Article 13, for the purpose of entitlement to notice, should not necessarily apply to the definition of the kind of serious misconduct that would justify the withholding of a severance allowance under the present Article. The Office considers that this point is well taken and that greater flexibility should be left in the present paragraph for countries in which the definition of serious misconduct for the purposes of Articles 13 and 15 differ. The words "as defined in Article 13, paragraph 1, of this Convention" have therefore been deleted, although the term "serious misconduct" has been retained.

PART III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATION OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

DIVISION A. CONSULTATION OF WORKERS' REPRESENTATIVES

Article 16

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall consult the workers' representatives concerned as early as possible on all appropriate questions, including measures to be taken to avert or minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2. The employer shall notify the workers' representatives concerned with a view to the consultations referred to in paragraph 1 of this Article sufficiently before carrying out the terminations to allow effective consultations to take place.

3. To enable the workers' representatives concerned to participate effectively in the consultations referred to in paragraph 1, the employer shall supply them in good time with all relevant information, including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

4. For the purposes of this Article the term "the workers' representatives concerned" means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

Observations on Article 16

Algeria. This provision conforms to the spirit of national legislation and is important.

Bangladesh. The Government agrees to this principle on condition that consultation with union representatives is not regarded as a workers' right but as a gesture of goodwill on the part of the employer.

Belgium. With a view to maintaining the parallelism between Articles 16 and 17, the Government proposes inserting the following paragraph between paragraphs 1 and 2 of this Article: "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."

Denmark. The Government states that the Danish Employers' Confederation considers that this Article should specify that it applies only where the intended dismissals affect a given number or percentage of the workforce.

France. National law requires workers' representatives to be consulted in cases of collective dismissal for economic reasons. This procedure applies when the dismissal of two workers is envisaged. However, the requirements contained in paragraphs 2 and 3 apply only when the number of dismissals is ten or more during a period of 30 days. The Government therefore proposes that a new paragraph should be inserted after paragraph 1 of this Article which would be similar to paragraph 2 of Article 17: "The application of paragraph 1 may be limited by the methods of application mentioned in Article 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." This new paragraph would re-establish an equivalence of scope between Articles 16 and 17 and take into account the provisions of the Directive of the Council of the European Communities on collective redundancies.

Certain collective dismissals for economic reasons occur in undertakings subject to a procedure of insolvency before a court. The precarious situation of such undertakings makes it necessary for rapid measures to be taken, failing which the undertaking might disappear entirely. Consequently, national law provides for a simplified procedure which requires informing rather than consulting workers' representatives in these cases. Accordingly, the Government proposes inserting a new paragraph after the proposed paragraph 2, as follows: "The application of paragraph 1 may be limited or adapted by the methods of application mentioned in Article 1 in cases in which the dismissals contemplated occur in an undertaking subject to a procedure of insolvency before a court."

Japan. The Government is of the view that the matters dealt with in this Article should be left to the voluntary efforts of workers and employers and therefore proposes transferring it to the Recommendation. The Government indicates that the employers' organisation considers that in paragraph 1 the words "where possible" should be inserted before the word "consult" and the words "the selection of the workers whose employment is to be terminated" should be inserted after the words "including measures to be taken to avert or minimise the

termination". It also considers that in paragraph 3 the word "all" before the words "relevant information" should be deleted and that the words "a written statement of" should be inserted before the words "the reasons".

Netherlands. The Government considers it essential to include a limitation similar to that contained in Article 17, paragraph 2, without which this provision cannot be implemented. It proposes inserting the following paragraph 2: "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."

Switzerland. (Paragraph 1) National law does not impose such an obligation, which may, however, be stipulated by collective agreement.

(Paragraphs 2-4) Since such procedures may be provided for only in collective agreements in the conclusion of which the State does not intervene, the Government is unable to express an opinion on the appropriateness of such provisions.

Turkey. The Government considers that as it is desirable to provide for appeal to a court in cases of termination on economic, technological, structural or similar grounds, no provisions should be made for consultation with workers' representatives. It also indicates that while the Turkish Confederation of Trade Unions favours this Article, the Turkish Confederation of Employers' Associations believes that the obligation to consult workers' representatives will interfere with the administration of the undertaking according to principles of modern management, will increase formalities and will lead to conflict and loss of time.

United Kingdom. It is necessary to include in this Article a paragraph similar to paragraph 2 of Article 17.

United States. Articles 16 to 18 should be in a Recommendation with a simple statement in the Convention of the following two principles: (1) the right of the workers' representatives to be consulted on how to mitigate the adverse effects of the collective terminations on the workers; and (2) the obligation of governments and employers to offer assistance to workers affected in securing suitable alternative employment.

Office Commentary

The Government of Turkey opposes the inclusion of a requirement to consult workers' representatives, having regard to the right to appeal against a termination, while the Governments of Japan and the United States consider that this provision would be more appropriate in a Recommendation, the latter Government considering that the Convention should only specify the right of workers to be consulted on the mitigation of the adverse effects of collective terminations. As this provision seemed to have been widely supported during the first discussion at the Conference, these suggestions have not been retained.

The Governments of Belgium, France, the Netherlands and the United Kingdom proposed reinsertion in this Article of a paragraph, that had been deleted during the first discussion, which was similar to paragraph 2 of Article 17 and would

provide for the possibility of limiting the applicability of paragraph 1 of this Article 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. The Office has given careful consideration to this proposal. It notes in this connection that in many countries with good protection in the field of termination of employment legislative requirements of consultation with workers' representatives only apply to the termination of employment of a minimum number or percentage of the workforce. It feels that adoption of this Article without the flexibility provided by the possibility of so limiting its application might seriously jeopardise the chances of ratification of the instrument. Having regard to existing national law on the question and also to the fact that Paragraph 8 of the proposed Recommendation would in any case recommend that employers should consult workers' representatives before a final decision is taken on individual cases of termination, the Office has concluded that a paragraph should be included in this Article authorising ratifying countries to limit its application in the manner suggested. The proposed text has been modified accordingly.

The Government of France proposes inserting a new paragraph to allow the application of paragraph 1 to be limited or adapted in cases in which the terminations contemplated occur in an undertaking subject to an insolvency procedure before a court. The Office has not retained this suggestion since it considers the existing terms of this Article to allow sufficient flexibility to cover this situation. Clearly, where events occur in a context in which it is not possible to have full consultations, an accelerated or simplified procedure of consultation, adapted to the realities of insolvency proceedings, would be allowed by the terms of this Article.

DIVISION B. NOTIFICATION TO THE COMPETENT AUTHORITY

Article 17

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify the competent 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 likely to be affected and the period over which the terminations are intended to be carried out.

2. 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 specific number or percentage of the workforce.

3. Where appropriate, the competent authority shall assist the parties in seeking solutions to the problems raised by the terminations contemplated.

4. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

Observations on Article 17

Algeria. See under Article 16.

Bulgaria. (Paragraph 2) The Government proposes to delete this paragraph so that the rights of all workers are protected. The competent bodies should be informed of all cases of dismissal.

(Paragraph 3) The competent authority should intervene not only “where appropriate”; it should be obliged to ensure the right to work of each worker affected by termination of employment. Accordingly, the Government proposes amending this paragraph to read: “The competent authority shall ensure that a worker affected by a termination of employment at the initiative of the employer is provided with alternative employment corresponding to his qualifications and with remuneration that is not less than that received before the termination.”

Japan. The Government indicates that the employers’ organisation considers that the words “where possible” should be inserted at the beginning of paragraphs 1 and 4, since such notice should be left to the judgement of each country.

Switzerland. The Government is unable to accept a general obligation to notify the competent authority. National labour law does not require the employer to notify the public authorities before terminating contracts of employment for the reasons mentioned in this provision. An Ordinance on the extension of labour market statistics requires notification to the authorities, but only in the case of termination of contracts for economic reasons in establishments employing more than five workers, which have already been notified to workers. While the competent authority may play the role of mediator, this is not expressly provided for by law; the authority undertakes to facilitate the placement of dismissed workers.

Trinidad and Tobago. (Paragraph 4) The determination of the period of time to be specified by national laws or regulations should take into account unforeseen circumstances that may be outside the control of the employer or the competent authority.

Office Commentary

The Government of Switzerland considers that there should not be a general obligation in paragraph 1 to notify the public authority of such terminations. As this paragraph seems to have been widely supported in the competent Conference Committee during the first discussion, the present text has been retained.

The Government of Bulgaria proposes to delete paragraph 2, so that employers would be under an obligation to notify the competent authority of such terminations in all cases. The Office believes that this paragraph provides a necessary degree of flexibility to this Article and has therefore not given effect to this proposal.

The Government of Bulgaria also proposes to replace paragraph 3 by the following text: “The competent authority shall ensure that a worker affected by a termination of employment at the initiative of the employer is provided with alternative employment corresponding to his qualifications and with remuneration that is not less than that received before the termination.” The Office considers that such an absolute obligation placed upon the competent authority would make it very difficult for most countries to ratify a Convention in which it would be included and has therefore retained the present text of this paragraph.

The Government of Trinidad and Tobago considers that the period of time referred to in paragraph 4 should take unforeseen circumstances into account. The Office believes that the present wording of this paragraph, which leaves it to national laws or regulations to specify the period in question, would allow each country to take such situations into account in giving effect to this provision.

DIVISION C. MITIGATING THE EFFECTS OF TERMINATION

Article 18

In the event of terminations of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible, with training or retraining where appropriate, shall be promoted by means suitable to national circumstances.

Observations on Article 18

Algeria. Though difficult to implement, this provision contains a very interesting idea which should be incorporated in national law.

Switzerland. Such a provision could be accepted to the extent that equality of treatment among all jobseekers is guaranteed.

United Kingdom. The phrasing of this Article seems more appropriate to a Recommendation.

Office Commentary

The Government of the United Kingdom considers that this provision would be more appropriate in a Recommendation. The Office recognises that this provision is of a promotional kind. It has been so worded because of the greatly varying systems and possibilities of training workers for and placing them in alternative employment in different countries. However, in initially including a provision of this kind in the Proposed Conclusions with a view to a Convention placed before the Conference, the Office had felt that the proposed Convention would be incomplete without some reference to one of the most important parts of any comprehensive system of protection of workers in connection with termination of employment. As this provision was approved by the competent Conference Committee during the first discussion by general consensus, the Office has retained it in the text of the proposed Convention.

Observations on the Proposed Recommendation concerning Termination of Employment at the Initiative of the Employer¹

I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

2. (1) This Recommendation applies to all branches of economic activity and to all employed persons.

(2) A Member may exclude the following categories of employed persons from all or some of the provisions of this Recommendation:

(a) workers engaged under a contract of employment for a specified period of time or a specific task;

¹ The observations are preceded by the relevant text as given in the proposed Recommendation set forth in Report V (1). Provisions on which no observations have been made are not reproduced.

- (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
- (c) workers engaged on a casual basis for a short period.

Observations on Paragraph 2

Canada. The Government proposes to amend subparagraph (2) by adding provision for the exclusion of employees in small establishments and of employees of retirement age entitled to an old-age pension.

France. See the observations on Article 2 of the proposed Convention.

Office Commentary

With regard to the observation of the Government of France, see the commentary regarding the observations on Article 2 of the proposed Convention.

The Government of Canada proposes to make provision in subparagraph (2) for the exclusion of employees in small establishments and of employees of retirement age entitled to an old-age pension. The Office would draw attention, in this connection, to its commentary on the observations on paragraph 4 of Article 2 of the proposed Convention. The Office had not considered it necessary to include a similar provision in the proposed Recommendation since the Recommendation is not intended to lay down obligations. The flexible nature of a Recommendation, which consists of guidelines to governments, employers and workers, makes it less necessary to make provision for all the different types of exclusions that member countries might find necessary; if they decide to apply all or some of the provisions of the Recommendation, they retain the right to exclude whichever categories of employed persons they so wish. The Office had nevertheless included a paragraph providing for the possibility of certain exclusions based on the type of employment contract (subparagraph (2)), since it seemed that it might be conceptually difficult for some of the provisions of the Recommendation to be applied to workers engaged under such contracts and that this should be recognised in the Recommendation.

3. (1) There should be adequate safeguards against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.

(2) To this end, for example, provision may be made for one or more of the following:

- (a) limiting recourse to contracts for a specified period of time to cases in which, owing to the nature of the work to be effected or to the circumstances under which it is to be effected, the employment relationship cannot be of an indeterminate duration;
- (b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration;
- (c) deeming contracts for a specified period of time, when renewed on one or more occasions, to be contracts of employment of indeterminate duration.

Observations on Paragraph 3

Algeria. This provision concerns the protection of casual or temporary personnel employed under contracts of fixed duration. This raises the whole

problem of employment policy in a given country. National law does not protect personnel in this regard, although it conforms to subparagraph (2 (c)).

Japan. The Government considers that the validity of contracts of employment of specified duration should be viewed not only taking into account considerations on the employers' side, such as the nature or the circumstance of the work, but also taking into account considerations on the workers' side. On the other hand, it is not always appropriate that fixed-term contracts, when renewed on just one occasion because of considerations affecting both parties, should be changed into contracts of indeterminate duration because of the nature and circumstance of work. This provision is too detailed for an international instrument. The Government therefore proposes the deletion of subparagraph (2). It also proposes the amendment of the provision on safeguards against recourse to such contracts so as to leave the matter to the methods of implementation of each member State. The Government indicates that the employers' organisation considers that Paragraph 3 should be deleted.

Norway. (Subparagraph (2)) The Government proposes deletion of the words "one or" in clause (c).

Switzerland. (Subparagraph (1)) Although national law does not contain such a provision, the Government is not opposed to the principle stated therein. In practice, such contracts are little used and to the Government's knowledge are not used with a view to avoiding the guarantees laid down for contracts of indeterminate duration.

Tunisia. (Subparagraph (2)) The Government proposes to add the following new clause (d): "assimilating contracts for a specified period to contracts of indeterminate duration, when at the expiry of the term fixed the worker continues to render services without opposition by the other party".

Office Commentary

The Government of Japan proposes to delete subparagraph (2) of this Paragraph, which it considers to be too detailed for inclusion in an international instrument. It does not consider that a single renewal of a fixed-term contract should in all cases transform the contract into a contract of indeterminate duration. The Office feels that this subparagraph is useful in enumerating a variety of ways, actually used in different countries, by which the safeguards referred to in subparagraph (1) might be provided. It is not an exhaustive enumeration, as evidenced by the use of the words "for example". Moreover, clause (c), regarding the assimilation of fixed-term contracts on renewal to contracts of indeterminate duration, does not suggest that this must occur when renewed on a single occasion, but leaves it to each country to determine whether one or more renewals should be required. The Office has therefore retained the present text of subparagraph (2). For this reason also, it has not given effect to the proposal of the Government of Norway to delete the words "one or" in clause (c).

The Government of Tunisia proposes to insert a new clause which would assimilate fixed-term contracts to contracts of indeterminate duration when a worker continues to render services at the expiry of the fixed term without

opposition by the other party. As this situation is in most countries tantamount to an implicit renewal of the contract, the Office believes that it is covered by subparagraph (2) (c).

II. STANDARDS OF GENERAL APPLICATION

Justification for Termination

5. In addition to the grounds referred to in Article 5 of the Termination of Employment Convention, 1982, the following should not constitute valid reasons for termination:

- (a) age, subject to national law and practice regarding retirement at or after the age normally qualifying for an old-age benefit;
- (b) absence from work due to compulsory military service or other civic obligations.

Observations on Paragraph 5

Canada. The Government proposes to amend this Paragraph to include the provisions in Articles 4 to 6 and 8 of the proposed Convention.

Denmark. The Government indicates that the Danish Employers' Confederation considers that clause (b) should be deleted as it may prevent young persons who have not performed compulsory military service from obtaining employment.

Japan. The Older Workers Recommendation, 1980 (No. 162), provides that each member State should take measures within the framework of the national laws, regulations and practice on the subject. The Government therefore proposes that the words "at or after the age normally qualifying for an old-age benefit" should be deleted. It indicates that the employers' organisation has made a similar suggestion.

Trinidad and Tobago. The term "civic obligations" in clause (b) may need to be clearly defined by the competent authority.

United Kingdom. Clause (a) should be amended so that employees in occupations such as that of airline pilot, in which the retirement age is earlier than the State retirement age, when old-age benefit is available, could not claim unfair dismissal after reaching the normal retirement age for their occupation. The Government proposes to delete the words "at or after the age normally qualifying for an old-age benefit".

Office Commentary

The Government of Canada proposes amending this paragraph to include the provisions in Articles 4 to 6 and 8 of the proposed Convention. This suggestion, as well as the other proposals by the Government of Canada to insert the text of various Articles of the proposed Convention in different places in the proposed Recommendation, apparently presume acceptance of the Government's view that only a Recommendation should be adopted. As effect has not been given, in the proposed texts, to this view (see the Office commentary on the General Observations by governments), these suggestions have not been retained.

The Governments of Japan and the United Kingdom propose the deletion in clause (a) of the words "at or after the age normally qualifying for an old-age benefit", the former Government stating that the Older Workers Recommendation provides for measures to be taken within the framework of national laws, regulations and practice on the subject, while the latter Government refers to the fact that employees in certain occupations (e.g. airline pilots) retire at ages earlier than the State retirement age when old-age benefit is available, and could thus be validly dismissed at such earlier age. Two questions appear to arise in this connection: first, whether it is appropriate to envisage elimination of the protection against termination on grounds of age when a worker reaches the retirement age if that age is earlier than the age normally qualifying for an old-age benefit and, secondly, whether in certain cases in which this is so for a particular category of workers (such as airline pilots) the grounds for termination might not be better conceived of in terms of capacity, which is a valid reason for termination under Article 4 of the proposed Convention. The competent Conference Committee might wish to consider these matters.

The Government of Trinidad and Tobago considers that the term "civic obligations" in clause (b) might require definition by the competent authority. It should be noted in this connection that such concepts are left by the proposed instrument for definition, where necessary, by the methods of implementation referred to in Paragraph 1 thereof.

Proposed New Paragraph

See the Office commentary on the General Observations and on Article 6 of the proposed Convention. The provision in question now appears as Paragraph 6 of the proposed Recommendation and subsequent Paragraphs have been renumbered accordingly.

Procedure Prior to or at the Time of Termination

6. The employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning.

Observations on Paragraph 6 (henceforth Paragraph 7)

Denmark. The Government indicates that the Danish Employers' Confederation and the Department responsible for matters relating to public salaries and pensions consider that the requirement that the warning be in written form should be deleted.

Japan. The Government proposes to insert the words "instructions or" before the word "warning", with a view to providing sufficient flexibility to take account of the variety of national practices.

Norway. The Government indicates that the Norwegian Employers' Confederation is of the opinion that written advance warning should not be required, and that "appropriate warning" is sufficient.

Portugal. The Government proposes to delete the requirement of a written form of warning, which it considers to be inappropriate to the characteristics of small and medium-sized undertakings.

Office Commentary

The Government of Portugal proposes deleting the requirement that a warning should be in written form, as this is inappropriate to small and medium-sized undertakings. The Office agrees that such a requirement might be difficult to apply in small undertakings. As this provision is included in the proposed Recommendation, member countries would be entitled to limit its application (or the application of the requirement regarding written form) to undertakings over a given size, as they would doubtless have been entitled to do under Article 2, paragraph 4, of the proposed Convention if the present Paragraph had been included in the Convention. Where it is practicable, as in larger undertakings, for such a warning to be in written form, the Office believes this to be preferable, since otherwise observance of the requirement of warning would be very difficult to verify in any appeal before the competent bodies. For these reasons the Office has left the text of this provision unchanged.

The Government of Japan proposes to insert the words "instructions or" before the word "warning" to provide additional flexibility. As the purpose of the requirement of a warning is to indicate to the worker the risk of loss of employment if the misconduct is repeated, so as to ensure that he or she fully understands the consequences to be expected, the Office believes that the word "warning" is the appropriate term to be used in this context; a requirement regarding instructions is more appropriate in the context of termination due to unsatisfactory performance of duties, dealt with in the following Paragraph.

7. The employment of a worker should not be terminated for unsatisfactory performance unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.

Observations on Paragraph 7 (henceforth Paragraph 8)

Denmark. See under Paragraph 6.

France. The principle contained in this Paragraph is not provided for in national law. However, having regard to the interest of this provision and the fact that it is contained in a Recommendation, the Government will not oppose the emergence of new standards on the question which may result from discussions between workers' and employers' representatives.

Japan. The Government proposes to replace the word "and" before the words "written warning" by the word "or", in order to provide sufficient flexibility to take into account varying national practices.

Norway. See under Paragraph 6.

United States. This Paragraph should be expanded to include the amendment submitted by the Government during the first discussion (Paragraph 166 of Report V (1)).

Office Commentary

The Government of Japan proposes to replace the word "and" by the word "or" between the words "instructions" and "written warning", to provide greater flexibility. The Office had sought to ensure adequate flexibility by providing for "appropriate" instructions and written warning. Where in given circumstances instructions could not be expected to assist the worker concerned to perform his or her duties satisfactorily, such instructions would not be required. On the other hand, the Office feels that an appropriate warning should be given even if instructions have been given, so that the worker concerned may appreciate the consequences of continuing unsatisfactory performance. For these reasons, the Office has left the present text unchanged. With regard to the requirement of warning in written form, see the commentary on the preceding Paragraph.

The Government of the United States recalls the proposal that it had submitted during the first discussion to insert in this Paragraph a second subparagraph as follows: "The employer, with the consultation of workers' representatives, may develop programmes and policies for assisting workers in meeting the rules and operational requirements of the enterprise so that they may continue in employment while they are resolving personal difficulties through, for example: (a) participation in a programme of rehabilitation from alcohol or drug addiction; (b) special financial counselling or arrangements for repayment of burdensome indebtedness; (c) mutually acceptable changes in working schedules so that the workers can meet family responsibilities for care of a member of the worker's family; (d) counselling, education, training or other measures to assist workers experiencing difficulties in meeting changing job requirements." The competent Conference Committee may wish to consider this proposal, which it had been agreed during the first discussion to reconsider in 1982.

Proposed New Paragraphs

See the Office commentary on the General Observations and on Article 7, paragraph 2, and Article 8 of the proposed Convention. The provisions in question now appear as Paragraphs 9 and 10 of the proposed Recommendation.

8. The employer should consult workers' representatives before a final decision is taken on individual cases of termination of employment.

Observations on Paragraph 8 (henceforth Paragraph 11)

Denmark. The Government states that the Danish Employers' Confederation considers that this provision should be deleted and that it should be left to each dismissed employee to decide whether he or she wants the matter to be discussed with the workers' representative.

France. See the observation regarding Paragraph 7.

Japan. The Government proposes to replace the word "should" by the word "may", since the worker concerned might not wish such consultation to take place

in some cases and this raises a problem of protection of privacy. The Government indicates that the employers' organisation considers that the words "where possible" should be inserted at the beginning of this Paragraph.

Trinidad and Tobago. The Government considers that some unions may regard this provision as placing them in the invidious position of appearing to be a party to the employer's action.

Office Commentary

The Government of Japan proposes to replace the word "should" by the word "may" to protect the workers' privacy while the Government of Trinidad and Tobago considers that some trade unions might not wish to be consulted on such matters although it has not proposed any change in wording. As the word "should" was inserted in this Paragraph in place of the word "may" by a majority of the competent Conference Committee at the first discussion, the Office has left the text unchanged. However, the competent Conference Committee may wish to consider the views expressed by the Governments of Japan and of Trinidad and Tobago.

Proposed New Paragraphs

Canada. The Government proposes inserting, after Paragraph 9, Articles 13 and 14 of the proposed Convention as new Paragraphs 10 and 11.

Niger. The Government proposes inserting the following new Paragraph after Paragraph 9: "In the case of failure to respect the procedure the employer shall *ipso facto* be required to reinstate the worker in his employment until a decision is taken."

Office Commentary

With regard to the observation of the Government of Canada, see the Office commentary on the observations on Paragraph 5.

The Government of Niger proposes inclusion in the Recommendation of provision for reinstatement until a final decision has been reached, in cases of failure to observe the appropriate procedure. In the view of the Office, the question of what sanctions to apply in cases of failure to follow procedural rules prior to termination should be left to each country to resolve. This question will generally arise in the course of an appeal against a termination considered by the worker to be unjustified and may be one of the issues needing to be determined in deciding whether the termination was justified, within the context of Articles 7 to 9 of the proposed Convention. The present text has therefore been left unchanged.

Proposed New Paragraph

Canada. The Government proposes to insert a new Paragraph after Paragraph 11, stating that the employer should bear the onus of proof in appeals against allegedly unjust dismissals.

Office Commentary

See the Office commentary on the observations on Paragraph 5.

12. (1) National laws or regulations may provide that, in case of appeal by a worker against the termination of his employment pursuant to Article 10 of the Termination of Employment Convention, 1982, the effects of termination may be suspended, pending decision by the competent body on the appeal.

(2) Suspension of the effects of termination pursuant to subparagraph (1) of this Paragraph may be limited to cases specified by national laws or regulations.

Observations on Paragraph 12 (henceforth Paragraph 15)

Denmark. The Government indicates that the Danish Employers' Confederation opposes the possibility of suspending a dismissal. Appeals should be considered by the competent body as quickly as possible, preferably before the expiry of the period of notice.

France. The Government does not consider it appropriate to provide that an appeal will suspend the effects of termination of employment. Appeal procedures are often long and, particularly in the case of dismissals for economic reasons, to keep surplus workers in undertakings that are in difficulty and need to be restructured may aggravate the problems and result in a higher number of dismissals or the closure of the undertaking.

Switzerland. In the Government's view, suspension of the effects of termination should not be dealt with in an international instrument of this kind. This is a procedural notion which may vary among countries and, in Switzerland, among cantons.

Trinidad and Tobago. This provision seems questionable since it may lead to the undesirable situation in which frequent resort would be had to appeals merely to postpone the outcome, which is usually determined by a body empowered to regulate its own practice and procedure, including the time taken to hear and determine matters before it.

Office Commentary

The Governments of France, Switzerland and Trinidad and Tobago consider the inclusion of a provision on suspension of termination in an international instrument to be inappropriate. In drafting the corresponding Point in the Proposed Conclusions with a view to a Recommendation in Report VIII (2), the Office recognised that the concept of suspension of termination pending a final decision by the appropriate body on an appeal against a termination might be found to be unacceptable in a number of countries, although it has been adopted by some. However, having regard to the positive response of many governments to the question on this subject in the questionnaire in Report VIII(1), the Office thought that it might be worth while, in the proposed Recommendation, to make a reference to suspension of termination as a possible procedure that might be found

appropriate in certain circumstances in certain countries. For this reason, it drafted a text which provided that provision “may” (instead of “should”) be made in this regard. The text sought to strike a balance between the systems in which a worker was entitled to request the competent body to suspend the termination pending a final decision on the appeal against the termination, and the systems in which suspension in certain circumstances was automatic in cases of appeal against termination. Having regard to the division of views on the subject during the first discussion, the Office believes that it would be advisable for this Paragraph to reflect more clearly the first-mentioned system, in which suspension of termination is not automatic on appeal but may be decided by the competent body on request. The text of both subparagraphs has been modified accordingly. The words “or circumstances” have been added in subparagraph (2) after the word “cases”, since the limitations on suspension of termination sometimes refer to “circumstances” (e.g. where a works council has opposed a termination) as well as to “cases”.

Proposed New Paragraph

See the Office commentary on the General Observations and on Article 14 of the proposed Convention. The provision in question now appears as Paragraph 16 of the proposed Recommendation.

Severance Allowance

13. (1) Irrespective of the availability of social security benefits, a worker whose employment has been terminated should be entitled where appropriate to a severance allowance or other separation benefits, increasing with length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions.

(2) Provisions may be made by the methods of implementation referred to in Paragraph 1 of this Recommendation for loss of entitlement to the allowance or benefits referred to in subparagraph (1) of this Paragraph in case of termination for serious misconduct as defined in Article 13, paragraph 1, of the Termination of Employment Convention, 1982.

(3) Entitlement to severance allowance or other separation benefits may be limited to workers whose employment is terminated for economic, technological, structural or similar reasons.

Observations on Paragraph 13 (henceforth Paragraph 17)

Algeria. The Government proposes to delete in subparagraph (1) the words “where appropriate”, since the case of serious misconduct is provided for in subparagraph (2).

Japan. The Government indicates that the workers' organisations consider that the words “loss of” should be deleted in subparagraph (2).

Mexico. (Subparagraph 2) The Government proposes to insert at the end of this subparagraph the words “except in the case of rights acquired as a result of length of service”.

(Subparagraph 3) The Government proposes to insert at the end of this subparagraph the words “in conformity with national law and practice”.

Romania. The allowance mentioned in Paragraph 1 should be provided for all workers irrespective of the seriousness of the misconduct.

Office Commentary

The Government of Algeria proposes to delete the words "where appropriate" in subparagraph (1). As these words were added to the text by a majority decision of the competent Conference Committee during the first discussion, the present text has been retained unchanged.

The Government of Romania considers that a severance allowance should be payable to workers irrespective of the seriousness of misconduct (subparagraph 2), while the Government of Mexico proposes that provision for loss of entitlement to severance allowance in the case of serious misconduct should not apply to rights acquired as a result of length of service. The Office calls attention in this regard to its comments on the observations on paragraph 3 of Article 15 of the proposed Convention. Having regard to the different approaches to the question of whether severance allowance or other separation benefits should be an acquired right or might be forfeited in the case of serious misconduct, the present text has been retained unchanged.

In its observations on Articles 13 and 15 of the proposed Convention, the Government of the United States has drawn attention to the possibility that the definition of serious misconduct might differ for the purposes of the right to notice and the right to severance allowance. For the reasons given in the commentary on Article 15, the Office has deleted from subparagraph (2) of the present Paragraph the words "as defined in Article 13, paragraph 1, of the Termination of Employment Convention, 1982", with a view to providing somewhat greater flexibility in this regard.

The Government of Mexico proposes to insert in subparagraph (3) the words "in conformity with national law and practice". As this provision constitutes a faculty afforded to each member country to limit the scope of this Paragraph, which it may exercise pursuant to the methods of implementation mentioned in Paragraph 1, insertion of these words in the present subparagraph would seem to be unnecessary and it has therefore been retained unchanged.

III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATION OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

14. All parties concerned should seek, with the assistance of the competent 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.

Observations on Paragraph 14 (henceforth Paragraph 18)

France. The Government considers Paragraphs 14-21 regarding dismissals for economic reasons to contain appropriate principles for guiding government policies

in respect of consultation of workers' representatives, avoidance of termination and attenuation of their effects. The formulation of these principles is sufficiently flexible to take account of national differences.

Niger. The Government proposes replacing the opening words of this Paragraph by the words "All parties concerned should submit to the decision of the competent authorities, in order to avert or minimise them as far as possible, terminations of employment . . .".

Office Commentary

The observation of the Government of Niger appears to refer to the system of prior authorisation of termination of employment for economic reasons which exists in a number of countries. As the present wording of this Paragraph seems to have been very widely supported during the first discussion, the text has been retained unchanged.

Proposed New Paragraph

Canada. The Government proposes to insert Article 17 of the proposed Convention after Paragraph 14.

Office Commentary

See the commentary on the observations on Paragraph 5.

Consultations on Major Changes in the Undertaking

15. (1) When the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail 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 likely to have and the measures for averting or mitigating the adverse effects of such changes.

(2) To enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have.

(3) For the purposes of this Paragraph the term "the workers' representatives concerned" means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

Observation on Paragraph 15 (henceforth Paragraph 19)

Japan. The Government indicates that the employers' organisation considers that the words "where possible" should be inserted, in subparagraph (1), before the word "consult", and that the words "all relevant" should be deleted in subparagraph (2), to take account of national circumstances.

Measures to Avert or Minimise Terminations

16. 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 might include, inter alia, 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, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

Observation on Paragraph 16 (henceforth Paragraph 20)

Tunisia. Consideration might be given to adding a reference to other solutions that might enable such terminations to be minimised, for example, part-time work, in particular for women with family responsibilities, additional annual leave, certain non-paid or partially paid long-term leave such as parental leave and leave without pay.

Office Commentary

The Government of Tunisia suggests including in this Paragraph a reference to other measures that might be taken to minimise terminations, such as part-time work and various kinds of leave. In drafting the provision that has become the present text of this Paragraph, the Office sought to include a reference to the kinds of measures frequently taken to minimise terminations for economic and similar reasons. The Office is not certain that part-time work or additional leave of various kinds are measures that are often used to this end. For this reason, the text has been retained unchanged, but the competent Conference Committee may wish to consider whether a reference to these measures should be included.

Priority of Rehiring

19. (1) Workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired.

(2) Such priority of rehiring may be limited to a specified period of time.

(3) The criteria for the priority of rehiring, the question of retention of rights—particularly seniority rights—in case of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation.

Observations on Paragraph 19 (henceforth Paragraph 23)

Japan. The Government considers that provision for rehiring presupposes the lay-off system. It points out that other methods of adjustment than lay-offs may be used to respond to business fluctuations. In Japan recourse has been had to absence from work with a certain amount of income, in conformity with the life-time employment system. Adoption of priority of rehiring may undermine security of employment in Japan since it may result in an easier recourse to dismissals. The

Government therefore proposes to qualify subparagraph (1) by words such as “to the extent possible”, which are contained in Paragraph 16(1) of Recommendation No. 119. The Government indicates that the employers’ organisation considers that this Paragraph should be deleted since the lay-off system is not suitable to Japan.

United Kingdom. Priority of rehiring would work against mobility of labour, which is particularly important at times of technological change. It might encourage workers to remain unemployed until their old jobs reappeared. At the same time, other employers might be reluctant to take on such workers, as they might expect to lose them when their old jobs were offered again. Moreover, priority of rehiring would seem to work directly against the young unemployed. The Government therefore proposes inserting the words “to the extent possible” after the word “should”.

Office Commentary

The Governments of Japan and the United Kingdom consider that priority of rehiring might have negative consequences, for example by making employers in a country with a life-time employment system more ready to terminate the employment of workers or by encouraging workers to remain unemployed until their former jobs reappear or by discouraging hiring by new employers. The Office finds it difficult to evaluate the extent to which priority of rehiring might have such negative consequences. It has therefore retained the text unchanged. However, the competent Conference Committee may wish to review the above-mentioned ideas and consider whether some additional flexibility should be added to this provision, for example, by the insertion of the words “to the extent possible” as proposed by the Governments of Japan and the United Kingdom.

Mitigating the Effects of Termination

20. (1) With a view to promoting, pursuant to Article 18 of the Termination of Employment Convention, 1982, the placement in alternative employment of workers affected by termination of employment for reasons of an economic, technological, structural or similar nature, the competent authority, where possible with the collaboration of the employer and the workers’ representatives concerned, should assist the workers affected, as early as possible after being notified of these terminations or being requested to do so, in the search for suitable alternative employment and where appropriate in obtaining training or retraining to this end.

(2) Where possible, the employer should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers.

(3) In assisting the workers affected in obtaining suitable alternative employment or training or retraining, regard may be had to the Human Resources Development Convention and Recommendation, 1975.

Observation on Paragraph 20 (henceforth Paragraph 24)

Niger. The Government proposes inserting at the end of subparagraph (2) the words “after informing the competent authority”.

Office Commentary

The Government of Niger considers that subparagraph (2) should require the employer to inform the competent authority when contacting other employers with a view to seeking suitable alternative employment for workers whose employment is to be terminated. It seems to the Office that such an obligation might involve an element of constraint that might discourage assistance by employers in certain cases; this subparagraph has therefore been retained unchanged. However, this provision would not prevent a member country from requiring employers to notify the competent authority of such efforts, if deemed appropriate to national circumstances.

21. (1) With a view to mitigating the adverse effects of termination of employment for reasons of an economic, technological, structural or similar nature, consideration should be given to providing income protection in addition to that provided for in Article 15 of the Termination of Employment Convention, 1982, 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) The competent authority should consider providing financial resources to support in full or in part the measures referred to in subparagraph (1) of this Paragraph.

Observations on Paragraph 21 (henceforth Paragraph 25)

Canada. The Government proposes to incorporate into subparagraph (1) the income protection measures in Article 15 of the Proposed Convention.

Switzerland. Draft legislation currently under parliamentary consideration accords great importance to preventive measures. To the extent that this Paragraph only requires that "consideration... be given" to certain benefits, it should not present any difficulties. However, it should be pointed out that, in its message to Parliament, the Federal Council indicated that attendance at courses should always be related directly to the possibility of placement of the insured person; benefits would be provided only if the placement of the worker concerned were hindered or rendered impossible by labour market conditions and if the retraining measures would considerably improve the possibilities for placement. Thus, unemployment insurance cannot provide "income protection during any course of training or retraining and partial reimbursement of expenses connected with training or retraining". With regard to measures to improve geographical mobility, the above-mentioned message indicated that the payment of benefits should be subject to strict conditions, so that encouragement of geographical mobility would not contribute to depopulating certain regions and concentrating the population in others.

Office Commentary

With regard to the observation of the Government of Canada, see the commentary on the observations to Paragraph 5. The other observations do not seem to call for comment.

PROPOSED TEXTS

(English Version)

The following are the English versions of (A) the proposed Convention concerning termination of employment at the initiative of the employer and (B) the proposed Recommendation concerning termination of employment at the initiative of the employer, which are submitted as a basis for discussion of the fifth item on the agenda of the 68th Session of the Conference.

A. Proposed Convention concerning Termination of Employment at the Initiative of the Employer

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the International
Labour Office, and having met in its Sixty-eighth Session on 2 June 1982,
and

Noting the existing international standards contained in the Termination of
Employment Recommendation, 1963, and

Noting that since the adoption of the Termination of Employment Recommen-
dation, 1963, significant developments have occurred in the law and
practice of many member States on the questions covered by that
Recommendation, and

Considering that these developments have made it appropriate to adopt new
international standards on the subject, particularly having regard to the
serious problems in this field resulting from the economic difficulties and
technological changes experienced in recent years in many countries,

Having decided upon the adoption of certain proposals with regard to
termination of employment at the initiative of the employer, which is the
fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international
Convention,

adopts this day of June of the year one thousand nine hundred and
eighty-two the following Convention, which may be cited as the Termination of
Employment Convention, 1982:

PART I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

Article 1

The provisions of this Convention shall, in so far as they are not otherwise made
effective by means of collective agreements, arbitration awards or court decisions

PROPOSED TEXTS

(French Version)

The following are the French versions of (A) the proposed Convention concerning termination of employment at the initiative of the employer and (B) the proposed Recommendation concerning termination of employment at the initiative of the employer, which are submitted as a basis for discussion of the fifth item on the agenda of the 68th Session of the Conference.

A. Projet de convention concernant la cessation de la relation de travail à l'initiative de l'employeur

La Conférence générale de l'Organisation internationale du Travail,
Convoquée à Genève par le Conseil d'administration du Bureau international
du Travail, et s'y étant réunie le 2 juin 1982, en sa soixante-huitième
session ;

Notant les normes internationales existantes contenues dans la recommanda-
tion sur la cessation de la relation de travail, 1963 ;

Notant que, depuis l'adoption de la recommandation sur la cessation de la
relation de travail, 1963, d'importants développements se sont produits
dans la législation et la pratique de nombreux Etats Membres relatives aux
questions visées par ladite recommandation ;

Considérant que ces développements rendent opportune l'adoption de nou-
velles normes internationales sur ce sujet, eu égard en particulier aux graves
problèmes rencontrés dans ce domaine à la suite des difficultés économi-
ques et des changements technologiques survenus ces dernières années dans
de nombreux pays ;

Après avoir décidé d'adopter diverses propositions relatives à la cessation de la
relation de travail à l'initiative de l'employeur, question qui constitue le
cinquième point à l'ordre du jour de la session ;

Après avoir décidé que ces propositions prendraient la forme d'une convention
internationale,

adopte, ce jour de juin mil neuf cent quatre-vingt-deux, la convention
ci-après, qui sera dénommée Convention sur le licenciement, 1982 :

PARTIE I. MÉTHODES D'APPLICATION, CHAMP D'APPLICATION ET DÉFINITIONS

Article 1

Pour autant que l'application de la présente convention n'est pas assurée par
voie de conventions collectives, de sentences arbitrales ou de décisions judiciaires,

or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.

2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:

- (a) workers engaged under a contract of employment for a specified period of time or a specified task;
- (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
- (c) workers engaged on a casual basis for a short period.

3. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements, which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise.

5. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 3 and 4 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms "termination" and "termination of employment" mean termination of employment at the initiative of the employer.

ou de toute autre manière conforme à la pratique nationale, elle devra l'être par voie de législation nationale.

Article 2

1. La présente convention s'applique à toutes les branches d'activité économique et à tous les travailleurs salariés.

2. Un Membre pourra exclure du champ d'application de l'ensemble ou de certaines des dispositions de la présente convention les catégories suivantes de travailleurs salariés :

- a) les travailleurs engagés aux termes d'un contrat de travail portant sur une période déterminée ou une tâche déterminée ;
- b) les travailleurs effectuant une période d'essai ou n'ayant pas la période d'ancienneté requise, à condition que la durée de celles-ci soit fixée d'avance et qu'elle soit raisonnable ;
- c) les travailleurs engagés à titre occasionnel pour une courte période.

3. Pour autant qu'il est nécessaire, des mesures pourront être prises par l'autorité compétente ou par l'organisme approprié dans un pays, après consultation des organisations d'employeurs et de travailleurs intéressées, là où il en existe, afin d'exclure de l'application de la présente convention ou de certaines de ses dispositions certaines catégories de travailleurs salariés dont les conditions d'emploi sont soumises à un régime spécial qui, dans son ensemble, leur assure une protection au moins équivalente à celle offerte par la convention.

4. Pour autant qu'il est nécessaire, des mesures pourront être prises par l'autorité compétente ou par l'organisme approprié dans un pays, après consultation des organisations d'employeurs et de travailleurs intéressées, là où il en existe, afin d'exclure de l'application de la présente convention ou de certaines de ses dispositions d'autres catégories limitées de travailleurs salariés au sujet desquelles se posent des problèmes particuliers revêtant une certaine importance.

5. Tout Membre qui ratifie la présente convention devra, dans le premier rapport sur l'application de la convention qu'il sera tenu de présenter en vertu de l'article 22 de la Constitution de l'Organisation internationale du Travail, indiquer, avec motifs à l'appui, les catégories qui pourront avoir été l'objet d'une exclusion en application des paragraphes 3 et 4 ci-dessus, et il devra exposer dans des rapports ultérieurs l'état de sa législation et de sa pratique à leur égard en précisant dans quelle mesure il a été donné effet ou il est proposé de donner effet à la convention en ce qui les concerne.

Article 3

Aux fins de la présente convention, le terme « licenciement » signifie la cessation de la relation de travail à l'initiative de l'employeur.

PART II. STANDARDS OF GENERAL APPLICATION**DIVISION A. JUSTIFICATION FOR TERMINATION***Article 4*

The employment of a worker shall 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.

Article 5

The following, inter alia, shall 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 proceedings against an employer involving alleged violation of laws or regulations;
- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (e) absence from work during maternity leave.

DIVISION B. PROCEDURE PRIOR TO OR AT THE TIME OF TERMINATION*Article 6*

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is given an opportunity to defend himself against the allegations made.

Article 7

1. A worker who has been notified of termination of employment or whose employment has been terminated shall be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination.

2. The provision of paragraph 1 of this Article need not be applied in the case of collective termination for the reasons referred to in Articles 13 and 14 of this Convention, if the procedure provided for therein is followed.

PARTIE II. NORMES D'APPLICATION GÉNÉRALE

SECTION A. JUSTIFICATION DU LICENCIEMENT

Article 4

Un travailleur ne devra pas être licencié sans qu'il existe un motif valable de licenciement lié à l'aptitude ou à la conduite du travailleur ou fondé sur les nécessités du fonctionnement de l'entreprise, de l'établissement ou du service.

Article 5

Ne constituent pas des motifs valables de licenciement, notamment :

- a) l'affiliation syndicale ou la participation à des activités syndicales en dehors des heures de travail ou, avec le consentement de l'employeur, durant les heures de travail ;
- b) le fait de solliciter, d'exercer ou d'avoir exercé un mandat de représentation des travailleurs ;
- c) le fait d'avoir de bonne foi déposé une plainte ou participé à des procédures engagées contre un employeur en raison de violations alléguées de la législation ;
- d) la race, la couleur, le sexe, l'état matrimonial, les responsabilités familiales, la grossesse, la religion, l'opinion publique, l'ascendance nationale ou l'origine sociale ;
- e) l'absence du travail pendant le congé de maternité.

SECTION B. PROCÉDURE À SUIVRE AVANT LE LICENCIEMENT OU AU MOMENT DE CELUI-CI

Article 6

Un travailleur ne devra pas être licencié pour des motifs liés à sa conduite ou à son travail avant qu'il n'ait eu la possibilité de se défendre contre les allégations formulées.

Article 7

1. Un travailleur auquel son licenciement a été notifié ou qui a été licencié aura le droit de se faire délivrer, à sa demande, par l'employeur une déclaration écrite du motif ou des motifs du licenciement.

2. La disposition de l'alinéa précédent pourra ne pas être appliquée en cas de licenciement collectif pour les motifs mentionnés aux articles 13 et 14 ci-après si les procédures prévues dans ces articles sont suivies.

DIVISION C. PROCEDURE OF APPEAL AGAINST TERMINATION

Article 8

1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.

3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

Article 9

1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

2. The burden of proving the existence of a valid reason for the termination shall rest on the employer.

3. 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 Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.

Article 10

If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

DIVISION D. PERIOD OF NOTICE

Article 11

1. A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of

SECTION C. PROCÉDURE DE RECOURS CONTRE LE LICENCIEMENT

Article 8

1. Un travailleur qui estime avoir fait l'objet d'une mesure de licenciement injustifiée aura le droit de recourir contre cette mesure devant un organisme impartial tel qu'un tribunal, un tribunal du travail, une commission d'arbitrage ou un arbitre.

2. Dans les cas où le licenciement aura été autorisé par une autorité compétente, l'application du paragraphe 1 ci-dessus pourra être adaptée en conséquence conformément à la législation et à la pratique nationales.

3. Un travailleur pourra être considéré comme ayant renoncé à exercer son droit de recourir contre le licenciement s'il ne l'a pas fait dans un délai raisonnable.

Article 9

1. Les organismes mentionnés à l'article 8 ci-dessus devront être habilités à examiner les motifs invoqués pour justifier le licenciement ainsi que les autres circonstances du cas et à décider si le licenciement était justifié.

2. La charge de prouver l'existence d'un motif valable de licenciement devra incomber à l'employeur.

3. En cas de licenciement motivé par les nécessités du fonctionnement de l'entreprise, de l'établissement ou du service, les organismes mentionnés à l'article 8 ci-dessus devront être habilités à déterminer si le licenciement est intervenu véritablement pour ces motifs, étant entendu que l'étendue de leurs pouvoirs éventuels pour décider si ces motifs sont suffisants pour justifier ce licenciement sera définie par les méthodes d'application mentionnées à l'article 1 ci-dessus.

Article 10

Si les organismes mentionnés à l'article 8 ci-dessus arrivent à la conclusion que le licenciement est injustifié, et si, compte tenu de la législation et de la pratique nationales, ils n'ont pas le pouvoir ou n'estiment pas possible dans les circonstances d'annuler le licenciement et/ou d'ordonner ou de proposer la réintégration du travailleur, ils devront être habilités à ordonner le versement d'une indemnité adéquate ou toute autre forme de réparation considérée comme appropriée.

SECTION D. PRÉAVIS

Article 11

1. Un travailleur qui va faire l'objet d'une mesure de licenciement aura droit à un préavis d'une durée raisonnable ou à une indemnité en tenant lieu, à moins qu'il

serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

2. During the period of notice the worker shall, for the purpose of seeking other employment, be entitled to a reasonable amount of time off without loss of pay, taken at times that are convenient to both parties.

DIVISION E. SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

Article 12

1. A worker whose employment has been terminated shall be entitled to—

- (a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by 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 allowance and benefits.

2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).

3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

PART III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATION OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

DIVISION A. CONSULTATION OF WORKERS' REPRESENTATIVES

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall consult the workers' representatives concerned as early as possible on all appropriate questions, including measures to be taken to avert or minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

ne se soit rendu coupable d'une faute grave, c'est-à-dire une faute de nature telle que l'on ne peut raisonnablement exiger de l'employeur qu'il continue à occuper ce travailleur pendant la période du préavis.

2. Pendant le préavis, le travailleur aura droit à des périodes de temps libre d'une durée raisonnable sans perte de salaire et qui seront prises à des moments convenant aux deux parties, afin qu'il puisse chercher un autre emploi.

SECTION E. INDEMNITÉ DE DÉPART ET AUTRES FORMES
DE PROTECTION DU REVENU

Article 12

1. Un travailleur licencié aura droit :

- a) soit à une indemnité de départ ou à d'autres prestations similaires dont le montant sera fonction entre autres de l'ancienneté et du niveau de salaire et qui seront versées directement par l'employeur ou par un fonds constitué par des cotisations des employeurs ;
- b) soit à des prestations d'assurance-chômage ou d'assistance aux chômeurs ou à d'autres prestations de sécurité sociale, telles que les prestations de vieillesse ou d'invalidité, aux conditions normales ouvrant droit à de telles prestations ;
- c) soit à une combinaison de ces indemnités et prestations.

2. Lorsqu'un travailleur ne remplit pas les conditions requises pour bénéficier de prestations d'assurance-chômage ou d'assistance aux chômeurs, au titre d'un régime de portée générale, il ne pourra prétendre aux indemnités ou prestations visées à l'alinéa a) du paragraphe 1 ci-dessus du seul fait qu'il ne reçoit pas de prestations de chômage au titre de l'alinéa b) dudit paragraphe.

3. En cas de licenciement pour faute grave, la déchéance du droit aux indemnités ou prestations mentionnées à l'alinéa a) du paragraphe 1 du présent article pourra être prévue par les méthodes d'application mentionnées à l'article 1 ci-dessus.

PARTIE III. DISPOSITIONS COMPLÉMENTAIRES
CONCERNANT LE LICENCIEMENT POUR DES MOTIFS ÉCONOMIQUES,
TECHNOLOGIQUES, STRUCTURELS OU SIMILAIRES

SECTION A. CONSULTATION DES REPRÉSENTANTS DES TRAVAILLEURS

Article 13

1. L'employeur qui envisage des licenciements pour des motifs de nature économique, technologique, structurelle ou similaire devra consulter les représentants des travailleurs intéressés aussi longtemps à l'avance que possible sur toutes les questions pertinentes, y compris les mesures à prendre pour prévenir ou limiter les licenciements et les mesures visant à atténuer les effets défavorables de tout licenciement pour les travailleurs intéressés, notamment les possibilités de reclassement dans un autre emploi.

2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention 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.

3. The employer shall notify the workers' representatives concerned with a view to the consultations referred to in paragraph 1 of this Article sufficiently before carrying out the terminations to allow effective consultations to take place.

4. To enable the workers' representatives concerned to participate effectively in the consultations referred to in paragraph 1, the employer shall supply them in good time with all relevant information, including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

5. For the purposes of this Article the term "the workers' representatives concerned" means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

DIVISION B. NOTIFICATION TO THE COMPETENT AUTHORITY

Article 14

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify the competent 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 likely to be affected and the period over which the terminations are intended to be carried out.

2. 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.

3. Where appropriate, the competent authority shall assist the parties in seeking solutions to the problems raised by the terminations contemplated.

4. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

DIVISION C. MITIGATING THE EFFECTS OF TERMINATION

Article 15

In the event of terminations of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in

2. L'application du paragraphe 1 ci-dessus pourra être limitée, par les méthodes d'application mentionnées à l'article 1 ci-dessus, aux cas où le nombre des travailleurs dont le licenciement est envisagé atteint au moins un nombre déterminé ou un pourcentage déterminé du personnel.

3. En vue des consultations visées au paragraphe 1 ci-dessus, l'employeur devra prévenir les représentants des travailleurs intéressés suffisamment tôt avant de procéder aux licenciements pour que lesdites consultations puissent avoir lieu de manière efficace.

4. Afin de permettre aux représentants des travailleurs intéressés de participer efficacement aux consultations mentionnées au paragraphe 1 ci-dessus, l'employeur devra leur fournir en temps utile toutes les informations pertinentes relatives aux licenciements envisagés, y compris leurs motifs, le nombre et les catégories de travailleurs qu'ils sont susceptibles d'affecter et la période au cours de laquelle il est prévu d'y procéder.

5. Aux fins du présent article, l'expression «représentants des travailleurs intéressés» signifie les représentants des travailleurs reconnus comme tels par la législation ou la pratique nationales, conformément à la convention concernant les représentants des travailleurs, 1971.

SECTION B. NOTIFICATION À L'AUTORITÉ COMPÉTENTE

Article 14

1. Lorsque l'employeur envisage des licenciements pour des motifs de nature économique, technologique, structurelle ou similaire, il devra les notifier à l'autorité compétente aussi longtemps à l'avance que possible, en lui donnant toutes les informations pertinentes relatives à ces licenciements, y compris un exposé écrit de leurs motifs, du nombre et des catégories de travailleurs qu'ils sont susceptibles d'affecter et de la période au cours de laquelle il est prévu d'y procéder.

2. La législation nationale pourra limiter l'application du paragraphe 1 ci-dessus aux cas où le nombre des travailleurs dont le licenciement est envisagé atteint au moins un nombre déterminé ou un pourcentage déterminé du personnel.

3. Lorsqu'il y a lieu, l'autorité compétente devra aider les parties à chercher des solutions aux problèmes que posent les licenciements envisagés.

4. L'employeur devra informer l'autorité compétente des licenciements mentionnés au paragraphe 1 ci-dessus dans un délai minimal, à déterminer par la législation nationale, avant de procéder à ces licenciements.

SECTION C. ATTÉNUATION DES EFFETS DES LICENCIEMENTS

Article 15

En cas de licenciements pour des motifs de nature économique, technologique, structurelle ou similaire, le placement des travailleurs touchés dans d'autres

B. Proposed Recommendation concerning Termination of Employment at the Initiative of the Employer

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-eighth Session on 2 June 1982, and

Having decided upon the adoption of certain proposals with regard to termination of employment at the initiative of the employer, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation supplementing the Termination of Employment Convention, 1982,

adopts this day of June of the year one thousand nine hundred and eighty-two the following Recommendation, which may be cited as the Termination of Employment Recommendation, 1982:

1. The provisions of this Recommendation may be applied by 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.

2. (1) This Recommendation applies to all branches of economic activity and to all employed persons.

(2) A Member may exclude the following categories of employed persons from all or some of the provisions of this Recommendation:

- (a) workers engaged under a contract of employment for a specified period of time or a specified task;**
- (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;**
- (c) workers engaged on a casual basis for a short period.**

3. (1) There should be adequate safeguards against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.

(2) To this end, for example, provision may be made for one or more of the following :

B. Projet de recommandation concernant la cessation de la relation de travail à l'initiative de l'employeur

adopte, ce jour de juin mil neuf cent quatre-vingt-deux, la recommandation ci-après, qui sera dénommée Recommandation sur le licenciement, 1982 :

(2) A cette fin, l'une ou plusieurs des mesures suivantes pourraient, par exemple, être prévues :

- (a) limiting recourse to contracts for a specified period of time to cases in which, owing to the nature of the work to be effected or to the circumstances under which it is to be effected, the employment relationship cannot be of an indeterminate duration;
- (b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration;
- (c) deeming contracts for a specified period of time, when renewed on one or more occasions, to be contracts of employment of indeterminate duration.

4. For the purpose of this Recommendation the terms “termination” and “termination of employment” mean termination of employment at the initiative of the employer.

II. STANDARDS OF GENERAL APPLICATION

Justification for Termination

5. In addition to the grounds referred to in Article 5 of the Termination of Employment Convention, 1982, the following should not constitute valid reasons for termination:

- (a) age, subject to national law and practice regarding retirement at or after the age normally qualifying for an old-age benefit;
- (b) absence from work due to compulsory military service or other civic obligations.

6. (1) Temporary absence from work because of illness or injury should not constitute a valid reason for termination.

(2) A medical certificate may be required for a worker to be entitled to the protection afforded by subparagraph (1) where the absence or absences exceed a specified number of days.

(3) Termination of employment during a temporary absence from work may be authorised by the methods of implementation referred to in Paragraph 1 of this Recommendation where the absence or absences exceed a specified maximum period or where the operational requirements of the undertaking, establishment or service make it necessary to replace the worker concerned on a permanent basis.

Procedure Prior to or at the Time of Termination

7. The employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning.

8. The employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions

- a) restreindre l'utilisation de contrats de durée déterminée aux cas où, en raison de la nature du travail à effectuer ou à cause des conditions dans lesquelles ce travail doit être accompli, la relation de travail ne pourrait avoir une durée indéterminée ;
 - b) assimiler les contrats de durée déterminée, sauf dans les cas mentionnés à l'alinéa précédent, à des contrats de travail de durée indéterminée ;
 - c) assimiler les contrats de durée déterminée, lorsqu'ils ont fait l'objet d'un ou de plusieurs renouvellements, à des conditions de travail de durée indéterminée.
4. Aux fins de la présente recommandation, le terme « licenciement » signifie la cessation de la relation de travail à l'initiative de l'employeur.

II. NORMES D'APPLICATION GÉNÉRALE

Justification du licenciement

5. Outre les cas prévus à l'article 5 de la convention sur le licenciement, 1982, ne devraient pas constituer des motifs valables de licenciement :

- a) l'âge, sous réserve de la législation et de la pratique nationales en ce qui concerne la retraite à l'âge qui normalement ouvre droit à une prestation de vieillesse, ou après cet âge ;
- b) l'absence du travail due au service militaire obligatoire ou à d'autres obligations civiques.

6. (1) L'absence temporaire du travail en raison d'une maladie ou d'un accident ne devrait pas constituer un motif valable de licenciement.

(2) Un certificat médical pourrait être requis pour qu'un travailleur ait droit à la protection prévue par le sous-paragraphe (1) ci-dessus lorsque l'absence ou les absences excèdent un nombre de jours déterminé.

(3) Le licenciement au cours d'une absence temporaire du travail pourrait être autorisé par les méthodes d'application mentionnées au paragraphe 1 de la présente recommandation lorsque l'absence ou les absences excèdent une période maximum déterminée ou lorsque les nécessités du fonctionnement de l'entreprise, de l'établissement ou du service rendent nécessaire le remplacement du travailleur intéressé sur une base permanente.

Procédure à suivre avant le licenciement ou au moment de celui-ci

7. Un travailleur ne devrait pas être licencié pour une faute qui, aux termes de la législation ou de la pratique nationales, ne justifierait le licenciement que si elle était répétée à une ou à plusieurs reprises, à moins que l'employeur ne lui ait donné, par écrit, un avertissement approprié.

8. Un travailleur ne devrait pas être licencié pour insuffisance professionnelle, à moins que l'employeur ne lui ait donné les instructions appropriées et ne l'ait

and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.

9. A worker should be entitled to be assisted by another person when defending himself, in accordance with Article 6 of the Termination of Employment Convention, 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment; this right may be limited, by the methods of implementation referred to in Paragraph 1 of this Recommendation, to assistance by another worker in the undertaking or a trade union representative.

10. 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.

11. The employer should consult workers' representatives before a final decision is taken on individual cases of termination of employment.

12. The employer should notify a worker in writing of a decision to terminate his employment.

Procedure of Appeal against Termination

13. Provision may be made for recourse to a procedure of conciliation before or during appeal proceedings against unjustified termination of employment.

14. Efforts should be made by public authorities, workers' representatives and organisations of workers and employers to ensure that workers are fully informed of the possibilities of appeal at their disposal.

15. (1) National laws or regulations may provide that, in the event of appeal by a worker against the termination of his employment pursuant to Article 8 of the Termination of Employment Convention, 1982, the competent body may, on request, suspend the effects of termination, pending a decision on the appeal.

(2) The power of the competent body to suspend the effects of termination pursuant to subparagraph (1) of this Paragraph may be limited to cases or circumstances specified by national laws or regulations.

Certificate of Employment

16. A worker whose employment has been terminated should be entitled to receive, on request, 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; on request, the worker may also be given another certificate providing an evaluation of his conduct or performance.

Severance Allowance

17. (1) Irrespective of the availability of social security benefits, a worker whose employment has been terminated should be entitled where appropriate to a

dûment averti par écrit et que le travailleur continue à ne pas s'acquitter de son travail de manière satisfaisante après l'expiration d'un délai raisonnable qui devrait lui permettre d'y parvenir.

9. Un travailleur devrait avoir le droit d'être assisté par une autre personne lorsqu'il se défend, comme le prévoit l'article 6 de la convention sur le licenciement, 1982, contre des allégations relatives à sa conduite ou à son travail qui sont susceptibles d'entraîner son licenciement ; ce droit pourrait être limité par les méthodes d'application mentionnées au paragraphe 1 ci-dessus au droit d'être assisté par un autre travailleur de l'entreprise ou par un représentant syndical.

10. L'employeur devrait être censé avoir renoncé à son droit de licencier un travailleur pour faute s'il ne l'a pas fait dans un délai raisonnable après avoir eu connaissance de la faute en question.

11. L'employeur devrait consulter les représentants des travailleurs avant de prendre une décision définitive sur les cas individuels de licenciement.

12. L'employeur devrait notifier par écrit au travailleur sa décision de le licencier.

Procédure de recours contre le licenciement

13. Le recours à une procédure de conciliation avant ou pendant une procédure de recours contre un licenciement injustifié pourrait être prévu.

14. Des efforts devraient être entrepris par les pouvoirs publics, par les représentants des travailleurs et par les organisations de travailleurs et d'employeurs pour faire en sorte que les travailleurs soient pleinement informés des possibilités de recours dont ils disposent.

15 (1) La législation nationale pourrait prévoir que, lorsqu'un travailleur recourt contre son licenciement conformément aux dispositions de l'article 8 de la convention sur le licenciement, 1982, l'organisme compétent peut, sur demande, suspendre les effets du licenciement jusqu'à ce qu'une décision ait été rendue sur ce recours.

(2) Le pouvoir de l'organisme compétent de suspendre les effets du licenciement en vertu du sous-paragraphe (1) ci-dessus pourrait être limité aux cas ou aux circonstances prévus par la législation nationale.

Certificat de travail

16. Un travailleur licencié devrait avoir le droit de se faire délivrer, à sa demande, par l'employeur, un certificat indiquant les dates de son entrée en service et de son départ ainsi que la nature du travail ou des travaux dont il était chargé, mais ne contenant aucune mention défavorable pour lui ; il pourra en outre être accordé au travailleur, sur sa demande, un autre certificat donnant une évaluation de sa conduite ou de son travail.

Indemnité de départ

17. (1) Indépendamment de prestations éventuelles de sécurité sociale, un travailleur licencié devrait avoir droit, si cela est approprié, à une indemnité de

severance allowance or other separation benefits, the amount of which should be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions.

(2) Provision may be made by the methods of implementation referred to in Paragraph 1 of this Recommendation for loss of entitlement to the allowance or benefits referred to in subparagraph (1) of this Paragraph in the event of termination for serious misconduct.

(3) Entitlement to severance allowance or other separation benefits may be limited to workers whose employment is terminated for economic, technological, structural or similar reasons.

III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATION OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

18. All parties concerned should seek, with the assistance of the competent 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.

Consultations on Major Changes in the Undertaking

19. (1) When the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail terminations, the employer should consult the workers' representatives concerned as early as possible on, inter alia, the introduction of such changes, the effects they are likely to have and the measures for averting or mitigating the adverse effects of such changes.

(2) To enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have.

(3) For the purposes of this Paragraph the term "the workers' representatives concerned" means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

Measures to Avert or Minimise Terminations

20. The measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological,

départ ou à d'autres prestations similaires dont le montant serait fonction, entre autres, de son ancienneté et de son niveau de salaire et qui seraient versées directement par l'employeur ou par un fonds constitué par des cotisations des employeurs.

(2) En cas de licenciement pour faute grave, la déchéance du droit aux indemnités ou prestations mentionnées au sous-paragraphe (1) ci-dessus pourrait être prévue par les méthodes d'application mentionnées au paragraphe 1 de la présente recommandation.

(3) Le droit à une indemnité de départ ou à d'autres prestations similaires pourrait être limité aux travailleurs licenciés pour des motifs économiques, technologiques, structurels ou similaires.

III. DISPOSITIONS COMPLÉMENTAIRES

CONCERNANT LE LICENCIEMENT POUR DES MOTIFS ÉCONOMIQUES, TECHNOLOGIQUES, STRUCTURELS OU SIMILAIRES

18. Toutes les parties intéressées devraient chercher avec l'assistance des autorités compétentes, s'il y a lieu, à prévenir ou à limiter, dans toute la mesure possible, les licenciements pour des motifs de nature économique, technologique, structurelle ou similaire, sans porter préjudice au fonctionnement efficace de l'entreprise, de l'établissement ou du service, et à atténuer les effets défavorables de tout licenciement ainsi motivé pour le travailleur ou les travailleurs intéressés.

Consultations sur les changements importants affectant l'entreprise

19. (1) L'employeur qui envisage d'introduire, dans la production, le programme, l'organisation, la structure ou les techniques, des changements importants, de nature à entraîner des licenciements devrait consulter les représentants des travailleurs intéressés aussi longtemps à l'avance que possible, notamment sur l'introduction de ces changements, les effets qu'ils sont susceptibles d'avoir et les mesures permettant de prévenir ou de limiter les effets défavorables de ces changements.

(2) Afin de permettre aux représentants des travailleurs intéressés de participer efficacement aux consultations mentionnées au sous-paragraphe (1), l'employeur devrait leur fournir en temps utile toutes les informations pertinentes sur les changements importants envisagés et sur les effets que ces changements sont susceptibles d'avoir.

(3) Aux fins du présent paragraphe, l'expression « représentants des travailleurs intéressés » signifie les représentants des travailleurs reconnus comme tels par la législation ou la pratique nationales conformément à la convention concernant les représentants des travailleurs, 1971.

Mesures permettant de prévenir ou de limiter les licenciements

20. Les mesures qui devraient être prises en considération afin de prévenir ou de limiter les licenciements pour des motifs de nature économique, technologique,

structural or similar nature might include, inter alia, 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, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

21. Where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for the normal hours not worked, by the employer or from public funds such as unemployment insurance funds.

Criteria for Selection for Termination

22. (1) 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 interests of the undertaking, establishment or service and to the interests of the workers.

(2) These criteria, their order of priority and their relative weight, should be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.

Priority of Rehiring

23. (1) Workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired.

(2) Such priority of rehiring may be limited to a specified period of time.

(3) The criteria for the priority of rehiring, the question of retention of rights—particularly seniority rights—in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation.

Mitigating the Effects of Termination

24. (1) With a view to promoting, pursuant to Article 15 of the Termination of Employment Convention, 1982, the placement in alternative employment of workers affected by termination of employment for reasons of an economic, technological, structural or similar nature the competent authority, where possible with the collaboration of the employer and the workers' representatives concerned, should assist the workers affected, as early as possible after being notified of these terminations or being requested to do so, in the search for suitable alternative employment and where appropriate in obtaining training or retraining to this end.

structurelle ou similaire pourraient comprendre notamment les restrictions de l'embauche, l'échelonnement de la réduction du personnel sur une certaine période afin de faire jouer la diminution naturelle des effectifs, les mutations internes, la formation et le recyclage, la retraite anticipée facultative avec une protection appropriée du revenu, la diminution des heures supplémentaires et la réduction de la durée normale du travail.

21. Lorsqu'il apparaît qu'une réduction temporaire de la durée normale du travail serait susceptible de prévenir ou de limiter les licenciements dus à des difficultés économiques temporaires, il conviendrait d'examiner la possibilité d'accorder, pour les heures normales non effectuées, une compensation partielle des pertes de salaire, versée par l'employeur ou par des fonds publics tels que les fonds d'assurance-chômage.

Critères de désignation pour les licenciements

22. (1) La désignation des travailleurs qui doivent être licenciés pour des motifs de nature économique, technologique, structurelle ou similaire devrait s'opérer selon des critères précis, qui devraient être établis autant que possible d'avance et qui tiendraient dûment compte aussi bien des intérêts de l'entreprise, de l'établissement ou du service que de ceux des travailleurs.

(2) Ces critères, leur ordre de priorité et leur importance relative devraient être déterminés par les méthodes d'application mentionnées au paragraphe 1 ci-dessus.

Priorité de réembauchage

23. (1) Les travailleurs qui ont été licenciés pour des motifs de nature économique, technologique, structurelle ou similaire devraient bénéficier d'une priorité de réembauchage si l'employeur embauche de nouveau des travailleurs ayant des qualifications comparables, à condition d'en avoir manifesté le désir dans un certain délai à compter de leur départ.

(2) Cette priorité de réembauchage pourrait être limitée à une période déterminée.

(3) Les critères de priorité du réembauchage, la question du maintien des droits, notamment d'ancienneté, en cas de réembauchage ainsi que les dispositions relatives au salaire des travailleurs réembauchés devraient être déterminés conformément aux méthodes d'application mentionnées au paragraphe 1 ci-dessus.

Atténuation des effets des licenciements

24. (1) En vue de faciliter, conformément à l'article 15 de la convention sur le licenciement, 1982, le placement dans d'autres emplois des travailleurs touchés par des licenciements pour motifs économiques, technologiques, structurels ou similaires, l'autorité compétente, avec la collaboration de l'employeur et des représentants des travailleurs intéressés lorsque cela est possible, devrait aider lesdits travailleurs dès que possible après avoir été informée des licenciements ou, dès qu'on lui demande de le faire, à rechercher un autre emploi convenable et, le cas échéant, à obtenir une formation ou un recyclage à cette fin.

(2) Where possible, the employer should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers.

(3) In assisting the workers affected in obtaining suitable alternative employment or training or retraining, regard may be had to the Human Resources Development Convention and Recommendation, 1975.

25. (1) With a view to mitigating the adverse effects of termination of employment for reasons of an economic, technological, structural or similar nature, consideration should be given to providing income protection in addition to that provided for in Article 12 of the Termination of Employment Convention, 1982, 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) The competent authority should consider providing financial resources to support in full or in part the measures referred to in subparagraph (1) of this Paragraph.

IV. EFFECT ON EARLIER RECOMMENDATION

26. This Recommendation and the Termination of Employment Convention, 1982, supersede the Termination of Employment Recommendation, 1963.

(2) Dans la mesure du possible, l'employeur devrait aider les travailleurs touchés par ces licenciements dans la recherche d'un autre emploi convenable, par exemple grâce à des contacts directs avec d'autres employeurs.

(3) En décidant de l'aide à fournir au travailleurs touchés afin qu'ils obtiennent un autre emploi convenable ou bénéficient d'une formation ou d'un cours de recyclage, on pourrait tenir compte de la convention et de la recommandation sur la mise en valeur des ressources humaines, 1975.

25. (1) Afin d'atténuer les effets défavorables des licenciements pour des motifs de nature économique, technologique, structurelle ou similaire, on devrait examiner la possibilité de fournir une protection du revenu complémentaire à celle qui est prévue à l'article 12 de la convention sur le licenciement, 1982, une protection du revenu pendant toute période de formation ou de recyclage et un remboursement partiel ou total des dépenses exposées pour la formation ou le recyclage et pour la recherche et la prise d'un emploi exigeant un changement de résidence.

(2) L'autorité compétente devrait prendre en considération la possibilité d'assurer des ressources financières permettant de supporter entièrement ou en partie les mesures mentionnées au sous-paragraphe (1).

IV. EFFET SUR LA RECOMMANDATION ANTÉRIEURE

26. La présente recommandation et la convention sur le licenciement, 1982, remplacent la recommandation sur la cessation de la relation de travail, 1963.