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National reports

Australia

I. EMPLOYMENT PROTECTION LEGISLATION (EPL)

Source and scope of regulation

1. **Source of regulation** – What is the main law (title and date of adoption) regulating employment contracts and dismissals (Please provide a Web-link, Word/PDF version, its translation in English or French).

Fair Work Act 2009

http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/

2. **Scope of legislation** – What categories of workers are excluded from the regulation? (e.g. public servants, domestic workers, police, judiciary etc).

The legislation covers all employees employed by a 'national system employer', which is defined as:

“(1) A **national system employer** is:

- (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
- (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
- (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
- (d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
 - (i) a flight crew officer; or
 - (ii) a maritime employee; or
 - (iii) a waterside worker; or
- (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
- (f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Note 1: In this context, **Australia** includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see paragraph 17(a) of the *Acts Interpretation Act 1901*).

Note 2: Sections 30D and 30N extend the meaning of **national system employer** in relation to a referring State.

Employees of any employer outside of the scope will be excluded from the legislation. See the link below for further information:

http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/s14.html

However, the Australian States, with the exception of Western Australia, have referred their industrial relations powers to the Commonwealth, resulting in most employees across Australia being covered by the new federal legislation. A useful guide to this process can be found here:

[http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Industrialrelationsupdate:ThereferralofpowersandtheFairWorkAct2009/\\$File/industrial+relations+update.E-brief.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Industrialrelationsupdate:ThereferralofpowersandtheFairWorkAct2009/$File/industrial+relations+update.E-brief.pdf)

3. **Size of enterprise excluded** – Are any enterprise of a certain size (e.g. employing less than 20 workers) excluded from the scope of application of the law?

No - with the exception of ‘small business employers’ which are defined as:

“FAIR WORK ACT 2009 - SECT 23

Meaning of small business employer

(1) A national system employer is a *small business employer* at a particular time if the employer employs fewer than 15 employees at that time.

(2) For the purpose of calculating the number of employees employed by the employer at a particular time:

(a) subject to paragraph (b), all employees employed by the employer at that time are to be counted; and

(b) a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis.

(3) For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.”

The result of this definition is that a small business employer will exempt from unfair dismissal claims if it can demonstrate compliance with the Small Business Fair Dismissal Code: <http://www.fwa.gov.au/index.cfm?pagename=legislationfwdissmissalcode>

4. **Collective agreements** – Are there any important collective agreements of general application at the national and/or branch level?

Under the current legislation Collective agreements are the preferred document to formalise the employment relationship between employer and employee. The agreements generally cover single enterprise operations, but can include multi-enterprise and greenfields operations. Accordingly, they do not apply at a national or branch level. However, in some

industries, such as the automotive industry and the building & construction industry, many agreements have similar terms, despite “pattern bargaining” being prohibited under the legislation. See ss.412 and 422 of the Fair Work Act 2009.

Types of employment contracts

5. Probationary period - What is its maximum duration?

“FAIR WORK ACT 2009 - SECT 383

Meaning of minimum employment period

The *minimum employment period* is:

(a) if the employer is not a small business employer--6 months ending at the earlier of the following times:

- (i) the time when the person is given notice of the dismissal;
- (ii) immediately before the dismissal; or

(b) if the employer is a small business employer--one year ending at that time.”

6. Fixed-term contracts (FTC) – May FTC be concluded only for objective and material reasons (e.g. nature of work) or without any limitation?^

Under Australian common law it is open to the parties to a contract of employment to agree expressly that the contract will continue for a specified period and no longer,¹ or to agree that the contract will continue initially for a specified period and, if not then terminated, thereafter indefinitely.² It is a question of fact in each case whether an employee has, or has not, entered into a fixed term contract.³ A variation of a fixed term contract is a contingent contract where the contract is to last for an uncertain period of time, usually to complete a particular project or while funding is available.⁴

Notes

¹ See, for example, *Beal v Hall* (1870) 9 SCR (NSW) L 285 (one year); *Bullock v Wimmera Fellmongery and Woolscouring Co Ltd* (1879) 5 VLR (L) 362; 1 ALT 59 (one year); *Mackie v Wienholt* (1880) 5 QSCR 211 (three years); *Cook v Sydney and County Bank* (1882) 3 LR (NSW) L 273 (one year); *Healy v Law Book Co of Australasia Pty Ltd* (1942) 66 CLR 252; [1942] ALR 310 (two years at a different fixed rate for each year); *Coleman v Mirror Newspapers Ltd* (1967) 10 FLR 426 (three years); *Martin v Tasmania Development and Resources* (1999) 163 ALR 79; 89 IR 98; [1999] FCA 593; BC9902224 (three year contract). See also *Yetton v Eastwoods Froy Ltd* [1966] 3 All ER 353; [1967] 1 WLR 104, QB (five years). The date on which the contract is to end must be precisely stated: *Primus v State Rail (Passenger Fleet Maintenance)* (1999) 90 IR 26; (1999) 46 AILR ¶140-112. If the employment continues on after the expiry of the fixed term, a court is likely to infer that the parties have entered into a new contract and the employer could then lose the right to rely on the expiration of the fixed term contract to justify termination: see, for example, *D’Arcy v SE Dickens Pty Ltd* (1992) 5 VIR 85; (1992) AILR ¶1279. If the contract is to be a lengthy one, the parties should include a term that the contract can be concluded prior to the expiry date by one party giving the other an agreed period of notice, as any attempt to terminate early will amount to a breach of contract unless grounds for summary dismissal can be established: *Walker v Zurich Australian Insurance Ltd* (2001) 50 AILR ¶19-195; [2001] QCA 296; BC200104291. Compare *Cooper v Darwin Rugby League Inc*; *Andersen v Umbakumba Community Council* (1995) AILR ¶13-027.

² See, for example, *WH Milsted & Son Ltd v Hamp & Ross & Glendinning Ltd* (1927) 71 Sol Jo 845; [1927] WN 233 (three years and then terminable on three months’ notice); *Salt v Power Plant Co Ltd* [1936] 3 All ER 322, CA (three years and then terminable on six months’ notice to expire within the next year, thereafter permanent); *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278; [1966] 3 All ER 683 (five years and then terminable on six months’ notice). As to termination of a contract before the expiry of a fixed term see [165-755].

³ Where short-term fixed contracts were considered to have been on-going relationships see *D’Lima v Board of Management, Princess Margaret Hospital for Children* (1995) 64 IR 19; *Minister for Health v Ferry* (1996) 65 IR 374. The date on which the contract is to end must also be precisely stated: *Primus v State Rail (Passenger Fleet Maintenance)* (1999) 90 IR 26; (1999) 46 AILR ¶14-112.

[4 Bunge \(Aust\) Pty Ltd v Mallard \(1982\) 41 ALR 223; BC8200077](#); [Bryant v Defence Housing Authority \[2002\] ACTSC 43; BC200202741 at \[32\]-\[34\]](#)

A fixed-term contract usually does not need an objective and material reason for its termination. However, provided the qualifying period has been served, an unfair termination proceeding may be commenced if an employee is dismissed prior to the expiration of the contract.

7. Maximum number of successive FTC – Are there any legal limitations?

There are no legal limitations, but consecutive ‘fixed-term’ contracts may indicate the existence of an ongoing employment relationship that means the contract is regarded differently to a regular fixed-term contract. See D’Lima v Board of Management, Princess Margaret Hospital for Children (1995) 64 IR 19; Minister for Health v Ferry (1996) 65 IR 374.

8. Maximum cumulative duration of FTC – Are there any legal limitations?

No.

9. What is the percentage of the workforce under FTC? – Please provide any statistics, if available.

No statistics available.

Substantive requirements for dismissals (justified and prohibited grounds)

10. Obligation to provide reasons for dismissals – Is the employer obliged to provide the worker with a reason of dismissal?

Yes, Under the Fair Work Act 2009, an employer should not act contrary to s.385, reproduced here:

“FAIR WORK ACT 2009 - SECT 385

What is an unfair dismissal

A person has been *unfairly dismissed* if FWA is satisfied that:

- (a) the person has been dismissed; and
- (b) the dismissal was harsh, unjust or unreasonable; and
- (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) the dismissal was not a case of genuine redundancy.

Note: For the definition of *consistent with the Small Business Fair Dismissal Code* : see section 388”

Under s.385(b), the dismissal should not be harsh, unjust or unreasonable, which is defined at s.387 as:

“Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that FWA considers relevant.”

So under the Fair Work Act 2009, an employer is obliged to provide the worker with reasons for the dismissal.

11. **Valid grounds to dismiss a worker** – Are any valid reasons to justify a dismissal listed in the law - e.g. worker's conduct, worker's capacity, economic reasons, or any fair reasons?

The Fair Work Act 2009 and the Fair Work Regulations 2009 cover valid reasons in a number of sections and regulations, given below accordingly:

“FAIR WORK ACT 2009 - SECT 389

Meaning of genuine redundancy

- (1) A person's dismissal was a case of **genuine redundancy** if:

- (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

- (2) A person's dismissal was not a case of **genuine redundancy** if it would have been reasonable in all the circumstances for the person to be redeployed within:

- (a) the employer's enterprise; or
- (b) the enterprise of an associated entity of the employer.

FAIR WORK ACT 2009 - SECT 386

Meaning of dismissed

....

- (2) However, a person has not been **dismissed** if:

- (a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
- (b) the person was an [employee](#):
 - (i) to whom a [training arrangement](#) applied; and
 - (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the [training arrangement](#); and the employment has terminated at the end of the [training arrangement](#); or
- (c) the person was demoted in employment but:
 - (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
 - (ii) he or she remains employed with the [employer](#) that effected the demotion.

(3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the [employer's](#) obligations under this Part.

FAIR WORK REGULATIONS 2009 - REG 1.07

Meaning of serious misconduct

(1) For the definition of *serious misconduct* in section 12 of the Act, serious misconduct has its ordinary meaning.

- (2) For subregulation (1), conduct that is serious misconduct includes both of the following:
 - (a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
 - (b) conduct that causes serious and imminent risk to:
 - (i) the health or safety of a person; or
 - (ii) the reputation, viability or profitability of the employer's business.
- (3) For subregulation (1), conduct that is serious misconduct includes each of the following:
 - (a) the employee, in the course of the employee's employment, engaging in:
 - (i) theft; or
 - (ii) fraud; or
 - (iii) assault;
 - (b) the employee being intoxicated at work;
 - (c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.
- (4) Subregulation (3) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.

(5) For paragraph (3) (b), an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug

(except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform.”

12. **Prohibited grounds to dismiss a worker** – Are there any prohibited grounds listed in the law or this issue is regulated by general non-discrimination provisions?

Under the Fair Work Act 2009, employees are protected by what are labelled ‘General Protections’. These Protections include a number of grounds on which an employer is prohibited from dismissing (or taking any other ‘adverse action’) against an employee. These Protections are detailed below:

“FAIR WORK ACT 2009 - SECT 340

Protection

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) A person must not take adverse action against another person (the **second person**) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Note: This subsection is a civil remedy provision (see Part 4-1).

FAIR WORK ACT 2009 - SECT 346

Protection

A person must not take adverse action against another person because the other person:

(a) is or is not, or was or was not, an officer or member of an industrial association; or

(b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or

(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

Note: This section is a civil remedy provision (see Part 4-1).

FAIR WORK ACT 2009 - SECT 351

Discrimination

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) However, subsection (1) does not apply to action that is:

- (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or
- (b) taken because of the inherent requirements of the particular position concerned; or
- (c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--taken:
 - (i) in good faith; and
 - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) Each of the following is an ***anti-discrimination law*** :

- (aa) the *Age Discrimination Act 2004* ;
- (ab) the *Disability Discrimination Act 1992* ;
- (ac) the *Racial Discrimination Act 1975* ;
- (ad) the *Sex Discrimination Act 1984* ;
- (a) the *Anti-Discrimination Act 1977* of New South Wales;
- (b) the *Equal Opportunity Act 1995* of Victoria;
- (c) the *Anti-Discrimination Act 1991* of Queensland;
- (d) the *Equal Opportunity Act 1984* of Western Australia;
- (e) the *Equal Opportunity Act 1984* of South Australia;
- (f) the *Anti-Discrimination Act 1998* of Tasmania;
- (g) the *Discrimination Act 1991* of the Australian Capital Territory;
- (h) the *Anti-Discrimination Act* of the Northern Territory.”

Also, Chapter 6, Part 3-4, ss769-772 for non-national system employers and employees, as per below:

“FAIR WORK ACT 2009 - SECT 769

Guide to this Part

This Part contains provisions to give effect, or further effect, to certain international agreements relating to discrimination and termination of employment.

Division 2 makes it unlawful for an employer to terminate an employee's employment for certain reasons. Division 2 also deals with compliance. In most cases, a dispute that involves the termination of an employee's employment will be dealt with by a court only if the dispute has not been resolved by FWA.

Division 3 sets out notification and consultation requirements in relation to certain terminations of employment.

SECT 771

Object of this Division

The object of this Division is to give effect, or further effect, to:

- (a) the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation, done at Geneva on 25 June 1958 ([1974] ATS 12); and

- (b) the ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, done at Geneva on 23 June 1981 ([1991] ATS 7); and
- (c) the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer, done at Geneva on 22 June 1982 ([1994] ATS 4); and
- (d) the Termination of Employment Recommendation, 1982 (Recommendation No. R166) which the General Conference of the ILO adopted on 22 June 1982.

Note 1: In 2009, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

Note 2: In 2009, the text of a Recommendation adopted by the General Conference of the ILO was accessible through the ILO website (www.ilo.org).

SECT 772

Employment not to be terminated on certain grounds

(1) An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons:

- (a) temporary absence from work because of illness or injury of a kind prescribed by the regulations;
- (b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;
- (c) non-membership of a trade union;
- (d) seeking office as, or acting or having acted in the capacity of, a representative of employees;
- (e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (g) absence from work during maternity leave or other parental leave;
- (h) temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) However, subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating a person's employment if:

- (a) the reason is based on the inherent requirements of the particular position concerned; or
- (b) if the person is a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--the employment is terminated:
 - (i) in good faith; and
 - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) To avoid doubt, if:

- (a) an employer terminates an employee's employment; and
 - (b) the reason, or a reason, for the termination is that the position held by the employee no longer exists, or will no longer exist; and
 - (c) the reason, or a reason, that the position held by the employee no longer exists, or will no longer exist, is the employee's absence, or proposed or probable absence, during maternity leave or other parental leave;
- the employee's employment is taken, for the purposes of paragraph (1)(g), to have been terminated for the reason, or for reasons including the reason, of absence from work during maternity leave or other parental leave.

(4) For the purposes of subsection (1), subsection 109(2) (which deals with the meaning of **voluntary emergency management activity**) has effect as if the word employee had its ordinary meaning.”

13. **Workers enjoying special protection from dismissal** - Please list any categories, such as women during the pregnancy and maternity leave, workers’ representatives etc.

Employees are not segregated into categories any further than what has been detailed above.

Procedural requirements for individual dismissals

14. **Notification to the worker to be dismissed –**

In which form the employer must inform the worker about his or her dismissal (orally or in writing)?

Employers are permitted to dismiss employees orally. However, as is noted in the Small Business Fair Dismissal Code, it is preferable for employees to be notified in writing. In instances of serious misconduct, this may not always be possible at the time.

<http://www.fwa.gov.au/index.cfm?pagename=legislationfwddismissalcode>

15. **Length of the notice period –** How long in advance does the employer have to inform the worker about his or her dismissal?

The notice period varies with the employee’s length of service. For a dismissal not to be unfair an employer must provide the employee with an opportunity to respond to a warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response.

16. **Pay in lieu of notice –** authorised or no by law?

Authorised by law (as a minimum) as per below:

“FAIR WORK ACT 2009 - SECT 117

Requirement for notice of termination or payment in lieu

Notice specifying day of termination

(1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

Note 1: Section 123 describes situations in which this section does not apply.

Note 2: Sections 28A and 29 of the *Acts Interpretation Act 1901* provide how a notice may be given. In particular, the notice may be given to an employee by:

- (a) delivering it personally; or
- (b) leaving it at the employee's last known address; or
- (c) sending it by pre-paid post to the employee's last known address.

Amount of notice or payment in lieu of notice

(2) The employer must not terminate the employee's employment unless:

- (a) the time between giving the notice and the day of the termination is at least the period (the **minimum period of notice**) worked out under subsection (3); or
- (b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

(3) Work out the minimum period of notice as follows:

- (a) first, work out the period using the following table:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	Period
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

- (b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given."

17. **Notification to administration** – Does the employer have to notify the public administration before dismissing a worker?

Only in limited circumstances:

“FAIR WORK ACT 2009 - SECT 785

Employer to notify Centrelink of certain proposed terminations

(1) If an employer decides to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons, the employer must give a written notice about the proposed terminations to the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink).

(2) The notice must be in the form (if any) prescribed by the regulations and set out:

- (a) the reasons for the terminations; and
- (b) the number and categories of employees likely to be affected; and
- (c) the time when, or the period over which, the employer intends to carry out the terminations.

(3) The notice must be given:

- (a) as soon as practicable after making the decision; and
- (b) before terminating an employee's employment in accordance with the decision.

(4) The employer must not terminate an employee's employment in accordance with the decision unless the employer has complied with this section.

Note: This subsection is a civil remedy provision (see Part 4-1).

(5) The orders that may be made under subsection 545(1) in relation to a contravention of subsection (4) of this section:

- (a) include an order requiring the employer not to terminate the employment of employees in accordance with the decision, except as permitted by the order; but
- (b) do not include an order granting an injunction.”

18. **Notification to workers’ representatives** – Does the employer have to inform workers’ representatives for each individual dismissal?

An employer is obliged to notify workers’ representatives in the following circumstances:

FAIR WORK ACT 2009 - SECT 205

Enterprise agreements to include a consultation term etc.

Consultation term must be included in an enterprise agreement

(1) An enterprise agreement must include a term (a **consultation term**) that:

- (a) requires the employer or employers to which the agreement applies to consult the employees to whom the agreement applies about major workplace changes that are likely to have a significant effect on the employees; and
- (b) allows for the representation of those employees for the purposes of that consultation.

Model consultation term

(2) If an enterprise agreement does not include a consultation term, the model consultation term is taken to be a term of the agreement.

- (3) The regulations must prescribe the ***model consultation term*** for enterprise agreements.

FAIR WORK ACT 2009 - SECT 786

FWA may make orders where failure to notify or consult registered employee associations about terminations

- (1) FWA may make an order under subsection 787(1) if it is satisfied that:

- (a) an employer has decided to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons; and
- (b) the employer has not complied with subsection (2) (which deals with notifying relevant registered employee associations) or subsection (3) (which deals with consulting relevant registered employee associations); and
- (c) the employer could reasonably be expected to have known, when he or she made the decision, that one or more of the employees were members of a registered employee association.

Notifying relevant registered employee associations

- (2) An employer complies with this subsection if:

- (a) the employer notifies each registered employee association of which any of the employees was a member, and that was entitled to represent the industrial interests of that member, of the following:
 - (i) the proposed terminations and the reasons for them;
 - (ii) the number and categories of employees likely to be affected;
 - (iii) the time when, or the period over which, the employer intends to carry out the terminations; and
- (b) the notice is given:
 - (i) as soon as practicable after making the decision; and
 - (ii) before terminating an employee's employment in accordance with the decision.

Consulting relevant registered employee associations

- (3) An employer complies with this subsection if:

- (a) the employer gives each registered employee association of which any of the employees was a member, and that was entitled to represent the industrial interests of that member, an opportunity to consult the employer on:
 - (i) measures to avert or minimise the proposed terminations; and
 - (ii) measures (such as finding alternative employment) to mitigate the adverse effects of the proposed terminations; and
- (b) the opportunity is given:
 - (i) as soon as practicable after making the decision; and
 - (ii) before terminating an employee's employment in accordance with the decision."

19. **Approval by administration** – Does the employer need to obtain any authorisation from the administration to dismiss a worker?

No.

20. **Approval by workers' representatives** – Does the employer have to obtain any authorisation to dismiss a worker?

No. See also answers to questions 17 and 18.

Procedural requirements for collective dismissals for economic reasons

21. **Definition of collective dismissal** - e.g. percentage or number of workers concerned

See answer to question 17 and 18.

22. **Prior consultation with trade unions/workers' representatives** – Does the employer have to consult them in case of planned collective dismissals for economic reasons?

See answer to question 18.

23. **Notification to the public administration in case of planned collective dismissals for economic reasons** – Must the employer notify the public authorities?

See answer to question 17.

24. **Notification to workers' representatives** – Is the employer obliged to inform them in case of collective dismissals for economic reasons?

See answer to question 18.

25. **Approval by the public administration** – Does the employer have to obtain any authorisation in case of expected collective dismissals for economic reasons?

No.

26. **Approval by workers' representatives** – Must collective dismissals be authorised by workers' representatives?

No. See also answer to question 18.

27. **Priority rules for collective dismissals** – Are there any legal rules to select workers to be dismissed (social considerations, age, job tenure)?

Not as set out in the legislation. But some Enterprise Agreements so provide.

28. **Is the employer obliged to consider transfers, retraining and other options prior to dismissal?**

Yes, see answers to question 11 and 15.

29. **Priority rules for re-employment** – Are there any obligations for an employer to first consider applications of former redundant workers while re-hiring the workforce?

No.

Severance payment

30. **Severance pay** – What does the employer have to pay to a worker in case of dismissal for personal and/or economic reasons?

“FAIR WORK ACT 2009 - SECT 119

Redundancy pay

Entitlement to redundancy pay

(1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

- (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
- (b) because of the insolvency or bankruptcy of the employer.

Note: Sections 121, 122 and 123 describe situations in which the employee does not have this entitlement.

Amount of redundancy pay

(2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

Redundancy pay period		
	Employee's period of continuous service with the employer on termination	Redundancy pay period
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks

Redundancy pay period		
	Employee's period of continuous service with the employer on termination	Redundancy pay period
10	At least 10 years	12 weeks

“

Avenues for redress (penalties, remedies) and litigation procedure for individual complaints on dismissals

31. **Compensation for unfair dismissal** – Are there any legal limits (ceiling in months or any calculation method defined by law) or freely decided by the judge?

Note: compensation is only awarded where reinstatement is inappropriate.

“FAIR WORK ACT 2009 - SECT 392

Remedy--compensation

Compensation

- (1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

- (2) In determining an amount for the purposes of an order under subsection (1), FWA must take into account all the circumstances of the case including:

- (a) the effect of the order on the viability of the employer's enterprise; and
- (b) the length of the person's service with the employer; and
- (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
- (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
- (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
- (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that FWA considers relevant.

Misconduct reduces amount

- (3) If FWA is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, FWA must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

- (4) The amount ordered by FWA to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by FWA to be paid to a person under subsection (1) must not exceed the lesser of:

- (a) the amount worked out under subsection (6); and
- (b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:

- (a) the total amount of remuneration:
 - (i) received by the person; or
 - (ii) to which the person was entitled;

(whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and

(b) if the employee was on leave without pay or without full pay while so employed during any part of that period--the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.”

32. Reinstatement – provided in law, rarely or often available to a worker unfairly dismissed?

Provided in law:

“FAIR WORK ACT 2009 - SECT 391

Remedy--reinstatement etc.

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:

- (a) reappointing the person to the position in which the person was employed immediately before the dismissal; or
- (b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

- (a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and
- (b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:

- (c) appoint the person to the position in which the person was employed immediately before the dismissal; or
- (d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If FWA makes an order under subsection (1) and considers it appropriate to do so, FWA may also make any order that FWA considers appropriate to maintain the following:

- (a) the continuity of the person's employment;
- (b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If FWA makes an order under subsection (1) and considers it appropriate to do so, FWA may also make any order that FWA considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), FWA must take into account:

- (a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and
- (b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement."

33. Preliminary (judicial and/or extra-judicial) conciliation – Is it mandatory or not?

Not described in the legislation, but unfair dismissal cases will generally go to a conciliator prior to going to hearing. Common for matters to go into private conference with consent of all parties. These steps are not mandatory, but in practice all unfair dismissal cases are referred for conciliation.

34. Competent courts – What bodies are competent for disputes on dismissals (ordinary tribunals, specialised labour courts)?

- a) Fair Work Australia - an industrial relations/employment tribunal.**
- b) Federal Court or the Federal Magistrates Courts.**

35. Alternative arbitration / mediation – Do the parties to an employment contract have any alternative possibility to settle out their labour dispute?

Some collective agreements will nominate an outside independent third party other than Fair Work Australia to mediate disputes.

36. Length of the court procedure – What is the average length for a case on dismissals (are there any legal limitations)?

The Fair Work Australia 2009-2010 Annual Report states that 85% of termination of employment applications are finalised with 87 days of their lodgement [ISSN 1838-5222]. There is no legal limitation on when such a matter must be concluded by, however, such claims under the Fair Work Act 2009 must be brought within 14 days (unfair dismissal) or 60 days (general protections).

37. Maximum time to make a claim for unfair dismissal – During which period does the worker have to bring his or her complaint to the court?

14 days. Also see answer to Question 36.

II. ECONOMIC CRISIS AND CASE LAW OF LABOUR COURTS

1. Which court decisions in your country have been related to the economic crisis (with the main focus on EPL)?

Please share information about any court decisions which:

- Have influenced the interpretation of legal provisions regulating dismissals, fixed-term contracts etc;
- Were necessary to fill any gaps in the national labour law?

We have not been able to find any cases specifically in these categories. However, in 2008 the then Australian Fair Pay Commission which was charged with the responsibility of fixing the national minimum wage, did not award an increase for that year.
<http://www.fwa.gov.au/index.cfm?pagename=afpc2009wagereview>

The number of applications alleging unfair dismissal or unlawful dismissal incurred in the period 1 July 2009 - 30 June 2010 the Fair Work Australia Annual Report 2009/10 states:

- 11,116 applications for unfair dismissal remedy; and
- 1188 applications to deal with contraventions involving dismissal (unlawful).

However, as the ability to bring such claims was enlarged with the Fair Work Act 2009 due to a change in the definition of a small-business employer, it is not possible to say how much, if any, of the increase was attributable to the global financial crisis.

2. Are there any labour law reforms under discussion in your country caused or affected by the economic crisis (to make labour more flexible, or to extend protection to some categories of workers)?

Small business continues to call for an expansion of protections from unfair dismissal claims, but reforms are not currently on the legislative agenda.

France

I. Employment protection legislation (EPL)

Source and scope of regulation

1. **Source of regulation** – What is the main law (title and date of adoption) regulating employment contracts and dismissals (Please provide a Web-link, Word/PDF version, its translation in English or French).

The main French law regulating employment contracts and dismissals is the “Code du travail” (Code of Labour). This code is divided in two parts, one comprising Articles from legislative origin (numbered “L”), the other containing Articles issued by corresponding regulations (numbered as “R” if Council of State decrees or “D” if simple decrees of the Government).

This Code was completely re-codified in its two parts in 2007 and 2008. The brand new version can be read on the following legal Website address:

<http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072050&dateTexte=20100907>

It was a heavy duty useful work. But, for a while, it is uneasy for a lawyer to find his way among new texts and numberings...

Here are the main headings of the Labour Code :

- Rights and freedoms inside the company : L 1221-1
- Discriminations : L 1131-1 – L 1134-5
- Employment equality between women and men
- Harassments : L 1151-1 – L 1155-4
- Corruption : L 1161-1
- **Contract of employment** L 1211-1 - L. 1274-7
R 1221-1 - D 1273-8
- ** Formation and execution : L 1221-1 – L 1227-1
R 1221-1 – R 1227-7
- ** Breach of the unspecified term contract : L 1231-1 – L 1238-5
R 1231-1 – R 1238-7
- ** Fixed-term employment contract : L 1241-1 – L 1248-11
D 1242-1 – D 1247-2
- ** Temporary employment contract : L 1251-1 – L 1254-13
D 1251-1 – R 1245-9
- **Duration of work, wages, incentives :** L 3111-1 – L 3172-2
R 3121-1 – R 3173-3
- **Health and security at work :** L 411-1 – L 4831-1
R 4121-1 – R 4822-1

2. **Scope of legislation** – What categories of workers are excluded from the regulation? (e.g. public servants, domestic workers, police, judiciary etc).

Are excluded : - public servants (comprising police, judiciary, army) unless secondment or temporary assignment in a private company

- persons not linked by a contract of employment setting out their legal subordination to an employer (but on the other hand, are included by lawgiver's will some non-employees who are placed in a situation of economic subordination with regard to companies or groups)

Work duration rules do not apply to “cadres dirigeants” (company managers).

3. **Size of enterprise excluded** – Are any enterprise of a certain size (e.g. employing less than 20 workers) excluded from the scope of application of the law?

Yes. For instance, dismissal for redundancy law does not apply to domestic workers.

In the same way, law provides that the unfair dismissal of an employee gives rise to damages amounting to no less than six month wages where the employee is at least 2 years' service and the employer's staff is 11 employees or more. (Code du travail, article L. 1235-3). Where more than 11 workers are employed, the loss sustained by the victim is assessed by the judge, according to the real damage. (L. 1235-5 and L. 1235-14)

4. **Collective agreements** – Are there any important collective agreements of general application at the national and/or branch level?

Yes, there are.

National level :

- *All branches covered*

Eg : Accord national interprofessionnel sur le harcèlement et la violence au travail (Interprofessional national agreement on harassment and violence at work)

– Specific branch covered by national collective agreement

Eg : Convention collective nationale des industries chimiques (National collective agreement of chemical industries)

Types of employment contracts

5. **Probationary period** - What is its maximum duration?

5.1 Under Article L. 1221-19 of the new Code du travail, issued from the law n° 2008-596 of 25 June 2008, the **unspecified term contract** of employment may include a probationary period whose maximum duration is :

- *2 months for workers and employees*
- *3 months for supervisory staff and technicians*
- *4 months for managers*

This period may be renewed once where a branch level agreement provides for it (L. 1221-21). The agreement must set out conditions and durations for the renewal.

In any event, the probationary period duration may not exceed, renewal included :

- *4 months for workers and employees*
- *6 months for supervisory staff and technicians*
- *8 months for managers*

Collective agreements may provide for shorter periods, the employer has to comply with.

5.2 **Fixed-term contract** may also comprise a probationary period. (L 1242-11). Its duration should not exceed :

- *1 day per week within the limit of 2 weeks when the initial duration of the contract is equal or inferior to 6 months*
- *1 month in other cases.*

But customs or collective agreements may provide for lesser durations.

6. **Fixed-term contracts (FTC)** – May FTC be concluded only for objective and material reasons (e.g. nature of work) or without any limitation?

French labour law (Articles L. 1241-1 to L. 1248-11 and D 1241-1 to D 1247-2) and case-law do frame strictly the conditions for concluding FTC.

As a matter of principle, FTC, whatever its reasons, may not be concluded with the aim or the result of filling on a sustainable (long-term) basis a job related to the normal and permanent activity of the company (L. 1242-1).

FTC is allowed only in order to perform a precise and temporary task, moreover in the following cases :

1. Replacement of a worker in case of :

- a Absence
- b temporary changeover of an employee to part-time work
- etc

2. Temporary increase of the company activity

3. Seasonal employments

4 Employments which constant custom , in specific sectors of activity defined by decree or extended collective agreements , authorise to be performed by FTC due to the nature of the activity and the naturally temporary feature of the employments.

5. Recruitments within the frame of regulations aimed at recruiting specific categories of unemployed people

6. Employer's commitment to provide a complementary vocational training to the employee

7. “Contrat à objet défini” (definite object contract) created by a law of 25 June 2008. This experimental pattern lasts between 18 and 36 months, but normally ends with the realization of the object it has been concluded for.

7. **Maximum number of successive FTC** – Are there any legal limitations?

No maximum number of successive FTC, but duration limitation.

** Under Article L. 1244-1, successive FTC may be concluded with the same worker in the following cases :

Replacement of a worker off work

Replacement of a worker whose contract of employment is suspended

Seasonal employments

Employments which constant custom , in specific sectors of activity defined by decree or extended collective agreements , authorise to be performed by FTC due to the nature of the activity and the naturally temporary feature of the employments.

(...)

** Under Article L. 1244-3, when FTC has expired, no other such contract may be concluded on the same employment before a **waiting period** the duration of which is defined by Article L. 1244-3.

There are some exceptions to this waiting period (L. 1244-4) in particular when the absent employee has not resumed work

8. **Maximum cumulative duration of FTC** – Are there any legal limitations?

The general rule is that the total duration of FTC should not exceed 18 months (renewal included).

But there are exceptions, and duration of FTC may be extended to 24 months in some cases (L 1242-8) :

- **Contract of employment performed abroad**
- **Exceptional order for export business**

Furthermore, the case-law of French “Cour de cassation” rules that the legal limitation does not apply to FTC concluded in order to replace an absent employee, when this contract has no precise term but has a minimum duration.

9. **What is the percentage of the workforce under FTC?** – Please provide any statistics, if available.

Temporary employment represents , in % of dependent employment :

14.0 in 1999

14.2 in 2008

13,5 in 2009

But the part of FTC in new recruitments of year 2009 vary, according to branches and company size, between 64 and 82 % (source : Dares, “les mouvements de main d'oeuvre au 4ème trimestre 2009” :

([http://www.travail-solidarite.gouv.fr/IMG/pdf/2010 - 049 - Les mouvements de main-d oeuvre au quatrieme trimestre 2009.pdf](http://www.travail-solidarite.gouv.fr/IMG/pdf/2010 - 049 - Les_mouvements_de_main-d_oeuvre_au_quatrieme_trimestre_2009.pdf))

Substantive requirements for dismissals (justified and prohibited grounds)

10. **Obligation to provide reasons for dismissals** – Is the employer obliged to provide the worker with a reason of dismissal?

Yes.

Under Article L. 1232- 6 Code du travail , when the employer decides to dismiss an employee, he must notify him/her in writing this decision by registered letter with acknowledgment of receipt.

This letter has to set forth the reasons of the dismissal.

And the Cour de cassation requires that these grounds should be precise, objective and materially verifiable (“matériellement vérifiables”). The Supreme Court rules that a dismissal without written statement of the reasons, or with unprecise grounds is unfair. (Soc. 29 november 1990, *Mr Rogie vs société Sermaize Distribution*, n° 88-44308, *Bulletin* 1990 V n° 598 p 360)

11. **Valid grounds to dismiss a worker** – Are any valid reasons to justify a dismissal listed in the law - e.g. worker’s conduct, worker’s capacity, economic reasons, or any fair reasons?

The Labour Code states that the employee may be dismissed for economic reasons (redundancy ; refusal by the worker of a modification of the employment contract proposed for economic reasons [L. 1233-3]) or personal reasons (real and serious grounds [L. 1232-1] ; serious fault [L. 1234-1] ; physical unfitness and impossible redeployment [L. 1226-4 and L.1226-12]).

Case-law adds the case of “force majeure“, strictly defined.

A new law (n° 2008-596, 25 June 2008) authorizes the mutual termination of the contract of employment [L. 1237-11 to L. 1238-5]

The anticipatory breach of FTC may be allowed only in case of serious fault, force majeure or conventional termination [L. 1243-1].

12. **Prohibited grounds to dismiss a worker** – Are there any prohibited grounds listed in the law or this issue is regulated by general non-discrimination provisions?

- Moral or sexual harassment [L. 1152-2 + L. 1153-2 , L. 1153-3] : dismissal of the victim or the witness of such harassment
- Worker's health, if not ascertained by the company's doctor, is a forbidden ground for dismissal, because it means discrimination (L. 1132-1, L. 1132-4, L. 1133-3)
- Suing the employer on the basis of professional equality between women and men [L. 1144-3]
- Discrimination : dismissal on the discriminatory basis [L. 1132-1] of :

- origin ; gender ; sexual orientation ; age ; family situation ; pregnancy ; genetical characteristics ; supposed belonging or non-belonging to an ethnic group, a nation or a race; political opinions ; unionism ; religion ; physical appearance ; family name ; health ; handicap

- Having witnessed or reported such schemes [L. 1132-3]

Right to withhold labour (“Droit de retrait”) : the law forbids dismissing a worker or a group of workers who remove from a work situation which they reasonably could deem it implied a serious and imminent danger to their life ou the health of each of them [L. 4131-3]

Right to strike [L. 1132-2] :

13. **Workers enjoying special protection from dismissal** - Please list any categories, such as women during the pregnancy and maternity leave, workers’ representatives etc.

- victims of industrial injury or work related disease (L. 1226-7 to L. 1226-12)
- women during the pregnancy and maternity leave (L. 1225-4, L. 1225-5)
- different workers' representatives (L. 2411-4 to L. 2411-20)
- Worker providing assistance to employee during the dismissal procedure - “conseiller du salarié” (L. 2411-21)
- labour court lay magistrates (L. 2411-22)
- Worker doing his National Service (L. 3142-71, L. 3142-74, L. 3142-75)
- Company's occupational health officer (L. 4623-4 to L. 4623-7)

OTHER WAYS OF TERMINATION IN FRENCH LABOUR LAW

The employee is allowed to obtain himself the termination of his contract of employment by these avenues :

- resignation
- judicial termination of employment (the labour court is asked to terminate the contract on the ground of employer's fault)
- “prise d'acte de la rupture” [= “notice of termination” (?) “constructive dismissal” (?)] - a system built by Cour de cassation since June 2003 and named by an autor “auto-licenciement” (auto-dismissal) : the employee notifies himself the termination of the contract to the employer and then asks the labour judge to qualify this termination as an unfair dismissal. If his claim is accepted, the “prise d'acte” produces the effects of an unfair dismissal : the judge who decides that the facts alleged justified the termination must grant the employee damage, pay in lieu of notice and related annual leave, and severance pay (Soc. 20 january 2010, n° 08-43471).
- If the facts are not found justified, the “prise d'acte” produces the effects of a simple resignation.

But whatever qualification is given, the termination of the contract is *immediate* : this is a major difference with judicial termination, that occurs only when the court rules if claim is sustained : if the facts are not serious enough to justify termination, the contract... continues (Soc. 7 july 2010, n° 09-42636)

Procedural requirements for individual dismissals

14. **Notification to the worker to be dismissed** – In which form the employer must inform the worker about his or her dismissal (orally or in writing)?

In writing, as said above, by registered letter with acknowledgment of receipt (L. 1232-6, dismissal on the ground of real and serious cause as well as individual dismissal for economic reasons ; L. 1233-15, collective dismissal of less than 10 workers within the same period of 30 days ; L. 1233-39, collective economic dismissal of 10 workers or more in the same period of 30 days)

15. **Length of the notice period** – How long in advance does the employer have to inform the worker about his or her dismissal?

The worker must be summoned to an interview before the employer decides whether to dismiss him/her or not. The dismissal can be notified one day after. If this dismissal is on the ground of serious fault or gross negligence, it takes effect at once.

When the dismissal occurs on a disciplinary ground, it must be notified within one month, otherwise it becomes void (L. 1332-2).

On non-disciplinary grounds as on a disciplinary ground without serious fault, dismissal will take effect at the end of the term of notice (1 month if seniority > 6 months and < 2 years ; 2 months if > 2 years) (L. 1234-1).

But collective agreements may provide for longer periods.

16. **Pay in lieu of notice** – authorised or no by law?

Dismissal with wages in lieu of notice is authorised by Article L. 1234-5 of Code du travail.

17. **Notification to administration** – Does the employer have to notify the public administration before dismissing a worker?

Yes when it concerns dismissals for economic reasons.

No, as regards individual dismissals for non-economic reasons (barring dismissals of workers' representatives)

18. **Notification to workers' representatives** – Does the employer have to inform workers' representatives for each individual dismissal?

No, except when the dismissal occurs within the frame of a winding up (L. 1233-60)

19. **Approval by administration** – Does the employer need to obtain any authorisation from the administration to dismiss a worker?

No (barring workers' representatives)

The administration authorisation of dismissals existed until 1986, where it was suppressed

20. **Approval by workers' representatives** – Does the employer have to obtain any authorisation to dismiss a worker?

No. It is up to the employer to decide, in accordance with his managerial power (“pouvoir de direction”)

Procedural requirements for collective dismissals for economic reasons

21. **Definition of collective dismissal** - e.g. percentage or number of workers concerned

Criterion is both *number* and *length of the period*

Collective dismissal occurs where it concerns more than one worker. The division is made, as aforesaid, between dismissals of less than 10 and dismissals of more than 10 in the same period of 30 days.

22. **Prior consultation with trade unions/workers' representatives** – Does the employer have to consult them in case of planned collective dismissals for economic reasons?

Yes (L. 1233-8 to L. 1233-10 ; L. 1233-28 to L. 1233-37 ; L. 1233-58)

23. **Notification to the public administration in case of planned collective dismissals for economic reasons** – Must the employer notify the public authorities?

Yes

24. **Notification to workers' representatives** – Is the employer obliged to inform them in case of collective dismissals for economic reasons?

Yes

25. **Approval by the public administration** – Does the employer have to obtain any authorisation in case of expected collective dismissals for economic reasons?

No

26. **Approval by workers' representatives** – Must collective dismissals be authorised by workers' representatives?

No

27. **Priority rules for collective dismissals** – Are there any legal rules to select workers to be dismissed (social considerations, age, job tenure)?

Yes.

Under Article L. 1233-5 Code du travail the employer must define criteria aimed at the selection of workers for redundancy.

These criteria are *inter alia* :

- family dependents, in particular those of single parents
- seniority in the company
- great difficulties to be reemployed (handicapped and aging workers)
- professional skills, assessed per category

28. **Is the employer obliged to consider transfers, retraining and other options prior to dismissal?**

Yes. Within the framework of his “obligation de reclassement”, the employer must take accompanying social measures aimed at aid for redeploying or retraining workers in order to avoid their redundancy.

Under Article L. 1233-4 the dismissal of a worker on the ground of economic reasons can occur only where all training and adaptation efforts have been made and his redeployment is not possible in the business or the group to which it belongs.

These offers for redeployment must be written and precises.

29. **Priority rules for re-employment** – Are any obligation for an employer to first consider applications of former redundant workers while re-hiring the workforce?

Yes. The priority for re-employment (“priorité de réembauche”) is set out in Articles L.1233-42 and L. 1233-45.

This priority must be specified in the dismissal letter.

Severance payment

30. **Severance pay** – What does the employer have to pay to a worker in case of dismissal for personal and/or economic reasons?

If the dismissal is judged unfair or irregular, the employer will pay damages *plus* severance pay.

If fairness and validity are not challenged, he will just have to pay severance indemnity.

The amount may not be lower than one fifth of the monthly salary per year of seniority. When seniority exceeds 10 years, severance pay is increased by two fifths of month per year over these ten years. (R. 1234-2)

Of course, collective agreements can be more generous.

Avenues for redress (penalties, remedies) and litigation procedure for individual complaints on dismissals

31. **Compensation for unfair dismissal** – Are there any legal limits (ceiling in months or any calculation method defined by law) or freely decided by the judge?

There are only minimum thresholds beyond which the judge freely assesses damages.

32. **Reinstatement** – provided in law, rarely or often available to a worker unfairly dismissed?

In French labour law, reinstatement is linked to the **nullity of dismissal**, which is different of unfair dismissal : if void, the dismissal is retroactively supposed not to have ever existed and the worker must resume employment.

Case-law puts on that there are no nullities without text or violation of fundamental rights or principles

Many articles of the Labour Code provide for nullities. For instance, when a workers' representative has been laid off without the authorisation of the labour inspector.

Cour de cassation holds that the dismissal of a worker who withdraws from his work station because he can reasonably think he is exposed to a serious and imminent hazard for his life or health, is void if decided on the ground of this abandonment. Nullity is pronounced, though not provided for by the text, because the employer has both the legal obligation to respect this right of the employee, and the judicial obligation to ensure effectively, as a result, safety and health at work (“*Obligation de sécurité de résultat*”).

Vu l'article L. 231-8-1 devenu l'article L. 4131-3 du code du travail, ensemble l'article L.1121-1 du même code interprété à la lumière de l'article 8 § 4 de la directive 89/391/CEE du 12 juin 1989 ;

Attendu d'une part qu'aucune sanction, aucune retenue de salaire ne peut être prise à l'encontre d'un travailleur ou d'un groupe de travailleurs qui se sont retirés d'une situation de travail dont ils avaient un motif légitime de penser qu'elle présentait un danger grave ou imminent pour chacun d'eux ; d'autre part que l'employeur, tenu d'une obligation de sécurité de résultat en matière de protection et de sécurité au travail, doit en assurer l'effectivité ; qu'il s'ensuit qu'est nul le licenciement prononcé par l'employeur pour un motif lié à l'exercice légitime par le salarié du droit de retrait de son poste de travail dans une situation de danger;

(Soc. 28 janvier 2009, Mr Wolff vs société Sovab, n° 07-44556, bull. Civ. 2009, V, n°24)

To notice : The judge has the possibility to propose reinstatement when the dismissal is only unfair (L. 1235-3)

32. **Preliminary (judicial and/or extra-judicial) conciliation** – Is it mandatory or not?

The parties are obliged to appear personally before the labour court for a preliminary judicial conciliation (R. 1454-12).

There are exceptions. E.g. when the claimant asks for the requalification of his FTC as an unspecified-period contract, he may seize directly the judgment chamber (L. 1245-2)

33. Competent courts – What bodies are competent for disputes on dismissals (ordinary tribunals, specialised labour courts)?

At first instance, the Conseil de Prud'hommes (specialised labour court comprising only lay magistrates) is competent. Its rulings are challenged either before a Cour d'appel (2nd degree jurisdiction composed only of professional judges) or the Cour de cassation (highest Court of the judiciary).

34. Alternative arbitration / mediation – Do the parties to an employment contract have any alternative possibility to settle out their labour dispute?

Yes as regards mediation. The parties to the employment contract have such a possibility, which is offered generally by the French civil procedure Code (Articles 131-1 to 131-15) and the Directive 2008/52/CE of European Parliament and Council, 21 may 2008. A specific text of the labour Code also provides for mediation in the case of moral harassment (L.1152-6).

To notice : mediation is applicable to the resolution of collective disputes (L. 2523-1 to L.2523-10, R. 2523-1 to R. 2523-20)

No as regards arbitration. This procedure is set up for the solution of collective disputes (L.2524-1 to 2524-11)

35. Length of the court procedure – What is the average length for a case on dismissals (are there any legal limitations)?

The average length of the procedure before the Conseil de prud'hommes was of 7 months in 2009.

*** 25 % of the cases were over within 2,1 months

*** 50 % of the cases were over within 8,1 months

*** 75 % of the cases were over within 14,7 months

Before the appellate courts, the average length was 11,9 months.

Before the Cour de cassation, the average length was 17,5 months

36. Maximum time to make a claim for unfair dismissal – During which period does the worker have to bring his or her complaint to the court?

The time-limit to bring a complaint for unfair dismissal to the court is 30 years.

A limitation exists for the claim against a dismissal for economic reasons : Article L. 1235-7 makes provision for that the challenge of regularity or validity of dismissal should be filed before 12 months.

II. ECONOMIC CRISIS AND CASE LAW OF LABOUR COURTS

1. Which court decisions in your country have been related to the economic crisis (with the main focus on EPL)?

Please share information about any court decisions which:

- Have influenced the interpretation of legal provisions regulating dismissals, fixed-term contracts etc;

Case-law relating to the definition of different sorts of working time (effective work, on-call time, equivalent hours) have been established in legal provisions.

Same thing with the definition of the “cadre dirigeant” (top executive managers).

It may be said that case-law sets *higher requirements* than the law-maker as regards the execution of the obligation of re-deployment (“reclassement”) lying on the employer as a means of preventing dismissals. And this, as much as in the appreciation made by trial judges as in the review exerted by the Cour de cassation, who demands that all the

possibilities of re-deployment should be explored, without reservation and without geographic limits, and that this search would be customized through the obligation of adaptation and training.

This severity recently led the legislator (law 2010-499 of 18 May 2010) to intervene and *relax* the rules governing international re-deployment.

Examples :

Cour de cassation ruled that the offers of redeployment in the framework of dismissal on economic grounds should be in *writing*, **precise and concrete**, and should also concern the entire *group* to which belongs the undertaking. These conditions were put on in the labour code (L.1223-4). The law of 18 May 2010 added that the salary should be *equivalent* to the former one.

French highest judiciary Court also decided that these offers should include employments located *abroad*, as long as the other's country domestic legislation would not preclude it.

The law of 18 May 2010 created an Article L.1233-4-1 providing that in the case of employment offered abroad, the employer is obliged to ask the employee, before dismissing him, whether he/she accepts to receive offers of redeployment in a foreign country and under which eventual restrictions relating to the characteristics of the offered employments, in particular as to payment and localization.

Then, the offers (that have to be in writing and precise) are only forwarded to the employee who accepted to receive them.

Two recent rulings of the Cour de cassation illustrate the strictness of its requirements as regards *precision* and *personalization* (customization) of proposals.

Last July 2010, the Court demanded that, in case of re-deployment proposed in undertakings of the group located abroad (Germany, to be specific) the employer should precise *number, nature and localization* of the employments available in this country. As it was not the case, the Court rejected the petition lodged against a decision of appellate jurisdiction who had annulled the plan for job preservation ("plan de sauvegarde de l'emploi") which had been established by a company employing more than 50 workers in the framework of the dismissal of 10 workers or more within the same period of 30 days.

" Et attendu que la cour d'appel, qui a constaté que l'entreprise faisait partie d'un groupe et que le plan de sauvegarde de l'emploi prévoyait la possibilité de reclassements dans des sociétés du groupe situées à l'étranger et, notamment, en Allemagne, sans que soient toutefois précisés le nombre, la nature et la localisation des emplois disponibles dans ces entreprises étrangères, a pu en déduire, abstraction faite des motifs erronés mais surabondants critiqués par les trois dernières branches du moyen, que ce plan ne répondait pas aux exigences de l'article L. 321-4-1 du code du travail, recodifié aux articles L. 1233-61 et L. 1233-62 de ce code ; Que le moyen n'est pas fondé ;

(Soc. 13 July 2010, n° 09-43028, société Toppan Photomasks France vs Mr Allarousse and alii.)

In an other decision of 13 July 2010, the Cour de cassation held that the employer, who had notified all the workers concerned by the redundancy project, a *same documentation (literature)* gathering the whole existing and available employments in the last branches of the undertaking maintained in Germany, had failed to fulfil his obligation to submit to each worker a customized proposal of re-deployment appropriate to his/her skills and abilities. Thus, unfair dismissal damage was due to the concerned workers.

(Soc. 13 July 2010, Economat des armées, n°0942839)

- Were necessary to fill any gaps in the national labour law?

The Parisian subway workers of RATP are submitted to regulatory statutes that don't provide for the daily break of 20 minutes after six hours work, established by Article L.3121-33 Code du travail. The Cour de cassation ruled that RATP detaining a part of public authority, was subject to the application of the UE Directive of 4 november 2003 relating to certain aspects of work duration and setting out such a rest. A new appellate court was thence requested to verify if the derogations defined by the Directive could apply or not to the company, as they are conditioned by granting equivalent advantages to workers. (*Soc. 17 february 2010, Mr Cots vs RATP, n° 08-43.212*)

2. Are there any labour law reforms under discussion in your country caused or affected by the economic crisis (to make labour more flexible, or to extend protection to some categories of workers)?

The reform of the retirement pension schemes is ongoing in the opinion (strikes, demonstrations) and before the Parliament.

Hungary

III. EMPLOYMENT PROTECTION LEGISLATION (EPL)

Source and scope of regulation

38. **Source of regulation** – What is the main law (title and date of adoption) regulating employment contracts and dismissals (Please provide a Web-link, Word/PDF version, its translation in English or French).

The main law is the Labour Code (LC): Act XXII. of 1992. on the labour Code. This act shall apply for the employment relationship of the competitive sector.

It is available on the NATLEX, the ILO website.

39. **Scope of legislation** – What categories of workers are excluded from the regulation? (e.g. public servants, domestic workers, police, judiciary etc).

The LC is the basic, or the background law of the other acts. For the civil servants relationship the LC shall apply, if the separate act does not order other way. On the other area, the special acts mostly end with a list of LC provisions, which shall apply accordingly (e.g. good faith and fairness, employers' liability of damages, the protection period against the termination)

There are separate acts for

- o *civil servants, who are employees of the public schools, universities, museums, medical institutes etc.*
- o *public servants, who are employees of the local government*
- o *government servants, who are employees of the central or territorial organs of the government (Act LVII. of 2010. on the legal status of government servants)*

There are separate acts for police officers, for soldiers, for judges, for judicial employees, for public prosecutors.

In Hungary all kind of dispute which are emerged of the above mentioned employment relationship belong to the labour court's scope.

40. **Size of enterprise excluded** – Are any enterprise of a certain size (e.g. employing less than 20 workers) excluded from the scope of application of the law?

There are no any kinds of enterprises, which are excluded from the scope of application of the LC.

The LC contains only one variant provision regarding the employers' liability for damages: private individual employer employing a maximum of ten full-time employees should be liable

only for damages caused to the employee by negligence. The other employers' liability is objective, regardless of accountability. This provision (Section 175 of LC) declared null and void by the Constitutional Court [41/2009 (III.27) CC decision). The Constitutional Court considered the above mentioned provision as a discriminative provision: it established unnecessary distinction among the injured workers.

The reasons of the LC decision disturbed the new developing intends of the labour law. The academic and the employer association's view have been same for a long time: the labour law has to make a distinction between the bigger and the smaller enterprises on the form and reasons of the termination. Now – from the beginning – the LC provides same protection for all workers, without any respect to the measurement of the enterprise.

41. Collective agreements – Are there any important collective agreements of general application at the national and/or branch level?

The weakness of the trade unions – which originated from the past – leads the weakness of the collective agreements. The year of 2006 only 32% of the employers have collective agreements. The multi employers' collective agreements covered only 2.7% of the competitive sector. Most of the case the scope of the collective agreement is limited only for one workplace. However we have a new act on the branch level bargaining, there are not any real branch level collective agreement.

Most of the case the collective agreement just repeats the rule of the LC. Some of them provide higher redundancy pay, longer notice period, more aid (e.g. offering another job before dismissal) for dismissed workers. We have to emphasise, that the LC contains very sophisticated provisions of the terms of dismissal and the compensation as well.

Types of employment contracts

42. Probationary period - What is its maximum duration?

The duration of the trial period shall be thirty days. A shorter or longer period, not to exceed three months, maybe stipulated in the collective bargaining agreement, or agreed upon by the parties. The trial period may not be extended. A trial period may be stipulated under the employment contract upon establishment of the employment relationship. Any deviation from these provisions shall be considered invalid. (Section 81 of LC)

The court rules this invalidity under section 8. of LC. It means the court shall recognise the invalidity ex officio, if such invalidity cannot remedied within a short time without causing injury to the parties and public interest.

The trial period is compulsory for the public servants and government servants. Here the minimum period is three months, and the maximum period is six months

43. Fixed-term contracts (FTC) – May FTC be concluded only for objective and material reasons (e.g. nature of work) or without any limitation?

At the LC – contrary to the public area – is not accurate list about objective or material reasons of FTC, although the court could examine the reasons of FTC from the beginning. According to the judicial practise initiated a new provision in 2003: the employment relationship shall be recognised for unfixed duration, if the renewing of the contract occurs without of the rightful interest of employer and intends for injury of rightful interest of employee. In the absence of an agreement on the contrary, an employment relationship is established for an unfixed duration.

The period of fixed-duration employment shall be determined according to the calendar or by other appropriate means. If the duration of employment relationship is not determined by calendar, the employer is obliged to inform the employee in the employment contract of the expected duration of employment. (Section 79 of LC) Without this kind of limitation or information the employment relationship is construed as an unfixed duration.

44. Maximum number of successive FTC – Are there any legal limitations?

There is not maximum number of successive FTC. The limit is the proper aim, the rightful interest.

45. Maximum cumulative duration of FTC – Are there any legal limitations?

The duration of FTC shall not exceed five years, including the establishment of a new employment relationship. If the time between the end and the beginning of the new relationship less than six months, the durations shall be add together.

46. What is the percentage of the workforce under FTC? – Please provide any statistics, if available.

There is not available statistics.

Substantive requirements for dismissals (justified and prohibited grounds)

47. Obligation to provide reasons for dismissals – Is the employer obliged to provide the worker with a reason of dismissal?

The employers must justify their ordinary and the extraordinary dismissals as well. The justification shall clearly indicate the cause therefore. [Subsection (2) of Section 89 of LC]

An employer is not required to explain the ordinary dismissal of a dismissed employee, if the employee is construed as a pensioner. [Subsection (6) of Section 89 of LC] The explaining is not required, if the employee is an executive officers. [Subsection (2) of Section 190 of LC]

Some of the public servants could be dismissed without reason (e.g. state secretary, political consultant). The new act about the government servants has extended this provision for all officers who are employed by government. This rule is under discussion. The former president of the Republic sent back the bill to the parliament before he assigned, but the parliament passed it again. Some persons (including a trade union) file a claim to the Constitutional Court to nullify this provision, and some dismissed officers ask from the labour court to do it as well. Any judge has a right to turn to the Constitutional Court, if an unconstitutional provision should be apply at the case.

48. Valid grounds to dismiss a worker – Are any valid reasons to justify a dismissal listed in the law - e.g. worker's conduct, worker's capacity, economic reasons, or any fair reasons?

An employee may be dismissed by ordinary dismissal only for reasons in connection with his/her ability, his/her behaviour in relation to the employment relationship or with the employer's operation. [Subsection (3) of Section 89 LC]

An employer may terminate an employment relationship by extraordinary dismissal in the event that the employee wilfully or by gross negligence commits a grave violation of any substantive obligations arising from the employment relationship, or otherwise engages in conduct rendering further existence of the employment relationship impossible. [Subsection (1) of Section 96 of LC]

The Supreme Court has published a statement (95. statement of Labour Law Department), about the appropriateness of justification. The most important aspect is the clarity: the employee has to recognise the real reason of the termination. A general and not clear reason is not acceptable by court. If the reason is the operation of the employer, which affected some other employees as well, the court could not examine why the plaintiff was selected by the employer to terminate his/her relationship. The reason of the selection could the subject of the litigation, if the plaintiff refers to improper exercising of right or discrimination.

The collective agreement could order more sophisticated reasons, which limited the scope of the employer.

49. Prohibited grounds to dismiss a worker – Are there any prohibited grounds listed in the law or this issue is regulated by general non-discrimination provisions?

The LC excludes dismissal the ground of succession. There are not any other particular provisions at the LC. Actually the court considers prohibited ground if it is discriminative. Exercise of rights shall be construed improper if such is intended for or leads to the injury of

the rightful interests of others, restrictions on the assertion of their interest, harassment, or the suppression of their opinion. (Section 4 of LC) In this case the written reasons could be true and rational, but the real ground of the dismissal is considered as prohibited grounds.

50. Workers enjoying special protection from dismissal - Please list any categories, such as women during the pregnancy and maternity leave, workers' representatives etc.
(Section 90 of LC) Employers shall not terminate an employment relationship by ordinary dismissal during the periods specified below

- a) incapacity to work due to illness, but not to exceed one year following expiration of the sick leave period, furthermore, for the entire duration of eligibility for sick pay on the grounds of incapacity as a result of an accident at work or occupational disease,
 - b) for the period of sick leave for the purpose of caring for a sick child,
 - c) leave of absence without pay for nursing or caring for a close relative,
 - d) during the process of artificial insemination and during pregnancy, for three months after giving birth, or during maternity leave,
 - e) leave of absence without pay for the purpose of nursing or caring for children, or until third years of children during the childcare benefit payment,
 - f) during regular or reserve army service, from the date of receiving the enlistment orders or the notice for the performance of civil service,
 - g) during the rehabilitation benefit payment for the whole period of incapacity to work due.
- For the purposes of prevalence of the restriction, the date of announcement of the dismissal shall taken into account.*

At the collective redundancy the relevant date is the announcement of the notification. In this case the employer shall notify the employee affected of its intention of collective redundancy at least thirty days prior delivery of the ordinary dismissal. [Subsection (1) of Section 94/E of LC]

The restriction shall not apply to the termination of an employee who qualifies as a pensioner. [Subsection (3) of Section 90 of LC]

[Section 28 of LC] The consent of the immediately superior trade union body is required for the termination of the employment of an employee who has been elected as a trade union official by the ordinary dismissal. Officials shall be entitled to the protection for the duration of their term and for the period of one year following expiration of such term, provided that the official held the office for at least six months. The member of work council and the elected workers' (industrial safety) protection official are entitled for the same protection.

Procedural requirements for individual dismissals

51. Notification to the worker to be dismissed – In which form the employer must inform the worker about his or her dismissal (orally or in writing)?

The statements for the termination shall be made in writing. [Subsection (2) of Section 87 of LC]. Some of the fundamental provisions of LC are important as well: Any declaration made in violation of formal requirements shall be construed invalid. Employers shall justify all actions issued in writing if the employee concerned is entitled to seek legal remedy in respect of such actions. In such cases the employees shall be duly informed regarding the manner and deadline of the available legal remedy [Section 6 of LC]

The violation of the above mentioned rules results an unlawful termination. The oral dismissal, the ordinary or extraordinary dismissal without justification shall be considered by the court as an unlawful termination. The absence of information about the remedy could be the ground for justification of omission if the plaintiff fails the thirty days deadline for legal issuing the claim.

52. Length of the notice period – How long in advance does the employer have to inform the worker about his or her dismissal?

The advance notice is required only at the collective redundancy. The employer could announce any other dismissal without previous notice period. Although the LC has a special provision about the prior discussion: Prior to dismissal by the employer on the grounds of the employee's work performance or conduct, an opportunity shall be given to the employee for defence against the complaints raised against him, unless it may not be expected of the employer in view of all the applicable circumstances. [Subsection (5) of Section 89 of LC] The breach of this provision is not considered by the court for ground of unlawful termination.

The notice period starts with the announcement of the ordinary dismissal, and the end of this period depends of the length of employment relationship. The start of the notice period should be delayed if the employees are under protection (e.g. sick leave). The notice period of dismissal, if the duration of termination restriction

- a) is more than fifteen days, may commence after another fifteen days,*
- b) is more than thirty days, may commence after another thirty days. [Subsection 2) of Section 90 of LC]*

The LC regulates the length of the notice period [Section 92 of LC]:

The period of notice shall be minimum thirty days and maximum one year. No deviation from this provision shall be considered valid.

The thirty-day notice period shall be extended

- a) by five days after three years,*
- b) by fifteen days after five years,*
- c) by twenty-five days after ten years,*
- d) by thirty days after fifteen years,*
- e) by forty days after eighteen years,*
- f) by sixty days after twenty years of employment at the employer.*

At the employment contract, or collective agreement the parties could conclude a longer period.

The faulty determination of the length does not result an unlawful termination. The court could modify the date of the period according to law, without consideration of unlawful dismissal.

53. Pay in lieu of notice – authorised or no by law?

[Section 93 of LC] In the event of ordinary dismissal the employer shall relieve the employee from performing work. The length of such relief shall be half of the notice period., in the time and in the stages of his choice.

For the period of being relieved of his duties the employee shall be entitled to his average earnings. The employee shall not be entitled to his average earnings for the period of time during which he would not be eligible for any wages otherwise (e.g. illness).

54. Notification to administration – Does the employer have to notify the public administration before dismissing a worker?

The notification is exclusively required at the case of collective redundancy.

55. Notification to workers' representatives – Does the employer have to inform workers' representatives for each individual dismissal?

No. Exception is dismissal of a trade union official, a member of work council, or an elected workers' protection official. In case of collective redundancy the notification is also necessary.

56. Approval by administration – Does the employer need to obtain any authorisation from the administration to dismiss a worker?

No.

57. Approval by workers' representatives – Does the employer have to obtain any authorisation to dismiss a worker?

The consent of the trade union, the work council or workers is required to dismiss a trade union official, a member of work council, or an elected workers' protection official.

Procedural requirements for collective dismissals for economic reasons

58. Definition of collective dismissal - e.g. percentage or number of workers concerned

Collective redundancy shall mean when an employer, based on the average statistical workforce for the preceding six-month period, intends to terminate the employment relationship

- a) of at least ten workers, when employing more than twenty and less than one hundred employees,*
- b) of 10 per cent of the employees, when employing one hundred or more, but less than three hundred employees,*
- c) of at least thirty persons, when employing three hundred or more employees within thirty days for reasons in connection with its operations*

The specified criteria shall be assessed, where applicable, separately for each place of business; however the number of workers employed at various locations, but within the jurisdiction of the same employment authority shall be calculated on the aggregate.

59. Prior consultation with trade unions/workers' representatives – Does the employer have to consult them in case of planned collective dismissals for economic reasons?

(Section 94/B of LC) When an employer is contemplating collective redundancies, he shall begin consultations with the work council or, in the absence of work council, with the committee set up by the local trade union branch and by the workers' representatives within fifteen days prior to decision, and shall continue such negotiations until the passing of such decision or until reaching an agreement. (When an employer is terminated without legal successor, the obligation shall apply to the liquidator.)

At least seven days before the discussions, the employer shall inform the workers representatives in writing regarding

- a) the reasons for the projected redundancies,*
- b) the number of workers to be made redundant broken down by categories, and*
- c) the number of workers employed (statistical workforce).*

During the course of the consultations the employer shall in good time inform the workers' representatives in writing of

- a) the period over which the projected redundancies are to be effected,*
- b) the criteria proposed for the selection of the workers to be made redundant, and*
- c) the conditions for eligibility and the method for calculating any redundancy payments other than those arising out of national legislation and/or collective agreement.*

In order to reach an agreement, the consultations shall, at least, cover

- a) the possible ways of avoiding collective redundancies,*
- b) the principles of redundancies,*
- c) the means of mitigating the consequences, and*
- d) reducing the number of employees affected.*

If an agreement is reached between the employer and the workers' representatives during the course of consultation, it shall be documented in writing, a copy of which shall be sent to the competent employment authority.

60. Notification to the public administration in case of planned collective dismissals for economic reasons – Must the employer notify the public authorities?

The employer shall notify the employment authority from the beginning of the process about the contemplating, the consultation, the result of consultation, the list of effected workers according to the LC.

61. Notification to workers' representatives – Is the employer obliged to inform them in case of collective dismissals for economic reasons?

Yes. (See 22. answer)

62. Approval by the public administration – Does the employer have to obtain any authorisation in case of expected collective dismissals for economic reasons?

No. But the absence of the previous information about the effected workers results an unlawful termination. The effected workers could refer it before the labour court.

63. Approval by workers' representatives – Must collective dismissals be authorised by workers' representatives?

No.

64. Priority rules for collective dismissals – Are there any legal rules to select workers to be dismissed (social considerations, age, job tenure)?

No.

65. Is the employer obliged to consider transfers, retraining and other options prior to dismissal?

No.

66. Priority rules for re-employment – Are any obligation for an employer to first consider applications of former redundant workers while re-hiring the workforce?

No. Sometimes the collective agreement includes this kind of rules.

Severance payment

67. Severance pay – What does the employer have to pay to a worker in case of dismissal for personal and/or economic reasons?

(Section 95 of LC) *An employee shall be entitled to severance pay if his employment relationship is terminated by ordinary dismissal or in consequence of the employer without legal succession, or a rightful extraordinary dismissal by the employee, except the employee is a pensioner.*

Eligibility for severance pay shall only apply upon the existence of an employment relationship. The following period shall not be included in the period applicable for eligibility for severance pay: any term of imprisonment or public service work (in meaning of a punishment), and a leave of absence without pay for a period more than thirty days, with the exception of a leave of absence without pay for caring for a close relatives or a child under ten years of age.

Severance pay shall be the sum of the average earnings of

- a) one month for at least three years,*
- b) two months for at least five years,*
- c) three months for at least ten years,*
- d) four months for at least fifteen years,*
- e) five months for at least twenty years,*
- f) six months for at least twenty-five years of employment.*

The amount of severance pay shall be increased by three months average earnings if the employee's employment is terminated within five-year period his/her eligibility for old age pension.

The parties could increase the measure of severance pay at the employment contract or at the collective agreement.

The new parliament initiated an extra-tax for severance pay above of 2 million forint (7400 EURO) when the state is the only or partly owner at the company.

Avenues for redress (penalties, remedies) and litigation procedure for individual complaints on dismissals

68. Compensation for unfair dismissal – Are there any legal limits (ceiling in months or any calculation method defined by law) or freely decided by the judge?

[Subsection (4)-(6) of Section 100 of LC] If the employee does not request or if upon the employer's request the court exonerates reinstatement of the employee in his original position, the court shall order, upon weighing all applicable circumstances – in particular the unlawful action and its consequences -, the employer to pay no less than two and no more than twelve months' average earning to the employee. If the employee does not request or if upon the employer's request the court exonerates reinstatement of the employee in his original position, the employment relationship shall be terminated on the day when the ruling to determine unlawfulness becomes definitive. In case of civil servants the court shall order upon weighing the circumstances 2-36 average earnings of the employer which ensures wild consideration for judges.

If the employment is terminated unlawfully the employee shall be reimbursed for lost wages (and other emoluments) and compensated for any damages arising from such loss. The portion of wages (other emoluments) or damages recovered elsewhere shall neither be reimbursed nor compensated.

An employee, if his employment was not terminated by ordinary dismissal, shall be eligible for his average earnings payable for the notice period and severance pay payable in the event of ordinary dismissal.

69. Reinstatement – provided in law, rarely or often available to a worker unfairly dismissed?

[Subsection (1)-(3) of Section 100 of LC] If it is determined by court that the employer has unlawfully terminated an employee's employment, such employee, upon request, shall continue to be employed in his original position.

At the employer's request the court shall exonerate reinstatement of the employee in his original position if the employee's continued employment cannot be expected of the employer, except if

- a) the employer's action violates the requirements of the proper execution of law, the prohibition on discrimination on discrimination, or restriction of termination, or*
- b) the employer has terminated the employment relationship of an employee under labour law protection prescribed for elected trade union representatives in violation of the law.*

In case of civil servants the employment relationship cannot be reinstated just in case of the above mentioned factors.

70. Preliminary (judicial and/or extra-judicial) conciliation – Is it mandatory or not?

The Labour Court shall apply The Civil Process Code (CPC) for the trial of labour cases. The CPC has a special chapter for labour trial. It is order a compulsory conciliation leading by the professional judge at the first stage of the trial. In case of disciplinary action the conciliation is prohibited.

71. Competent courts – What bodies are competent for disputes on dismissals (ordinary tribunals, specialised labour courts)?

The dispute on dismissal belongs to the jurisdiction of labour courts. Labour courts are separate first instance courts at the local courts level. Labour courts operate in Budapest and in every counties at the chief town of the county (19). The separation of labour court is limited to the jurisdiction. In any other aspect they are parts of the ordinary judicial system. In the second instance the labour cases are dealt by the ordinary county courts. The highest instance is the Supreme Court, which provides an extraordinary remedy.

However both in the second- instances courts and in the Supreme Court specialized panels are dealing with employment/labour disputes.

72. Alternative arbitration / mediation – Do the parties to an employment contract have any alternative possibility to settle out their labour dispute?

The parties could regulate the preliminary conciliation at the employment contract or at the collective agreement. The LC recommends it, but does not order it. In practice the contracts does not contain regulation about the preliminary conciliation.

There is an experimental programme at the Budapest Labour Court for the popularization of mediation. Including of this programme the judges inform the parties about the advantages of mediation, and the court provide a place for mediation and a mediator on duty. The mediators are recruited from the member of a mediators' association.

- 73.Length of the court procedure** – What is the average length for a case on dismissals (are there any legal limitations)?

There is not any legal limitation of the procedural length. The length of the process is depending on the difficulties of the case, the instances of the process the number of evidences (witnesses, experts ...) and the workload of the court. At the Budapest Labour Court the average length of the process is 1 year, while in countryside is less than 6 month. Some cases takes for several years, especially when the parties appeal against the first, and second level decision. The result could be an economical disaster for a company, because it has to pay the whole salary for the employer for the reinstatement period of employment.

- 74.Maximum time to make a claim for unfair dismissal** – During which period does the worker have to bring his or her complaint to the court?

The time limit is thirty days.

IV. ECONOMIC CRISIS AND CASE LAW OF LABOUR COURTS

3. Which court decisions in your country have been related to the economic crisis (with the main focus on EPL)? Please share information about any court decisions which:
- Have influenced the interpretation of legal provisions regulating dismissals, fixed-term contracts etc;
 - Were necessary to fill any gaps in the national labour law?

The court cannot examine the decision of the employer regarding was his decision about the outsourcing, redundancy, reorganization was or not suitable. The court can examine only the validity of reason.

4. Are there any labour law reforms under discussion in your country caused or affected by the economic crisis (to make labour more flexible, or to extend protection to some categories of workers)?

In Hungary the Labour Code and the other acts rule very sophisticated the employment relationship. One of the features of European labour law, the contractual legal source system of labour law had not developed under circumstances prevailing in Hungary. This deficiency was realised by the legislator and was endeavoured to be resolved in two ways. On the one hand, amendments to the LC also authorized for dispositive regulation with respect to several legal institutions within the collective agreement, that is, for derogations to detriment of employees. On the other hand issues typically included in collective agreement were forced by regulated. This effects against the flexibility. The result was the employers attempts towards efficiency are coupled, in many cases, with the devolution of employment, and escape from employment within the framework of labour law. There is a widely perceptible tendency towards sham contracts of work and employment in the process of "escaping from labour law".

The modification of the labour law is a very sensitive political question. The former governments had not serious intents or power to change the law, but there are six lawyers (advocates, professors) who have been worked for a years of conception of a new Labour Code. Their theories started to be popular – mostly among the employers – at the last year. The intents are to make labour more flexible for example

- small employers: termination without reasons – in return for compensation for damages,
- socially justified termination – by strengthening the rights of participation,
- termination – more efficient employee protection by doing away with excessive employer burdens,
- working hours and rest periods – with more flexible guarantees,
- atypical employment relationships – wide-range dispositivity,
- managers – those in confidential position,
- work council and trade unions – resolving the confusion of roles in the regulation etc.

Israel

I. EMPLOYMENT PROTECTION LEGISLATION (EPL)

Source and scope of regulation

75. **Source of regulation** – What is the main law (title and date of adoption) regulating employment contracts and dismissals (Please provide a Web-link, Word/PDF version, its translation in English or French).

In Israel, there is no act regulating specifically employment contracts neither is an act regulating dismissals. However, the **Severance Pay Law, 5723-1963** (available at: <http://www.israeltrade.gov.il/NR/rdonlyres/CC5E4B42-7F21-4B96-B805-C920A56B26A8/0/21.pdf>) regulates workers' right to receive severance pay from the employer who dismissed him/her.

76. **Scope of legislation** – What categories of workers are excluded from the regulation? (e.g. public servants, domestic workers, police, judiciary etc).

The labor Court is empowered to adjudicate all employment relations, including those that take place in the case of public servants (the **Employment Service Law, 5719-1959**, available at: <http://www.israeltrade.gov.il/NR/rdonlyres/45D51915-43A7-49F4-873D-0E013347D787/0/4.pdf>), policemen and prison guards. However, soldiers, people who serve due to legal appointment (such as judges) and people elected for their public service (such as MPs) are excluded from the Labor Court's power and conflicts relating to their status are judges by the Israeli Supreme Court. In **DNGZ 95/4601 Sarusi vs. The National Labor court, PD NB(4) 817** (available only in Hebrew: http://www.nevo.co.il/psika_html/elyon/9504601.htm) the Supreme Court decided that at least for some purposes (such as the right to receive unemployment stipend) a person who is elected for a public post is entitled to be regarded as a worker.

77. **Size of enterprise excluded** – Are any enterprise of a certain size (e.g. employing less than 20 workers) excluded from the scope of application of the law?

Basically, labour laws apply in Israel to any size of enterprise. However, there are some exceptions. For example, section 21(c) of the **Employment (Equal Opportunities) Law, 5748-1988** (available at: <http://www.israeltrade.gov.il/NR/rdonlyres/2654DA40-7F3A-44DE-AC90-813996BD7570/0/25.pdf>) states that: "**The provisions of this law, except section 7, shall not apply to a person employing fewer than six persons**".

78. **Collective agreements** – Are there any important collective agreements of general application at the national and/or branch level?

In Israel, there are quite a lot collective agreements which apply to all the workers at the national level, and also collective agreements which apply at the branch level. An example for a national wide collective agreement quite recently signed is the agreement which creates a **Frame for Comprehensive Pension Insurance in the Economy (agreement no. 7019/2007)**. This agreement was applied on all workers in Israel by an extension order (available at: <http://www.moit.gov.il/NR/exeres/3C1054A2-C08F-47C0-A02A-3606863D7295.htm>).

Types of employment contracts

79. Probationary period - What is its maximum duration?

The Probation period is maximally of one year.

80. Fixed-term contracts (FTC) – May FTC be concluded only for objective and material reasons (e.g. nature of work) or without any limitation?

Basically, FTCs are contracted for a practical reason, such as seasonal work or a fixed term project. In unusual cases, the court found that contracts were signed on a fixed-term basis and renewed time after time. In some of these cases, depending on the specific matter of fact, the National Labor Court ruled that this type of employment is essentially problematic and that when the employer avoids signing a regular contract after a long term of resigning FTC contracts with the same employee it might lead to the conclusion that the employee became a permanent worker (AA (National) 96/300053 **Nitai vs. Beit Hatfutsot, PDA LZ 311**; available only in Hebrew: http://www.nevo.co.il/psika_word/avoda/a96300053-padi.doc).

81. Maximum number of successive FTC – Are there any legal limitations?

The law doesn't state formally any maximum number of successive FTCs. As explained with reference to the aforementioned **NITAI case**, the court did limit the legitimacy of successive FTCs, nonetheless with no specific designation of the number of successive re-contracting which will make a successive FTC illegitimate.

82. Maximum cumulative duration of FTC – Are there any legal limitations?

There is no inclusive legal resolution of this issue. However, in the **Regulations for Public Service (Appointments) (Special Contract), 5720-1960** (available only in Hebrew: http://www.nevo.co.il/law_word/law01/p221k1_011.doc) there are some provisions which relate exclusively to a number of specific cases, such as a work that doesn't fit permanent employment, a person with disabilities who is employed for the purpose of his/her rehabilitation, etc.

83. What is the percentage of the workforce under FTC? – Please provide any statistics, if available.

There are no statistical data for answering this question.

Substantive requirements for dismissals (justified and prohibited grounds)

84. Obligation to provide reasons for dismissals – Is the employer obliged to provide the worker with a reason of dismissal?

The answer is in the positive. Usually, the reason/s for dismissal will be given in the process of hearing which the judiciary in Israel decreed to be a mandatory part of any dismissal, both in the public sector and in the private sector (AA (National) 09/516 **Avraham Malka vs. Agam Metal Industry**, 17.12.2009; available only in Hebrew: http://www.nevo.co.il/psika_html/avoda/a09000516-142.htm).

85. Valid grounds to dismiss a worker – Are any valid reasons to justify a dismissal listed in the law - e.g. worker's conduct, worker's capacity, economic reasons, or any fair reasons?

The Law doesn't register a list of valid reasons for dismissal. Some collective agreements detail such a list for a specific plant or branch of employment.

86. Prohibited grounds to dismiss a worker – Are there any prohibited grounds listed in the law or this issue is regulated by general non-discrimination provisions?

Prohibited reasons for dismissal are dispersed between some laws which related to different fields of equality. For example, section 2 of the **Employment (Equal Opportunities) Law, 5748-1988** (available at: <http://www.israeltrade.gov.il/NR/rdonlyres/2654DA40-7F3A-44DE-AC90-813996BD7570/0/25.pdf>) states that: "**An employer shall not discriminate among his employees... on account of their sex, sexual tendencies, personal status or because of their age, race, religion, nationality, country of origin, views, party or duration of reserve service... in any of the following... (5) dismissal or severance pay**"; and section 2 of the **Protection of Employees (Exposure of Offences of Unethical Conduct and**

Improper Administration Law, 5757-1997 (available at: <http://www.israeltrade.gov.il/NR/rdonlyres/812A9432-511A-4C08-9950-8C71D6515665/0/22.pdf>) states that: "**An employer must not impair an employee's terms of employment and must not dismiss the employee submitted a complaint against his employer or against any other employee of that employer**". There are other laws which deal with that subject matter with reference to other cases, such as the **Collective Agreements Law, 5717-1957**, with reference of employers' attempt to impair the term of employment or dismiss an employee because of his/ her membership or activity in a union (available at: <http://www.israeltrade.gov.il/NR/rdonlyres/DF31497A-297C-431A-8C63-7DB7CD653C1F/0/3.pdf>, but unfortunately the specific section is not updated). Another provision is in section 8 of the **Equal Rights of Persons with Disabilities, 5758-1998** (available at: <http://www.israeltrade.gov.il/NR/rdonlyres/128CB794-3584-4AE0-87A2-B8E931E1A8D5/0/27.pdf>).

87. **Workers enjoying special protection from dismissal** - Please list any categories, such as women during the pregnancy and maternity leave, workers' representatives etc.
Part of the answer is already included in the above answer to question 12 – relating to persons with disabilities, elderly workers, members of a union regarding their membership or activity etc. To these one should add the limitations included in section 9 of the **Employment of Women Law, 5714-1954**, with regard to a woman employee who is pregnant, a woman or man during a maternity leave, a woman or man during a period of 60 days after a maternity leave, a woman or man who undergoes fertility treatments, or a woman who stays in a women's shelter fallout (available at: <http://www.israeltrade.gov.il/NR/rdonlyres/D1F1E33F-9227-49DA-8E74-BC8D523C642F/0/13.pdf>, but unfortunately the specific section is not updated) (for a more detailed account of the abovementioned limitations, see below the answer to question no. 17).

Procedural requirements for individual dismissals

88. **Notification to the worker to be dismissed** – In which form the employer must inform the worker about his or her dismissal (orally or in writing)?
According to section 2 of the **Preliminary Announcement of Dismissal and Retirement Law, 5771-2001** the announcement dismissal must be in a written form.
89. **Length of the notice period** – How long in advance does the employer have to inform the worker about his or her dismissal?
Sections 3-4 of the **Preliminary Announcement of Dismissal and Retirement Law, 5771-2001** include the following arrangement: **Salaried employees** – will be given an announcement of one day for each month (one day for one month of work, two days for two months of work etc.) of the first six months; from the seventh month onwards (until one year) they will be given an announcement of 6 days + 2.5 days more for each additional month in the second half of the year; after one year the obligatory term of preliminary announcement for these workers is of 30 days; **Wage workers** – will be given an announcement of one day for each month of the first year; from the second year onwards until the third year they will be given an announcement of 14 days + 1 more day for each additional 2 months in the second year; from the third year onwards until the fourth year they will be given an announcement of 21 days + 1 more day for each additional 2 months in the third year; after three years the obligatory term of preliminary announcement for these workers is of 30 days.
90. **Pay in lieu of notice** – authorised or no by law?
This possibility is authorized by section 6 of the **Preliminary Announcement of Dismissal and Retirement Law, 5771-2001**.
91. **Notification to administration** – Does the employer have to notify the public administration before dismissing a worker?
The answer is in the negative, except for special cases including women's work, parental responsibilities and related issues. The relevant arrangements are in section 9 of the

Employment of Women Law, 5714-1954 (available at: <http://www.israeltrade.gov.il/NR/rdonlyres/D1F1E33F-9227-49DA-8E74-BC8D523C642F/0/13.pdf>, but unfortunately the specific section is not updated). The section states that an employer shall not dismiss: a woman employee who is pregnant and who has not yet begun her maternity leave; a woman or man during a period of 60 days after a maternity leave; a woman or man who undergoes fertility treatments; or a woman who stays in a women's shelter fallout – "**save under a permit from the Minister of Labour and Social Affairs**". In any of these cases, the law includes a detailed account of the Minister's scope of deliberation and the type of considerations he/ she has to take into account.

92. **Notification to workers' representatives** – Does the employer have to inform workers' representatives for each individual dismissal?

Notification to workers' representatives is not regulated by law but by collective agreements. In plants in which there is a collective agreement, it usually states a system in which the employer informs the workers' representatives of a future plan to dismiss an individual.

93. **Approval by administration** – Does the employer need to obtain any authorisation from the administration to dismiss a worker?

The answer is as detailed in the answer to question no. 17.

94. **Approval by workers' representatives** – Does the employer have to obtain any authorisation to dismiss a worker?

The subject matter is developed by collective agreements which some of them state the duty to consult workers' representatives in cases such as collective redundancies. In some cases (such as: AA (National) 99/359 **Lea Levin vs. Rashut Hashidur**, 28.2.2001, available only in Hebrew: http://www.nevo.co.il/psika_html/avoda/a99359.htm; ASK (National) 01/1003 **Histadrut vs. Ai. Si. Telkum LTD.**, PDA LV (2001) 289; available only in Hebrew: http://www.nevo.co.il/psika_html/avoda/a1003-01.htm) a more general rule was developed according to **directive 75/129 of the EU** (which was after replaced by **directive 92/56**), attempting to establish the duty to consult as general and independent of any specific collective agreements. If the problem is individual and grounded in disciplinary reasons, there might be mechanisms (such as committees of employer's and employees' representatives) for examining the matter and adjudicate the required consequence.

Procedural requirements for collective dismissals for economic reasons

95. **Definition of collective dismissal** - e.g. percentage or number of workers concerned

There are no statistical data for answering this question.

96. **Prior consultation with trade unions/workers' representatives** – Does the employer have to consult them in case of planned collective dismissals for economic reasons?

The answer is as detailed in the answer to question no. 20.

97. **Notification to the public administration in case of planned collective dismissals for economic reasons** – Must the employer notify the public authorities?

No. There is no such duty related specifically to collective dismissals. One should note, however, that the limitations detailed in section 9 of the **Employment of Women Law, 5714-1954** – in cases of women's work or parental responsibilities (see answer to question no. 17) – are applied also when the situation is of planned collective dismissals for economic reasons.

98. **Notification to workers' representatives** – Is the employer obliged to inform them in case of collective dismissals for economic reasons?

The issue is not settled by law, but via judicial ruling. The National Labour Court ruled that even when there is no collective agreement the employer is obliged to notify the representative union of future planned collective dismissals and to consult the union regarding these plans (ASK (National) 05/52 **General Histadrut – Kiriat Gat**, section 12, 10.11.2005; available only in Hebrew: [http://www.nevo.co.il/psika_html/avoda/a05000052-122\[1\].htm](http://www.nevo.co.il/psika_html/avoda/a05000052-122[1].htm)). However,

lacking any specific provision in a collective agreement, the union is **not** entitled to prohibit collective dismissals for economic reasons.

99. **Approval by the public administration** – Does the employer have to obtain any authorisation in case of expected collective dismissals for economic reasons?

See the answer to question no. 23.

100. **Approval by workers' representatives** – Must collective dismissals be authorised by workers' representatives?

No, there is no such authorization (see the answer to question no. 24). However, the representative union might examine the real reason for dismissals, and in some cases it was approved by court that the dismissals were rightly declared by the union as unfair and thus approved they were canceled by the court (See, for example: ASK (National) 00/1008 **Horn and Leibovitz vs. General Histadrut**, 23.7.2000; available only in Hebrew: http://www.nevo.co.il/psika_html/avoda/a1008-00.htm).

101. **Priority rules for collective dismissals** – Are there any legal rules to select workers to be dismissed (social considerations, age, job tenure)?

The law does not state priority rules for collective dismissals which select workers to be dismissed. Nevertheless, judicial ruling stated that a decision to dismiss must be grounded in reasons and that even in a case of collective dismissals for economic reasons the employer should explain by reason his/ her rejection of the worker's claims in the act of hearing (see for example: AA (National) 08/378 **Fargun vs. the Israeli Post Company**, 12.11.2008; available only in Hebrew: http://www.nevo.co.il/psika_html/avoda/a08000378-111.htm). More detailed priority rules might be settled by a collective agreement. Also, it will be noted that there are workers enjoying special protection from dismissal (see answer to question no. 13).

102. **Is the employer obliged to consider transfers, retraining and other options prior to dismissal?**

Yes, this is again a rule which was developed by judicial activity. For example, in the case of **Ovadia Bi-Nun** it was established that the dismissals were unfair – with no hearing and no sufficient grounds. The National Labor Court ruled that the dismissals will be cancelled and the employee will be transferred to another branch of the employer (in that case, another school) (AA (National) 08/109 **The Center for independent Education for Tora vs. Ovadia Bi-Nun**, 21.8.2008; available only in Hebrew: http://www.nevo.co.il/psika_html/avoda/a08000109-56-A.htm).

103. **Priority rules for re-employment** – Are any obligation for an employer to first consider applications of former redundant workers while re-hiring the workforce?

That field is not considered by Israeli law, but in some cases might be considered by a collective agreement.

Severance payment

104. **Severance pay** – What does the employer have to pay to a worker in case of dismissal for personal and/or economic reasons?

As noted (see the answer to question no. 1), the **Severance Pay Law, 5723-1963** (available at: <http://www.israeltrade.gov.il/NR/rdonlyres/CC5E4B42-7F21-4B96-B805-C920A56B26A8/0/21.pdf>) regulates this field. Section 1 of this law states that: "**A person who has been employed continuously for one year or, in the case of a seasonal employee, has been employed for two seasons in two consecutive years, by the same employer or at the same place of employment and has been dismissed is entitled to receive severance pay from the employer who has dismissed him**".

Section 2 of the same law refers to several cases (such as military service, annual leave etc.) which would not be considered as "breaks" of the continuation of work and would not deny the right for severance pay. Section 12 of the same law states the rates of severance pay, which are related to the type of employment (salaried employees / wage workers / seasonal employees) and the total period of work. Other

rights in cases of dismissal might be part of a collective agreement or an individual contract, and in any case would not deprive the employee of the minimal right stated by law.

Avenues for redress (penalties, remedies) and litigation procedure for individual complaints on dismissals

105. **Compensation for unfair dismissal** – Are there any legal limits (ceiling in months or any calculation method defined by law) or freely decided by the judge?

In Israel, Reinstatement is a rare remedy (see a detailed account in the answer to question no. 32 below), and thus compensation is the main path in many cases of unfair dismissal. Section 10(a) of the **Employment (Equal Opportunities) Law, 5748-1988** (available at: <http://www.israeltrade.gov.il/NR/rdonlyres/2654DA40-7F3A-44DE-AC90-813996BD7570/0/25.pdf>) refers – inter alia – to unfair dismissals which violate the principle of equal opportunity and states that the court is authorized to rule award compensation even if no monetary damage has been caused to an amount deemed appropriate by it. A fixed limit is given in that law only to compensation awarded with no proof of damage at all in cases of prejudice related to sexual harassment. Section 13a(b) of **Employment of Women Law, 5714-1954** states that in cases of violation of the provisions in that law the court will rule a compensation that will not be less than 150% of the wage entitled for the relevant period. Other legal (maximum or minimum) limits for compensation are fixed in section 3 of the **Protection of Employees (Exposure of Offences of Unethical Conduct and Improper Administration) Law, 5757-1997** (available at: <http://www.israeltrade.gov.il/NR/rdonlyres/812A9432-511A-4C08-9950-8C71D6515665/0/22.pdf>) and in section 6 of the **Prevention of Sexual Harasment Law, 5758-1958** (available at: <http://www.israeltrade.gov.il/NR/rdonlyres/C9A1038A-E88A-4696-9985-541B8C8E439A/0/15.pdf>). In other cases of unfair dismissal not related to these specific laws, compensation was adjudicated by judicial decision according to criteria that are less rigid. Thus, in a case in which the employer violated the duty to perform a hearing but it was clear from the matter of fact that there were real problematic aspects to the employee's work, it was stated that the employer will compensate the employee for the lack of procedure of hearing with six months of salary (AA (National) 09/516 **Avraham Malka vs. Agam Metal Industry**, 17.12.2009; available only in Hebrew: http://www.nevo.co.il/psika_html/avoda/a09000516-142.htm). And, in an unusual case in which a senior worker, that was nominated to her post by the correct formal procedure, was a good worker and dismissed in a faulty procedure, the court decided for a compensation of 24 months salary (AA (National) 07/ 205 **Tel Aviv University vs. Rivka Elisha**, 7.2.2008; available only in Hebrew: http://www.nevo.co.il/psika_html/avoda/a06000456-161.htm).

106. **Reinstatement** – provided in law, rarely or often available to a worker unfairly dismissed?

The law provides the remedy of reinstatement only rarely. An example of this remedy is in cases of violation of the provisions included in the **Employment of Women Law, 5714-1954** (section 13a(a)(2) provides this remedy; unfortunately it is not included in the English version of the law available on the internet). That remedy is allowed also in section 10(a)(2) of the **Employment (Equal Opportunities) Law, 5748-1988** (available at: <http://www.israeltrade.gov.il/NR/rdonlyres/2654DA40-7F3A-44DE-AC90-813996BD7570/0/25.pdf>).

Apart from that, reinstatement is a rare remedy developed mainly by judicial activity, which throughout the years changed its interpretation to the relevant law and also brought about changes in the legal condition.

Section 3(2) the **Contract Law (Remedies), 5731-1970** states that: The person entitled for the contract's fulfilment and was injured by its violation "**is entitled to the contract's execution, except in cases in which the contract forces to accomplish a personal work or service**". For many years, this section was interpreted as prohibiting reinstatement, even in clear cases of unfair dismissal. This judicial interpretation was corroded by later rulings

which developed the exceptions to the rule. Today, following judicial activity, section 33j of the **Collective Agreements Law, 5717-1957** states a clear prohibition against the dismissal of an employee because of his/ her membership or activity in a labour union. In a list of judgements (which some of them were given **before** the above legislative provision and anticipated its formulation), the National Labour Court ruled, that if a worker is dismissed in that case the remedy is his/ her reinstatement (see, for example: ASK (National) 10/24 **Hot vs. General Histadrut**, 16.3.2010; available only in Hebrew: http://www.nevo.co.il/psika_html/avoda/a10000024.htm). The remedy of reinstatement was also recently approved by the Supreme Court in the case of dismissals that are grounded in political reasons (BGZ 08/4284 **Shmuel Klepner vs. The Company of Israeli Post**, 26.4.2010; available only in Hebrew: http://www.nevo.co.il/psika_html/elyon/08042840-t06.htm).

107. **Preliminary (judicial and/or extra-judicial) conciliation** – Is it mandatory or not?
No, conciliation is not mandatory.
108. **Competent courts** – What bodies are competent for disputes on dismissals (ordinary tribunals, specialised labour courts)?
The competent courts for disputes on dismissals are the labour courts which are divided into two instances – the National Labour Court in Jerusalem and the District Courts which are located in 5 different cities of Israel and divide the country into 5 local areas. As explained in the answer to question no. 2 only soldiers, people who serve due to legal appointment and people elected for their public service are excluded from the Labor Court's power.
109. **Alternative arbitration / mediation** – Do the parties to an employment contract have any alternative possibility to settle out their labour dispute?
Parties to an employment contract might use alternative possibilities to settle out their labour disputes. Among these possibilities: arbitration and mediation. In some cases, the mediation is offered to the parties within the courts, with no expense, and with lawyers or laymen who have specific knowledge in labor law. In any case, these alternative possibilities are only at will and cannot be enforced on a party who prefers to bring his/ her dispute to the court. In collective disputes in which the state is one of the parties, the dispute can also be settled by the "**Institute for Agreed Mediation**" in which case also – the appeal to this institute is at the parties' will and cannot be enforced on them.
110. **Length of the court procedure** – What is the average length for a case on dismissals (are there any legal limitations)?
There are no special formal limitations for the treatment of a case on dismissals. Sometimes, a case of dismissal is dealt with while a prohibitory or mandatory order is activated. On the average, it might take one year until the case is determined.
111. **Maximum time to make a claim for unfair dismissal** – During which period does the worker have to bring his or her complaint to the court?
There are no special formal restrictions for the worker to bring his/ her case before the court, except for the more general provision of 7 years of limitation. However, a delay in bringing about the case before the court might influence the remedy that will be given, especially when another employee already fulfils the relevant post.

II. ECONOMIC CRISIS AND CASE LAW OF LABOUR COURTS

by Judge Yigal Plitman, National Labour Court, Israel

1. Which court decisions in your country have been related to the economic crisis (with the main focus on EPL)?
Please share information about any court decisions which:
 - Have influenced the interpretation of legal provisions regulating dismissals, fixed-term contracts etc;

- Were necessary to fill any gaps in the national labour law?
- 2. Are there any labour law reforms under discussion in your country caused or affected by the economic crisis (to make labour more flexible, or to extend protection to some categories of workers)?

The answer to the two last questions is detailed below:

In Israel, the economic crisis was quite moderate. One result of the crisis was the pension funds' inability to sufficiently pay insurances, a phenomenon which required governmental support (see: the report of the Hodek Committee, available in Hebrew: <http://www.mof.gov.il/Insurance%20savings/Pages/HodakCommitteeReport.aspx>; available in English: <http://www.finance.gov.il/hon/bituah/docs/PP-HodakReport2.pdf>).

The main change in labour relations which took place following the economic crisis is the "Round Table" agreement which was agreed by the General New Histadrut which is the largest labour union in Israel (<http://www.histadrut.org.il/index.php>), Israeli Ministry of Finance (http://www.finance.gov.il/mainpage_eng.asp) and the Manufactures Association of Israel (<http://www.industry.org.il/Eng/>). The agreement is called "**the Package Deal Histadrut – Employers – Government**": its aim was to support the Israeli economy in a period of crisis by facilitating some economical renounces of the workers to which the workers agreed because of their success in achieving some legislative changes they aspired to accomplish long before.

This agreement includes: a fund for factories in distress; convalescence pay which will be deducted from workers in the public sector and will be delivered to the fund; the leave without pay plan; changes in legislation which reinforce the freedom of association; removal of decrees from the budget proposal; increasing the budget framework; increase in the budget for professional training, day care canthers, unemployment allowance, etc (see: http://www.histadrut.org.il/index.php?page_id=956; see also: http://www.histadrut.org.il/index.php?page_id=1104; and also: <http://www.israelpolicyforum.org/blog/finance-ministry-budget-director-ram-belinkov-announces-resignation>).

On August 3 2009 the Knesset (Israeli Parliament) passed three labour laws which were initiated by the Histadrut in the framework of the economic package deal: a delay in the payment of wages offence – meaning that at present a delay of wage will be considered a criminal offence; the obligation to conduct negotiations in the first attempt to unionize; and a criminal liability for employers who violate the branch minimum wage (see: http://www.histadrut.org.il/index.php?page_id=1101).

From the first agreement onwards, the round table meets periodically, discussing related issues. For more recent information on meetings of this forum, see: <http://www.haaretz.com/print-edition/business/finance-ministry-raises-for-public-sector-a-legitimate-demand-1.290314>. It should be noted that there is also a critical stance towards this deal, see: http://www.wac-maan.org.il/en/article__115.

Italy

I. EMPLOYMENT PROTECTION LEGISLATION (EPL)

Source and scope of regulation

1. **Source of regulation** – What is the main law regulating employment contracts and dismissals.

The Italian Constitution of 1948 contains some declarations of fundamental principles on labour law (e.g. sec. 1 "Italy is a democratic Republic founded on labour", sec. 4 "the Republic recognises to every citizen the right to work", sec. 35 "the Republic protects work in all its forms and applications"), and some more effective rules, largely employed in case-law: sec. 36 on fair salary,

the maximum working hours, the weekly and annual paid vacation (see number 5, 6 and 11); sec. 37 on the protection of woman and of minors on the job (see number 7 and 9); sec. 38 on the social insurance for old age, illness, invalidity, industrial diseases and accidents, etc.; sec. 39 on the free activity of labour unions (see number 12; sec. 40 on the right to strike (see number 15).

These fundamental principles are in force with the ordinary legislation. The main laws are:

Civil Code of 1942 (which was conformed to the fundamental principles by the Italian Constitutional Court); Legislative Act 15 July 1966 n. 604 (which implemented a collective agreement on the issue and introduced limitations on the employer's freedom to dismiss); Legislative Act 20 May 1970 n. 300 (Statute of the Workers' Rights); Legislative Act 23 July 1991 n. 223 on collective dismissals.

Web links to sources of the Labour Law: <http://www.giustizia.it>, a free web site of the Justice Department from which you can connect to the CED Cassazione (an individual code number is needed) which contains all State laws since 1865, and Regional laws since their institution in 1948; constitutional, civil, penal and administrative case-law of Upper Courts since 1970.

Other institutional free web sites are: <http://www.senato.it>; camera.it, to find laws and Acts in discussion; minilavoro.it, to find administrative regulations; cnel.it, where all collective agreements, in force and of the past, are filed; Inps.it for laws and administrative regulations on social security; Inail.it idem for industrial diseases and accidents; giustizia-amministrativa.it, cortecostituzionale.it, governo.it, finanze.it.

2. Scope of legislation – What categories of workers are included from the regulation?

Work relationship of public servants is regulated by legislative Act 30 March 2001 n. 165. The job of Judges (and Public Prosecutors), policemen, soldiers and of some particular categories of public servants has a particular regulation.

In private work domestic workers only are excluded from the regulation of Legislative Acts sub n. 1.

3. Size of enterprise exclude – Are any enterprise of a certain size excluded from the scope of application of the law?

In case of unjustified dismissal, remedies are different according to the size of the firm: Employers employing more than 15 employees (or five in the agricultural sector) in each establishment, branch, office or autonomous department, and employers employing more than 60 workers, wherever located, are liable for reinstatement of the employees and payment of damages equal to a minimum of five months' pay.

Where there are fewer than 15 employees in each unit or fewer than 60 employees in total, the employee unfairly dismissed has no right to reinstatement, but is entitled to a compensation from 2,5 to six times the months' pay.

The employees of charity, union or political organizations are not entitled to be reinstated (Legislative Act 11m May 1990 n. 108, Art. 4).

4. Collective agreements – Are there any important collective agreements of general application at the national and/or branch level?

Collective agreements on dismissals of general application were implemented by Legislative Act n. 1966/604 and introduced limitations on the employer's freedom to dismiss (see n. 1).

Types of employment contracts

5. Probationary period – What is its maximum duration?

Maximum duration of probationary period is six months (art. 10 Acts 15 July 1966 n. 604). Collective agreements can provide a shorter duration.

6. Fixed-term contracts (FTC) – May FTC be concluded only for objective and material reasons (e.g. nature of work) or without any limitation?

FTC in Italy is ruled according with the European Directive on fixed-term work (1999/70/EC), that was implemented by Act 6 September 2001 n. 368. This Act was amended next by the general legislation on the labour market (Act 10 June 2003 n. 276), according with EC Directives always.

FTC may be concluded for reasons concerning technical or productive aspects of enterprises, for organization or replacement of workers (art. 1, Act 2001/ 368).

7. Maximum number of successive FTC – Are there any legal limitations?

It is possible a respite of the FTC of a maximum period of three years beyond the expiry date (art. 4, Act 2001/368).

8. Maximum cumulative duration of FTC – Are there any legal limitations?

Act n. 368 does not fix a maximum duration of FTC.

9. What is the percentage of the workforce under FTC? – Please provide any statistics, if available.

Substantive requirements for dismissals (justified and prohibited grounds)

10. Obligation to provide reasons for dismissals – Is the employer obliged to provide the worker with a reason of dismissal?

Yes, but only on request of the worker (art. 2, Act n. 1966/604).

11. Valid grounds to dismiss a worker – Are any valid reasons to justify a dismissal listed in the law – e.g. worker's conduct, worker's capacity, economic reasons, or any fair reasons?

Civil code provides that each contracting party (the employer and the employee) of a contract of indefinite duration can terminate it, when the notice period is respected (art. 2118), or without any notice in case of just cause (art. 2119).

Act 1966/604 introduced limitations on the employer's freedom to dismiss, for companies employing more than 35 people, and extended to all organizations of whatever size by Act 1990/108; now termination by the employer is only possible for a "justified reason" and provided that the notice period is respected; or without notice for a just cause (art. 2119, Civil code). There is "just cause" for dismissal when such fact occurs as not to allow continuance, even provisory, of employment (as in case of sabotage, theft, or other misconducts).

Collective agreements frequently list the grounds for dismissal.

Termination without grounds is limited to trial periods, domestic workers, employees who have reached retirement age and directors.

12. Prohibited grounds to dismiss a worker – Are there any prohibited grounds listed in the law or this issue is by general non-discrimination provisions?

13. Workers enjoying special protection from dismissal – Please list any categories, such as women during the pregnancy and maternity leave, workers' representative etc.

(12-13) There are a number of provisions protecting individual categories of employees, which will render their dismissal automatically unfair; for example, dismissal on the grounds of political opinion, trade union membership, sex, race, language or religious affiliation will automatically be unfair, and members of workers' committees may not be dismissed or transferred for one year following the cessation of their duties on the committee without the authorization of the relevant regional trade union organization.

Discriminatory dismissals (art. 3, Act 1990/108) are considered null and void.

Dismissal on the grounds of pregnancy, if the dismissal takes place between the conception and the end of the female employee's statutory period of absence on confinement leave or unpaid leave, until the child reaches one year of age, is specifically prohibited. Dismissal on the grounds of marriage is also prohibited.

Procedural requirements for individual dismissals

14. Notification to the worker to be dismissed – In which form the employer must inform the worker about his or her dismissal (orally or in writing)?

In writing (art. 2, Act 1966/604).

15. Length of the notice period – How long in advance does the employer have to inform the worker about or her dismissal?

Termination for a just cause does not need a notice (art. 2119, Civil code). Termination for a "justified reason" needs a notice period (art. 2118, Civil Code) whose length is fixed by collective agreements (see n. 11).

16. Pay in lieu of notice – authorised or no by law?

Employer can pay a sum relating to the wage of period of notice (art. 2118, Civil Code).

17. Notification to administration – Does the employer have to notify the public administration before dismissing a worker?

Not.

18. Notification to workers' representatives – Does the employer have to inform workers' representatives for each individual dismissal?

Not.

19. Approval by administration – Does the employer need to obtain any authorisation from the administration to dismiss a worker?

Not.

20. Approval by workers' representatives – Does the employer have to obtain any authorisation from to dismiss a worker?

Not.

Procedural requirements for collective dismissals for economic reasons

21. Definition of collective dismissal – e.g. percentage or number of workers concerned.

Employers employing more than 15 employees can dismiss at the same time five workers for redundancy (due to reduction or transformation of the activity of the enterprise) in a period of one hundred twenty days (art. 24, Act 1991/223) in each establishment, or in more establishments located in the same district.

Act n. 1991/221 (art. 4 and 5) provides special procedures of information and bargaining with unions before firing employees, and special indemnities for the employees fired, according to EU directives. These special procedures (both administrative and in collaboration with the trade unions) must be fulfilled before employer dismiss the workers.

The aim of the procedure is to let unions know reasons of the redundancy and criteria proposed by employer to select workers to be dismissed. It is possible that employer and unions agree on number of workers and criteria of selection; if they do not come to an arrangement, employer at the end of the procedure can dismiss freely, following legal rules to select workers to be dismissed (see n. 27).

Public authorities can make a mediation between employer and unions. They must be informed by employer at the same time of the unions about the will to dismiss.

22. Prior consultation with trade unions/workers' representatives – Does the employer have to consult them in case of planned collective dismissals for economic reasons?

Yes.

23. Notification to the public administration in case of planned collective dismissals for economic reasons – Must the employer notify the public authorities?

Yes.

24. Notification to workers' representatives – Is the employer obliged to inform them in case of collective dismissals for economic reasons?

Yes.

25. Approval by the public administration – Does the employer have to obtain any authorisation in case of expected collective dismissals for economic reasons?

Not.

26. Approval by workers' representatives – Must collective dismissals be authorised by workers' representatives?

Not.

27. Priority rules for collective dismissals – Are there any legal rules to select workers to be dismissed (social considerations, age, job tenure)?

Yes. *Act 1991/223 (art. 5) provides that workers to be dismissed are selected on the ground of family charges, age, technical demands of production.*

28. Is the employer obliged to consider transfers, retraining and other options prior to dismissal?

Yes (*Act. 1991/223, art. 4*).

29. Priority rules for re-employment – Are any obligation for an employer to first consider applications of former redundant workers while re hiring the workforce?

Yes. *It is a jurisprudence principle (decision of Supreme Court 2000/1410).*

Severance payment

30. Severance pay – What does the employer have to pay to a worker in case of dismissal for personal and/or economic reasons?

For any termination of the contract of employment, on whatever ground, even for dismissal for just cause or resignation, the employee is entitled to receive from the employer a severance payment (i.e. trattamento di fine rapporto) which is considered to be a part of salary, set aside every year and kept by the employer (for whom it is an important source of self-financing) (art. 2120 Civil Code).

Avenues for redress (penalties, remedies) and litigation procedure for individual complaints on dismissals

31. Compensation for unfair dismissal – Are there any legal limits (ceiling in months or any calculation method defined by law) or freely decided by the judge?

In case of unjustified dismissal, remedies are different according to the size of the firm: Employers employing more than 15 employees (or five in the agricultural sector) in each establishment, branch, office or autonomous department, and employers employing more than 60 workers, wherever located, are liable for reinstatement of the employees and payment of damages equal to a minimum of five months' pay. Alternatively, the employee can refuse reinstatement and request payment of damages equal to 15 months' pay. If the employer invites the employee to return to work and the employee does not take up the offer within 30 days, the contract is automatically terminated.

Where there are fewer than 15 employees in each unit or fewer than 60 employees in total, the employee unfairly dismissed has no right to reinstatement, but is entitled to a compensation from 2,5 to six times the months' pay.

32. Reinstatement – Provided in law, rarely or often available to a worker unfairly dismissed?

Reinstatement in employment is impossible without the agreement of the employee. When a bill of judge orders the reinstatement of the employee, not reinstating employer must pay to the employee the wages.

33. Preliminary (judicial and/or extra-judicial) conciliation – Is it mandatory or not?

Yes (art. 410 Civil procedure code).

34. Competent courts – What bodies are competent for disputes on dismissals (ordinary tribunals, specialised labour courts)?

All disputes on dismissals are in competence of Labour Court Judges.

35. Alternative arbitration/mediation – Do the parties to an employment contract have any alternative possibility to settle out their labour dispute?

If the mandatory attempt of conciliation is not successful, the parties of an employment contract have the possibility to settle their labour dispute to an arbitration panel. Collective agreements can provide permanent arbitration panel (art. 412 ter Civil procedure code).

36. Length of the court procedure – What is the average length for a case on dismissals (are there any legal limitations)?

There is not a fixed timing. All Labour court give a priority to dismissal cases. An average length is six months for first instance and three-four years for the total dispute (first and second instance and Supreme Court proceeding). In labour disputes, decisions of the judges can be executed immediately.

37. Maximum time to make a claim for unfair dismissal – During which period does the worker have to bring his or her complaint to the court?

The worker have to bring his or her complaint to the court during sixty days from the moment in which he or she receives the writing of the dismissal.

II. ECONOMIC CRISIS AND CASE LAW OF LABOUR COURTS

1. Which court decisions in your country have been related to the economic crisis (with the main focus on EPL)?

Please share information about any court decisions which:

- Have influenced the interpretation of legal provisions regulating dismissals, fixed-term contracts etc;
- Where necessary to fill any gaps in the national labour law?

Italian Social Security has a particular means to assure the salary of the workers during the economic crisis of the enterprise. There is a redundancy payment of the National Social Security Coverage Institute (Istituto Nazionale della Previdenza Sociale - I.N.P.S.) for workers of companies in financial crisis due to production or restructuring process. They receive from this fund (Cassa Integrazione guadagni, Act 1991/223) an indemnity equivalent to 80 per cent of their wage (sometimes up to 100 per cent).

This indemnity can be paid at the end of a particular procedure that is the same than in collective dismissal (see n. 21). The role of Labour court judge is very important when conditions to obtain the redundancy payment are in disputation between administrative authority and employer, or employer and employees.

2. Are there any labour law reforms under discussion in your country caused or affected by the economic crisis (to make labour more flexible, or to extend protection to some categories of workers)?

Recently, the work relationship has been split in many legal types up, from the temporary work (Legislative Act 24 June 1997 n. 197) to the many types of the legislative Act 10 September 2003 n. 276. Even the conditions to comply with traditional part-time and short-time contracts have been eased. The aim is to make work more flexible and to extend protection to some categories of workers, whose .

Now in the same factory a lot of persons can work, side to side, with different contracts: employees of the firm, employees of a logistic company, self-employees, contract for services, temporary workers (who are employees of the temporary employment agency), etc.

The only thing they have in common are the rules on the health and security protection on job.

From year 2009 (agreement 22 January 2009, among Italian Government, Employers Associations and Unions, concerning “rules and procedures of bargaining and collective agreements”) is in experiment a new way of bargaining based on two different steps of agreement: the first one to fix the general conditions of work, the second one (in particular production sectors or in single enterprises) to have more flexibility. In the second case is possible to bargain a different regulation of work in particular industrial districts or in specified companies, in which a crisis situation is arising.

Norway

I. EMPLOYMENT PROTECTION LEGISLATION (EPL)

Source and scope of regulation

1. **Source of regulation** – What is the main law (title and date of adoption) regulating employment contracts and dismissals (Please provide a Web-link, Word/PDF version, its translation in English or French).

Lov om arbeidsmiljø, arbeidstid og stillingsvern mv (arbeidsmiljøloven)/Act relating to working environment, working hours and employment protection, etc. (Working Environment Act - WEA) of 17 June 2005 no. 62

As subsequently amended last by Act of 23rd February 2007 no. 10

<http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156>

The act was last amended by act of 19 June 2009 no. 39, but this amendment has not been translated into English.

2. **Scope of legislation** – What categories of workers are excluded from the regulation? (e.g. public servants, domestic workers, police, judiciary etc).

Section 1-2 determines the scope of the legislation. The act applies to all undertakings that engages employees with the following exceptions: shipping, hunting, fishing and military aviation. Public servants are exempt from the Acts provisions regarding appointment, termination of employment, transfer of ownership of undertakings and disputes concerning working conditions.

3. **Size of enterprise excluded** – Are any enterprise of a certain size (e.g. employing less than 20 workers) excluded from the scope of application of the law?

No.

4. **Collective agreements** – Are there any important collective agreements of general application at the national and/or branch level?

In the public sector almost all employees are organised and subordinate to collective agreements.

The corresponding amount in the private sector is approximately fifty percent.

The most important collective agreements are:

Hovedavtalen i staten 1. februar 2009 – 31. desember 2012/Basic agreement for the civil service

Hovedavtalen LO – NHO 2010 – 2013/The Basic Agreement. This is an agreement between the Confederation of Norwegian Enterprise (NHO) including all its national and local associations and individual enterprises, and the Norwegian Confederation of Trade Unions (LO) including all its unions and associations (divisions).

Types of employment contracts

5. **Probationary period** - What is its maximum duration?
According to the WEA § 14-6 (1) f a probationary period must be agreed upon in writing and the duration of the probationary period has to be agreed upon. The maximum length of the probationary period is 6 months, cf. WEA § 15-6 (3).
6. **Fixed-term contracts (FTC)** – May FTC be concluded only for objective and material reasons (e.g. nature of work) or without any limitation?
As a starting point an employee shall be appointed permanently. Temporary employment may be agreed upon:
 - a. when warranted by the nature of the work and the work differs from that which is ordinarily performed in the undertaking
 - b. for work as temporary replacement for another person or persons
 - c. for work as a trainee
 - d. for participants in labour market schemes
 - e. for athletes, trainers, referees and other leaders within organised sportWEA § 14-9
7. **Maximum number of successive FTC** – Are there any legal limitations?
There are no legal limitations as to the number of successive FTC's.
8. **Maximum cumulative duration of FTC** – Are there any legal limitations?
There are no legal limitations as to the cumulative duration of FTC's, but an employee who has been employed over a specific length of time may obtain certain additional rights.

An employee who has been employed for more than one year is entitled to written notification of the date on which he is to leave his post, not later than one month prior to that date.

An employee, who has been employed for more than four consecutive years, shall be treated as employees in permanent positions in relation to termination of that employment relationship.
9. What is the percentage of the workforce under FTC? – Please provide any statistics, if available.

12b. Employees aged 15-74 with temporary jobs, by major industry division (LFS). In per cent of all employees

Industry	Annual average		2009				2010	
	2008	2009	1. quarter	2. quarter	3. quarter	4. quarter	1. quarter	2. quarter
01-99 All industries	9,0	8,1	7,6	8,1	8,6	7,9	7,7	8,7
01-03 Agriculture, forestry and fishing	13,3	12,4	9,1	11,8	17,4	10,6	8,7	17,2
05-39 Mining etc., manufacture, power and water supply	4,3	3,7	3,5	3,3	4,6	3,2	3,3	4,3
41-43 Construction	4,9	4,0	3,7	3,7	4,8	3,9	3,7	4,1
45-47 Domestic trade	7,9	7,0	6,1	6,6	7,7	7,8	7,3	7,8
49-53 Transportation and storage	5,1	4,7	3,8	4,4	6,0	4,6	4,5	5,9
55-56 Accommod. and food service act.	13,4	11,7	8,7	11,6	16,0	10,5	10,2	11,0
58-63 Information and communication	3,9	5,1	3,2	5,2	7,3	4,8	3,4	5,7
64-66 Financial and insurance act.	2,5	2,0	1,5	1,3	3,3	1,8	1,7	2,6
68-82 Real estate, scient.,tech., adm. and support service act.	8,1	6,7	6,2	7,4	6,7	6,5	7,9	9,1
84 Public administration and defence	8,3	7,6	7,6	6,7	8,0	8,1	7,1	7,4
85 Education	14,1	12,3	13,4	13,1	10,3	12,5	12,7	12,2
86-88 Human health and social work act.	13,5	11,9	11,8	12,4	12,3	11,2	10,6	12,3
90-99 Other service act.	15,3	15,1	16,2	15,5	15,5	13,1	13,0	15,7

Substantive requirements for dismissals (justified and prohibited grounds)

10. **Obligation to provide reasons for dismissals** – Is the employer obliged to provide the worker with a reason of dismissal?
Yes. According to WEA § 15–7 employees may not be dismissed unless this is objectively justified on the basis of circumstances relating to the undertaking, the employer or the employee.
11. **Valid grounds to dismiss a worker** – Are any valid reasons to justify a dismissal listed in the law - e.g. worker's conduct, worker's capacity, economic reasons, or any fair reasons?
a. unacceptable behaviour of the employee
b. lack of formal qualifications of the employee
c. failure to achieve what is expected by the employee
d. absence from work
e. curtailed operations or rationalisation may be valid ground for dismissal as long as there is no other suitable work to offer the employee in the undertaking
12. **Prohibited grounds to dismiss a worker** – Are there any prohibited grounds listed in the law or this issue is regulated by general non-discrimination provisions?
As established through legal practise:
a. entering into marriage
b. party-political affiliation
c. non-contagious illness
d. raising questions regarding safety at the undertaking
13. **Workers enjoying special protection from dismissal** - Please list any categories, such as women during the pregnancy and maternity leave, workers' representatives etc.
The WEA provides protection against dismissal in the event of sickness, during pregnancy or following the birth or adoption of a child and in connection with military service, cf. WEA §§ 15-8, 15-9 and 15-10

Procedural requirements for individual dismissals

14. **Notification to the worker to be dismissed** – In which form the employer must inform the worker about his or her dismissal (orally or in writing)?
The employee shall receive notice in writing either in person or by registered mail. The notice shall be deemed to have been given when it is received by the employee
15. **Length of the notice period** – How long in advance does the employer have to inform the worker about his or her dismissal?
Unless otherwise agreed in writing or laid down in a collective agreement, a period of one month's notice shall be applicable to either party

Before notice has been given, an agreement on a shorter period of notice may only be concluded between employer and employee's elected representatives at undertakings bound by a collective agreement.

For an employee who has been employed for more than five consecutive years, a period of two month's notice shall be given by either party.

For an employee who has been employed for more than ten consecutive years, a period of three month's notice shall be given by either party.
16. **Pay in lieu of notice** – authorised or no by law?
17. **Notification to administration** – Does the employer have to notify the public administration before dismissing a worker?
No
18. **Notification to workers' representatives** – Does the employer have to inform workers' representatives for each individual dismissal?

Before making a decision regarding dismissal with notice, the employer shall, to the extent that it is practically possible, discuss the matter with the employee and the employee's elected representative unless the employee himself does not desire this.

19. **Approval by administration** – Does the employer need to obtain any authorisation from the administration to dismiss a worker?

No

20. **Approval by workers' representatives** – Does the employer have to obtain any authorisation to dismiss a worker?

No

Procedural requirements for collective dismissals for economic reasons

21. **Definition of collective dismissal** - e.g. percentage or number of workers concerned

Collective redundancies, cf. WEA § 15-2, means notice of dismissal given to at least 10 employees within a period of 30 days without being warranted by reasons related to the individual employees. Other forms of termination of contracts of employees shall be included in the calculation, provided that at least five persons are made redundant.

22. **Prior consultation with trade unions/workers' representatives** – Does the employer have to consult them in case of planned collective dismissals for economic reasons?

An employer contemplating collective redundancies shall at the earliest opportunity enter into consultations with the employees' elected representatives with a view to reaching an agreement to avoid collective redundancies or to reduce the number of persons made redundant.

23. **Notification to the public administration in case of planned collective dismissals for economic reasons** – Must the employer notify the public authorities?

Notice corresponding to the below shall also be given to the Labour and Welfare Service

24. **Notification to workers' representatives** – Is the employer obliged to inform them in case of collective dismissals for economic reasons?

Employers shall be obliged to give the employees' elected representatives all relevant information, including written notification concerning:

- a. the grounds for any redundancies
- b. the number of employees who may be made redundant
- c. the categories of workers to which they belong
- d. the number of employees normally employed
- e. the groups of employees normally employed
- f. the period during which such redundancies may be effected
- g. criteria for selection of those who may be made redundant
- h. criteria for calculation of extraordinary severance pay, if applicable

25. **Approval by the public administration** – Does the employer have to obtain any authorisation in case of expected collective dismissals for economic reasons?

Approval is not necessary, but projected collective redundancies shall not come into effect earlier than 30 days after the Labour and Welfare Service has been notified.

26. **Approval by workers' representatives** – Must collective dismissals be authorised by workers' representatives?

No, but consultations with the employees' elected representatives have to be carried out prior to collective redundancies.

27. **Priority rules for collective dismissals** – Are there any legal rules to select workers to be dismissed (social considerations, age, job tenure)?

No.

28. **Is the employer obliged to consider transfers, retraining and other options prior to dismissal?**

Yes, this is necessary to avoid the dismissal to be considered an unfair dismissal.

29. **Priority rules for re-employment** – Are any obligation for an employer to first consider applications of former redundant workers while re-hiring the workforce?

WEA § 14-2, an employee who has been dismissed owing to circumstances relating to the undertaking shall have a preferential right to a new appointment at the same undertaking unless the vacant post is one for which the employee is not qualified.

The preferential right shall also apply to an employee who is temporarily engaged and who, owing to circumstances relating to the undertaking, is not offered continued employment. The preferential right does not apply to employees engaged as temporary replacements. The preferential right applies to employees who have been employed by the undertaking for a total of at least 12 months during the previous two years. The preferential right shall apply from the date on which notice is given and for one year after expiry of the period of notice. The preferential right shall lapse if an employee fails to accept an offer of employment in a suitable post not later than 14 days after receiving the offer.

Severance payment

30. **Severance pay** – What does the employer have to pay to a worker in case of dismissal for personal and/or economic reasons?

There is no automatic obligation to provide severance pay.

Avenues for redress (penalties, remedies) and litigation procedure for individual complaints on dismissals

31. **Compensation for unfair dismissal** – Are there any legal limits (ceiling in months or any calculation method defined by law) or freely decided by the judge?

An employee may seek compensation for unfair dismissal. There are no legal limits to the amount payable as compensation so this is for the judge to decide. The judge may take into account the employees actual financial loss in addition to the other merits of the case.

32. **Reinstatement** – provided in law, rarely or often available to a worker unfairly dismissed?

In case of an unfair dismissal, the court shall if so demanded by the employee, rule the dismissal invalid. The employee may then continue in his/her position at the undertaking.

33. **Preliminary (judicial and/or extra-judicial) conciliation** – Is it mandatory or not?

Before making a decision regarding dismissal with notice, the employer shall, to the extent that it is practically possible, discuss the matter with the employee and the employee's elected representative unless the employee himself does not desire this.

34. **Competent courts** – What bodies are competent for disputes on dismissals (ordinary tribunals, specialised labour courts)?

Ordinary tribunals take care of these cases.

The Norwegian Labour Court handle cases regarding validity, interpretation and existence of collective agreements, questions regarding breach of collective agreements, questions regarding breach of the peace obligation and

35. **Alternative arbitration / mediation** – Do the parties to an employment contract have any alternative possibility to settle out their labour dispute?

Certain disputes (leave of absence and preferential rights for part time employees) may be brought before a Dispute Resolution Board, but not disputes regarding unfair dismissal.

The court is however composed of two lay judges with a broad knowledge of industrial life.

36. **Length of the court procedure** – What is the average length for a case on dismissals (are there any legal limitations)?

There are no legal limitations.

37. **Maximum time to make a claim for unfair dismissal** – During which period does the worker have to bring his or her complaint to the court?

An employee who wishes to claim that a dismissal has been unfair may demand negotiations with the employer and must notify the employer of this in writing within two weeks. The time limit for demanding negotiations runs from the date of dismissal. The employer shall ensure that a meeting for negotiations is held as early as possible and, at the latest, within two weeks of receiving the request.

In a dispute as to whether the dismissal has been unfair, the time limit for instituting legal proceedings shall be eight weeks. In individual cases, the parties may agree upon a longer time limit for initiating legal proceedings.

II. ECONOMIC CRISIS AND CASE LAW OF LABOUR COURTS

1. Which court decisions in your country have been related to the economic crisis (with the main focus on EPL)?

Please share information about any court decisions which:

- Have influenced the interpretation of legal provisions regulating dismissals, fixed-term contracts etc;
- Were necessary to fill any gaps in the national labour law?

N/A

2. Are there any labour law reforms under discussion in your country caused or affected by the economic crisis (to make labour more flexible, or to extend protection to some categories of workers)?

N/A

Slovenia

I. Employment protection legislation (EPL)

Source and scope of regulation

37. **Source of regulation** – What is the main law (title and date of adoption) regulating employment contracts and dismissals (Please provide a Web-link, Word/PDF version, its translation in English or French).

The main law regulating employment contracts and dismissals in Slovenia is the Employment Relationship Act (ERA), adopted in 2002 and which entered into force on 1 January 2003 (Official Gazette of the Republic of Slovenia No 42/02), amended in 2007 (Official Gazette of the Republic of Slovenia No 103/07). Unofficial consolidated text is available on an English web page of Ministry of Labour, Family and Social Affairs:

http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti_pdf/zdr_npb_en.pdf

38. **Scope of legislation** – What categories of workers are excluded from the regulation? (e.g. public servants, domestic workers, police, judiciary etc).

None. ERA (§3) applies to all employment relationships between employers established or residing in the Republic of Slovenia and the workers employed with them and also to employment relationships between foreign employers and workers, concluded on the basis of an employment contract on the territory of the Republic of Slovenia. In case of workers posted to the Republic of Slovenia by a foreign employer on the basis of an employment contract pursuant to foreign law, ERA shall apply in accordance with the provisions regulating the position of workers posted to work in the Republic of Slovenia.

Unless stipulated otherwise by a special act, ERA (§2) also regulates employment relationships of workers employed with state bodies, local communities and institutions, other organisations and private persons carrying out a public service. In special acts there are some specific provisions about

employment contracts, rights and obligations and dismissals for i.e. public servants, military, police, teachers, actors ...

39. Size of enterprise excluded – Are any enterprise of a certain size (e.g. employing less than 20 workers) excluded from the scope of application of the law?

No. For the purposes of ERA smaller employers (employing ten or less workers, ERA §5) are not excluded. There are just some special exceptions for them, i.e.: the branch collective agreement may stipulate that a smaller employer can conclude fixed-term employment contracts for a definite period regardless of the restrictions referred to in ERA (§ 52); in the case of terminating the employment contract for reasons of incapacity or for a business reason, the smaller employer is not obliged to check whether it is possible to employ the worker under changed conditions or in other work, and/or whether it is possible to additionally train the worker for the work he carries out or to retrain the worker for other work (ERA, § 88); the minimum duration of the period of notice may be stipulated by a branch collective agreement (ERA, § 91).

40. Collective agreements – Are there any important collective agreements of general application at the national and/or branch level?

A collective agreement is valid for the parties of the collective agreement or its members. A collective agreement is valid for all persons employed by an employer or employers to whom the collective agreement applies, if the collective agreement is signed by one or more representing trade unions. If a collective agreement on one or more activities is concluded between one or more representative trade unions and one or more representative associations of employers, one of the parties may propose to the minister responsible for labour to extend the validity of the whole of the collective agreement or a part of it to all employers in an activity or activities for which the collective agreement has been concluded. The minister recognises an extended validity of the whole or a part of collective agreement if the collective agreement has been concluded between one or more representative trade unions and one or more associations of employers, the members of which employ more than half of all employees at employers for whom an extension of the collective agreement has been proposed.

At a moment three collective agreements has extended validity:

The Collective Agreement for Trade Activity; Collective Agreement for Metal Materials and Foundry Industry, and Collective Agreement for Metal Industry

All the collective agreements concluded at the national level are entered into the register of collective agreements kept by the ministry responsible for labour (*only in Slovene language*):

http://www.mddsz.gov.si/si/delovna_podrocja/delovna_razmerja_in_pravice_iz_dela/socialno_partnerstvo/evidenca_kolektivnih_pogodb/

With regard to public servants a special system of collective agreements applies with which salaries and other remunerations are determined.

Types of employment contracts

41. Probationary period - What is its maximum duration?

The worker and the employer may agree on the probation period in the employment contract. The probation may not last longer than six months but may be extended in case of temporary absence from work (for the period of absence; ERA, §125).

42. Fixed-term contracts (FTC) – May FTC be concluded only for objective and material reasons (e.g. nature of work) or without any limitation?

A fixed-term employment contract can be concluded (only) in cases of (ERA, § 52):

- work which by its nature is of limited duration,
- replacing a temporarily absent worker,
- temporarily increased volume of work,

- employment of a foreigner or person without citizenship who was granted work permit for a definite period, except in case of a personal work permit,
- managerial staff and those executive workers who manage a business field or organisational unit at the employer and are authorised to conclude legal transactions or to make independent personnel and organisational decisions,
- seasonal work,
- a worker who concludes a fixed-term employment contract for the reason of preparation for work, vocational training or advanced study for work and/or education,
- employment for a definite period of time due to working during the accommodation period on the basis of the final decision and certificate issued by the competent body in the procedure of recognition of qualifications pursuant to a special law,
- performance of public works and/or inclusion in the measures of active employment policy pursuant to law,
- preparation or realization of work organised as a project,
- work required during the period of introduction of new programs, new technology and other technical and technological improvements of the working process or for training workers,
- elected and appointed officials and/or other workers related to the term of office of a body or official in local communities, political parties, trade unions, chambers, associations and their federations,
- other cases laid down by law and/or branch collective agreement .

43. Maximum number of successive FTC – Are there any legal limitations?

No

44. Maximum cumulative duration of FTC – Are there any legal limitations?

Yes there are legal limitations (ERA, § 53). The employer may not conclude one or more successive fixed-term employment contracts with the same worker and for the same job, the uninterrupted period of which would last longer than two years, except in cases laid down by law and in cases referred to in the second, fourth, fifth and twelfth indent of § 52; in cases referred to in the tenth indent of § 52 a fixed-term employment contract may be concluded for a period longer than two years, if the project lasts more than two years and if the employment contract is concluded for the entire duration of the project. A branch collective contract shall serve to determine what is deemed to be project work.

An interruption of three months or less does not represent an interruption of the uninterrupted two-year period.

45. What is the percentage of the workforce under FTC? – Please provide any statistics, if available.

Approximately 17%. Among persons aged between 15 to 24 years of age, as many as 70% of persons have fixed-term contracts; in the age group from 25 to 29 years of age, the share of employees employed in fixed-term employment is reduced to 31,5%; and among persons aged from 30 to 54 years there are 7,7% of employees with fixed-term employment contracts.

Substantive requirements for dismissals (justified and prohibited grounds)

46. Obligation to provide reasons for dismissals – Is the employer obliged to provide the worker with a reason of dismissal?

In the notice of termination of employment contract, the employer must explain the reason for termination in writing as well as call the worker's attention to legal remedies and his rights arising from unemployment insurance (ERA, § 86).

47. Valid grounds to dismiss a worker – Are any valid reasons to justify a dismissal listed in the law - e.g. worker's conduct, worker's capacity, economic reasons, or any fair reasons?

The reasons for ordinary termination (= with period of notice) of a worker's employment contract by the employer are (ERA, § 88):

- cessation of the need to carry out certain work, under the conditions pursuant to the employment contract, owing to economic, organisational, technological, structural or similar reasons on the employer's side (business reason), or
- non-achievement of expected work results because the worker failed to carry out the work in due time, professionally and with due quality, or non-fulfilment of the conditions for carrying out work provided by laws and other regulations issued on the basis of law, for which reason the worker fails to fulfil or cannot fulfil the contractual or other obligations arising from the employment relationship (reason of incapacity),
- violation of a contractual obligation or other obligation arising from the employment relationship (reason of culpability)
- inability to carry out the work under the conditions set out in the employment contract owing to disability in accordance with the regulations governing pension and disability insurance, or with the regulations governing employment rehabilitation and the employment of disabled persons.

The employer may extraordinarily terminate (= without period of notice) the worker's employment contract (ERA, § 111), if the worker:

- violates the contractual or any other obligation arising from employment relationship and the violation has all characteristics of a criminal offence,
- intentionally or by gross negligence violates the contractual or any other obligations arising from employment relationship,
- if for at least five days in succession the worker does not come to work, and does not inform the employer of the reasons for his absence, although he should and could have done so,
- is prohibited by a final judgement to carry out certain works within the employment relationship or if he is pronounced an educational, safety or protection measure or a sanction for a minor offence on the basis of which he cannot carry out the work for longer than six months, or if due to serving a prison sentence he must be absent from work for longer than six months,
- if the worker refuses the transfer and the actual carrying out of work with the transferee,
- fails to successfully pass the probation period,
- within five working days after the cessation of the reasons for the suspension of the employment contract, unjustifiably fails to return to work,
- during the period of being absent from work because of disease or injury, fails to respect the instructions of the competent doctor and/or of the competent medical commission, or if he in this period carries out gainful work or leaves his residence without the approval by the competent doctor and/or by the competent medical commission.

48. Prohibited grounds to dismiss a worker – Are there any prohibited grounds listed in the law or this issue is regulated by general non-discrimination provisions?

Under ERA § 89 the following shall be deemed as unfounded reasons for ordinary termination of an employment contract:

- temporary absence from work due to the inability for work because of a disease or injury or due to the care for family members pursuant to regulations on health insurance, or absence from work due to the parental leave pursuant to regulations on parenthood;
- bringing an action or participation in the proceedings against the employer due to the allegation of having violated the contractual and other obligations arising from employment before the arbitration, court or administrative authorities;
- trade union membership;
- participation in trade union activities outside the working time;
- participation in trade union activities during the working time in agreement with the employer;
- participation of the worker in a strike organised in accordance with the law;
- candidacy for the function of a worker's representative and the current or past performance of this function;
- change of employer (transfer of the undertaking);
- race, ethnicity or ethnic origin, skin colour, sex, age, disability, marital status, family obligations, pregnancy, religious and political conviction, national or social origin;
- conclusion of a contract on voluntary performance of military service, a contract on performing military service in the Slovenian armed forces reserve, a contract on service in the Civil Protection and the voluntary participation of citizens in protection and relief in accordance with the law.

49. Workers enjoying special protection from dismissal - Please list any categories, such as women during the pregnancy and maternity leave, workers' representatives etc.

Workers' Representatives (ERA, § 113), Older Workers (ERA, § 114), Parents (ERA, § 115) and Disabled Persons and Persons Absent From Work Because of Disease (ERA, § 116).

Procedural requirements for individual dismissals

50. Notification to the worker to be dismissed – In which form the employer must inform the worker about his or her dismissal (orally or in writing)?

Ordinary and extraordinary termination of the employment contract must be in writing, and must be served on the worker by the employer in person, as a rule on the employer's premises or at the address given in the employment contract.

51. Length of the notice period – How long in advance does the employer have to inform the worker about his or her dismissal?

If the employment contract is terminated through ordinary procedure by the employer, the period of notice is:

- 30 days if the worker's period of service with the employer is less than five years,
- 45 days if the worker's period of service with the employer is at least five years,
- 60 days if the worker's period of service with the employer is at least 15 years,
- 120 days if the worker's period of service with the employer is at least 25 years.

If the employment contract is terminated through ordinary procedure by the employer for reasons of culpability of the worker, the period of notice is one month.

52. Pay in lieu of notice – authorised or no by law?

The worker and employer may come to an agreement about adequate monetary compensation in lieu of work or the entire notice period. The agreement must be in writing. (ERA, § 94)

53. Notification to administration – Does the employer have to notify the public administration before dismissing a worker?

No, only in the case of larger number of Workers (see question 23).

54. Notification to workers' representatives – Does the employer have to inform workers' representatives for each individual dismissal?

Only if thus is requested by the worker, the employer must inform in writing the trade union, whose member the worker is at the time of the introduction of the procedure, about the intended ordinary or extraordinary termination of the employment contract. (ERA, § 84)

55. Approval by administration – Does the employer need to obtain any authorisation from the administration to dismiss a worker?

No. Only in the case of termination of employment on grounds of invalidity, the reasons for termination of employment contract shall be determined by a commission composed of: a representative of the Institute of Pension and Invalidity Insurance of Slovenia, a representative of the Labour Inspectorate of the Republic of Slovenia, a representative of the Employment Office and a representative of employers and a representative of trade unions.

56. Approval by workers' representatives – Does the employer have to obtain any authorisation to dismiss a worker?

No, but if the trade union opposes the ordinary termination for the reason of incapacity or for a fault reason, or if it opposes the extraordinary termination of the employment contract, and if the worker requests from the employer the suspension of the effect of the termination of the employment contract due to the given notice, the termination of the contract shall not be effective until the expiration of the term for arbitration and/or judicial protection.

Procedural requirements for collective dismissals for economic reasons

57. Definition of collective dismissal - e.g. percentage or number of workers concerned

The employer who establishes that due to business reasons within the period of 30 days the work shall become redundant for:

- at least 10 workers with the employer employing more than 20 and less than 100 workers,
- at least 10 % of workers with the employer employing at least 100 workers, and less than 300 workers,
- at least 30 workers with the employer employing 300 or more workers,

shall be obliged to elaborate the dismissal programme for redundant workers.

The programme shall also be elaborated by the employer who establishes that due to business reasons, within the period of three months, the work of 20 or more workers will become redundant.

58. Prior consultation with trade unions/workers' representatives – Does the employer have to consult them in case of planned collective dismissals for economic reasons?

The employer must as soon as possible inform the trade unions at the employer about the reasons for the redundancies, about the number and the categories of all employed workers, about the foreseen categories of redundant workers, about the foreseen term in which the need for the work of workers will cease, and about the proposed criteria for the determination of redundant workers.

With the aim of achieving an agreement, the employer must first consult with the trade unions about the proposed criteria for the determination of redundant workers, and in relation with the elaboration of the dismissal programme for redundant workers, about the possible ways of avoiding and limiting the number of terminations and about the possible measures for the prevention and mitigation of harmful consequences.

The Workers Participation in Management Act determines the employer's obligation for joint consultation with work council regarding personal issues which also includes the questions concerning the reduction of the number of employees. If an employer does not meet this obligation, a work council may withhold employer's individual decision until the decision made by the responsible body (the labour Court) in the dispute.

59. Notification to the public administration in case of planned collective dismissals for economic reasons – Must the employer notify the public authorities?

The employer must inform the Employment Service in writing about the procedure of establishing the redundancies of a larger number of workers, about the performed consultation with Trade unions, about the reasons for the redundancies, about the number and categories of all employed workers, about the foreseen categories of redundant workers and about the foreseen term in which the need for the work will cease.

60. Notification to workers' representatives – Is the employer obliged to inform them in case of collective dismissals for economic reasons?

see answer 22

61. Approval by the public administration – Does the employer have to obtain any authorisation in case of expected collective dismissals for economic reasons?

No, but the employer is obliged to deal with and to take into account the potential proposals by the Employment Service regarding the possible measures for preventing or limiting to the highest possible degree the termination of employment relationship of workers and the measures for the mitigation of harmful consequences due to the termination of employment relationship. (ERA, § 101)

62. Approval by workers' representatives – Must collective dismissals be authorised by workers' representatives?

An employer should also obtain a consent from the Work council when the changes regarding the legal form of the enterprise, the disposal of the enterprise, or the closure of the enterprise result in a reduction of the number of workers and it concerns a greater amount of workers under ERA.

63. Priority rules for collective dismissals – Are there any legal rules to select workers to be dismissed (social considerations, age, job tenure)?

When stipulating the criteria for determining redundant workers, particularly the following criteria shall be taken into account (ERA, § 100):

- the worker's professional education and/or qualification for work and the necessary additional skills and capacities,
- working experience,
- job performance,
- years of service,
- health condition,
- the worker's social condition,
- that he or she is a parent of three or more minor children or the sole bread-winner in the family with minor children.

When determining the workers whose work will become redundant, under the same criteria the priority shall be given to the preservation of jobs by those workers who are in a bad social condition.

The temporary absence from work of the worker due to a disease or injury, due to the care for a family member or for a severely handicapped person, due to parental leave and due to pregnancy may not be a criterion for the determination of redundant workers.

64. Is the employer obliged to consider transfers, retraining and other options prior to dismissal?

Yes. The dismissal programme for redundant workers shall comprise also measures for preventing or limiting to the highest possible degree the termination of workers' employment relationship, where the employer must check the possibility of continuing the employment under modified conditions; and the measures and criteria for the selection of measures to mitigate harmful consequences of the termination of employment relationship, such as: the offer for employment with another employer, the assurance of pecuniary aid, the assurance of assistance for starting an independent activity, and the purchase of insurance period. (ERA, § 99, for individual dismissals see § 88).

65. Priority rules for re-employment – Are any obligation for an employer to first consider applications of former redundant workers while re-hiring the workforce?

Yes. If the employer employs new workers within the term of one year, the workers whose employment contracts were terminated for business reasons shall have the preferential right to employment, if they fulfil the conditions for carrying out the work (ERA, § 102).

Severance payment

66. Severance pay – What does the employer have to pay to a worker in case of dismissal for personal and/or economic reasons?

The employer who terminates the employment contract due to business reasons or due to the reason of incapacity shall be obliged to pay the worker the severance pay. As the basis for the calculation of the severance pay, the average monthly wage which was received by the worker, or which would have been received by the worker if working, in the last three months before the termination shall be taken.

The worker shall be entitled to severance pay amounting to:

- 1/5 of the basis for each year of employment with the employer, if the worker has been employed with the employer for more than one and up to five years;
- 1/4 of the basis for each year of employment with the employer, if the worker has been employed with the employer for the period from five to fifteen years;
- 1/3 of the basis for each year of employment with the employer, if the worker has been employed with the employer for the period exceeding fifteen years.

The level of the severance pay may not exceed the tenfold amount of the basis or the calculation, unless otherwise stipulated by the branch collective agreement.

Avenues for redress (penalties, remedies) and litigation procedure for individual complaints on dismissals

67. Compensation for unfair dismissal – Are there any legal limits (ceiling in months or any calculation method defined by law) or freely decided by the judge?

Where the court determines that the employer's termination is illegal but that the worker does not wish to continue the employment relationship, the court shall upon the worker's proposal establish the duration of the employment relationship, but not beyond a ruling of the court of first instance, it shall recognise the worker's period of service and other rights arising from the employment relationship, and shall grant the worker adequate monetary compensation in the maximum amount of 18 months of the worker's wage paid in the last three months prior to termination of the employment contract.

If, taking into account the circumstances and the interest of both contractual parties, the court establishes that the continuation of the employment relationship would no longer be possible, it may decide in the same way, even regardless the worker's proposal.

68. Reinstatement – provided in law, rarely or often available to a worker unfairly dismissed?

Reinstatement is provided by law as a rule. Decisions about compensation instead of reinstatement are (still) very rare.

69. Preliminary (judicial and/or extra-judicial) conciliation – Is it mandatory or not?

It is not mandatory. But the labour inspector may mediate in the dispute between the worker and the employer with the purpose to achieve an amicable settlement of the dispute (ERA, § 228).

70. Competent courts – What bodies are competent for disputes on dismissals (ordinary tribunals, specialised labour courts)?

Specialised labour courts are competent for disputes on dismissals: there are four first instance Labour Courts (Labour and social Court in Ljubljana also deals with disputes in social cases), there is one appellate Court (Higher Labour and social Court in Ljubljana) and at last instance (revision) Supreme Court (special Senate for Labour and Social cases).

71. Alternative arbitration / mediation – Do the parties to an employment contract have any alternative possibility to settle out their labour dispute?

Yes. A collective agreement may stipulate arbitration for settlement of individual labour disputes. In such case, the collective agreement shall lay down the composition, the procedure and other issues relevant to the work of the arbitration. Should the arbitration not reach a decision within the time limit stipulated in the collective agreement, however, not later than within 90 days, a worker may within the following 30 days request judicial protection before the labour court.

For disburdening the courts and shortening judicial proceedings was adopted the Act on Alternative Settlement of Legal Disputes (Official Gazette of the Republic of Slovenia No 97/09). In cooperation with the courts in implementing programmes on alternative settlement of disputes it regulates anew so-called prior proceedings of amicable settlement of disputes, with the aim of resolving as many matters as possible in an amicable manner even before the initiation of a civil or other procedures.

72. Length of the court procedure – What is the average length for a case on dismissals (are there any legal limitations)?

There is no explicit legal limitation, but there is a general provisions in Labour and Social Courts Act, that a procedure in labour and social disputes must take place quickly (§ 20), and that disputes on the existence or termination of employment relations shall have priority (§ 41). Also, the court must hold a settlement hearing, or if there is no settlement hearing, the first main hearing, not later than within two months from receipt of answer to the complaint or the expiration of the time limit for answer to the complaint (the court must forward the complaint to the defendant within 30 days after it has been filed, the time limit for answer a complaint is 15 days).

In 2009, there were 1563 complaints filed due to a termination of employment relationship or due to a termination of employment contract. The average duration time of a first instance court procedure was 6 months. There were 411 appels lodged before the second-instance court where on average the appellate procedure also lasted for a 6 months. There is no special data regarding the duration of proceedings in such disputes before the Supreme Court. Currently proceedings in all revision cases last on average from 12 to 18 months whereby also the Supreme Court settles the dismissal cases on a priority basis.

73. Maximum time to make a claim for unfair dismissal – During which period does the worker have to bring his or her complaint to the court?

A worker may request the establishment of illegality of termination of the employment contract, of other modes of termination of the employment contract, and/or of a decision on disciplinary responsibility of the worker within 30 days from the day of the service or the day when he learnt about the violation of the right, before the competent labour court.

II. ECONOMIC CRISIS AND CASE LAW OF LABOUR COURTS

- Which court decisions in your country have been related to the economic crisis (with the main focus on EPL)?

Please share information about any court decisions which:

- I. Have influenced the interpretation of legal provisions regulating dismissals, fixed-term contracts etc;
- II. Were necessary to fill any gaps in the national labour law?

After 1 January 2003, Labour Courts have dealt with a greater number of disputes on the termination of employment contracts which were based on a new law (contractual relationship), but employers have actually acted in the same or in a similar manner as under previously valid legislation (mutual employment relationship with unilateral decisions of an employer with regard to the rights and obligations of a worker). Few decisions (the essential part) shall be mentioned which relate to a different or a new legal regulation of an employment relationship as an contractual relationship and a termination of employment contract as a civil sanction due to a violation of contractual obligations including special features of such an agreement in comparison to entirely civil contractual relationships.

Substantiation of a ground for termination

VIII Ips 16/2007: The termination of employment contract is envisaged as final means.

It is possible to understand efforts of an employer to provide higher standards of work or his engagement that workers conscientiously perform their work at a work post under the employment contract and consistently follow employer's instructions but it is not possible to also avoid taking into consideration reasonable and objective criteria when weighing the weight of violations of contractual or other obligations from employment relationship. Violations should be such that they really disable the continuation of employment relationship between the worker and the employer.

Time period in which an employer should deliver the termination of the employment contract

VIII Ips 33/2006: The time period referred to in the 2nd paragraph of Article 110 of ERA is a preclusive time limit which means that after its expiration the employer's right to deliver the extraordinary termination of the employment contract expires. When an employer becomes acquainted with reasons which substantiate the extraordinary termination is a question of facts: he may become acquainted immediately when the reason actually occurs or he may become acquainted with it later all up to the submission of the defence of a worker. If there was no defence (the reason is not important) it is not deemed that the employer has become acquainted with reasons on a day determined for unsuccessful defence since on this day he did not find anything new but he could become acquainted with them before or he does not have any reasons for the termination of the contract.

A defence of a worker

VIII Ips 20/2005: The employer is not obliged to allow a worker to offer a defence if circumstances exist due to which it would be unjustified to expect from the employer to allow it to the worker or if the worker explicitly refuses it or unjustifiably does not respond to the invitation to defence.

VIII Ips 210/2006: A great extent of appropriated items due to which the employer's trust in the worker has been damaged is not a reason due to which it would be groundless to expect that the employer will allow the worker to offer a defence. On the contrary, precisely due to this reason, the worker who is threatened with the extraordinary termination of the employment contract due to the alleged theft should have the possibility to put up his defence, to state what he thinks about the recrimination, what is his viewpoint regarding the measure foreseen by the employer, regarding the circumstances and similar. The possibility of the employer, for justified reasons, not to allow the worker to offer a defence prior to the termination of the employment contract should be interpreted in a restrictive manner, and it should be determined in individual cases whether circumstances exist which show that it is not possible to expect from the employer (it would be unjustified) to allow the worker this right.

The termination of employment contract on the Basis of a Court Judgement and the compensation

VIII Ips 26/2007: Due to the (special) nature of a compensation award under Article 118 of ERA, when deciding on it, it is not possible to base a claim directly or to apply all instruments of civil law

(law of obligations). Primarily this compensation represents compensation for a future evaluated damage or a certain fair monetary compensation with regard to which the criteria will have to be formed by case law. The assessments of compensation for property or non-property damage for this case is not possible to envisage without an adequate claim pursuant to the 1st paragraph of Article 118 of ERA (and in the continuation, an adequate procedure for taking evidence and legal conclusions made by the court), or pursuant to the 2nd paragraph of this legislative provision without adequate statements and clearly and precisely determined facts on certain (future) damage recognized in law with regard to the property and/or non-property field. In other words, in a case of a decision pursuant to the 2nd paragraph of Article 119 of ERA this means, that the Court itself, without taking into consideration the principle of an open trial, with the indicated possibilities regarding the decision pursuant to the 2nd paragraph of Article 118 of ERA and the principle of substantive conduct of proceedings under which it will take care that the plaintiff will state adequate facts and produce evidence regarding the damage and its amount for the assessment of the damage which might even be taken into consideration, and in the continuation also the taking of the evidence, will not provide the basis to award certain damages to the plaintiff by itself.

VIII Ips 548/2007: The criteria for the assessment of compensation pursuant to Article 118 of ERA will have to be finally formed by case law – particularly considering that it concerns the compensation for damage to the worker who shall not return to work with the employer. Because of this with its assessment it will have to take into consideration mainly the employment opportunities of the worker, his age, his years of service, profession, other personal circumstances, the receiving of monetary allowance, and the like.

The termination of the employment contract with an offer of a new employment contract

VIII Ips 422/2006: In ERA or the Code of Obligations it is not determined that due to the establishment of illegality with regard to the termination of the employment contract a new employment contract which the worker has concluded with the same employer would terminate or become void. The challengeability of the contract should be explicitly enforced by the eligible person. A later, valid employment contract reflects later consent of the parties' contractual will and has a priority over the old contract although the latter was illegally terminated. In the 3rd paragraph of Article 90 of ERA, in the case of an acceptance of an offer for appropriate employment for an indefinite period of time the extent of judicial protection is limited to the challenge of the substantiation of the reason for termination. The new employment contract was not concluded with a resolutive condition as its termination was not dependant on an uncertain fact – a potential determination of the illegality with regard to the termination of employment contract.

Severance Pays under Collective Agreements

VIII Ips 84/2006: ERA does not determine the highest amount of severance pays so that in accordance with the 2nd paragraph of Article 7 of ERA it is necessary to take into consideration that with the employment contract or the collective agreement higher severance pays may be determined.

The transformation of the fixed-term employment contract into the employment contract for an indefinite period of time

VIII Ips 355/2006: Since the conclusion of the fixed-term employment contract is an exception which is allowed only in cases which are determined in advance in the law or collective agreement, the legality of the employment agreement is linked to the legality of a reason which is stated in the contract. It is up to the employer to state in the employment contract an actual existing and legal reason for the conclusion of the fixed-term employment contract. Since the reason for the conclusion of the fixed-term employment contract which was stated by a plaintiff in a disputed employment contract actually did not exist the fixed-term employment contract was concluded contrary to the law.

VIII Ips 310/2007: The employer may, on the basis of the first paragraph of Article 52 of ERA conclude the fixed-term employment contract with the worker only if any of reasons mentioned in the law is given. Since the alleged legal reason with regard to the temporarily increased volume of work due to which the plaintiff concluded the employment contract was not determined, the Court, on the basis of Article 54 of ERA, reasonably judged that the employer concluded the fixed-term

employment contracts the worker contrary to the law and it is therefore assumed that they were concluded for an indefinite period of time.

VIII Ips 558/2007: The defendant concluded the fixed-term employment contracts due to business economic risk of operation which was linked to the scope of orders for known customers. This is not one of legal reasons for the conclusion of the fixed-term employment and it can not be assumed as a reason for the increased volume of work.

VIII Ips 525/2008: A fixed-term employment contract was concluded due to economic risk of operation which was linked to uncertainty whether a plaintiff will retain a business partner which, however, is not one of the legal reasons for the conclusion of the fixed-term employment contract pursuant to Article 52 of ERA. The contract was actually not concluded due to the temporarily increased volume of work as when concluding the contract the defendant experienced a normal, expected volume of work.

The existence of the employment relationship with the fulfilled legally determined elements of such a relationship

VIII Ips 35/2008: In accordance with the second paragraph of Article 11 of ERA it is prohibited to perform work on the basis of civil law contracts where there are elements of an employment relationship pursuant to Article 4, and in connection with Article 20 of ERA, except in cases provided by law. With regard to the above-mentioned provision, the autonomy of parties is therefore not unlimited. With regard to the content the cited provision refers to Article 16 of ERA which regulates the assumption on the existence of employment relationship if elements of the employment relationship are given. It is the issue of legislative presumption with which the parties, in the event of a dispute, do not need to prove the putative legal fact – the existence of employment relationship – but only the so-called putative basis – the elements of employment relationship.

- Are there any labour law reforms under discussion in your country caused or affected by the economic crisis (to make labour more flexible, or to extend protection to some categories of workers)?

After 1 January 2003, Labour Courts have dealt with a greater number of disputes on the termination of employment contracts which were based on a new law (contractual relationship), but employers have actually acted in the same or in a similar manner as under previously valid legislation (mutual employment relationship with unilateral decisions of an employer with regard to the rights and obligations of a worker). Few decisions (the essential part) shall be mentioned which relate to a different or a new legal regulation of an employment relationship as an contractual relationship and a termination of employment contract as a civil sanction due to a violation of contractual obligations including special features of such an agreement in comparison to entirely civil contractual relationships.

Substantiation of a ground for termination

VIII Ips 16/2007: The termination of employment contract is envisaged as final means.

It is possible to understand efforts of an employer to provide higher standards of work or his engagement that workers conscientiously perform their work at a work post under the employment contract and consistently follow employer's instructions but it is not possible to also avoid taking into consideration reasonable and objective criteria when weighing the weight of violations of contractual or other obligations from employment relationship. Violations should be such that they really disable the continuation of employment relationship between the worker and the employer.

Time period in which an employer should deliver the termination of the employment contract

VIII Ips 33/2006: The time period referred to in the 2nd paragraph of Article 110 of ERA is a preclusive time limit which means that after its expiration the employer's right to deliver the extraordinary termination of the employment contract expires. When an employer becomes acquainted with reasons which substantiate the extraordinary termination is indeed a question: he may become acquainted immediately when the reason actually occurs or he may become acquainted with it

later all up to the submission of the defence of a worker. If there was no defence (the reason is not important) it is not deemed that the employer has become acquainted with reasons on a day determined for unsuccessful defence since on this day he did not find anything new but he could become acquainted with them before or he does not have any reasons for the termination of the contract.

A defence of a worker

VIII Ips 20/2005: The employer is not obliged to allow a worker to offer a defence if circumstances exist due to which it would be unjustified to expect from the employer to allow it to the worker or if the worker explicitly refuses it or unjustifiably does not respond to the invitation to defence.

VIII Ips 210/2006: A great extent of appropriated items due to which the employer's trust in the worker has been damaged is not a reason due to which it would be groundless to expect that the employer will allow the worker to offer a defence. On the contrary, precisely due to this reason, the worker who is threatened with the extraordinary termination of the employment contract due to the alleged theft should have the possibility to put up his defence, to state what he thinks about the recrimination, what is his viewpoint regarding the measure foreseen by the employer, regarding the circumstances and similar. The possibility of the employer, for justified reasons, not to allow the worker to offer a defence prior to the termination of the employment contract should be interpreted in a restrictive manner, and it should be determined in individual cases whether circumstances exist which show that it is not possible to expect from the employer (it would be unjustified) to allow the worker this right.

The termination of employment contract and the compensation by litigation

VIII Ips 26/2007: Due to the (special) nature of a compensation award under Article 118 of ERA, when deciding on it, it is not possible to base a claim directly or to apply all instruments of civil law (law of obligations). Primarily this compensation represents compensation for a future evaluated damage or a certain fair monetary compensation with regard to which the criteria will have to be formed by case law. The assessments of compensation for property or non-property damage for this case is not possible to envisage without an adequate claim pursuant to the 1st paragraph of Article 118 of ERA (and in the continuation, an adequate procedure for taking evidence and legal conclusions made by the court), or pursuant to the 2nd paragraph of this legislative provision without adequate statements and clearly and precisely determined facts on certain (future) damage recognized in law with regard to the property and/or non-property field. In other words, in a case of a decision pursuant to the 2nd paragraph of Article 119 of ERA this means, that the Court itself, without taking into consideration the principle of an open trial, with the indicated possibilities regarding the decision pursuant to the 2nd paragraph of Article 118 of ERA and the principle of substantive conduct of proceedings under which it will take care that the plaintiff will state adequate facts and produce evidence regarding the damage and its amount for the assessment of the damage which might even be taken into consideration, and in the continuation also the taking of the evidence, will not provide the basis to award certain damages to the plaintiff by itself.

VIII Ips 548/2007: The criteria for the assessment of compensation pursuant to Article 118 of ERA will have to be finally formed by case law – particularly considering that it concerns the compensation for damage to the worker who shall not return to work with the employer. Because of this with its assessment it will have to take into consideration mainly the employment opportunities of the worker, his age, his years of service, profession, other personal circumstances, the receiving of monetary allowance, and the like.

The termination of the employment contract with an offer of a new employment contract

VIII Ips 422/2006: In ERA or the Code of Obligations it is not determined that due to the establishment of illegality with regard to the termination of the employment contract a new employment contract which the worker has concluded with the same employer would terminate or become void. The challengeability of the contract should be explicitly enforced by the eligible person. A later, valid employment contract reflects later consent of the parties' contractual will and has a priority over the old contract although the latter was illegally terminated. In the 3rd paragraph of

Article 90 of ERA, in the case of an acceptance of an offer for appropriate employment for an indefinite period of time the extent of judicial protection is limited to the challenge of the substantiation of the reason for termination. The new employment contract was not concluded with a resolutive condition as its termination was not dependant on an uncertain fact – a potential determination of the illegality with regard to the termination of employment contract.

Severance Pays under Collective Agreements

VIII Ips 84/2006: ERA does not determine the highest amount of severance pays so that in accordance with the 2nd paragraph of Article 7 of ERA it is necessary to take into consideration that with the employment contract or the collective agreement higher severance pays may be determined.

The transformation of the fixed-term employment contract into the employment contract for an indefinite period of time

VIII Ips 355/2006: Since the conclusion of the fixed-term employment contract is an exception which is allowed only in cases which are determined in advance in the law or collective agreement, the legality of the employment agreement is linked to the legality of a reason which is stated in the contract. It is up to the employer to state in the employment contract an actual existing and legal reason for the conclusion of the fixed-term employment contract. Since the reason for the conclusion of the fixed-term employment contract which was stated by a plaintiff in a disputed employment contract actually did not exist the fixed-term employment contract was concluded contrary to the law.

VIII Ips 310/2007: The employer may, on the basis of the first paragraph of Article 52 of ERA conclude the fixed-term employment contract with the worker only if any of reasons mentioned in the law is given. Since the alleged legal reason with regard to the temporarily increased volume of work due to which the plaintiff concluded the employment contract was not determined, the Court, on the basis of Article 54 of ERA, reasonably judged that the plaintiff concluded the fixed-term employment contracts in dispute with the defendant contrary to the law and it is therefore assumed that they were concluded for an indefinite period of time.

VIII Ips 558/2007: The defendant concluded the fixed-term employment contracts due to business economic risk of operation which was linked to the scope of orders made every time for known customers. This is not one of legal reasons for the conclusion of the fixed-term employment and it can not be assumed as a reason for the increased volume of work.

VIII Ips 525/2008: A fixed-term employment contract was concluded due to economic risk of operation which was linked to uncertainty whether a plaintiff will retain a business partner which, however, is not one of the legal reasons for the conclusion of the fixed-term employment contract pursuant to Article 52 of ERA. The contract was actually not concluded due to the temporarily increased volume of work as when concluding the contract the defendant experienced a normal, expected volume of work.

The existence of the employment relationship with the fulfilled legally determined elements of such a relationship

VIII Ips 35/2008: In accordance with the second paragraph of Article 11 of ERA it is prohibited to perform work on the basis of civil law contracts where there are elements of an employment relationship pursuant to Article 4, and in connection with Article 20 of ERA, except in cases provided by law. With regard to the above-mentioned provision, the autonomy of parties is therefore not unlimited. With regard to the content the cited provision refers to Article 16 of ERA which regulates the assumption on the existence of employment relationship if elements of the employment relationship are given. It is the issue of legislative presumption with which the parties, in the event of a dispute, do not need to prove the putative legal fact – the existence of employment relationship – but only the so-called putative basis – the elements of employment relationship.

- Are there any labour law reforms under discussion in your country caused or affected by the economic crisis (to make labour more flexible, or to extend protection to some categories of workers)?

Yes. The new legislative developments in Slovenia (e.g. changes of the ERA in 2007) introduce changes that are directed towards further flexibility of work and employment. There is a proposal for changes of the ERA provisions about period of notice and severance pay: shortening the period and reducing the height of severance pay. On the other hand an increase of monetary allowances from the system of unemployment insurance is envisaged.

The current system of unemployment insurance in Slovenia does not provide to many sufficient protection upon the loss of employment whereby particularly young people stand out who do not meet the entry condition to obtain monetary allowance, that is at least 12 months employment in the preceding 18 months. The Employment and Insurance Against Unemployment Act (hereinafter referred to as EIAUA)¹ does not allow partial unemployment and partial activation of unemployed persons. Nor does it provide sufficient basis for the co-operation of various institutions in the treatment of persons with employment obstacles.

In EIAUA (ZZZPB), the field of student work is also regulated. This is a unique form of work in Europe and in the EU and OECD reports it receives numerous criticisms. Students may be strong competition in the labour market as for the employer their average payment represents only 55 percent of the cost for an average paid worker. Cost competitiveness, however is not the only factor of the employer's decision about the employment of a student or other person: - student work is competitive also because of greater flexibility regarding the employment.

Student work in the current form represents unfair competition to regular forms of employment as in many cases it is performed at systemised job posts, 8 hours per day, 40 hours per week which is also against the law regulating employment relationships. This form of work represents approximately 3,7 percent of the labour market in Slovenia as well as the cheapest and the most flexible form of work for employers, while on the other hand, it does not allow for young persons to obtain formal work experience which would be beneficial for them when looking for their first employment. There are a lot of abuses in this field which cannot be prevented due to inappropriate legislative solutions in ZZZPB. This field will be regulated by a special law on mini jobs.

The Act Amending the Act on the Prevention of Illegal Work and Employment (ZPDZC) put into effect in December 2006 with the aim to decrease the extent of illegal work and employment already introduced the instrument of mini jobs which provides the legal basis for the work of persons who are not in an employment relationship with full working time or do not perform an independent activity or do not receive a pension.

The Mini Jobs Act wishes to regulate anew in a uniform manner forms of work which due to their temporal nature and dynamics of work performance cannot be assumed as an employment relationship in spite of the fact that such work in individual cases may also have elements of an employment relationship. According to the data by the Tax Administration of the Republic of Slovenia, in 2008, 173,827 persons, of these 33,010 retired persons, received income from other contractual relationships. The aim of the Mini Jobs Act is that temporary and occasional work is also included in the mechanism of support for social budgets and that everybody who performs these forms of work is allowed comparable rights from social insurance and with this also adequate protection in the labour market. The introduction of mini jobs wishes to diminish the extent of illegal work and employment as it introduces a new possibility of legal performance of paid work which may also have elements of an employment relationship under more favourable conditions for the employer (fast response to the needs for work, lower labour costs as with an employment relationship, less administrative procedures).

¹ Lako se uporablja tudi kar kratica ZZZPB skladno z neuradnim prevodom, objavljenim na spletni strani MDDSZ.

Spain

- Antonio Martín Valverde- Magistrado Emérito del Tribunal Supremo, Catedrático de Derecho del Trabajo
- Miguel Angel Limón Luque.- Magistrado de Trabajo, Profesor Titular de Derecho del Trabajo
- José María Ríos Mestre.- Abogado laboralista, Profesor Ayudante de Derecho del Trabajo

I. EMPLOYMENT PROTECTION LEGISLATION (EPL)

Source and scope of regulation

38. **Source of regulation** – What is the main law (title and date of adoption) regulating employment contracts and dismissals (Please provide a Web-link, Word/PDF version, its translation in English or French).

Ley del Estatuto de los Trabajadores (ET): Statute of the Workers Act. The original draft is Act 8/1980, March 10. The actual draft is “Texto Refundido de la Ley del Estatuto de los Trabajadores”, approved by Real Decreto Legislativo 1/1995, March 24. Since 1995 the Statute of the Workers Act has often been modified in matter of “employment contracts” and “dismissals”; the most important reforms are contained in: Ley 63/1997, December 26; Ley 12/2001, July 12; Ley 43/2006, December 29; and very recently Real Decreto-Ley 10/2010, June 16.

39. **Scope of legislation** – What categories of workers are excluded from the regulation? (e.g. public servants, domestic workers, police, judiciary etc).

Excluded: 1) civilian and military public servants [art. 1.3.a) ET]; 2) volunteers and benevolent work [art. 1.3.d) y Ley 6/1996]; 3) “trabajos familiares” (“family shops and enterprises”) of the workers that are members of the employer’s family persons and that live in the same home [art. 1.3.e) ET]

“*Special contracts of employment*” with a notably different regulation from the “common contract of employment”: 1) high executives [art. 2.a) ET]; 2) domestic workers [art. 2.b) ET]; 3) artists and professional sportmen [art. 2.d) y e) ET]

Size of enterprise excluded – Are any enterprise of a certain size (e.g. employing less than 20 workers) excluded from the scope of application of the law?

No

40. **Collective agreements** – Are there any important collective agreements of general application at the national and/or branch level?

1) Convenio Colectivo Único del personal laboral de la Administración General del Estado (“unique collective agreement for the State workers”) ; 2) “Basic” agreements (regulating particular employment and work conditions) in certain important branches: chemistry, textile, metal, building and construction enterprises.

Types of employment contracts

41. **Probationary period** - What is its maximum duration?

Six months (art. 14 ET). It is possible, in principle, to go beyond this limit by means of a disposition of collective agreement. A ruling of the Supreme Court (STS 12-11-2007) has decided the reduction of a too prolonged probationary period of two years fixed in a collective agreement; interesting from the point of view of the interplay and the limits of collective bargaining in matter of dismissals

42. **Fixed-term contracts (FTC)** – May FTC be concluded only for objective and material reasons (e.g. nature of work) or without any limitation?

Yes, for three objective and material reasons: “determined work or service” (see STS 28-2-2002, STS 30-6-2005 and STS 11-4-2006), “temporary substitution of another worker”, “temporary peak load of production” (art. 15.1 ET)

43. Maximum number of successive FTC – Are there any legal limitations?

There is a limitation of cumulative duration of successive FTC but no numerical limitation of them. See 7

44. Maximum cumulative duration of FTC – Are there any legal limitations?

Limitation of cumulative duration of FTC: 24 months in a period of 30 months when the worker has been hired successively by the same enterprise through two or more fixed-term contracts (art. 15.5 ET) (STS 3-8-2008).

45. What is the percentage of the workforce under FTC? – Please provide any statistics, if available.

The ratio of fixed-term contract is about 30 %. Since the emergence of the current economic crisis this ratio is diminishing because of the massive termination of contracts of the temporary workers.

Substantive requirements for dismissals (justified and prohibited grounds)

46. Obligation to provide reasons for dismissals – Is the employer obliged to provide the worker with a reason of dismissal?

Yes, except in the fixed-term contracts where it is sufficient to notice the term of the contract.

47. Valid grounds to dismiss a worker – Are any valid reasons to justify a dismissal listed in the law - e.g. worker’s conduct, worker’s capacity, economic reasons, or any fair reasons?

The reasons are listed in art. 51 ET (collective dismissal), 52 ET (objective dismissal, that include *inter alia* economic dismissal under the legal threshold of collective dismissal) y 54 ET (disciplinary dismissal).

48. Prohibited grounds to dismiss a worker – Are there any prohibited grounds listed in the law or this issue is regulated by general non-discrimination provisions?

The prohibited grounds to dismiss a worker are listed in art. 55.5 ET; they are related with the union freedom, the protection of fundamental rights and liberties, and the conciliation of work and family (STS 19-11-2009: dismissal of a pregnant worker whose pregnancy was not known by the employer, with dissenting opinion).

49. Workers enjoying special protection from dismissal - Please list any categories, such as women during the pregnancy and maternity leave, workers’ representatives etc.

1) Women during pregnancy [art. 55.5.b) ET]; 2) Women and men during maternity and paternity leave (including adoption) [art. 55.5.a) ET]; 3) Worker’s representatives (art. 68 ET)

Procedural requirements for individual dismissals

50. Notification to the worker to be dismissed – In which form the employer must inform the worker about his or her dismissal (orally or in writing)?

In writing; and with concrete and detailed specification of the ground of dismissal (*carta de despido*).

51. Length of the notice period – How long in advance does the employer have to inform the worker about his or her dismissal?

Notice period (15 days) is required in the termination of fixed-term contracts for duration of a year or more [art. 49.1.c) ET]. Notice period is not required in disciplinary dismissal. Notice period is required in objective dismissal (15 days since Real Decreto-Ley 16-6-2010; before: 30 days) [art. 53.1.c) ET].

52. Pay in lieu of notice – authorised or no by law?

Yes, authorised.

53. **Notification to administration** – Does the employer have to notify the public administration before dismissing a worker?
No.
54. **Notification to workers' representatives** – Does the employer have to inform workers' representatives for each individual dismissal?
Yes in: 1) in objective dismissal for economic grounds [art. 53.1.c) ET]; and 2) in disciplinary dismissal of workers' representative and of workers who are members of a union (art. 55.1 ET).

Otherwise, the employer is obliged to communicate to the workers' council "all the sanctions inflicted because of serious violation of their duties committed by the workers" (art. 64.1.7º ET); amongst these sanctions are the disciplinary dismissals.
55. **Approval by administration** – Does the employer need to obtain any authorisation from the administration to dismiss a worker?
Not in individual dismissals. In collective dismissal the employer is obliged to obtain the authorisation of the Public Administration (art. 51 ET). See 24
56. **Approval by workers' representatives** – Does the employer have to obtain any authorisation to dismiss a worker?
No

Procedural requirements for collective dismissals for economic reasons

57. **Definition of collective dismissal** - e.g. percentage or number of workers concerned
Dismissals that concern at least :
- a. 10 workers in enterprises which employ less than 100 workers
 - b. 10 % of the workers in enterprises which employ between 100-300 workers
 - c. 30 workers in enterprises which employ 300 workers or more
(art. 51.1 ET)
58. **Prior consultation with trade unions/workers' representatives** – Does the employer have to consult them in case of planned collective dismissals for economic reasons?
Yes (art. 51.2 ET). The consultation with the workers' representative is mandatory before the authorisation of the Public Administration (see 24); the duration of the period of consultation is 15/30 days depending of the size of the enterprise (less of 50 workers: 15; 50 or more: 30). The consultation may conclude in a collective agreement on the terms and conditions of the collective dismissal.
59. **Notification to the public administration in case of planned collective dismissals for economic reasons** – Must the employer notify the public authorities?
Collective dismissal depends on authorisation of the Public Administration (art. 51. 5 and 6 ET).
60. **Notification to workers' representatives** – Is the employer obliged to inform them in case of collective dismissals for economic reasons?
Yes. See 21.
61. **Approval by the public administration** – Does the employer have to obtain any authorisation in case of expected collective dismissals for economic reasons?
In collective dismissal the employer is obliged to obtain the authorisation of the Public Administration (art. 51.5 and 6 ET), authorisation that must be conceded when there is a regular collective agreement on the terms and conditions of the collective dismissal (see 21) (art. 51.6 ET). Silence of the Public Administration after 15 days since the petition of authorisation means approval.
62. **Approval by workers' representatives** – Must collective dismissals be authorised by workers' representatives?
Not approved but consulted. See 21.

63. **Priority rules for collective dismissals** – Are there any legal rules to select workers to be dismissed (social considerations, age, job tenure)?
Only worker's representatives have priority to keep their jobs [art. 51.7 ET and art. 68 b) ET].
64. **Is the employer obliged to consider transfers, retraining and other options prior to dismissal?**
Transfers, retraining and other measures must be considered in the period of consultation with the workers' representatives. See 21.
65. **Priority rules for re-employment** – Are any obligation for an employer to first consider applications of former redundant workers while re-hiring the workforce?
There are limitations of hiring temporary workers, or of hiring workers with promotion of employment measures, during the period (a year/six months, according the cases) that follows a collective dismissal.

Severance payment

66. **Severance pay** – What does the employer have to pay to a worker in case of dismissal for personal and/or economic reasons?
20 days of salary for each year of services with a maximum of 12 months [art. 51.8 ET; art. 53.1.b) ET]

Avenues for redress (penalties, remedies) and litigation procedure for individual complaints on dismissals

67. **Compensation for unfair dismissal** – Are there any legal limits (ceiling in months or any calculation method defined by law) or freely decided by the judge?
42 months of salary [art. 56.1.a) ET] is the maximum of compensation for unfair dismissal.
68. **Reinstatement** – provided in law, rarely or often available to a worker unfairly dismissed?
Reinstatement is provided in law for workers' representative unfairly dismissed (art. 56.4 ET) and for nullified unfair dismissal (art. 55.5 ET); see 11. Out of these cases, reinstatement depends on the will of the employer, which is empowered to dismiss with compensation.
69. **Preliminary (judicial and/or extra-judicial) conciliation** – Is it mandatory or not?
Mandatory
70. **Competent courts** – What bodies are competent for disputes on dismissals (ordinary tribunals, specialised labour courts)?
Specialised labour courts
71. **Alternative arbitration / mediation** – Do the parties to an employment contract have any alternative possibility to settle out their labour dispute?
Arbitration / mediation are very infrequent in dismissals' disputes and, generally speaking, in individual labour disputes.
72. **Length of the court procedure** – What is the average length for a case on dismissals (are there any legal limitations)?
Three or four months in trial courts is most frequent; six-eight months in appeal. There are no legal limitation.
73. **Maximum time to make a claim for unfair dismissal** – During which period does the worker have to bring his or her complaint to the court?
Twenty days since the dismissal (art. 59.3 ET). See STS 8-2-2010.

II. ECONOMIC CRISIS AND CASE LAW OF LABOUR COURTS

3. Which court decisions in your country have been related to the economic crisis (with the main focus on EPL)?
Please share information about any court decisions which:

- Have influenced the interpretation of legal provisions regulating dismissals, fixed-term contracts etc;
- Were necessary to fill any gaps in the national labour law?

The decisions of the labour courts on these matters, specially the decisions of the Supreme Court (Social Chamber), are very influential on the development of the Labour Law. A decision that intends to fill the gaps (*rectius*, the vagueness) of the definition of the dismissal for economic reasons is STS 16-6-1996, partly incorporated in recent Real Decreto-Ley 16-6-2010; see 1.

It is difficult to select decisions related to the recent economic crisis. I think that a first review may include:

- 1) STS 17-6-2008 (termination of fixed-term contracts of subcontracting enterprises, related to the end and the renewal of the subcontracting);
- 2) STS 30-5-2006 (compensation for collective dismissal whose administrative authorisation has been revoked by the judge);
- 3) STS 27-10-2009 (compensations in unfair dismissals).
4. Are there any labour law reforms under discussion in your country caused or affected by the economic crisis (to make labour more flexible, or to extend protection to some categories of workers)?

Real Decreto-Ley 10/2010, de 16 de junio, “de medidas urgentes para la reforma del mercado de trabajo” (“urgent measures for the reorganisation of the labour market”): to make labour more flexible.

Sweden

- Judges Michaël Koch, Carina Gunnarsson and Cathrine Lilja Hansson

I. EMPLOYMENT PROTECTION LEGISLATION (EPL)

Source and scope of regulation

1. The Swedish legislation in this field is the 1982 Employment Protection Act (SFS 1982:80, non-official English translation: Employment Protection Act), henceforth called EPA.
2. According to EPA Section 1, four categories of employees are excluded from the application of the act:
 - a) Employees whose duties and conditions of employment are such that they may be deemed to occupy a managerial or comparable position;
 - b) Employees who are members of the employer's family;
 - c) Employees employed for work in the employer's household;
 - d) Employees who are employed for work with special employment support or in sheltered employment or in development employment.
3. EPA is applicable on all enterprises and employers. The enterprise's size is of no importance in this respect.
4. Collective agreements are certainly of great importance on the Swedish labour market ("the Nordic labour market model"). There are, in practically all branches, nation-wide collective agreements covering all members of the employer organizations and trade unions. The high union density on both sides means that collective agreements are directly binding for around 70 per cent of all employees. These agreements are in practice applied also on employees who are

not members of a trade union, provided that they perform work in a work-place covered by an agreement of this kind. In sum, this means that collective agreements cover around 90 per cent of all employees.

Types of employment contracts

5. According to EPA Section 6, a contract for probationary employment of a limited duration may be entered into, provided that the probationary period does not exceed six months.

6-8. These three questions must be dealt with in the same context. According to EPA Section 5, a FTC may be concluded

- a) for a general fixed-term employment,
- b) for a temporary substitute employment,
- c) for a seasonal employment, and
- d) when the employee has attained the age of 67.

There are limitations only as far as the general fixed-term employment and the temporary substitute employment are concerned: If an employee has been employed for a period of five years by an employer either for a general fixed-term employment for in aggregate more than two years, or as a substitute for in aggregate more than two years, the employment is transformed into an indefinite-term employment.

EPA's rules on FTCs are the only ones that have undergone frequent and substantial changes over the 36 years that have passed since the first EPA came into force. There has been many variant forms of FTC rules, and those applicable at present were introduced only 2007. These rules have been subjected to controversy. The European Commission has held that the rules are not in compliance with Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. This has been refuted by the Swedish Government. It is quite possible that this controversy may in the future be decided by the European Court of Justice.

9. In 2009, the percentage of the workforce under FTC amounted to 17.1 for women and 12.4 for men (source: Statistics Sweden).

Substantive requirements for dismissals (justified and prohibited grounds)

10. The employer is always obliged to give a reason for a dismissal, be it a dismissal with or without notice.

11. According to EPA Section 7, the notice of termination by the employer must be based on objective grounds ("just cause"). What constitutes a just cause is not listed in EPA, with one exception: it is mentioned in the aforementioned section that a just cause for notice of termination does not exist where it is reasonable to require the employer to provide other work in his service for the employee. The legislators general view on what constitutes a just cause is explained in the travaux préparatoires. The statements there have been confirmed by the Labour Court's comprehensive case-law. EPA makes a difference between dismissals caused by shortage of work and other dismissals (i.e. dismissals based on circumstances relating to the employee personally).

12. The issue of prohibited grounds for dismissal is regulated by the general non-discrimination act, namely the 2008 Discrimination Act (SFS 2008:567) and certain other acts, e.g. the 1995 Parental Leave Act, the 1974 Workers' Representatives Act and the 2008 Prohibition of Discrimination of Employees Working Part Time and Employees with Fixed-term Employment Act.

13. All categories covered by non-discrimination acts may be said to have a special protection against dismissal, but only in a formal sense. All categories of employees may be dismissed owing to circumstances relating to the employee personally. There is a special protection for an

employee on parental leave who is dismissed because of a shortage of work. In these cases, the period of notice shall start to run when the employee has completely or partially resumed work. And a workers' representative who is given notice of termination may be given a better place in the order of termination than would otherwise have been the case.

Procedural requirements for individual dismissals

14. Notice of termination by the employer must be given in writing (EPA Section 8). An oral dismissal is however not invalid.

15, 18 and 20. An employer who wishes to summarily dismiss an employee or to give notice terminating employment for reasons relating to the employee personally, shall inform the employee of this in advance. Information concerning termination shall be given at least two weeks in advance. Information concerning summary dismissal shall be given at least one week in advance.

If the employee is a union member, the employer shall notify the local organisation of employees to which the employee belongs at the same time as notice is given to the employee.

The employee and the local organisation of employees to which the employee belongs are entitled to consultations with the employer concerning the measure to which the information and the notice relate. This shall apply provided that such consultations are requested not more than one week after information or notice was given. Where such consultations have been requested, the employer may not give notice of termination or summarily dismiss the employee until the consultations have been concluded. (EPA Section 30)

There is no need of approval from the trade union.

16. We are sorry, but we don't understand the question.

17 and 19. There are no rules on notification to or approval of administration in the case of individual dismissals for reasons relating to the employee personally.

Procedural requirements for collective dismissals for economic reasons

21. There is no such term in the Swedish legislation. According to the EPA there is a difference between to give notice terminating employment for reasons relating to the employee personally and to give notice of termination on the grounds of shortage of work.

22, 24 and 26. Before an employer takes any decision regarding significant changes in its activities, he shall, on its own initiative, enter into negotiations with the employees' organisation with which he is bound to negotiate under a collective bargaining agreement. The above-mentioned shall also apply prior to any decisions by an employer regarding significant changes in working or employment conditions for employees who belong to the organisation. This means that an employer according to the regulation has to inform and enter into negotiations in the case of a redundancy situation, even if only one employer is concerned. There is no need of a formal approval. This is regulated in the Employment (Co-Determination in the Workplace) Act.

23 and 25. If there is a redundancy situation and five employees or more are concerned or if more than 20 employees are concerned in a period of 90 days, the employer has to notify Swedish Public Employment Service and inform the authority according to the requirements in the Collective Redundancy Directive (98/59/EEC) – Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies

27. There are rules to select workers in a redundancy situation, in EPA Section 22.

In the event of notice of termination on the grounds of shortage of work, the employer shall observe the following rules on priority. The order of termination is determined on the basis of each employee's total time of employment with the employer. Employees with longer employment times shall have priority over employees with shorter employment times. In the event of equal employment times, priority shall be given to the older employee. Where it is only

possible to offer continued work to an employee with the employer following a re-location of the employee, priority shall be contingent on the employee possessing satisfactory qualifications for the continued work. Before order of termination is determined an employer with at most ten employees may exempt at most two employees who, in the opinion of the employer, are of particular importance for the future activities. Employees who are exempted have priority for continued employment.

28. Yes. According to Section 7, EPA, notice of termination by the employer must be based on objective grounds. And the same section states that objective grounds for notice of termination do not exist where it is reasonable to require the employer to provide other work in his service for the employee.

29. Employees whose employment has been terminated as a consequence of shortage of work have rights of priority for re-employment in the business in which they were previously employed (Section 25, EPA). The right to priority, however, is contingent upon the employee having been employed by the employer for a total of more than twelve months during the last three years and provided that the employee is sufficiently qualified for the new employment. The right to priority applies from time of the notice of termination until nine months from the date that the employment ceased. Where the employer has several production units, or if the employer's business involve several collective bargaining agreement sectors, the rights of priority applies to employment within the unit and the collective bargaining agreement sector to which the employee belonged at the termination of the previous employment.

Severance payment

30. An employee who has been given notice is entitled to retain pay and other employment benefits during the period of notice, notwithstanding that the employee is not assigned any duties or is assigned duties different from those the employee previously performed (Section 12, EPA). This rule applies whether the dismissal takes place for personal or economic reasons. The period of notice of termination usually varies between one month and a year.

Avenues for redress (penalties, remedies) and litigation procedure for individual complaints on dismissals

31. An employer who violates the law by an unfair dismissal is liable for damages for loss suffered by the employee as well as pay and other employment benefits to which the employee may be entitled (Section 38, EPA). Damages may comprise both compensation for losses sustained and for violation of the law. Where reasonable, damages may be reduced, in whole or in part. The damages are decided by the court but compensation for losses in respect of the period following the cessation of employment may not, under any circumstances, exceed the amount mentioned in Section 39, EPA. These damages are to be determined according to the employee's total period of employment with the employer at the time of dissolution of the employment relationship, and shall correspond to certain amounts stated in the mentioned section. According to the law the damages could not exceed 16 months' pay for less than five years of employment; 24 months' pay for at least five years but less than ten years of employment; 32 months' pay for ten or more years of employment. Damages may not be determined, however, in such a manner that such damages are calculated on the basis of a greater number of months than have actually been commenced with the employer. Where the employee has been employed by the employer for less than six months, the amount assessed shall correspond to six months' pay.

32. Where notice of termination is given without objective grounds, the notice shall be, according to Section 34, EPA, declared invalid upon the application of the employee. However, this do not apply where the notice of termination is challenged solely on the grounds that it is in breach of the rules regarding priority. Thus the possibility to have a dismissal declared invalid is available in every case of notice of termination without objective grounds, with the mentioned exception. However there are no means to force an employer to actually reinstate the employee. According to provisions in Section 39, EPA, where an employer who refuses to comply with a court order

that notice of termination or a summary dismissal is invalid the employment relationship shall be deemed to have been dissolved. As a consequence of the employer's refusal to comply with the court order, the employer shall pay damages to the employee with the amounts stated in the provision. The amounts are the same as mentioned above.

33. Preliminary conciliation is not mandatory. However, if an organization of employees wants to bring an action before the Labour Court as a court of first instance, the claim shall not be taken up for consideration before the negotiations that can be requested under the Employment (Co-determination in the Workplace) Act (1976:580) or that are provided for by collective agreement have taken place in connection with the matter in dispute. Although the parties at those negotiations are not forced to try to reach a settlement, trying to do so must be considered as a natural part of the negotiations.

34. When an organization of employees brings a dispute concerning a dismissal of a member of the organization to court, the Labour Court is first – and last – instance. When an employee himself wants to initiate a litigation procedure concerning a dismissal he has to bring the dispute before a district court. In these cases the Labour Court is the court of second and final instance.

35. A dispute may be referred for determination by an arbitrator if agreement has been reached to that effect.

36. The average length for a case on dismissals in the Labour Court is approximately thirteen months from the moment the case is brought into court until a final judgment is given. (Almost half of the cases brought into the court are closed in a considerably shorter time than that since the parties often come to a conciliation during the preparatory proceedings.) There are no legal limitations as regards the length of the proceedings.

II. ECONOMIC CRISIS AND CASE LAW OF LABOUR COURTS

37. It is not possible to relate certain decisions especially to the economic crisis.

38. There has been a discussion going on regarding a change of the rules on priority in connection with termination of employment on grounds of shortage of work. The main principle in these rules is that the order of termination is determined on the basis of each employee's total time of employment with the employer. One argument put forward for a change in the rules is to make the labour-market more flexible. The discussions are not especially linked to the economic crisis though but to differences in political outlook.

UK

- The Honourable Lady Smith,
The Employment Appeal Tribunal (Edinburgh & London)

I. EMPLOYMENT PROTECTION LEGISLATION

Source and scope of regulation

Q.1 What is the main law regulating employment contracts and dismissals?

The Employment Rights Act 1996 (UK statutes 1996 c.18). See, in particular, sections 1-7B, and sections 94 – 98.

Q2. What categories of workers are excluded from the regulation? The statutory regulation applies to all employees.

Q.3 Are any enterprises of a certain size excluded from the scope of the application of the law? No.

Q.4 Are there any important collective agreements of general application at the national and/or branch level? In both Scotland and England/ Wales, new collective agreements have been entered into at national level relating to employment of local authority employees so as to achieve “single table bargaining” for employees of every status. The agreements are referred to as a “single status” agreement and do not distinguish between “manual” and “administrative, professional, technical and clerical” as was the case with their predecessor agreements. In Scotland, the relevant agreement is referred to as the “Red Book”; there has been some implementation of its provisions and principles at local level although that implementation is not yet complete.

Types of employment contracts

Q.5 Probationary period – what is its maximum duration? There are no limits to the length of a probationary period. However, an employee obtains important statutory rights including the right not to be unfairly dismissed, after one year.

Q.6 May fixed term contracts be concluded only for objective and material reasons or without any limitation? There are no limitations to the terms on and circumstances in which parties may enter into fixed term contracts. However, protection against discrimination is afforded to the employee under the *Fixed- Term Employees (Prevention of Less Favourable Treatment) Regulations 2002*. If he receives less favourable treatment than full time employees it will require to be objectively justified, and the fixed term contract employee is entitled not to be unfairly dismissed after he has been employed for a year. If such an employee claims his dismissal was unfair, the whole surrounding facts and circumstances will be examined and the fact that he was employed on a fixed term contract may not of itself be sufficient to show that his dismissal at the end of the contract period was a fair one.

Q.7 Are there any limits to the number of fixed term contracts permitted? No but depending on the facts and circumstances of the individual case, a series of fixed term contracts may be interpreted as being a single continuous contract.

Q.8 Maximum cumulative duration of FTC? If an employee is employed on a fixed term contract (or series of continuous contracts) for 4 years or more and it cannot be objectively justified, then he will be regarded as being employed on a permanent contract (*Fixed Term Employees etc Regulations 2002 reg 8*).

Q.9 What is the percentage of the workforce under FTC? No statistics available. The impression is that they are much more common. In particular, many young people are being offered only FTC’s.

Substantive requirements for dismissals

Q.10 Is the employer obliged to provide the worker with a reason for dismissal? There is no obligation as such but if he fails to do so, it will be presumed that the dismissal was not fair. The onus is on the employer to show the reason for the dismissal (section 98(1) of the *Employment Rights Act 1996*).

Q.11 Are any valid reasons to justify dismissal listed in the law? Section 98(1) and (2) of the *Employment Rights Act 1996* provide that the onus is on the employer to show that the dismissal was one which:

- (a) related to the capability or qualifications of the employee for performing the work of the kind which he was employed to do;
- (b) related to the conduct of the employee;
- (ba) was that the employee retired;
- (c) was that the employee was redundant;

(d) was that the employee could not continue to work in the position for which he was employed without a contravention (either on his part or on the part of his employer) of a duty or restriction imposed by law;

OR

that it was for “some other substantial reason” .

These reasons are referred to as making the dismissal “potentially fair”. It could still be unfair, depending on the whole circumstances e.g. if an unfair procedure was adopted, the dismissal will be unfair even although it was on account of a potentially fair reason.

Q.12 and 13 Prohibited grounds to dismiss a worker? The various anti discrimination statutes (soon all to be embodied in a single statute – the Equality Act 2010) prohibit dismissal on grounds of any of the protected characteristics. There is a separate “code” for **pregnancy** and a woman is entitled not to be dismissed on grounds of pregnancy. Also, dismissals will be deemed to be unfair for a long list of reasons which might be regarded as relating to particular categories of employee, including those where the reason is, broadly put, that the employee :

- Had been summoned for **jury duty**
- Was involved in statutory **health and safety** activities,
- Declined to do shop work or betting work on a **Sunday**,
- Refused to comply with an instruction to work that would have been in breach of the **Working Time Regulations 1998**,
- Being entitled to participate in **education or training**, was not allowed to do so,
- Being a **trustee** of an **occupational pension scheme**, he was fulfilling his duties in that regard,
- Was performing certain **employee representative activities** ,
- Had made a “**protected disclosure**” (e.g. that his employer was in breach of health and safety regulations) ,
- Had **previously brought proceedings** to assert his statutory rights,
- Had sought to secure the **national minimum wage**,
- Had taken action against his employer to secure a **tax credit** right,
- Had taken action in respect of **flexible working** ,
- Sought to enforce a right under the **Pensions Act 2008**,
- Was on a prohibited “**blacklist**” or
- Was selected for **redundancy** because of one of the foregoing reasons.

For further details in respect of the above , see *Employment Rights Act sections 98B -105*.

Procedural requirements for individual dismissals

Q.14 Must the employer inform the employee about his dismissal orally or in writing? There was a statutory requirement that all such notices required to be in writing but that has been repealed. The norm is, nonetheless, for warning of the possibility of dismissal to be given in writing. An employer will find his decision very difficult to defend if he has not done so.

Q.15 Length of the Notice Period? Where an employer wishes to terminate the contract of an employee has been employed for one month or more, he requires to give :

(a) not less than one week’s notice if his period of continuous employment is less than two years;

(b) not less than one week's notice for each year of continuous employment if the period of employment is two years or more but less than twelve years; and

(c) not less than twelve weeks' notice if the period of notice is twelve years or more. See: *Employment Rights Act 1996 section 86*.

The contract of employment may provide for longer notice periods and if it does, they will prevail.

However, in some circumstances, such as gross misconduct, the employer will be justified in imposing summary dismissal i.e. without notice.

Q.16 Pay in lieu of notice : PILON is authorised . The right to notice can be waived. See: *Employment Rights Act 1996 section 86(3)*.

Q.17 Does an employer have to notify the public administration before dismissing an employee? Not as a generality. However, if an employer is proposing to dismiss 100 or more employees at one establishment on grounds of redundancy, he must give at least 90 days notice to the Secretary of State prior to notifying the employees. If he is proposing to dismiss 20 or more employees at one establishment on grounds of redundancy, he must give notice to the Secretary of State at least 30 days prior to notifying the employees (*Trade Union and Labour Relations (Consolidation) Act 1992(UK Statutes 1992 c.52)*). Failure to give such notice is an offence.

Q.18 Does an employer have to notify employee representatives for each individual dismissal? No. However, where an employer is proposing to dismiss 20 or more employees at one establishment , within a period of 90 days or less, on grounds of redundancy , he requires to consult the appropriate employee representatives (*Trade Union and Labour Relations (Consolidation) Act 1992 s.188*)

Q.19 and 20 Does an employer need to obtain any authorization from the administration before dismissing an employee? Whilst I am not sure what is envisaged by "administration" here, an employer does not need permission from any other person or body or authority to dismiss an employee.

Procedural requirements for collective dismissals for economic reasons

Q 21 What is the definition of collective dismissal? There is no such definition in our legislation but see the answers to Q17 and 18 above.

Q22 Prior consultation with trade unions/ workers' representatives: See the answers to Q17 and 18 above. Where consultation is required under s.188, it requires to include consultation about ways of (a) avoiding the dismissals, (b) reducing the numbers of employees to be dismissed, and (c) mitigating the consequences of dismissals, all with a view to agreement being reached . To assist with the consultation process, the employer is obliged to disclose to the employee representatives, in writing:

- The reasons for his proposals
- The number and description of employees whom it is proposed to dismiss as redundant
- The total number of employees of any such description at the establishment affected
- The proposed method of selection for redundancy
- The proposed method of carrying out the dismissals
- The proposed method of calculating redundancy payments
- The number of agency workers working temporarily for the employer or under his supervision/ direction
- The parts of the undertaking in which those agency workers are working

- The type of work those agency workers are carrying out.

Q23 Must the employer notify the public administration in case of planned collective dismissals? See answer to Q17.

Q24 Notification to employee representatives: See answer to Q18.

Q25 Does the employer have to obtain any authorization in the case of collective dismissals for economic reasons? No.

Q26 Must collective dismissals be authorized by employee representatives? No.

Q27 Priority rules for collective dismissals – Are there rules to select workers to be dismissed? No. The approach in our jurisdiction is perhaps best explained by reference to judicial discussion of the relevant principles. The following is an excerpt from a judgment of mine when sitting in the Employment Appeal Tribunal in a recent case about redundancy dismissal (*Semple Fraser v Daly*, July 2010) :

“[28]various observations have been made in the authorities regarding redundancy dismissals which show that, in assessing the reasonableness of a decision to dismiss for redundancy, it will rarely be appropriate for an Employment Tribunal to embark on a detailed scrutiny of the criteria used for scoring or the application of those criteria to the particular circumstances of the claimant and others in the same pool. In *Buchanan v Tilcon Ltd* [1983] IRLR 417, a decision of the First Division in which the opinion was delivered by the Lord President (Lord Emslie) (referred to in both *Eaton Ltd v King* in 1995 and *British Aerospace plc v Green*) a clear limitation is expressed as to what was to be expected so far as scrutiny of employers’ actings in a redundancy situation was concerned:

“ ...In this situation where no other complaints were made by the appellant all that the respondents had to do was to prove that their method of selection was fair in general terms and that it had been applied reasonably in the case of the appellant by the senior official responsible for taking the decision. As was pointed out by Phillips J in *Cox v Wildt Mellor Bromley Ltd* [1978] IRLR 157 it is quite sufficient for an employer in a case such as this to call witnesses of reasonable seniority to explain the circumstances in which the dismissal of an employee came about and it was not necessary to dot every “i” and to cross every “t” or to anticipate every possible complaint which might be made.” (at p. 418)

[29] In the same vein, in *British Aerospace plc v Green*, Waite LJ, at paragraph 3, said:

“Employment law recognises, pragmatically, that an over-minute investigation of the selection process by the tribunal members may run the risk of defeating the purpose which the tribunals were called into being to discharge – namely a swift, informal disposal of disputes arising from redundancy in the workplace. So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him.”

and Millet LJ, as he then was, at paragraph 25, having observed that the question for the tribunal in the case of a claim for unfair redundancy dismissal is whether the employee who is claiming was unfairly dismissed, not whether some other employee could have been fairly dismissed, continued:

“If the applicant can show that he was unfairly dismissed, he will succeed; if he cannot, he will fail. It will not help him to show that by the same criteria some other employee might not have been retained. The tribunal is not entitled embark upon a re- assessment exercise. I would endorse the observations of the Employment Appeal Tribunal in *Eaton Ltd v King and others* [1995] IRLR 75 that it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered...”.

[30] The same theme was taken up by this Tribunal in *John Brown Engineering Ltd v Brown and others*. At paragraph 8, Lord Johnston said:

“.....in each case what is required is a fair process, where an opportunity to contest the selection of each individual is available to the individual employee.....it also has

to be reasserted that it is no part of the industrial tribunal's role in the context of redundancy to examine the marking process as a matter of criteria under a microscope; nor to determine whether, intrinsically, it was properly operated. At the end of the day the only issue is whether or not the employers treated their employees in a fair and even handed manner."

[31] Then, in *Sanmina*, Elias J, as he then was, rejected the claimant's contention that an employers' "absence" criterion should have included something to allow for the reason for absence, observing at paragraph 86, that to have acceded to that submission would have been to allow exceptions to what was a "carefully drafted" redundancy scheme and the Tribunal's upholding of that contention had amounted to a substitution of its own view. At paragraph 87, he explains that this Tribunal was satisfied that:

"it could not properly be said that no reasonable employer could adopt this criterion."

[32] Later in the judgment, at paragraph 93, he refers to the need to consider whether a particular approach to scoring was within the band of reasonable responses that was open to a reasonable employer.

[33] Finally, the judgment of the Court of Appeal in *Bascetta v Santander* makes it clear that the principles articulated in the earlier cases, referred to above, still hold good. The passages that we have referred to in both *British Aerospace plc v Green* and *Eaton Ltd v King* are referred to with approval and at paragraphs 29 – 30, the judgment of Pill LJ includes the following comments:

"29.The question for the industrial tribunal, which must be determined separately for each applicant, is whether the applicant was unfairly dismissed, not whether some other employee could have been dismissed.....It will not help him to show that on the same criteria some other employee might not have been retained.

30. The Tribunal is not entitled to embark upon a reassessment exercise."

Q28 Is the employer obliged to consider transfers, retraining and other options prior to dismissal? There is no obligation to do so but if an employer has not at least considered such options, it is likely to be difficult for him to persuade an employment tribunal that the dismissal was fair one.

Q29 Priority rules for re- employment : are there any obligations to consider application of former redundant workers first, when rehiring ? No.

Severance payment

Q30. What does the employer have to pay to a worker in the case of dismissal for personal and/or economic reasons? I am not sure what is meant by "personal reasons" as the concept does not arise in our jurisdiction. If by "economic reasons" what is envisaged is dismissal for redundancy, the employee is entitled to a redundancy payment (*Employment Rights Act s.135*) calculated in accordance with a statutory formula (s.162) which is , essentially:

- 1 ½ weeks pay for each year continuously employed in that employment in which the employee was not below the age of 41 years
- 1 weeks pay for each year in which he was not below the age of 22 years , and
- ½ week's pay for each year of employment not falling within either of the above,

all in respect of a maximum of 20 years employment (i.e. even if the employee had been employed for longer than 20 years, his redundancy pay would be calculated by reference to a period of 20 years).

Avenues for redress

Q31. Compensation for unfair dismissal : In the case of unfair dismissal , an employment tribunal can award (a) a "basic award" of 1 ½ week's pay for each year of employment that the employee was not below the age of 41 years , 1 week's pay for each year he was not below the age of 22 years , and ½ week's pay for each year not falling within those 2 categories, and (b) compensation up to a limit of

£65,300 (the limit can be varied by the Secretary of State). If the dismissal is by reason of discrimination in respect of one of the protected characteristics, there is no limit to the compensation that may be awarded.

Q32 Does the law provide for reinstatement ? Yes. The employee can seek an order for reinstatement (i.e. in the same employment) or for re- engagement (i.e. in comparable employment): *Employment Rights Act 1996 s. 112 -117*. Claimants do not often do so. If they do, the employment tribunal has to consider whether or not it is “practicable” to make the order.

Q33 Is preliminary conciliation mandatory? No.

Q34 What courts are competent for disputes on dismissals? All claims for unfair dismissal or dismissal by reason of a characteristic that is protected by anti – discrimination legislation must be presented to an **Employment Tribunal** which is a statutory tribunal (see: *Employment Tribunals Act 1996 Part 1*). Appeals on a question of law lie from the Employment Tribunal to the **Employment Appeal Tribunal** , a court also established by statute (*Employment Tribunals Act 1996 Part 2*). A further appeal lies from the EAT to the **Inner House of the Court of Session** (for Scotland) and to the **Court of Appeal** (for England and Wales). There is, from there, an ultimate appeal to the **Supreme Court** (rarely used). A claim for unfair dismissal (i.e a claim in which the employee is asserting his statutory right not to be unfairly dismissed) can *only* be initiated in an employment tribunal.

If an employee claims that he has been dismissed in circumstances which amount to a breach of contract (i.e. a claim under the law of contract, not in assertion of a statutory right) , can be litigated either in the employment tribunal or in a court (in Scotland, either the **Sheriff Court** or the **Court of Session**; in England/Wales, the **County Court or High Court**). Since the facts underlying an unfair dismissal claim and a claim of wrongful dismissal (i.e. a claim for breach of contract) may be the same, the employee can bring both claims, in the same action before the employment tribunal, if he wishes to do so. He cannot, however, add an unfair dismissal claim to a claim of wrongful dismissal that is brought before a court.

35. Do parties to an employment contract have any possibility of settling their dispute? Most claims are settled. Some settlements may be achieved through the assistance of ACAS (Advisory, Conciliation, and Arbitration Service). There is also a judicial mediation pilot project ongoing in the Employment Tribunal service in Scotland at present which has had some success in achieving resolution of disputes.

36. What is the average length for a case on dismissals? There is no average. There are no limits although the “overriding objective” that is written into the Employment Tribunal procedural rules includes that those Rules seek to enable employment tribunals to deal with cases “expeditiously” (*Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004* , reg. 3).

37. Maximum time for claims of unfair dismissal : within what period must the employee bring his claim ? 3 months from the date of dismissal. Employment tribunals have a discretion to extend that time limit to such longer period as is reasonable provided the claimant shows that it was not “reasonably practicable” for him to have presented his claim prior to the end of the 3 month period .

II. ECONOMIC CRISIS AND CASE LAW OF LABOUR COURTS

Q1 Which court decisions have been related to the economic crisis, particularly any which have influenced the interpretation of legal provisions regarding dismissals, fixed term contracts etc?

No court decisions have related to the economic crisis as such. There have been no instances of the law being interpreted in a particular way because of the economic crisis. The economic situation may, however, be partly or wholly explanatory of disputes such as *British Airways v Unite the Union* (2010 EWCA Civ 669 , where the company are in dispute with the union over changes they seek to make to employment contracts with a view to strengthening their financial position, and sought a court order to prevent a strike) or *Rolls Royce PLC v Unite the Union* (2009 EWCA Civ 387, where an issue arose as to the application of age discrimination regulations in the context of collective

redundancies), of the apparent increase in the number of cases relating to redundancy dismissals (*Semple Fraser v Daly* , referred to above, concerned redundancies in a solicitor's firm on account of the economic situation) and the apparent increase in the number of cases in which "garden leave" is an issue or in which employers have been seek injunctions to prevent significant employees working for a competitor during the notice period.

Q2. Are there any labour law reforms under discussion /affected by the economic crisis?

The *Equality Act 2010*, which is not yet in force, will afford some protection to "contract workers" (i.e. persons who are employed by A but work for B) , otherwise known as "agency workers". Their have, for some time, been concerns that they lack protection under current employment law. They will not be afforded full employment rights but they will have the right not to be discriminated against in respect of any of the standard protected characteristics, not to be harassed and not to be victimized. They will also have the right, if disabled, to have reasonable adjustments made for them. Whilst this reform is not directly inspired by the economic crisis, since the crisis would appear to be at least partly responsible for the persisting and possibly increased use of contract workers, it could be said to have a relationship to it.

There are ongoing discussions about widening the existing right to request flexible working (for present provisions see Part VIIIA of the *Employment Rights Act 1996*). There are also proposals to abolish the "default" retirement age of 65 years so as to enable employees who wish to work beyond that age to do so, partly due to successful lobbying by groups such as "Heyday" but also because of what some see as the economic necessity of working beyond the current retirement age of 65 years.

Finally , given that there are substantial cuts in employment proposed for the public sector , there could be further disputes involving the relevant trade unions and issues such as the appropriateness of our current legislation on rules which apply to trade unions (e.g. balloting procedures) may require to be revisited. The wording of the current legislation on balloting rules, for instance, was the subject of judicial criticism in the *British Airways* decision, referred to above.

Venezuela

I. EMPLOYMENT PROTECTION LEGISLATION (EPL)

Source and scope of regulation

1. Source of regulation – What is the main law (title and date of adoption) regulating employment contracts and dismissals (Please provide a Web-link, Word/PDF version, its translation in English or French).

Answer: Organic Law of Labor (OLL) of June 19th, 1997.

Website: <http://www.tsj.gov.ve/legislacion/legislacion.shtml>

2. Scope of legislation – What categories of workers are excluded from the regulation? (e.g. public servants, domestic workers, police, judiciary etc).

Answer: The members of the armed forces – the Army and police forces – and public servants are excluded but their benefits will not be lower than the benefits established by the OLL. (Articles 7th and 8th of the OLL)

Domestic workers were excluded of some regulations. However, the case law removed such exclusion according to the ruling N° 522 of April 14th, 2009 (<http://www.tsj.gov.ve/decisiones/scs/abril/0522-14409-2009-05-340.html>). Superintendents are also excluded of some regulations. (Art. 282 of the OLL)

3. Size of enterprise excluded – Are any enterprise of a certain size (e.g. employing less than 20 workers) excluded from the scope of application of the law?

Answer: No. However, some companies employing less than 20 or 10 workers are excluded from the scope of the law. For instance, the companies employing less than 10 workers are not compelled to have 90% of Venezuelan workers (Art. 27 of the OLL) or to rehire the dismissed workers (Art. 117 of the OLL); the companies employing less than 20 workers are not compelled to give a salary report to each worker (Art. 318 of the OLL), nor to have a kindergarten (Art. 391 of the OLL). Plus, their workers cannot constitute a union in the company. (Art. 417 of the OLL)

4. Collective agreements – Are there any important collective agreements of general application at the national and/or branch level?

Answer: Yes, although it is not implemented at a national level since collective conventions are taken into consideration in two ways: between a union and a company or through branch of activity, at a local, regional or national level. It is usually implemented in Venezuela in certain industrial branches such as oil, textile, building, wheat, shoes, automobiles, metals and furniture or for specific services, such as gastronomy. (Art. 507, 528 of the OLL)

Types of employment contracts

5. Probationary period - What is its maximum duration?

Answer: The probationary period cannot exceed ninety (90) days. (Art. 103, second paragraph, OLL)

6. Fixed-term contracts (FTC) – May FTC be concluded only for objective and material reasons (e.g. nature of work) or without any limitation?

Answer: No, the fixed-term contract may be concluded by expiration of the term. (Art. 74 of the OLL)

7. Maximum number of successive FTC – Are there any legal limitations?

Answer: The maximum number of successive fixed-term contracts is one (1). (Art. 74 of the OLL)

In case of two (2) or more extensions, the contract will be considered as an indefinite contract, unless there is a fair cause that excludes the intention of keeping the labor relation. (Art. 74 of the OLL)

8. Maximum cumulative duration of FTC – Are there any legal limitations?

Answer: The fixed-term contract may not last more than one (1) year for regular workers or more than three (3) years for employees or qualified workers. (Art. 76 of the OLL)

9. What is the percentage of the workforce under FTC? – Please provide any statistics, if available.

Answer: There are no statistics available. In any case, the percentage is very low since the fixed-term contract is an exception.

A work contract will be considered as indefinite when the parties' will to work together for a specific term is not unmistakably expressed. (Art. 73 of the OLL)

Substantive requirements for dismissals (justified and prohibited grounds)

10. Obligation to provide reasons for dismissals – Is the employer obliged to provide the worker with a reason of dismissal?

Answer: Yes, employers are obliged to provide the reason of dismissal and if they do not, this may be considered as unjustified dismissal, which may oblige employers to pay for severance. (Art. 105, 125 of the OLL)

11. Valid grounds to dismiss a worker – Are any valid reasons to justify a dismissal listed in the law - e.g. worker's conduct, worker's capacity, economic reasons, or any fair reasons?

Answer: Yes, article 102 of the OLL states the following as justified causes to dismiss workers:

- a) Dishonesty or immoral behavior at work;
- b) Acts of violence, except in case of self-defense;

- c) Slanderous allegations or lack of respect and consideration to the employer, the employer's representatives or family members;
- d) Intentional acts or negligence that affect the security or hygiene at the worksite;
- e) Omissions or imprudence that affect the security or hygiene at the worksite;
- f) Unjustified absence for three (3) working days in one (1) month.
A worker's illness will be considered as a justified cause of absence. The worker must notify the employer of the cause that hampers the worker from attending to work;
- g) Material damage caused intentionally or due to negligence to machinery, tools, furnishing, raw material or manufactured products, plantations and other belongings;
- h) Disclosure of manufacturing, fabrication or procedure secrets;
- i) Non-fulfillment of the obligations imposed by the work relationship and;
- j) Abandoning the work post.

The employer may dismiss the worker based on economic or technological reasons. In this case, the employer is obliged to give a notice of termination of employment to the worker. (Art. 104 of the OLL)

12. Prohibited grounds to dismiss a worker – Are there any prohibited grounds listed in the law or this issue is regulated by general non-discrimination provisions?

Answer: No, there is no criterion stated in the law in this sense. However, there is a general prohibition against discrimination in working conditions, which is also applied in terms of dismissals.

All discrimination based on sex, race, marital status, religion, political preference or social condition is prohibited. All offenders will be penalized according to the law. Special dispositions to protect motherhood and family or those that aim to protect youngsters, elders and handicapped people will be considered as discriminatory. (Art. 26 of the OLL)

Job offers may not include proposals that go against what is stipulated in this article. (First paragraph of Art. 26 of the OLL)

No one shall be discriminated from their right to work due to criminal records. The State will secure the services to promote rehabilitation of ex-convicts. (Second paragraph of Art. 26 of the OLL)

13. Workers enjoying special protection from dismissal - Please list any categories, such as women during the pregnancy and maternity leave, workers' representatives etc.

Answer: Workers who enjoy special protection from dismissal are:

- a) Pregnant women, plus one (1) year after childbirth. (Art. 384 of the OLL)
- b) Men after childbirth, during his couple's pregnancy and up to one (1) year after childbirth. (Article 8 of the Family Protection, Motherhood and Parenting Law of September 20th, 2007; and sentence N° 609 of June 10th, 2010, <http://www.tsj.gov.ve/decisiones/scon/junio/609-10610-2010-09-0849.html>).
- c) Every woman who receive in adoption a child younger than three (3) years, up to one (1) year after the adoption. (Art. 387 of the OLL)
- d) Workers with union privileges. (Art. 449 of the OLL)

Procedural requirements for individual dismissals

14. Notification to the worker to be dismissed – In which form the employer must inform the worker about his or her dismissal (orally or in writing)?

Answer: The dismissal must be notified in writing, indicating the cause on which it is based, if any. Once the notification is made, the employer cannot thereafter mention other causes to justify the dismissal. The omission of the written notice may not hinder the worker to demonstrate the dismissal for any other proof. (Art. 105 of the OLL)

15. Length of the notice period – How long in advance does the employer have to inform the worker about his or her dismissal?

Answer: When the indefinite work relation concludes for unjustified dismissal or based on economic or technological reasons, the worker will have the right to a notice, according to the following rules:

- a) After one (1) month of continuous work, one (1) week of notice;
- b) After six (6) months of continuous work, two (2) weeks of notice;
- c) After one (1) year of continuous work, one (1) month of notice;
- d) After five (5) years of continuous work, two (2) months of notice;
- e) After ten (10) years of continuous work, three (3) months of notice. (Art. 104 of the OLL)

16. Pay in lieu of notice – authorized or no by law?

Answer: Yes, the notice may be omitted by paying the worker a sum that is equal to the salary of the worker for the corresponding term. (Art. 106 of the OLL)

17. Notification to administration – Does the employer have to notify the public administration before dismissing a worker?

Answer: Yes, when the employer dismisses one or more workers, the employer must notify the Magistrate of Substantiation, Mediation and Execution of his/her jurisdiction, indicating the causes that justify the dismissal within the following five (5) working days. If the employer fails to do this, he/she will be taken as confessed, in recognition that the dismissal was made without a just cause. (Article 187 of the Organic Law of Labor Procedure (OLLP) of August 13th, 2002)

18. Notification to workers' representatives – Does the employer have to inform workers' representatives for each individual dismissal?

Answer: No, the employer does not need to inform the workers' representatives to dismiss them.

19. Approval by administration – Does the employer need to obtain any authorization from the administration to dismiss a worker?

Answer: Yes, the employer needs an authorization of the administration to dismiss the workers that have special protection. (Art. 453 of the OLL)

20. Approval by workers' representatives – Does the employer have to obtain any authorization to dismiss a worker?

Answer: No, the employer does not need any authorization from the workers' representatives to dismiss them.

Procedural requirements for collective dismissals for economic reasons

21. Definition of collective dismissal - e.g. percentage or number of workers concerned

Answer: The dismissal may be considered as collective when it affects more than ten percent (10%) of the workers of a company is employing more than one hundred (100) workers, or twenty percent (20%) of a company that is employing more than fifty (50) workers, or ten (10) workers of a company that is employing less than fifty (50) workers in a period of three (3) months, or even worse if the circumstances are critical. (Art. 34 OLL)

22. Prior consultation with trade unions/workers' representatives – Does the employer have to consult them in case of planned collective dismissals for economic reasons?

Answer: Yes, the employer is obliged to present a list of requests before the administration in order to achieve conciliation between the parties. In case conciliation is not achieved, the case will be submitted to arbitration. (Art. 34, 473, 479 of the OLL)

23. Notification to the public administration in case of planned collective dismissals for economic reasons – Must the employer notify the public authorities?

Answer: Yes, the employer is obliged to notify the administration in case of planned collective dismissals for economic reasons. (Art. 46 of the regulation of the Organic Law of Labor of April 28th, 2006, ROLL)

24. Notification to workers' representatives – Is the employer obliged to inform them in case of collective dismissals for economic reasons?

Answer: Yes, the request of the employer will be notified to the representatives of the workers involved. If there are no representatives, the employer must inform the worker directly. (Art. 34 of the OLL)

25. Approval by the public administration – Does the employer have to obtain any authorization in case of expected collective dismissals for economic reasons?

Answer: No. However, the employer is obliged to present a list of requests before the administration in order to achieve conciliation between the parties. In case conciliation is not achieved, the case will be submitted to arbitration. Moreover, in case of collective dismissals, the administration may cancel it, due to reasons of social interest, through a special resolution. (Art. 34, 469, 479 of the OLL; Art. 46 of the ROLL)

26. Approval by workers' representatives – Must collective dismissals be authorized by workers' representatives?

Answer: No. However, the employer is obliged to present a list of requests before the administration in order to achieve conciliation between the parties. In case conciliation is not achieved, the case will be submitted to arbitration. (Art. 34, 469 of the OLL; Art. 46 of the ROLL)

27. Priority rules for collective dismissals – Are there any legal rules to select workers to be dismissed (social considerations, age, job tenure)?

Answer: No. However, there are general applicable rules about the right to work according to which public or private companies, exploitations and establishments are obliged to prioritize family heads from either sex, on equal terms, when hiring. Such priority could cover up to seventy-five percent (75%) of the workers. (Art. 29 of the OLL).

Moreover, when hiring foreign workers, those who have children that were born in the national territory, who are married to Venezuelans or have been living in the country the longest will have priority. (Art. 30 of the OLL)

On the other hand, the recognition of justified preferences for workers based on criteria of relevance (such as dependents, seniority in service, professional training, productivity, assiduity, economy of raw materials, union affiliation and other of analogous nature) will not be considered as a violation of the principle of no arbitrary discrimination. (Art. 14 of the ROLL)

28. Is the employer obliged to consider transfers, retraining and other options prior to dismissal?

Answer: No.

29. Priority rules for re-employment – Are any obligation for an employer to first consider applications of former redundant workers while re-hiring the workforce?

Answer: No.

Severance payment

30. Severance pay – What does the employer have to pay to a worker in case of dismissal for personal and/or economic reasons?

Answer: When the indefinite work relation concludes for unjustified dismissal or based on economic or technological reasons, the worker will have the right to a notice and to severance for seniority according to the following rules: (Art. 108 of the OLL)

- a) After one (1) month of continuous work, one (1) week of notice;
- b) After six (6) months of continuous work, two (2) weeks of notice;
- c) After one (1) year of continuous work, one (1) month of notice;
- d) After five (5) years of continuous work, two (2) months of notice;

- e) After ten (10) years of continuous work, three (3) months of notice. (Art. 104 of the OLL)

Additionally, in case of omission of the notice, the worker will receive a substitute severance, according to the following sums and conditions:

- a) Fifteen (15) days of salary, when seniority exceeds one (1) month but does not exceed six (6) months;
- b) Thirty (30) days of salary, when seniority exceeds six (6) months but does not exceed one (1) year;
- c) Forty-five (45) days of salary, when seniority is equal or greater than one (1) year;
- d) Sixty (60) days of salary, when seniority is equal or greater than two (2) years but does not exceed ten (10) years;
- e) Ninety (90) days of salary, when seniority exceeds the limit previously mentioned;

The basic salary to calculate this severance shall not exceed ten (10) minimum wages per month. (Art. 125 of the OLL)

Avenues for *redress* (penalties, remedies) and litigation procedure for individual complaints on dismissals

31. Compensation for unfair dismissal – Are there any legal limits (ceiling in months or any calculation method defined by law) or freely decided by the judge?

Answer: Yes, there are legal limits. If the employer insists on dismissing the worker, the employer must pay, additionally to what is established in article 108 of this Law, a severance for:

- 1) Ten (10) days of salary if the worker's seniority exceeds three (3) months but does not exceed six (6) month.
- 2) Thirty (30) days of salary for each year of seniority or fraction longer than six (6) months, to a maximum of one hundred and fifty (150) days of salary. (Art. 125 of the OLL)

32. Reinstatement – provided in law, rarely or often available to a worker unfairly dismissed?

Answer: Every worker has the right to appeal before the Judge of Substantiation, Mediation and Execution whenever he/she does not agree with the origin of the cause alleged for his/her dismissal for the Judge to qualify and order his/her rehiring and payment of the missed salaries if the dismissal is not justified according to the law. (Art. 187 of the OLLP)

33. Preliminary (judicial and/or extra-judicial) conciliation – Is it mandatory or not?

Answer: Preliminary conciliation is mandatory. (Art. 133 of the OLLP)

34. Competent courts – What bodies are competent for disputes on dismissals (ordinary tribunals, specialized labor courts)?

Answer: The Examining Magistrate of Substantiation, Mediation and Execution of the jurisdiction. (Art. 187 of the OLLP)

35. Alternative arbitration / mediation – Do the parties to an employment contract have any alternative possibility to settle out their labor dispute?

Answer: Yes, the parties have obligatory mediation in the preliminary hearing (Art. 133 of the LOPT). They also have the right to request a judicial arbitration, which is not used in practice since the judicial mediation is successful in more than 90% of the cases.

36. Length of the court procedure – What is the average length for a case on dismissals (are there any legal limitations)?

Answer: Six (6) months. The law does not establish any temporary limitation.

37. Maximum time to make a claim for unfair dismissal – During which period does the worker have to bring his or her complaint to the court?

Answer: Every worker has the right to appeal before the Judge of Substantiation, Mediation and Execution whenever he/she does not agree with the origin of the cause alleged for his/her dismissal for the Judge to qualify and order his/her rehiring and payment of the missed salaries if the dismissal is not justified according to the law. (Art. 187 of the OLLP) If the worker takes more than five (5) working days to request the qualification of the dismissal, the worker loses the right to rehiring but not the other rights that correspond to the worker's conditions, which may be requested before the corresponding Labor Court. (Art. 187 of the OLLP)

II. ECONOMIC CRISIS AND CASE LAW OF LABOUR COURTS

1. Which court decisions in your country have been related to the economic crisis (with the main focus on EPL)?

Please share information about any court decisions which:

- **Have influenced the interpretation of legal provisions regulating dismissals, fixed-term contracts etc;**
- **Were necessary to fill any gaps in the national labor law?**

Answer: a) Adjustments for inflation.

<http://www.tsj.gov.ve/decisiones/scs/Noviembre/1841-111108-2008-07-2328.html>

b) Participation of the dismissal. Requirements and effects.

<http://www.tsj.gov.ve/decisiones/scs/Agosto/1806-090807-062209.htm>

c) Notice (to those who can be paid).

<http://www.tsj.gov.ve/decisiones/scs/Noviembre/c315-201101-01379.htm>

d) Constitutional and legal principles.

<http://www.tsj.gov.ve/decisiones/scs/Marzo/61-160300-98546.htm>

2. Are there any labor law reforms under discussion in your country caused or affected by the economic crisis (to make labor more flexible, or to extend protection to some categories of workers)?

Answer: A reform to the Organic Law of Labor is being currently discussed in Venezuela in order to improve the protection that the law gives to workers. However, this reform is not caused nor has it been affected by the economic crisis.