XVIth Meeting of European Labour Court Judges
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HELSINKI, Finland

National reports and judgements

Decision-making in Labour Courts

General Reporter:
Judge Jorma Saloheimo,
Labour Court of Finland

Belgium

National report

Judge Koen Mestdagh,
Raadsheer in het Hof van Cassatie
(Conseiller à la Cour de cassation)

Is the case decided immediately upon the main hearing, or is a separate session held for that purpose ?

As a rule, the Court of Cassation decides immediately upon the main hearing and the decision is passed the same day, but sometimes another session is needed.

A. Labour Tribunal (first instance jurisdiction) or a Labour Court of Appeal also decides immediately upon the main hearing, unless the ‘Ministère Public’ intervenes (cf. question 2) and gives a written advisory opinion that is communicated to the parties, in which case the case is decided after the period allowed to the parties to reply to the advisory opinion, has expired. The decision is generally passed within a month of the deliberation.

1. Is there a presenting official involved in the process ? If yes, please describe the formal and factual role of the official.

Before the Court of Cassation the ‘Ministère Public’ (advocate general) intervenes in every case. His role is to give an advisory opinion to the court. It is generally given only orally at the main hearing. When a written advisory opinion is given, it is communicated to the parties beforehand.

Before the Labour Tribunal and the Labour Court of Appeal the ‘Ministère Public’ (the ‘auditeur du Travail’ before the tribunal and an ‘advocate general’ before the court) can intervene when he considers this useful. In Labour law disputes the intervention of the ‘Ministère Public’ is not mandatory. Intervention of the ‘Ministère Public’ has become exceptional before the Labour Tribunal. Before the Labour Court of Appeal it happens more regularly. When the ‘Ministère Public’ decides to intervene, he normally will give a written advisory opinion to the tribunal or court after the main hearing, generally within two weeks.

Since 1997, as a result of a decision of the European Court of Human Rights, the parties are allowed a short period decided by the judge, to reply to the advisory opinion.

2. Does the composition of your court include lay members ? If yes, please give a description of their role in deliberation leading to the decision, with a view to the interplay between the chair and the lay members. What is in your experience the main contribution of the lay members in the decision-making process ?

All members of the Court of Cassation are professional judges (5 of them must have practised at least during 5 years in a Labour Tribunal or Labour Court of Appeal).

The Labour Tribunal and Labour Court of Appeal are in principle made up by 1 professional judge who is presiding and 2 lay judges, one nominated by employer organisations and the other by the trade unions. All members have an equal vote. The professional judge leads the discussion and will try to come to a unanimous decision. If he can't, it's a majority decision. Usually the two lay members will have opposite views but it is possible that the professional judge is in minority and has to write a decision against his own opinion.

The main contribution of the lay members is that they can share their knowledge of how the rules really are applied in the field or what difficulties are experienced to apply a rule, with the professional judge. As some lay members also take part in the negotiation of collective agreements in a particular branch of industry, they can give valuable information allowing to interpret the clauses of collective agreements, e.g. concerning function descriptions and function classifications. On the whole their contribution leads to a better insight in reality and a higher level of empathic ability.

3. To what extent does the presiding judge take part in writing the decision?

At the Court of Cassation the presiding judge takes part in drawing up the decision just like the other judges. He is responsible for checking the final result.

At the Labour Tribunal and the Labour Court of Appeal the presiding judge, who is always the professional judge, does all the writing. The lay members only take part in the deliberation.

4. What are the main legal sources you use in deciding a case, especially a difficult one ? In the reasoning of the decision, do you make express references to legal literature, case law, previous decisions of your own court, etc. ?

The Court of Cassation uses previous decisions of the own court and legal literature to a large extent in deciding a case but doesn't make references to it in the reasoning of the decision. The advocate general usually makes references in his advisory opinion, mostly to previous decisions of the Court of Cassation.

The Labour Tribunal and the Labour Court of Appeal both use and make express references to legal literature and previous decisions of other courts, especially to decisions of the Court of Cassation. When making a reference they have to present it as their own opinion and not as a binding rule.

5. Is it customary to express the personal views of the judge in a decision ?

No. The Court of Cassation only judges on points of law and never expresses personal views in a decision.

Other judges may sometimes express a personal view in a decision but it's not customary and isn't considered as a good practice.

6. Are there any further comments you wish to make on the subject ?

No.

Judgement

Labour Court of Appeal, Ghent
Ghent Division, Eighth Chamber
24 October 2003

A.R. nr.: 261/02 Rep. no.

PUBLIC SESSION OF TWENTY-FOURTH OF OCTOBER TWO THOUSAND AND THREE.

IN THE CASE OF:

The private limited company [D.V.], (...)

APPELLANT, represented by Mr. L. Carlé, attorney, deputising for Mr. G. De Smedt, attorney in Lokeren,

AGAINST:

[H. V.D.], (...),

RESPONDENT, represented by Mrs. B. Buysse, delegate of a representative employees' organisation, holder of a written proxy.

* * *

Having regard to the exhibits of the file, in particular the certified copy of the judgment in a defended action by the Labour Tribunal in Dendermonde, Sint-Niklaas division, First Chamber, dated 17 April 2002 (A.R. n°57.670), whic h has not been served.

Having regard to the petition for appeal, deposited with the Registry of the Labour Court of Appeal in Ghent, Ghent division, dated 9 August 2002, and the cross appeal by the respondent, lodged by counter claim with the registrar on 22 November 2002.

Having heard the representations cum legal remedies of the parties at the public proceedings on 26 September 2003.

* * *

1. <u>Admissibility of appeal</u>

The appeal was lodged in the manner and the time limits prescribed by law. It therefore appears admissible. The same is true of the cross appeal.

2. <u>Subject of the dispute</u>

By summons served on 14 October 1999, (...), the respondent (the original claimant) requested – in a provisionally enforceable judgment, notwithstanding further redress, without bail, and with the exclusion of any judicial deposit or payment into court – for the appellant (the original respondent) to be ordered to pay:

- 170,894 francs (4,236.35 euros) gross severance pay;

- (…)
- 500,000 francs (12,394.68 euros) net in damages for non-compliance with the agreement that the respondent would remain in the employ of the appellant for at least 4 years;
- (…)

plus the statutory and legal interest.

Finally, the respondent petitioned for the appellant to be sentenced to pay the costs of the action.

The respondent claims to have been the manager and owner of the private limited company [D.H.V] for many years. In an agreement dated 20 August 1998, he transferred his business to one of his employees, namely [W.D.], who continued to run the business as a newly named [D.V.] private limited company. An arrangement was made under which the respondent would remain in the employ of the new private limited company for 20 hours per week for a net monthly salary of 35,000 francs, corresponding to a gross monthly salary of 49,178 francs, plus the use of a car, Mercedes make, which was leased by the appellant. In an agreement dated 20 August 1998, the appellant undertook to employ the respondent for a time span of at least four years. As part of this agreement, a flat-rate compensation of 500,000 francs was agreed for non-compliance with the terms of the agreement. The same agreement set forth the right of the respondent to use said car, with the right to purchase the car at the end of the lease contract. For the non-compliance of this undertaking, a flat-rate sum in compensation of 500,000 francs was agreed.

According to the respondent, from the very outset of the labour contract, the appellant was constantly difficult, failing to comply with various arrangements that had been agreed. On 2 November 1998, he was even dismissed on due grounds, the substance and form of which he disputes. As such, he is not only petitioning for severance pay but also for the damages agreed, arising from the termination of the labour contract before the end of the first four years and for the damages agreed for the failure to comply with the agreement concerning the use of the leased car. He also claims various amounts owed at the end of the labour contract.

* * *

By judgment pronounced by the First Chamber of the Labour Tribunal in Dendermonde, Sint-Niklaas division, dated 17 April 2002, the claim was found duly admissible and partly substantiated. The appellant was ordered to pay the respondent the sum of:

- 4,445.17 euros, plus the moratory interest and the legal interest on the net amount corresponding to this gross amount,
- 12,394.68 euros.

Any sums claimed in excess thereof were dismissed as unsubstantiated. The costs of the litigation were assigned to be paid by the appellant. In conclusion, the court judged there was no reason for declaring the judgment provisionally enforceable.

Concerning the dismissal on due grounds, the judge in first instance found that there was no clearly demonstrable fault on the part of the respondent, so that he is justified in claiming severance pay. (…)

It was found that the respondent is not accused of not having carried out his work duties with due diligence or to proper standards and that the letter of dismissal did not mention the fact that he had allegedly spoken badly of his employer to customers, as had been posited in a previous letter, but only that he had twice started work too early and that on 31 October he had refused to leave work at noon, but had continued to work until 5.50 pm. Indeed, there was a difference of opinion between the parties concerning the hours to be worked, something which arose immediately after the transfer of the business. According to the judge in first instance, the situation between the parties has by no means been worked out, with both of them still having to learn to accept their new roles. In all this, one should not lose sight of the fact that the appellant must have quickly realised that he had an expensive employee on his books, which must have made it very tempting to jump at the first incident that occurred. According to the judge in first instance, this compels even greater caution when appraising the reasons presented.

(…)

3. <u>Appeal grievances</u>

The appellant feels aggrieved by the disputed judgment because the due grounds for the dismissal of the respondent were not recognised.

The appellant states that her fish shop is naturally bound by opening and closing times, while the respondent, who was annoyed at the agreed work rota, came in at irregular times, even at times when the shop was not open to the public. It goes without saying that the respondent was unable to execute his labour contract at such times. On repeated occasions he was cautioned, yet he stubbornly refused to comply with the instructions of his employer. The consistent refusal to keep to the work rota drawn up in advance is certainly to be considered as a fault. The failure to comply with working hour arrangements must be considered a violation of the obligation to work, which is an acceptable justification ground for dismissal on due grounds. The respondent cannot deny that, in addition to his labour contract with the appellant, he also continued to operate his own company. According to the appellant, this was partly the reason for the respondent's irregular attendance. After the dismissal, she had to conclude that the respondent acted in contravention of article 17 of the Labour Contract Act and with the non-competition clause included in the transfer agreement by continuing to operate activities in the fish trade. She is convinced that the respondent was unjustifiably absent and did not wish to adhere to the working rota drawn up by the appellant in order to set up unfair competition with the appellant.

According to the appellant, the validity of the dismissal on due grounds cannot possibly be disputed. All objective details in the file indicate that she was justified in the dismissal on due grounds. She has demonstrated in every conceivable manner that the respondent left the shop early without her permission and in contravention of the agreed work rota. The judge in first instance incorrectly assumed that coming to work too early and staying at work too long could scarcely be considered due grounds for dismissal. The respondent was not, however, dismissed for coming to work too early but because he did not comply with the agreed work rota, with the consequence that the appellant constantly had to change the whole day rota to ensure that there was personnel in the shop throughout the day. From her letter dated 6 October 1998, it clearly emerges that the respondent even then refused to comply with the work rota. On 7 October 1998, he again came in to work late and left unduly early. The appellant responded to this through her external payroll service provider and started keeping records of when the respondent started and ended his duties. These reports, which are not disputed by the respondent, show that the respondent continued to refuse to comply with the work rota so that she was forced to dismiss him on due grounds. One should not forget that the appellant had on several occasions complained about the repeated absences of the respondent and the way he challenged her authority, but always without result. According to established case law, this is sufficiently serious to justify dismissal on due grounds.

The appellant therefore petitions for the contentious judgment to be overruled and, amending and doing what the judge in first instance should have done, for the original claim to be dismissed as completely unfounded; costs to be borne by the respondent.

(…)

4. <u>Discussion</u>

4.1. *<u>Concerning the dismissal on due grounds</u>*

4.1. A. Pursuant to article 35 of the Labour Contract Act, due grounds are defined as the serious shortcoming which renders any professional collaboration between the employer and the employee impossible to immediate and definitive effect. In addition, the fact used to justify the dismissal may only be known to the party appealing to it for a maximum of three working days, and only the due grounds which are made known within three working days after the dismissal may be used in justification thereof. Finally, the party calling on the due grounds must supply proof thereof, and furthermore must prove that he/she has observed the aforesaid period of three working days.

When the employee is accused of various or repeated shortcomings, after the last shortcoming has been committed the employer has three working days to dismiss the employee. Previous offences, which in themselves can no longer be used to justify due grounds, can only be used to illustrate the fact for which dismissal on due grounds was given (Cass., 16 December 1979, J.T.T.. 1981 35; Cass., 28 October 1987, J.T.T., 1987, 494; Cass., 28 March 1988, J.T.T., 1989, 82). They can be used in illustration even if they are not described in the letter of dismissal (Cass., 21 May 1990. J.T.T., 1990, 435). Offences which only emerge after the dismissal on due grounds can also be used as additional proof for the reason given (Cass., 24 September 1979, J.T.T., 1980, 98; Cass., 13 October 1986, R.W., 1986-87, 1711).

Pursuant to the first member of article 35 of the Labour Contract Act, due grounds are left to the judgment of the court. The court is not bound by a summary or description in the Labour Contract or the labour regulation of shortcomings that are such so as to warrant the immediate termination of a labour contract. The appraisal of the gravitas of the offences can therefore not be withdrawn from the judgment of the court.

4.1.B. The appellant runs a fish shop in (...) since 3 August 1998, the date on which she took over all the goods and activities of the private limited company [D.H.V.]. The manager of the appellant had previously been employed by this company, of which the respondent was the manager. As part of the transfer arrangements, one of the agreements made was that the respondent would be employed by the appellant as a shop assistant on a part-time basis working 20 hours per week with a net salary of 35,000 francs per month, for a period of at least 4 years from 3 August 1998.

In a letter dated 2 November 1998, which was served on the same day by a bailiff, the respondent was dismissed with immediate effect on due grounds, which – in the letter that was served at the same time – were described as follows:

“The following serious shortcomings on your part make any further collaboration impossible:

- *Despite several demands for you to comply with your contractual time rota, you continue to neglect to come to work at the agreed times and you come to work when it suits you.*
- *On Thursday 29/10/98, you had to work from 8 am to 1 pm. You worked from 7.20 am to 12.45 pm.*
- *On Friday 30/10/98, you had to work from 8 am to 1 pm: you worked from 6.20 am to 11.30 am.*

- *On Saturday 31/10/98, you had to work from 8 am to 1 pm: you worked from 7.15 am to 5.50 pm. You refused to leave the premises at the end of your assigned working time in the afternoon (from 12 noon) you were absent for a long time."*

4.1.C. Pursuant to article 17, 1st and 2nd paragraphs of the Labour Contract Act, the employee is under obligation to carry out his work diligently, honestly and accurately, at the time and place and in the manner agreed, and to act in compliance with the orders and instructions given to him by the employer, his agents or those appointed by him with a view to executing the agreement. The employer in turn is obligated to have the employee work in the manner and at the time and place agreed (article 20, 1st paragraph, Labour Contract Act).

According to the annexe to the Labour Contract of 1 August 1998, which apparently was not signed by the respondent until 5 October 1998, the respondent was supposed to work on Wednesdays, Thursdays, Fridays and Saturdays, one week from 8 am to 1 pm, the next week from 1 pm to 6 pm.

The respondent does not dispute that, on Thursday 20 October, Friday 30 October and Saturday 31 October 1998, he worked as specified in the letter of dismissal and not in compliance with the time rota. He suggests that he always began work before 8 am to get the shop ready by the time it opened its doors, as he used to do when he was the manager, and that he had left work early on 29 and 30 October at the insistence of the appellant. In addition, he maintains that in reality he always worked every other Saturday from 8 am to 6 pm and that an oral agreement had been made that this arrangement would be maintained.

There is nothing to prove that the respondent was sent home early by the appellant when she noticed that he was working too many hours as he always started work before 8 am. Nor is there any proof of the oral agreement concerning the Saturday arrangement suggested by the respondent. There is no proof nor is it claimed by the respondent that he had been ordered to get the shop ready to open. Moreover, it is difficult to believe that, to get the shop ready, it was necessary to be present one hour and forty minutes before opening time, as was the case on Friday 30 October 1998.

In the given circumstances, it can only be found that the respondent did not bother with the agreed work rota but determined his working hours as he saw fit, so that, in any case, he can be blamed for a contractual shortcoming.

The exhibits show that the respondent had already been reprimanded on 6 October 1998 because he frequently interrupted work to attend to personal matters. Again on 13 October 1998, he was reprimanded for failing to observe the agreed working time and he was urgently requested to act like an employee. The respondent appears to have utterly disregarded this reprimand. On the contrary, he started deviating even more from the agreed hour rota. As such, the contractual shortcoming of the respondent should also be qualified as insubordination.

Through his conduct, the respondent clearly showed that he was neither willing nor able to accept the authority of the appellant as his employer. In the opinion of the Labour Court of Appeal, this shows that a professional collaboration between the parties based on a relationship of authority, an essential feature of the Labour Contract, was totally impossible.

Consequently, the court accepts the due grounds for the dismissal of the respondent.

4.2. *Concerning the flat-fee compensation for the termination of the labour contract before the first four years of employment were completed*

In the first private agreement dated 20 August 1998, it was stipulated that if the appellant were to terminate the agreement to employ the respondent for a minimum period of 4 years starting as of 3 August 1998, except on due grounds, she would be liable to pay a flat-fee sum in compensation of 500,000 francs, reduced by 100,000 francs for each completed period of 12 months. In the agreement, it was abundantly added that a termination on due grounds would not occasion any compensation on the part of the appellant.

Since the due grounds for the dismissal of the respondent are acknowledged by the Labour Court of Appeal, this compensation is not owed. This part of the original petition too is therefore considered unfounded.

4.3. (…)

4.4. (…)

4.5. (…)

4.6. (…)

* * *

FOR THESE REASONS,

IT HAS PLEASED THE LABOUR COURT OF APPEAL,

Having regard to the statutory law of 15 June 1935 on the use of languages in

court proceedings, with particular reference to article 24.

Rejecting all other and conflicting conclusions.

Passing judgment in a defended action.

Declares both the appeal and the cross appeal duly admissible.

Declares the appeal largely founded.

Declares the cross appeal unfounded.

Consequently overturns the judgment of the Labour Tribunal in Dendermonde, Sint-Niklaas division, First Chamber, dated 17 April 2002, in all its decisions.

And, passing judgment again,

Hereby declares the original petition of the respondent only very partially founded to the following degree.

Hereby orders the appellant to pay the respondent the sum of (...)

Hereby dismisses any sums claimed in excess thereof.

Divides the costs, pursuant to article 1017, third member, of the Civil Procedure Code, and orders the appellant to pay one tenth of the costs of both court cases and the respondent nine tenths of the costs of both court cases.

Settles these costs as follows: (…)

Thus pronounced on Friday October the twenty-fourth, two thousand and three in public session of the Eighth Chamber of the Labour Court of Appeal in Ghent, in session in Ghent, with the following: Koen Mestdagh, Judge of Appeal of the Labour Court of Appeal, presiding judge, Vladimir Blat-Muylaert, Judge of Appeal in Labour Affairs, appointed as employer, Wim De Clercq, Judge of Appeal in Labour Affairs, appointed as employee-office worker, and Lucienne Versieren, Court Registrar.

Signed

L. Versieren W. De Clercq V. Blat-Muylaert K. Mestdagh

Denmark

National report

Fora

In Denmark, the hearing of labour and employment law disputes is distributed between the ordinary courts of law (of first instance: 24 district courts and the Copenhagen Maritime and Commercial Court, and under appeal the Eastern High Court, the Western High Court and the Supreme Court), the Labour Court and as regards civil servants, the Public Service Court and the Municipal and Regional Public Servants Court, and industrial bodies (conciliation proceedings, meetings between the organisations, joint meetings and industrial arbitration courts, set up for dealing with specific cases or on a more permanent basis) or, less ordinary, general arbitration courts.

The Labour Court and the industrial bodies deal with disputes where governing law is laid down in collective bargaining agreements between the parties (employers' associations or single employers and employee organisations), but may also consider disputes where statutory law is important for settling the case.

The hearing of the case is initiated through conciliation proceedings, meetings between the organisations and/or joint meetings, where the parties (the organisations or the employer and the employee organisation) each appoint a number of members with no personal interest in the case. In the event that the parties agree, the dispute may be settled finally and conclusively.

In practice most disputes are settled by a compromise agreement or decision during this hearing, but when these attempts fail, cases may be brought before the Labour Court or an industrial arbitration court for final and conclusive settlement.

The main criterion for the distribution is that disputes concerning breach of the collective agreement are to be brought before the Labour Court, whereas cases dealing with interpretation thereof are to be brought before an industrial arbitration court staffed by a chairman (or presidency) who is appointed by the Labour Court and 4 other members, two appointed by the employer side and two by the employee side of the case.

At the pre-trial stage the Labour Court is staffed by the chairman, one of the vice-chairmen or the head of secretariat, and provided that the parties agree, the person presiding can on the evidence and following argument finally and conclusively settle the case, with the parties' accept, if necessary, by resolution with no written justification. This settlement form is used in practically all cases of no general public importance.

During the few actual full-court hearings, the Court is manned by the chairman or one of the vice-chairmen and 6 lay judges, of whom 3 have been appointed among persons assigned upon recommendation by the employers' associations or public authorities with employers' functions and 3 among persons assigned upon recommendation by employee organisations. In cases of great general public importance, 3 members of the Court's presidency may participate; and parties who are not attached to any organisation recommending the appointment of lay judges, may demand that the case be heard without their participation.

Cases involving dismissals

The parties to a collective agreement may decide, in general and specifically, that also cases involving breach of the collective agreement are to be brought before an industrial arbitration court. The two largest organisations, the Danish Employers' Confederation and The Danish Federation of Trade Unions, have among others made such an agreement for the purpose of deciding cases involving dismissals, and have simultaneously set up a permanent arbitration court, the Board of Dismissals, which is staffed by a chairman, who is a judge of the Supreme Court, and 4 other members.

Consequently, the Labour Court has only few cases involving dismissal, and during the past decade the Court has not once handed down judgment in cases involving dismissal on the grounds of employees' failure to comply with their work obligations.

Instead we have attached a case from the Board of Dismissal which has been settled amicably in compliance with the chairman's (umpire's) written declaration on what the outcome of an actual judgment would have been, had it been handed down.

Here it should be noted that similar to the procedure in other industrial arbitration courts, disputes before the Board of Dismissal are settled by the umpire alone in cases where the members assigned by the parties can reach neither an agreement nor a majority decision. Furthermore, if the dispute is of no general public importance, the umpire will normally agree with the parties that it is not necessary for him/her to make a formal decision.

Answers

Question 1

Settlement of disputes in the Labour Court during the pre-trial stage often takes place by the oral statement by the chairman/vice-chairman/head of secretariat immediately after the parties' argument. In this connection the justification is presented orally, however often only the settlement is entered in the court records. In cases of a more complicated nature, the action is stayed pending a written declaration formulated by the chairman/vice-chairman/head of secretariat which is similar to the attached declaration from the Board of Dismissal in terms of both wording and size.

As regards cases to be settled after the full-court hearing with lay judges, deliberation and consideration takes place immediately after the argument. The action is then stayed pending the formulation by the chairman/vice-chairman of a draft judgment to be forwarded to the lay judges; and the judgment is delivered in open court after the chairman/vice-chairman and the lay judges have had the opportunity to discuss the matter again.

At the Board of Dismissal and in other industrial arbitration courts, the members assigned by the parties retire to deliberate immediately after the argument. In the event that neither an agreement nor a majority decision can be reached, the chairman (umpire) may either promptly declare his/her opinion or adjourn the hearing of the action with the purpose of preparing a written declaration or a genuine judgment. No further meetings are held.

Question 2

No.

Question 3

Following the full-court hearing in the Labour Court, the lay judges will in turn orally present their opinion, after which the chairman/vice-chairman will present his/her. The case will then be settled in accordance with the opinion of the majority, and minority opinions, if any, will not be written in the judgment. Lay judges who are not lawyers contribute greatly to the proceedings with for instance knowledge about the labour market in function.

The members of the Board of Dismissal and other industrial arbitration courts assigned by the parties are considered actual representatives of the parties, provided however that the case does not relate to working conditions in which they have a personal interest.

Question 4

In principle, the chairman/vice-chairman dictates or writes the judgment him/herself. However, he/she may ask the assistant judge, who has participated as registrar during the full-court hearing, to prepare a draft.

Question 5

Judgments are principally based on the collective agreements and legislation on the area as well as the public policy and custom as laid down in literature on labour and employment that can be inferred from previous judgments etc. As to the judgments, references to literature and custom vary and are only found on a relatively modest scale.

Question 6

No.

Question 7

No.

Judgement

The Board of Dismissal

Declaration of 3 March 2006
Case 1338/05
The United Federation of Danish Workers (3F)
for
A
vs.
The Confederation of Danish Industry (DI)
for
Post Danmark A/S

On 24 February 2006, oral proceedings were held with former judge of the Supreme Court Mogens Hornslet as president of the Board and umpire.

Statements were given by A, postal worker Søren Rasmussen, postal worker Lone Pedersen, postmaster Johnny Rasmussen, former postmaster Robert Jørgensen and production engineer Peter Wessel Christiansen.

Claims

The complainant’s principal claim is that Post Danmark’s dismissal of A be overruled, in the alternative that Post Danmark be ordered to pay compensation assessed at the discretion of the Board of Dismissal. The defendant asks for judgment in favour of the defendant.

Statement of claim

The action concerns A, who has been continuously employed for 16 years as postal worker in the defendant company.

On 7 March 2005, A was given a written warning for not having complied with the guidelines on merging letter mail and unsolicited mail as defined by the management. The following appeared from the warning, among other things: "Against this background you are given a written warning for not complying with the guidelines relating to the use of method as defined by the management. If it happens again, you shall be dismissed without any further prosecution".

On 20 July 2005 an official interview was held, in which A, postmaster Johnny Rasmussen, union representative Kirsten Corell and HR manager Benny Laursen participated.

The background to the official interview was the loss of a package sent with "addressee's receipt", and which A had delivered in the mailbox at the receiving company's. It appeared from the minutes of the meeting that A acknowledged having delivered a package with "addressee's receipt" without having delivered the package personally to the addressee and secured the latter's receipt for the delivery. Upon delivery of the package in the addressee's mailbox, A wrote her "initials" on the handscanner as receipt. During the official interview, A declared that she was aware that this was not in compliance with the guidelines in force for the delivery of packages with "addressee's receipt". She further denied having previously delivered packages with "addressee's receipt" disregarding the guidelines. A was informed that she was temporarily suspended from duty.

On 25 July 2005, another official interview was held. It appeared from the minutes of the meeting that at this meeting A was presented with a number of cases relating to packages with "addressee's receipt", which had been delivered in contravention of the prescribed guidelines. The following also appeared from the minutes: "The postmaster asks A if she can acknowledge that she did not speak the truth, when she asserted that she had not previously signed for packages with "addressee's receipt". A answered that it is correct that she until now has not spoken the truth".

By letter of 26 July 2005, A was discharged and was to retire at the end of January 2006. She was suspended from service in the period under notice.

Reasoning of the parties

In support of the claims put forward, the complainant submitted that the way in which A delivered packages with "addressee's receipt" was commonly used and accepted by the management.

In support of the defence put forward, the defendant submitted that A was familiar with the current guidelines on delivery of packages with "addressee's receipt" and that the management has never accepted the failure to comply with these guidelines.

The umpire's declaration

The members of the Board of Dismissals assigned by the organisations have not been able to carry a majority in the action, and thus judgment is to be passed by the president of the Board as umpire. The parties agreed that judgment can be passed in the case – with no award – in compliance with the declaration of the umpire.

It should be taken into account when assessing whether the dismissal was lawful that A on 7 March 2005 was given a written warning for failing to comply with the guidelines on the use of method prescribed by the management, in which she was informed that she, if it happened again, with no further prosecution would be dismissed from the workplace. The previous case dealt with mail merger of unsolicited mail and letter mail.

The circumstances that led to the dismissal a few months later – on 26 July 2005 – related to the handling of packages with “addressee’s receipt”, i.e. packages that a sender for specific payment has posted in this manner because he/she needs to be able to know to whom and when the packages have been delivered.

It can be taken into account that the background to the dismissal was, among other things, that it had been verified that A in a number of cases herself had signed for packages with “addressee’s receipt” by writing her “initials” as “addressee’s receipt” on the handscanner. Further it is unobjectionable to take into account that A was aware that such procedure was contrary to the current guidelines on the handling of such packages.

It should be noted that it is seems highly unlikely that the management of Post Danmark should have accepted the use of such procedure when it comes to packages where customers have indeed paid specifically for proof of delivery of the sent packages. It has not been established during the production of evidence that such accept exists.

Conclusion

For this reason the dismissal is found to be fairly reasoned in A’s circumstances, and judgment is given in favour of Post Danmark.

In compliance with the declaration of the umpire, the complainant withdraws the case..

Complainant to pay the fees of the umpire.

Transcript
of
judgment of 16 June 2005 of the Labour Court of Denmark

in case No. A2003.631:
The Danish Confederation of Trade Unions
on behalf of
Forbundet Træ-Industri-Byg i Danmark [The Confederation Wood-Industry-Building in Denmark]
vs.
The Danish Employers' Confederation
on behalf of
The Confederation of Danish Industries
on behalf of
Brdr. Villadsen Totalentreprise
on behalf of
Bodilsen A/S

Judges: Peter Andersen, Jens Bollerup-Jensen, Børge Elgaard, Poul Flemming Hansen, Lene Pagter Kristensen (Chairman), Jens Pors and Nicolai Westergaard.

The issue in this case is whether the defendant company, Bodilsen A/S, has breached its labour agreement by not paying wages etc. to the workers for the period between approximately 2.40am and 5.30am on 6 January 2003. During this period, the workers had ceased work, because they found that the temperature at the workplace was below the regulations governing minimum temperatures in workrooms at permanent workplaces.

Claims
The plaintiff, the Danish Confederation of Trade Unions on behalf of the Confederation Wood-Industry-Building in Denmark, claims that the defendant, the Danish Employers' Confederation on behalf of the Confederation of Danish Industries on behalf of Bodilsen A/S, has breached the current labour agreement and should consequently pay a penalty at the discretion of the Labour Court comprising an amount of DKK 8,700.15 as additional payment to the members of the Confederation Wood-Industry-Building in Denmark as well as legal costs from the due date of the individual payments and until the date of payment.

The defendant has moved for dismissal of the plaintiff's claim.

Statement of the case
On 5 January 2003 at 11.00pm, the workers of Bodilsen A/S returned to work after the company had been closed for 14 days for Christmas and New Year. The outdoor temperature was approximately minus 10° C, and it was also cold indoors at the factory. When the staff began to work, a recirculation and air extraction system was started, whereby the factory became even colder.

Around 2.00am the workers contacted the safety steward, who then measured the temperature manually at the different workplaces within the factory. These measurements showed temperatures of 15-16° C and in one place 14° C. According the factory's automatic calibrated measurements, the temperature did not fall below 17° C.

After a break, the workers decided around 2.40am to stay in the canteen until the temperature had become acceptable. Work was resumed at 5.30am, when the temperature had risen as a consequence of alternative heating.

In a fax of 7 January 2003 to the Danish Confederation of Trade Unions, the Danish Employers' Confederation announced that they had received a report from the Confederation of Danish Industries stating that a number of members of the Confederation Wood-Industry-Building in Denmark had called an illegal work stoppage at Bodilsen A/S.

and that in case of further work stoppages a request for a joint meeting would be submitted.

On pay day, 16 January 2003, the workers realised that the hours of the work stoppage on 6 January had been deducted from their pay checks, except those of the safety and shop stewards; they had not received any meeting allowance either.

Local negotiations were held on 16 January 2003, but the parties did not reach an agreement.

On 20 February 2003, a conciliation meeting was held, also without reaching an agreement. It appears from the minutes of the meeting, however, that the parties urged the company's safety committee, assisted by a local representative of the Confederation Wood-Industry-Building in Denmark, to examine the rules applying to the situation with the supervisory health and safety at work authority; prior to this, the Confederation would send an inquiry to the National Labour Inspection. In addition, the parties agreed to suspend any deadlines, until the final decision from the authorities had been received.

It appears from the National Labour Inspection's Notice in force at the time, No. 1.01.7 of September 1995 on temperatures in workrooms at permanent workplaces:

"Minimum temperatures

Basically and generally, the temperature of:

Sedentary or static work with slight physical exertion should not be below 18° C.

Work with limited physical exertion should not be below 15° C.

Work with heavy physical exertion should not be below 10° C, obtained one hour after the start of the working hours at the latest.

Lower temperatures are acceptable during brief intervals in extraordinary situations such as unforeseen and suddenly occurring low outdoor temperatures or unfavourable wind conditions.

In certain business categories, practice is based on the special temperature regulations of older rules, which have now been revoked. In such cases the following practice applies:

Special circumstances may cause deviations from the minimum temperature requirements to be accepted."

After this, the National Labour Inspection's Notice includes a diagram of minimum temperatures in different business categories. As regards the wood industry, the diagram indicates 18° as far as "Sedentary or static work or work involving slight physical exertion" is concerned, and 15° for other types of work, however with the permission to go down to 12°, if this is required for the sake of the materials. It appears from the comments to the diagram that 15° indicates the permitted minimum temperature during the first work hour, and the Notice continues:

"This may e.g. be the case in large workrooms (factory halls) with few workplaces, where it would be unreasonably costly to heat up the room, and in cases where the nature of the production may require a lower room temperature. In that case the individual workplaces in the room should be heated locally. If it is not possible to establish local heating of the

individual workplaces, for instance because the workers move around the room, other measures should be taken to protect the workers, such as particularly suitable work clothes (thermal clothes)."

The National Labour Inspection has now replaced Notice No. 1.01.7 by Notice No. A.1.12 of March 2005, which i.a. refers to the same regulations.

In a letter of 24 February 2003, the Confederation Wood-Industry-Building in Denmark asked the National Labour Inspection for an interpretation of the regulations in Notice No. 1.01.7. It was stated in the letter, with reference to the physical exertion of the work, that it varies between slight physical exertion and limited physical exertion.

On 17 March 2003, the National Labour Inspection replied as follows, amongst other things:

"The National Labour Inspection is unable to offer an opinion on whether the situation described involves a breach of the Danish health and safety at work legislation, as the concrete working environment situation has not been examined by the National Labour Inspection. Based on the information submitted, the National Labour Inspection advises the Confederation Wood-Industry-Building in Denmark as follows:

Temperatures in workrooms at permanent workplaces are governed by the provisions of chapter 7 of the Executive Order on the organisation of permanent workplaces. As a principal rule, the temperature in the workrooms should be adapted to the human organism with due regard to the working methods used and the physical exertion of the employees.

These provisions are implemented in the directions in the above-mentioned Notice from the National Labour Inspection. According to this Notice, when the work involves slight or limited physical exertion, the temperature should not come below 18□ C or 15□ C, respectively.

Under extraordinary circumstances, e.g. when the outdoor temperature suddenly and unexpectedly drops to a low level, a lower temperature may be accepted during brief intervals.

The National Labour Inspection finds that the situation described cannot be motivated by extraordinary circumstances, and that the workroom should have been heated up before the start of the working hours."

Hereafter, the parties discussed the statement of the National Labour Inspection in writing without coming to terms. The Danish Employers' Confederation claimed in particular that the situation should rightfully be settled according to the trade instructions which the parties have drawn up together, and which have been approved by the National Labour Inspection. The trade instructions state i.a. the following:

> *"What is it about?*
>
> *The requirement to the temperature of the workroom is dependent on the type of work to be performed.*
>
> *The recommended minimum temperature for different types of work:*
>
> *Minimum 18□ C for sedentary and static work with slight physical exertion – Machine operation and monitoring*

Minimum 15□ C for work with limited physical exertion – sorting and grading, feeding and withdrawing objects from machines, light assembly work and light packing (typically light objects)

Minimum 10□ C for work with heavy physical exertion

The problem arises for instance if the body gets cold after physically heavy work (involving perspiration), and is then exposed to coldness or draught. The musculature becomes cold, loses its flexibility and is no longer ready to handle everyday exertions, thereby increasing the risk of injuries.

..."

At the request of the Danish Confederation of Trade Unions, a joint meeting was held on 9 May 2003, without reaching an agreement.

The case was brought before the Industrial Tribunal of Denmark by a letter of complaint of 26 June 2003.

The defendants have not contested that the total amount deducted from the wages etc. amounts to DKK 8,700.15.

Statements
During the hearing of the case, evidence was given by Peter Nielsen, Peter Katholm and Henning Sørensen.

Peter Nielsen stated, amongst other things, that he is safety steward at Bodilsen A/S. He was also safety steward on 5 January 2003. When he showed up for work on 5 January 2003 at 11.00pm, it was cold in the hall, but the workers did not at first talk about it after they arrived. They took up their positions in the hall, where they perform different work functions. A number of workers operate the glue press, where they control pieces of wood which arrive automatically on a roller table. The pieces are glued together, and before this it should be controlled that they are positioned correctly, and that edges and ends are in order. If a piece of wood is not in order, it should be replaced by another piece. This work involves lifting. The pieces may also have to be turned around. The worker stands or sits during this work. It is not necessary to walk.

During the night of 5-6 January 2003, most of the workers were occupied at the glue press. It is not a job that keeps them warm. The recirculation/exhaust system is above the glue press, but the workers are not exposed to draught from the exhaust. Others were working in the repair unit. Here the wooden boards are turned around, and any defects are repaired using a filling knife. A pressure saw cuts off any unwanted parts of the boards. Boards that cannot be used are withdrawn. A truck driver transports the boards to the repair unit. On the night in question, he worked in the repair unit cutting up boards. He stood still while doing so and used a lifting truck to help with any lifting. The work did not make him warm. Other workers were crosscutting wood. For this purpose the wood is brought in from a drying room by a truck which lifts the wood up into a box, where a machine will then peal the wood layer by layer. The worker in this unit monitors the work and uses the truck to refill the box with wood. It is possible to sit down on a chair while performing this work. The truck driver drives from the store to the glue press and back. It is not hard to drive a truck, as it is similar to driving a car.

When the workers began working on 5 January 2003, the recirculation system was started and drew in the cold, unheated outside air. It became cold, and it felt as if there was a draught. Especially near the piping where the air is sucked out it felt as if the coldness spread downwards. Four or five workers came up to him and said that now they had had enough, it was too cold. Thereafter they went into the canteen. When he went in to talk with them together with the shop steward, the foreman said that they had stopped working. He then took a handheld thermometer and measured the temperature in the workroom. It showed 14□ C at one of the old glulam presses, on the other locations the temperature was 15□ C. The alternative heating, consisting of small radiators with blowers located approximately 4 meters up below the ceiling, was now started. It had not been turned on before. The company's automatic temperature sensors are located approximately 2-3 metres above floor level.

Peter Katholm stated, amongst other things, that he is Human Ressource Manager of Bodilsen A/S. At the time in question he was Management Assistant in the company and the Managing Director's right hand. The company processes glulam boards for furniture. Wooden planks are cut up and glued together. At the time in question this was done manually by lifting lamellas off a pallet. They could not be lifted from a seated position. The nature of the work was basically the same: Handling pallets, lamellas and glulam boards. This involved a good deal of movement, including lifting of approximately 600-1000 kilos an hour. In order to avoid overexertion, the workers regularly rotated between the more and the not so strenuous workplaces. Today, the work is more automated.

Before starting work, the room is heated. Thus on 5 January 2003 the production room had been heated some time before the production team showed up for work. There is normally a temperature of approximately 22□ C in the room, as the quality of the wood is at its best at this temperature. The company regularly controls temperature and air humidity, and for this purpose automatic temperature and humidity sensors have been installed in six different places around the room. The measuring equipment, which is calibrated, is located 2.8 metres above floor level. It is not warmer at this height, as the air is circulated because the warm air is pressed down as a result of the venting conduits. There is both an extraction system and a recirculation system. The extracted air has the same temperature as the temperature of the workroom, whereas the air sucked in may have the same temperature as the outdoor temperature, if the plant has just begun operating. On the night in question, the outdoor temperatures reached minus 15□ C, and consequently some very cold air was drawn in from outside. It was an extreme situation, and the company has never had a similar experience. However, the company's measuring equipment did not measure any temperatures below 17□ C that night. He has heard of the manual measurements, but does not know anything further about them.

Henning Sørensen stated, amongst other things, that he is plant manager and chairman of the safety committee. The production work is not sedentary, and it has made him sweat. There is no actual lifting, but some boards are moved – probably some 600-700 kilos in all per hour. This cannot be done from a chair. It is correct that chairs had been placed around the production plant, but it is better to stand. The longest pieces of wood are approximately 2.5 meters long. On the night in question it was cold, because cold air was drawn in from outside. The exhaust system should probably have been activated somewhat earlier. The company has not experienced anything like this before or after. He believes that the temperature of 17□ C, which the company's measuring equipment recorded as the lowest temperature that evening and night, must be correct, and he does not know how the other measurements were made. Normally, the workers wear a shirt, not thermal clothes. Monitoring the process does not make one sweat, but people are only rarely able to sit down, as they have to attend to other tasks at the same time.

The arguments of the parties

The plaintiff states in support of its claim that the work stoppage on 6 January 2003 was justified, having regard to the measurement of temperatures down to 14□ C at the workplace. At any rate, the work functions were partly sedentary or static, and therefore the temperature was to be at least 18□ C, both according to Notice No. 1.01.7 of the National Labour Inspection and to the trade instruction. The plaintiff's members were therefore entitled not to work until the temperature had gone up, cf. section 5(2) of the norm, directly or analogously. Even though the norm uses the expression "life and welfare", it is generally assumed that the expression also comprises health deterioration hazards and general working environment issues, cf. in that connection Per Jacobsen, Kollektiv Arbejdsret [Collective employment law], 5th edition (1994), p. 267. Moreover, it follows from practice that the workers are entitled to stop working when the company does not comply with the current regulations regarding minimum temperatures, cf. in particular the ruling of the Industrial Tribunal of 13 September 1933 in case No. 1778, labour arbitration rulings of 9 March 1982 and 22 September 1983, and an umpire ruling of 8 October 1984 in a labour arbitration case. In addition, in its statement of 17 March 2003, the National Labour Inspection established that in the present case none of the special circumstances which may in exceptional cases justify lower temperatures had occurred. It had been cold for several days, and the company had simply not fulfilled its obligation to ensure sufficient heating. The work stoppage was therefore legal, and the company is obliged to pay wages etc.

As the crucial obligation to pay wages has been breached, a substantial fine should be imposed on the defendant.

The defendant stated that the plaintiff has failed to meet the burden of proof that the current regulations regarding minimum temperatures have been disregarded. It must be taken into account that the work concerned consisted in moving wood from pallet to conveyor belt etc., and so the work was neither sedentary or static, let alone light, but involved limited physical exertion. That is how the work is also characterised in the current trade instruction, which specifically mentions sorting and grading, feeding and withdrawing as examples of work involving limited physical exertion. The recommended minimum temperature for such work is 15□ C according to both the regulations of the National Labour Inspection and the trade regulation. Irrespective of whether the manual measurements could be taken into account – which is contested - only one of these – if at all relevant – does not live up to the recommended minimum temperature, and in that case this is also motivated by the extraordinary weather conditions which occurred on that evening and night. This cannot form the basis of invoking section 5(2) of the norm, as work stoppage requires qualified circumstances. In any circumstances, as section 5(2) of the norm protects only the individual workers, it cannot be invoked as basis for initiating a collective action. Therefore, if relevant, only the workers present in the area where the temperature was measured manually at 14□ could have been entitled to cease work. In support of its views the defendant has referred to Per Jacobsen: Collective Labour Law, 5th edition 1994, pp. 263-264, and Jens Kristiansen: The Collective Labour Law, 2004, pp. 549-550 and p. 574, and to the judgments of the Labour Court of Denmark of 6 June 1988 in the cases 87.459, 87.462 and 88.025, to the judgment of the Labour Court of Denmark of 1 December 1988 in case No. 88.276, and to the judgment of the Labour Court of Denmark of 4 March 2003 in case No. 2002.169.

As the workers ceased working, and it has not been proved that they were entitled to do so, they are in breach, and the company was therefore entitled to withhold wages etc. for the period under consideration.

In case judgment is passed against the defendant, no penalty should be paid, as the subject matter is doubtful.

The grounds and result of the Labour Court of Denmark

Based on the evidence it is taken into account that the work comprised primarily sorting and grading of pieces of wood, feeding and withdrawing from machine etc., and that the work thus involved limited physical exertion, cf. in that connection the description in the parties' trade instructions. It is therefore taken into account that the recommended minimum temperature was 15□ C, as provided by both the trade instructions and the regulations of the National Labour Inspection.

It appears from the evidence of the witness Peter Nielsen that he measured the temperature manually, and that the temperature was 14□ C on one location. Against this are the company's measurements, which are made automatically with stationary, calibrated equipment, and which showed that the temperature did not fall below 17□ C. Because of the air circulation it must be taken into account that the temperature at the height at which the automatic measuring equipment is located is the same as at floor level. Hereafter, there seem to be no grounds for doubting the automatic measurements.

Consequently, as the plaintiff has not proved that the work stoppage was legal for any of the workers, the company was entitled to the salary deductions made.

The liability of the defendant is therefore denied.

IT IS HELD THAT:

The court finds for the defendant, the Danish Employers' Confederation, acting on behalf of the Confederation of Danish Industries, acting on behalf of Bodilsen A/S.

The plaintiff, the Danish Confederation of Trade Unions, acting on behalf of the Confederation Wood-Industry-Building in Denmark, shall within 14 days as legal costs pay DKK 2,000 to the Labour Court of Denmark.

Lene Pagter Kristensen

Finland

National report

President Pekka Orasmaa
Labour Court of Finland

The competence of the Labour Court covers legal disputes resulting from collective agreements. The Labour Court is the first and last instance in cases falling within its competence. Other labour law cases are heard and tried in the regular courts of justice. The main features of the procedure in the Labour Court resemble the procedure in civil law cases in the regular courts.

1. Is the case decided immediately upon the main hearing, or is a separate session held for that purpose?

After the main hearing the members of the court remain to exchange their tentative views on the case. However, normally a separate deliberative session is needed to finally decide the case. The time of this session is agreed at the main hearing. The presiding judge and the legal secretary then prepare a draft for a decision, taking into account the views expressed in the tentative discussion. In difficult cases several deliberative sessions may be needed to reach a decision. Subsequently, the written decision is mailed to the parties to the litigation.

On the other hand, if the case is clear and unanimity is reached immediately after the main hearing, the case is decided straight away. A written draft decision is merely circulated among the members for potential comments via email, after which the decision is mailed to the parties.

In urgent matters the court may decide the case and pronounce the ruling immediately after the main hearing. This can be done for example in situations where there is an ongoing industrial action at the time of the main hearing.

2. Is there a presenting official involved in the process? If yes, please describe the formal and factual role of the official.

A so-called legal secretary takes part in all stages of the procedure. He or she summons the parties to court, draws up a summary of the claims and their grounds presented in the case, and prepares the minutes of oral sessions. The secretary also prepares a proposal for a decision of the case and presents it in the deliberative session. Before the proposal is sent to the members, it is checked and, as the case may be, revised by the presiding judge. The role of the secretary is mainly that of an assisting legal officer.

3. Does the composition of your court include lay members? If yes, please give a description of their role in the deliberation leading to the decision, with a view to the interplay between the chair and the lay members. What is in your experience the main contribution of the lay members in the decision-making process?

Most cases are heard and tried in panels, where, in addition to a chairman and another so-called neutral member, two members representing the employers' interests and two members representing the interests of employees are present. The interest members are appointed upon the nomination by the most representative central organizations of the employers' and employees' associations. These members are often leading officers and, as a rule, lawyers employed in national workers' or employers' federations, and they have a solid experience in collective bargaining and other labour market issues. Apart from being independent judges, the interest members can also be regarded as an expert audience, the views of which assist in securing that the decision is reasonable and in conformity with good labour market practices.

All written material relating to a case is sent in advance to the members, allowing them to make themselves familiar with the case in the same way as the presiding judge. This creates a good basis for discussions, which may often become quite vivid. Members frequently propose amendments to a draft decision, mostly orally but sometimes in writing, too. The proposed changes are usually small, but occasionally they cause that the draft decision has to be entirely re-examined. The validity of a judgement is a special concern for those members, who represent the same side of industry as the losing party. Ca. 90 per cent of the decisions are unanimous.

It must be reminded that the bulk of labour law disputes, that is to say disputes arising from individual employment contrats, are handled within the system of regular courts. Lay members do not participate in deciding these cases, which are in the first instance usually heard and tried in a one judge composition.

4. To what extent does the presiding judge take part in writing the decision?

The first draft for a decision is usually drawn up by the legal secretary, as explained above. In simple or rutine cases there is usually little need to revise the draft, but the tougher the case, the more amendments are required to be made by the presiding judge. This may mean that the draft is completely rewritten before it is passed on to the members. Writing the reasoning of a judgement is the most demanding part of the procedure, and the presiding judge is responsible for the clarity and validity of the reasoning.

Dissenting opinions are usually formulated by the members in question themselves, but the chair or the secretary may give them technical assistence, if needed.

5. What are the main legal sources you use in deciding a case, especially a difficult one? In the reasoning of the decision, do you make express references to legal literature, case law, previous decisions of your own court etc.?

The most important legal sources in the labour court are, as in other courts, rules of statutory law and case law. Provisions of collective agreements are applied in the Finnsh labour on a daily basis in conjunction with the general principles of interpretation of contracts. In some cases also EU law, judgements of the ECJ as well as rules of the European Human Rights Convention and ILO Conventions are applied.

Whenever a decision is based on these legal sources, they are also expressly referred to. It is most common that the reasoning of a judgement contains references to previous decisions of the labour court. Mention is sometimes made of preparatory works of labour laws (governmet bills etc.), as well as opinions presented in legal literature.

6. Is it customary to express the personal views of the judge in a decision?

No, except sometimes in dissenting opinions. Personal or moral judgements in a court decision are not considered appropriate. Also, the labour court makes its decisions as a collegial body, which rather effectively conceals individual views the members may have had on a case.

The general rule does not prevent the court from weighing evidence or arguments presented to the it. Thus, the court may state in the reasoning that it has found the testimony of witness A not credible in comparison with that of witness B, or that argument X presented by the plaintiff has not convinced the court, etc.

7. Are there any further comments you wish to make on the subject?

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Judgement 2007:78 of the Finnish Labour Court

Summary of the case

A sprinkler mechanic worked at installation sites, where it was not possible in practice to monitor whether he was observing his working hours. The employee had been absent from work for one day without notifying the employer of his absence. Nevertheless, the employee had listed the day in question as a working day using his time card. In addition, the employee had come to work late every now and then as well as left from work before finishing his working day. For the reasons mentioned, the employment had been cancelled with immediate effect.

In the judgement, the actions taken by the employee were regarded to have broken the trust presumed to exist between an employer and an employee. As it could not be shown that the employee had ever before engaged himself in similarly dishonest action, and the employee had not been given a clear warning including a threat of terminating the employment due to his absence from work, the labour court considered that the preconditions of continuing the employment had not deteriorated so much that it would have been unreasonable to continue the employment for a period of notice. However, the employer was considered to have had a proper and weighty reason to terminate the employment contract of the employer by giving him notice.

PLAINTIFF

The Construction Trade Union

DEFENDANT

The Association of Technical Contractors

PARTY TO BE HEARD

Firecon Ltd

THE CASE

Violation of collective agreement, groundless termination of employment contract and failing to fulfil the supervisory duty

PROCEEDINGS IN THE LABOUR COURT

Oral preparation 17.4.2007

Main hearing 19.6.2007

PROVISIONS OF THE COLLECTIVE AGREEMENT

In the collective agreement 2005-2007 for the HPAC branch of the field of building services signed by The Construction Trade Union and The Association of Technical Contractors, there is a following provision (Section 5).

The signatory unions have agreed that the employment security of employees working in building services as well as the associated procedures are determined by the Employment Contracts Act, which is a part of this agreement, with the exceptions mentioned later.

SUIT

Claims

The Construction Trade Union has demanded the labour court

- to confirm that Firecon Ltd has violated the provisions in Section 5 of the collective agreement concerning employment security by terminating the employment contract of its employee A groundlessly contrary to the collective agreement and the Employment Contracts Act. In addition, Firecon Ltd has not observed the 14-day notice period stipulated in the collective agreement when terminating the employment;
- to oblige Firecon Ltd to pay A compensation equal to his 10 months salary, 23.632,80 euros, for groundless termination of the employment contract, added with the legal interests as from the day the employment terminated;
- to oblige Firecon Ltd to pay A 1.099,20 euros as pay for the notice period, added with the legal interests as from the day the employment terminated;
- to oblige The Technical Contractors Association to pay a compensatory fine by virtue of Sections 8 and 9 of the Collective Agreements Act on the account of failing to fulfil its supervisory duty;
- to oblige The Technical Contractors Association and Firecon Ltd to be jointly and severally liable to pay the plaintiff’s legal costs, added with the legal interests after one month has elapsed from the day the judgment will have been delivered.

Causes of action

Sprinkler mechanic A has concluded a written, indefinitely valid employment contract with his employer on 6 June 2005. The employer had terminated A’s employment contract by cancellation on 27 April 2006 by reason of the events of 13 April and 26 of April 2006.

On 13 April 2006 A had been to a hospital where his child was to be performed an operation that required a parent to be present. A had received a certificate of the events to be given to his employer, in which A was considered to have been unable to work from 8 to 10 a.m. on the day in question. The visit to hospital was planned to last even longer, but the operation intended was not performed on the child. However, A was not able to return to work, because due to the above mentioned operation, the child’s day care had been cancelled for that day, and he had had to stay at home for the rest of the day to care for the child. A had informed his co-worker of his absence. A admits having listed 13 April 2006 as a working day using his time card, but states that he had not done so with dishonest intentions but merely by accident.

Employer’s representative B had phoned A on 26 April 2006 and informed that his annual holiday shall begin on 2 May 2006. A would have preferred to take his annual holiday some other time. A had left his place of work at 2 pm as he was irritated because of the holiday issue and had also sorted out matters regarding the renovation of his apartment. A should have been at work until 3.30 p.m., when his working day was to end. In the morning of 27 April 2006 A had phoned B and they had agreed that A can begin his annual holiday immediately.

A has not breached against or neglected his duties based on the employment contract or the law in a way which would have an essential impact on the employment relationship. A has not been given either complaints or warnings during his employment. A has not been heard concerning the termination of employment. There has been neither a proper and weighty reason required by the Employment Contracts Act to terminate the employment nor an extremely weighty cause to cancel the employment. Thus, the termination of the employment has been groundless.

As the employment has been terminated contrary to the grounds laid down in the Employment Contracts Act, A is to be paid a compensation for groundless termination of his employment contract. The amount of the compensation is 13,74 euros x 8 hours x 21,5 days x 10 months = 23.632,80 euros, which equals to the amount demanded.

A has been unemployed after the termination of his employment contract and has been paid earnings-adjusted unemployment allowance by The Construction Industry Unemployment Benefit Fund. A has received a total of 3.216 euros in allowance between 27 June and 31 August 2006.

Because A’s employment relationship has lasted for less than a year, the 14-day notice period laid down in Section 5 of the collective agreement is to be applied. In legal literature as well as in legal praxis the Paragraph 1 of Section 4, Chapter 6 in the Employment Contracts Act has been interpreted so that the employer has to pay the employee full pay for a period equivalent to the notice period as compensation also in cases of groundless cancellation of the employment relationship.

The Construction Trade Union and The Association of Technical Contractors have negotiated with each other to resolve the issue on 6 June 2006. The employer’s association, however, has not taken immediate measures to end the situation that violates the provisions of the collective agreement. Because The Association of Technical Contractors has supported the employer on the case regardless of evident violations of the collective agreement and has approved the employer’s conduct without intervening, a compensatory fine for failing to fulfil its supervisory duty is to be imposed on The Association of Technical Contractors.

RESPONSE

Response to the claims

The Association of Technical Contractors and Firecon Ltd have demanded the suit to be dismissed in its entirety and The Construction Trade Union to be obliged to pay their legal costs, added with the legal interests.

Even if the employer had not had the right to terminate the employment relationship by cancellation, it has nonetheless had the right to give the employee notice. Consequently, A is to be paid no more than the pay for the notice period, that is to say two weeks pay, which is 1.099,20 euros. No further compensation is to be paid. In addition and for the reasons mentioned, The Association of Technical Contractors and Firecon Ltd are not to be ordered to pay the legal costs of The Construction Trade Union.

Causes to contest the suit

Firecon Ltd supplies automatic sprinkler systems around Finland. Because the distances between offices and working sites are long, the daily working hours cannot be monitored on the spot at an installation job, which is why trust between the employer and the employee is a prerequisite of the business.

During his employment in the company, A has received several complaints and warnings orally because of installation mistakes he has done as well as his nonchalant attitude f. It is very important to be careful in the work that A does, considering that it concerns installation of security devices. Moreover, he has refused assignments. The warnings have been given within a year prior to the cancellation of the employment relationship.

A has not been at the working site on 13 April 2006, although he had entered the day as a working day in the list of working hours. First, A claimed to have worked on the day in question, but later he revealed to have been to a hospital with his child due to a previously scheduled appointment. It has not been a case of the child falling suddenly ill.

A had not notified the employer of his absence, but had dishonestly entered the day in question in the list of working hours as if he had been to work. The usual practice, which is documented in the written guidelines of the company that are given to the employees, is that the employee notifies the leader of the project in question of the absence in advance and then attaches the possible certificate of the absence to the list of working hours. This is not what A did.

It is apparent that A had made the incorrect listing using his time card to be able to get the mid-week holiday compensation of the Easter holidays following 13 April 2006. Had he entered the correct reason for his absence using his time card, that is a visit to hospital with a child, he would not have been entitled to either his pay of 13 April 2006 or the Easter holidays, because his employment had lasted for less than a year.

A had also left his place of work without permission on 26 April 2006 at 2 pm, while the working day was not to finish until 3.30 pm. A had not asked for an appropriate permission to leave the working site too early.

A’s absence has hampered the work of the other employees working with him.

After having heard A, the employer has cancelled A’s employment contract on 27 April 2006 on the grounds of, first and foremost, lack of confidence and dishonesty that has become apparent through the intentionally made incorrect entries in the time cards.

The amount of compensation demanded is indisputable.

The employer’s association was informed of the case only after the cancellation had already occurred, so the employer’s association is not to be imposed a compensatory fine for failing to fulfil its supervisory duty.

DECISION OF THE LABOUR COURT

Reasoning of the court

A's employment relationship and its termination

A has worked in Firecon Ltd as a sprinkler mechanic beginning from 6 June 2005. The employer has cancelled A's employment contract on 27 April 2006. The employer had orally communicated the cause of cancellation to have been lack of confidence and dishonesty, both of which have related to A's absence from work on 13 April 2006 and his leaving from work on 26 April 2006 for example.

The evidence presented of the grounds for termination

Called by the employee party, A has been heard in court in purpose to present evidence, but not as a witness. Called by the employer party, managing director B has been heard in purpose to present evidence but not as a witness, and vice managing director C, project manager D as well as sprinkler mechanic E have been heard as witnesses.

From the reports of B, C and also A, it comes out that at the Isku working site, as the project leader of which A had worked in the autumn of 2005, nozzles departing from the plan had been installed and the bracket system as well was installed divergently from the plan, the pipes had been grooved incorrectly and after a trial run the pipeline had neither been drained of water nor filled with glycol, which had caused damage later on as the pipes had frozen. The mistakes made at the Isku site had been discussed in a meeting, which B, C and A had attended. In the meeting A had also been given an oral warning including the possibility of terminating his employment. After the Isku site A was transferred away from a supervisory position.

D has reported having initiated A to the work when his employment in Firecon Ltd began. D had told A about the working hours as well as the practice regarding absence from work and the notifying procedure and had also given him the phone numbers necessary to notify the absence. D had been contacted in June 2005, when work at one of the working sites had not been progressing, and he had gone to the site to observe the situation. A had not been on the working site. When witness had phoned A, he told he was at home caring for his child. D had then pointed out that absences need to be reported and he had repeated the complaint the next day.

E has reported A to have had a flexible impression of the working hours. In the mornings A had more often than not been late from work and been there at 8-8.15 a.m., although the working day had commenced at 7 a.m. At times E had had to wait for A to arrive and help him, as there were phases of work that could not be done alone, and the waiting had hampered the work. A few times A had also left from work before the working day was finished. E's observations of A being late had begun at the working site of Normaali paint factory, where they had worked in the winter of 2005-2006. As A has been heard in the labour court, he has admitted having been late from work sometimes.

C had observed A's absence on 13 April 2006 as he went to the working site he was managing. C had asked E about A, and E had answered that A had mentioned something about taking his child to a doctor. At first C had thought that A had possibly informed the other managers D or B of his absence. As it came out that A had not notified anyone of his absence, the managers had decided to wait for the list of working hours and the possible medical certificate of his absence, but it had not arrived. D has reported visiting the Yli-Kölli working site in case A would have been there, after C had been asking about A on 13 April 2006. A has reported that he told about his absence to E and that he thought the information would be passed on through E. The child had not been performed the planned operation, but A had decided to stay at home with the child for the rest of the day, because he had already informed the day care centre that the child would not be in day care at all that day.

The lists of working hours had revealed that A had entered the day in question as a working day in spite of his absence. When B asked A about this, A had first claimed to have been at work, but later told that he was at a hospital with his child on a previously scheduled visit. According to B’s understanding, the reason for the incorrect entry in the list of working hours was to secure the mid-week holiday compensation, to which A would not have had the right due to his absence. A has admitted that he made an incorrect entry to the list of working hours but told it to have been a mistake.

D had noticed A leaving the Yli-Kölli working site at around 1.30 p.m. on 19 April 2006. When D confronted A the next day, A had told him that he had had errands to run. D had then reminded A of the notifying procedure regarding absences. D had not directly said to A that the absences and the failure to report them could effect the continuation of his employment, but he had supposed A to understand that. E too has reported to have heard D telling A in the spring of 2006 on the Yli-Kölli working site that the absences need to be reported.

A has admitted that he left his place of work on 26 April 2006 at 2 p.m., although the working day would not have ended until 3.30 p.m.. According to A the motive for this has been the anger over B ordering him to begin his annual holiday on 2 May 2006. B has reported finding out about A’s too early an exit from work during the morning of 27 April 2006. At the same time B was informed of A’s absence on 13 April 2006 and of the incorrect entry in the list of working hours made by A. The events led to the cancellation of A’s employment relationship in conclusion of a hearing arranged on 27 April. Before this B had unsuccessfully tried to contact a representative of the employer’s association.

Evaluation and conclusions

According to Section 1, Chapter 8 of the Employment Contracts Act the employer is entitled to cancel an employment contract with an immediate effect regardless of the applicable period of notice or the duration of the employment contract only upon an extremely weighty cause. Such a cause can be deemed to exist in case the employee commits a breach against or neglects duties based on the employment contract or the law and having an essential impact on the employment relationship in such a serious manner as to render it unreasonable to expect that employer should continue the contractual relationship even for the period of notice.

A’s duty in Firecon Ltd has been to work as a sprinkler mechanic. For this reason, the installation errors that occurred at Isku working site and of which A as a leader of the project has been responsible, have no significant importance, due to the differences between the job descriptions, when evaluating the grounds for terminating the employment.

It has been shown that A has been absent from work on 13 April 2006 without informing the employer, and that he has listed the day in question as a working day despite his absence. In addition, when asked about it, A had first insisted on having been to work that day. Because no other reason to be reckoned with has been presented explaining the incorrect entry to the list of working hours, the labour court considers it probable that A had made the incorrect entry with an intention of obtaining benefit, that is to obtain the mid-week holiday compensation of the days to follow accordant to the collective agreement. In any case, the reports by D and E have shown A to have been late from work and that he had left from work without permission, of which E had complained to A. Although having received an oral complaint from D on 20 April 2006 stemming from his absences and the failure to report them, A has not reported his absence on 13 April 2006, but has made an incorrect entry to the list of working hours regarding that day.

The installation operations of Firecon Ltd have required the mechanics to work independently on the projects and monitoring the working hours round-the-clock has not been possible. Such a nature of the industry emphasizes the importance of trust in A's employment relationship. In addition, there have been phases in installation that another mechanic cannot have completed without assistance. For this reason A's being late and failure to report his absences have hampered the installation work.

The labour court considers that A's dishonest conduct with the time card and his failure to report absences have broken the trust, which is presumed to exist between an employer and an employee in an employment relationship. On the other hand, it has not been shown that A has ever before engaged himself in similarly dishonest action, and even due to the absences A has not been given a clear warning including a threat of terminating his employment. When evaluating A's conduct and the matter as a whole, the labour court considers that the preconditions of continuing the employment had not been deteriorated insomuch it would have been unreasonable to continue the employment for a period of notice. For this reason, the labour court considers that Firecon Ltd did not have an extremely weighty reason required by the Employment Contracts Act to cancel A's employment contract. However, the employer has had a proper and weighty reason to terminate the employment contract of the employer by giving him notice.

Pay for the notice period

As A's employment relationship has been terminated without observing the notice period, the company is liable to pay A full pay for a period equivalent to the notice period. The amount of the demand, 1.099,20 euros, has not been disputed.

The amount of compensation

Instead of cancelling the employment contract, Firecon Ltd could have, by virtue of Section 2 of Chapter 7 in the Employment Contracts Act, terminated the employment contract by giving the employee notice. In a case like this the compensation will be ordered mainly as a compensation of the immaterial damage caused by the groundless termination of the employment contract (see also decision 2007-43). A, who is now ordered to be paid the pay for the notice period, has not suffered other loss of income or immaterial damage due to the termination of his employment that could be considered to derive from the erroneous action of the employer. Taking into account the short duration of A's employment and the fact that he gave cause for the termination of his employment himself, the labour court considers the reasonable compensation for the premature termination of his employment to be 500 euros.

Failing to fulfil the supervisory duty

Firecon Ltd has violated the Collective Agreements Act when terminating A's employment contract without observing the notice period. However, the matter has been insomuch open to various interpretations that The Association of Technical Contractors, when approving the erroneous action of a member company, cannot be considered to have failed its supervisory duty as laid down in the Collective Agreements Act.

The legal costs

Both parties have, more or less, won and lost in this trial. As both parties have had sufficient grounds for the legal proceedings, they are to carry their own legal costs according to the legal rule expressed in Section 33 of the Act on the Labour Court.

The judgment

Labour court obliges Firecon Ltd to pay A 1.099,20 euros as pay for the notice period, added with the legal interests as from 27 April 2006 in accordance with the paragraph 1 of Section 4 of the Interest Act, and 500 euros as compensation for the groundless termination of the employment contract, added with penal interest as from the communication of the summons, that is 27 December 2006, according to the interest rate meant in paragraph 1 of Section 4 of the Interest Act.

On further accounts the case is dismissed.

The parties involved are to carry their own legal costs.

Saloheimo as chairman as well as Äimä, H. Rautiainen, K. Rautiainen, Lehto and Raitioharju as members have participated in deciding the case. Sundtröm served as clerk.

The decision is unanimous.

France

National report

M. le Conseiller Michel Blatman
Cour de cassation
Paris

1. Is the case decided immediately upon the main hearing, or is a separate session held for that purpose?

Most of the time, in labour court as well as before common courts, there are two different stages: one during which the case is heard, the other one, after generally a few weeks used for reflection, where the judgment or order is passed..

It is only in special cases, marked by emergency, particular circumstances or reaching of an agreement, that the judgment would be made the same day as the hearing.

2. Is there a presenting official involved in the process? If yes, please describe the formal and factual role of the official.

a) Before first level labour courts (“conseil de prud’hommes”) there is usually no presenting official involved in the case.

But the **public prosecutor** (Procureur de la République) is entitled to present, ex officio, arguments tending to the protection of law and order (“ordre public”). It is also allowed to set out statements in order to see the court judge in a way, and not the other, for public interest reasons.

For instance, public prosecutors had been requested by the minister of Justice to intervene in labour trials relating to the legality of the recently created “contract of new employment”, whose compliance with ILO Convention n°158 was challenged by workers and their unions.

The public prosecution service may also be present before the second level courts (cours d’appel).

Before the supreme court (“Cour de cassation”), the Advocate General (“Avocat général) will have to set out its opinion in all cases, unless otherwise deemed..

The Advocate General before the Supreme court is independent. This has been demonstrated in 2008 when he called for a statement of non-compliance of French legal contract of first employement with the ILO standards (2 years trial period being too long, and termination of employment contract without explanation being against the international standards).

b) The HALDE (Haute Autorité de Lutte contre les Disriminations – High Authority Combating Discriminations) is allowed to submit to any court in France, even the Supreme court, its opinion in a case where discrimination is alleged or assumed.

The HALDE recently intervened this way before the Cour de cassation, contending that the special allowance paid to foreigners working in France in the international status site of Synchrotron was a breach of equality with French workers who would not receive this bonus. But the Supreme court did not share this opinion and decided that there was no discrimination (Soc. 17 april 2008, Mr Wattecamps vs société European synchrotron, n° 06-45.270) [1]. It was ruled that this expatriation allowance was intended to compensate for the disadvantages resulting from the worker and his family’s expatriation, also aimed at the creation of an international scientific “pôle d’excellence”‘ (pole of excellence) and was proportional to the goals pursued by the Member States,. Thus, its deprivation for French workers was justified by objective, relevant and discrimination-free reasons.

3. Does the composition of your court include lay members? If yes, please give a description of their role in the deliberation leading to the decision, with a view to the interplay between the chair and the lay members. What is in your experience the main contribution of the lay members in the decision-making process?

In France, only first level labour courts are only composed of lay members “conseillers prud’hommes”) in an equi-representational way.

The professional chairman only intervenes when no majority can be found between both sides (2 against 2). His main contribution is to provide for a better knowledge of the law and of case-law, and to make a decision possible.

[1] Attendu, ensuite, qu’il résulte des dispositions combinées du préambule de la Convention de Paris du 16 décembre 1988 relative à la construction et à l’exploitation d’une installation européenne de rayonnement synchrotron, de la résolution no2 jointe à l’acte final, des articles 12 et 25 des statuts de la société Installation européenne de rayonnement synchrotron et 50 de la convention collective d’entreprise précitée,que la prime d’expatriation, prévue par les statuts annexés à la convention, est destinée à compenser les inconvénients résultant de l’expatriation du salarié et de sa famille et à contribuer à la création d’un pôle d’excellence scientifique international; que la privation de cet avantage pour les salariés français repose ainsi sur une raison objective, pertinente, étrangère à toute discrimination prohibée et proportionnée à l’objectif légitimement poursuivi par les Etats contractants;”

4. To what extent does the presiding judge take part in writing the decision?

The presiding judge takes part in writing the decision of the case he has been allocated.

Before the second level court (cour d'appel) the presiding judge also contributes in the decision' writing when the judges start their wording together (not often the case).

He reviews the judgment when he has to sign it.

Before the Cour de cassation, the wording is made collectively, by the chamber or section, on the basis of reporter's draft, which is then amended.

The presiding judge may not change by himself the text adopted (else just spelling or style mistakes). If something wrong is discovered, he has to call for a new meeting of the judges on the case.

5. What are the main legal sources you use in deciding a case, especially a difficult one? In the reasoning of the decision, do you make express references to legal literature, case law, previous decisions of your own court, etc.?

a) In accordance with the principle of hierarchy of standards, the courts have to apply the highest source in case there would be differences between them. Therefore, the Cour de cassation often refers to international or EU regulations or directives, constitutional principles, general principles of law. In domestic law, the law prevails on regulation. The collective agreement may vary from law and regulation but mostly if more beneficial to the employees.

The Supreme court obliges the jurisdictions to be informed of the collective agreements or company-level agreements and, in case they could not find them, to compel the parties to produce them before the court.

The courts usually refer to the actual case-law.

But the choice of the applicable standards has to match with the principle according which the parties may choose their own grounds for claim.

Pure law questions may be risen by the judge, except the case where the topic is already "dans le débat" (in the debates) so the matter is not really "new".

Parties can also be asked by the reporting judge, or during the hearings to give further details as to the facts themselves.

b) No express reference is made to anything else than law, regulations, EJC opinions, customs and other sources of law.

No reference, either, to previous decisions of the own court (except when it was ruled between the same parties). The court may vary its case-law.

6. Is it customary to express the personal views of the judge in a decision?

Usually, the judge should be careful in expressing his/her personal views, because he is just supposed to apply the legal rule, or not, and to explane why he does so. He is not expected to bring a value judgement on the parties or witnesses. For instance, he would rather say that the evidence of X... is not persuasive than X... is "a liar".

The dissent opinion is not allowed in French judicial system, because of the rule of the secret deliberation.

7. Are there any further comments you wish to make on the subject?

Use of thematic hearings – Gathering in the same hearings different cases rising the same legal matter is a good way to have a better knowledge of the questions raised and means to give a more relevant decision.

Specialization of chambers – Having judges specialized in some matters is also a way of reaching to a better understanding of the matter. Eg: work duration, discrimination and equal pay for equal work, collective agreements ingeneering.

Judgement

Translation by
M. le Conseiller Michel Blatman,
Chambre sociale de la Cour de cassation

Judgment of the 1st July 2008, Vanlerberghe vs société Cartonneries de Godardennes, n°06-46421, published

By this judgment, the Cour de cassation (French supreme court) approves the dismissal on ground of serious fault, of an employee who smoke inside the premises of a cardboard factory (classified installation) and thus breached the general ban on smoking instituded for security reasons and notified to him.
To mention that, on the same day, the Supreme Court also approved the dismissal on the same ground of serious fault, of two employees caught together smoking a "joint" of cannabis.

THE COUR DE CASSATION (Social Chamber)
(1st July 2008)

Judgment

On the unique ground of appeal:

Considering that, according to the judgment under appeal (Court of appeal[2] of Douai, 14 april 2006), Mr Vanlerberghe was hired on 6 november 1979 by the company "Cartonneries de Godardennes" (Cardboard factory of Godardennes), where he was employed as an operator; he was dismissed on 24 september 2004, on the ground of a serious fault[3], because he had been caught smoking inside the premises of the company; challenging his dismissal, he submitted his case to the conseil de prud'hommes[4];

Considering that the employee criticises the court of appeal for having held that his dismissal was justified by a serious fault, whereas, according to the ground of appeal :

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[2] The "Cour d'appel" is the second level court

[3] In French labour law the serious fault ("faute grave") is the fault that causes employee's departure from the company without notice nor severance payment.

[4] First instance labour court, composed of lay judges only

1/ the serious fault is characterised by a behaviour that makes any continued working together impossible even during the short period of notice; in the present case, in order to say his dismissal was based on a serious fault, the judgment upheld that the employee infringed the ban on smoking; thus stating, whilst the employee had been in the company for 25 years, had smoked freely until 1st january 2001 as all other smokers in the firm, was tobacco addicted, had no time enough during his rest break to have a smoke outside the premises of the company, the employer had refused setting up a special area for smokers, and had not taken any initiative to help his smoking employees such as assessement of dependence and motivation, help to stop smoking, real strategies for withdrawl from tobacco, disposal of a tobacologist within the company, delivering of nicotinic substitutes, the court of appeal did not characterise the serious fault, thus violating Article L. 122-6 of labour code;

2/ no one shall bring to the rights of persons and individual freedoms such restrictions that woud not be justified by the nature of the task nor proportionate to the aim pursued; in the present case, the employer had refused to set up special smoking areas and had taken no initiative to help smoking employees; thus, in saying that the employee had committed a serious fault, though the absolute ban on smoking without any help given to tobacco dependent employees was unfair, the court of appeal infringed Article L. 120-2 of labour code;

But, considering that the court of appeal pointed out that the employee, member of the staff of a cardboard factory, smoked a cigarette in a restroom inside the premises of the company, in breach of **a general smoking prohibition**[5] justified by the sake of security of persons and goods, imposed because of the fire risk by an order of the prefect authorizing a classified installation[6] and appearing in the general orders of the company, notified to him by the posting of these general orders as well as by numerous notice boards placed inside the firm and by an in-house note specifying the incurred penalties; that by these sole reasons the Court of Appeal, against whose decision the grounds of appeal are unfounded, could infer that the employee’s behaviour made it impossible to keep him in the company and constituted a serious fault;

ON THESE GROUNDS,

Hereby:

Dismisses the appeal.

[5] Text underlined by me to have a clear understanding of the sentence

[6] In French legislation, special provisions apply to factories, workshops, depots, building and other sites and in general installations operated or owned by any natural or legal person, public or private, which may threaten any danger or nuisance, whether in regard to neighbourhood amenity, public health, safety or sanitation, agriculture, protection of nature and environment, or conservation of sites and monuments. The installations referred to are defined in the Register of Classified nstallations established by a decree of the Council of State, based on a report by the Minister responsible for Classified Installations and the opinion of the Higher Council for Classified Installations. This decree subjects installations either to authorisation or declaration depending on the gravity of any danger or nuisance threatened by their operation. Installations which may threaten the above interests with any grave danger or nuisance shall be subject to authorisation by the Prefect. Authorisation shall only be granted provided such danger or nuisance may be prevented by measures specified in the Prefectoral Order.

Germany

National report

Annelie Marquardt,
Richterin am BAG
and
Dr. Mario Eylert,
Richter am BAG

1. Is the case decided immediately upon the main hearing, or is a separate session held for that purpose ?

The case was immediately decided after the hearing on November 24th.

2. Is there a presenting official involved in the process ?

No.

3. Does the composition of your court include lay members ?

If yes, please give a description of their role in the deliberation leading to the decision, with a view to the interplay between the chair and the lay members. What is in your experience the main contribution of the lay members in the decision making process ?

Yes. In the first and second instance they even outnumber the professional judge (2 to 1; one from the employers' side (mostly from associations of employers), one from the employees' side, (mostly from unions or work councils). At the Federal court we have 2 lay members and three professionals. They do normally lead a strong role in the decision-making process in the sense that they contribute their practical experience and often their professional skills.

4. To what extend does the presiding judge take part in writing the decision.

Normally the reporter (a professional judge) designs the decision.

5. What are the main legal sources you use in deciding a case, especially a difficult one ? In the reasoning of the decision, do you make express references to legal literature´, case law, previous decisions of your own court, etc.

Normally we give extensive references to previous decisions of our own court, sometimes also to decisions of others courts (like the Bundesgerichtshof – Supreme Court). We give notice to legal literature if necessary, e.g. when a new legal problem arises.

6. Is it customary to express the personal views of the judge in a decision ?

No.

7. Are there any further comments you wish to make on the subject ?

No.

Judgement

Dr. Mario Eylert
Richter am BAG

Bundesarbeitsgericht: 2 AZR 39/05: Übersetzung –Translation

Judgement of November 24th, 2005

Tatbestand: Facts of the Case

The parties are in dispute about the dismissal of the plaintiff on the grounds of misbehaviour.

The plaintiff was born on July 29, 1949, and is divorced. He worked as a social worker for the defendant since July 1, 1995, for a monthly salary of approximately 3.200 Euro. The collective agreements of the municipal civil service apply to the employment contract of the parties.

The working hours of the defendant's employees are recorded by a technical device, requiring the employee to insert a registration card when entering and leaving the enterprise. In the year 2003 the defendant noticed that the hours recorded by the plaintiff were often identical to those of his colleague H.. In the defendant's view, the home addresses of the two employees made a car-pooling agreement seem unlikely. The defendant began to suspect a manipulation of the registration process. On October 2, 2003, the defendant, therefore, assigned a superior to observe the recording device at the time the employees were to arrive at work. The superior observed that H. not only inserted his own registration card into the recording device, but also the card of the plaintiff. When the plaintiff was confronted with this information on the same day, he initially disputed that his registration card had been inserted into the machine by H. on his behalf and with his consent. He later admitted to this.

After initially denying it, H. also admitted to having inserted the plaintiff's card into the recording device. He declared the plaintiff had been late and that he [H.] could not say exactly when the plaintiff had arrived at work.

On October 7, 2003, the defendant consulted the employee representatives about the intended dismissal of the plaintiff. The employee representatives confirmed the measure. The defendant gave the plaintiff notice of his immediate dismissal with letter of October 6, 2003, which the plaintiff received on October 14, 2003. In the course of the proceedings the defendant clarified that the dismissal was alternatively to be regarded as a dismissal with notice in the case that the dismissal without notice was void. With decision of September 23, 2002, the plaintiff was recognised as being handicapped to a degree of 50 percent since February 24, 2004.

The plaintiff put forward as reasons for his claim against the dismissal that he had already been on the premises on October 2 at 7:08 a.m., when his registration card was inserted into the recording device. He claimed he had been in the course of buying breakfast buns at a supermarket directly next to the premises for the breakfast customary in the course of a therapy session. He argued that this had been work-related and a non-recurring incident. He stated that he had asked his colleague H. via mobile telephone to insert his card into the recording device on his behalf to spare himself the walk to the building. He claimed that he often arrived and left work together with H.. In the course of the appeals proceedings, the plaintiff purported that he had driven directly to the supermarket and had called his colleague

H. from there to ask him to register his arrival at work by inserting his card into the recording device. He stated that he had then driven from the supermarket across the sweeping premises to the textile centre to park his car. He predicates to have delivered dirty laundry to the textile centre and picked up clean laundry in return and to have reached his final parking destination near his workplace only after 8:30 a.m. He claims not to have acted with fraudulent or deceitful intent and that in any case the employer would have had to issue a warning before giving him notice of the dismissal, as he had done in a comparable case concerning another employee. Furthermore he reasons that the employer had not informed the employee representatives sufficiently.

The plaintiff applied for the declaration that the employment contract of the parties was not terminated by the dismissal issued by the defendant on October 6, 2003.

The defendant applied for the dismissal of the action and argued that the plaintiff had infringed upon fundamental obligations arising from his employment contract by asking his colleague to register his arrival at work on his behalf. According to the defendant, this had fundamentally destroyed the basis of mutual trust. The defendant reasoned that a warning was not necessary in case of such a severe violation of the rules. The defendant maintained that in any case the plaintiff had not appeared at his workplace before 7:38 a.m. He alleged, the superior assigned to observing the registration device had seen H. ride his bike to the supermarket immediately after having registered and returning from there a short while later with a paper bag of breakfast buns. The defendant argued, the alternating allegations of the plaintiff could only be regarded as protective statements. In addition, the defendant brought forth that he suspected that the plaintiff and his colleague H. had manipulated the registration of the working hours on several occasions in the past. The defendant argued, the employee representatives had been duly consulted.

The Labour Court granted the action. The Labour Appeals Court dismissed the appeal and admitted the revision. The plaintiff is pursuing his application at the Federal Labour Court.

Entscheidungsgründe –Grounds

The revision is unfounded. The judgment of the Labour Appeals Court bears up against the arguments of plaintiff.

I. The Labour Appeals Court assumed that the employee representatives had been duly consulted and had especially been sufficiently informed of the facts leading to the dismissal. It held that at the time of the dismissal the plaintiff had not fallen in the scope of the legal protection specifically for handicapped employees against dismissal.

It further assumed that the behaviour of the plaintiff on October 2, 2003, constituted a severe breach of trust that justified a dismissal without notice and without a warning. It reasoned the plaintiff's explanations for the registration of his working hours by his colleague were not correct and not suited to justifying his behaviour. According to the Labour Appeals Court, the plaintiff had been obliged to record the beginning and the end of his working hours and temporary absences from the premises on his registration card. He himself had conceded that he regularly added up the registered hours on his card on a monthly basis to determine his monthly working hours. The Labour Appeals Court established that the plaintiff had acted with intent when he generated a false record of the beginning of his workday by asking his colleague to insert his [the plaintiff's] card into the registration device. This had happened at a time when the plaintiff had not yet been on the premises and had not even been in the supermarket. The Labour Appeals Court found that the plaintiff and Hitschfeld had both initially lied deliberately when confronted with the allegations by the defendant. The plaintiff had upheld his untruthful statements in the proceedings at the Labour Court. This had even led to a judgment on his behalf in the court of first instance. According to the facts established by the Labour Appeals Court, the plaintiff adhered to his untruthful allegations even in the appeals procedure by maintaining he had parked his car at the supermarket as early as 7:00 a.m. on October 2, 2004, and had then called H. on his mobile phone from there. The Labour Appeals Court established that this call had occurred before the plaintiff arrived at the supermarket with his car. It assumed that the unruly behaviour with intent justified a dismissal without notice and without a warning. It argued that the consideration of the interests of both parties also led to an outcome against the case of the plaintiff. The Labour Appeals Court reasoned that the registration of working hours required particular trust on the part of the employer in the integrity of his employees. In the view of the Labour Appeals Court, an employer who tolerated intentional violations such as those of the plaintiff would risk that other employees follow suit.

II. The Senate follows the Labour Appeals Court in effect and to a large extent in reasoning. The claim is ungrounded. The dismissal issued by the defendant terminated the contract of employment without notice.

1. In the revision proceedings, the plaintiff no longer admonished the consultation with the employee representatives in terms of § 72 a LPVG Northrhine-Westphalia. The grounds brought forth by the Labour Appeals Court on this point contain no error of law.

2. The Labour Appeals Court also assumed correctly that the dismissal without notice of October 6, 2003 is not invalid on the grounds of §§ 134 BGB, 85 SGB IX. The plaintiff was recognised to be handicapped with a degree of 50 percent only at a point in time after the declaration of the dismissal.

3. The Labour Appeals Court established correctly that the dismissal terminated the employment contract without notice, because of the important reason in terms of §§ 626 para. 1 BGB.

   a) It is predominantly up to the Labour and Labour Appeals Courts to decide whether the facts of a case constitute an important reason in terms of § 626 BGB. This decision entails the application of indeterminate terms of law. The review by the Federal Labour Court is restricted to the question whether the Labour Appeals Court defined the legal term incorrectly, whether it violated general principles of thought or principles derived from experience, when applying the term to the facts of the case, and whether it considered all relevant facts, that could be used to argue for or against the validity of the dismissal *(case law, see BAG April 8, 2003 – 2 AZR 355/02 – AP BGB § 626 Nr. 181 = EzA BGB 2002 § 626 Unkündbarkeit Nr. 2).* By this restricted measure of review the contested judgment shows no errors in points of law.

   b) According to § 626 para. 1 BGB either party may terminate a contract of employment without notice, if facts arise that render the continuation of the contract up to its expiry or for the duration of the period of notice inacceptable for one party. All the facts of the particular case are to be taken into account and the interests of both parties are to be considered.

The reasoning of the Labour Appeals Court that the violation of the obligation of an employee to register his working hours correctly is generally suited to constitute an important reason for a dismissal without notice in terms of § 626 para. 1 BGB and that the employer hardly has any other means of effectively controlling the working hours of his employees is not subject to an error of law *(BAG April 21, 2005 – 2 AZR 255/04 – EzA SGB IX § 91 Nr. 1, August 12, 1999 – 2 AZR 832/98 – AP BGB § 123 Nr. 51 = EzA BGB § 123 Nr. 53, under II 3 of the reasons; August 9, 1990 – 2 AZR 127/90 – RzK I 8 c Nr. 18, under II 5 of the reasons; August 13, 1987 – 2 AZR 629/86 – RzK I 5 i Nr. 31; January 27, 1977 – 2 ABR 77/76 – AP BetrVG 1972 § 103 Nr. 7 = EzA BetrVG 1972 § 103 Nr. 16; January 23, 1963 – 2 AZR 278/62 – BAGE 14, 42; ErfK/Müller-Glöge 5. edition § 626 BGB para. 158; KR-Fischermeier 7. edition § 626 BGB para. 444; Stahlhacke/Preis/Vossen Kündigung und Kündigungsschutz im Arbeitsverhältnis 9. edition para. 713).* The test is not one on the grounds of criminal law, but one based on the importance of the breach of trust in connection with the violation of duty by the employee *(BAG August 12, 1999 – 2 AZR 832/98 – l.c.)*. This applies in the case where the employer calculates the daily or monthly working hours on the basis of registered arrival and departure times as well as in the case where the employee himself adds up the hours registered by a device or in his own records. All manipulations of the registration process as well as the intentionally incorrect information in general constitute a grievous abuse of trust by the employee. This is particularly so, when the employee deceives his employer by instructing another employee to register his working hours on his behalf.

c) The Labour Appeals Court established (pg. 98 of the judgment) that the plaintiff had intentionally manipulated the registration process by asking his colleague to insert his card into the recording device at a point in time when he had not actually taken up work on the premises or even in the supermarket. It argued that the plaintiff had thus deceived the defendant about a claim to pay for a time, when no claim to pay had arisen, because the working hours of the plaintiff had actually not yet begun, even taking into consideration his varying explanations (purchase of breakfast buns). The Labour Appeals Court considered the fact proved that the plaintiff had called his colleague to ask him to register on his behalf before he had reached the supermarket.

The Senate is bound by the findings of the Labour Appeals Court, § 559 para. 2 ZPO. The plaintiff did not effectively point out any errors of law. He merely tried to replace the plausible conclusions that the Labour Appeals Court drew from the various depictions of the facts of the case by the plaintiff and the evidence, with his own, more favourable evaluation. In doing so, the plaintiff incorrectly interpreted the established facts of the case and the evidence. For example, he denied his time of arrival as confirmed by the witness to have been at +/– 7:10 a.m., and purported to have arrived at 7:04 a.m. The evaluation of the facts and especially the evidence by the Labour Appeals Court contains no error of law, even when taking into account the version presented by the plaintiff in the revision proceedings, which once again deviates from his previous depictions. The slight irregularity of the clock in the registration device, in particular, does not effectively challenge the judgment. The Labour Appeals Court took this irregularity into consideration, when evaluating the evidence.

d) The plaintiff's violation of duties established by the Labour Appeals Court is suited to constituting an important reason for a dismissal without notice in terms of § 626 para. 1 BGB. The mere act of asking another employee to register on one's own behalf is already a considerable breach of duty. The control function of a recording device, that the employee must use to register beginning, end and temporary absence during his workday, is thus rendered ineffective. The employer is led to believe that the employee was at least on the premises near the recording device at the registered point in time. The behaviour is particularly suited to justifying a dismissal without notice when the manipulation serves to create the impression the employee had started work at a time when actually he had not. The deceitful behaviour of the plaintiff appears even more severe considering that he – in his numerous varying depictions of the incident – purports to have taken up work not on the premises, but at the supermarket for work-related reasons. The course of action taken by the plaintiff was suited and designed to eliminate any control the defendant might have had of the plaintiff's arrival on the premises. The breach of duty is intensified by the fact that the plaintiff did not immediately admit his behaviour when the defendant confronted him with it, but denied that his colleague had registered on his behalf, and then impeded the discovery of the facts of the case by the Courts by his varying statements. Furthermore, the registration cards presented to the Court raised the reasonable suspicion that the incident had not been a singular one, but that the plaintiff had breached the rules in a similar way several times in the past. The plaintiff's explanation for the fact that he had not presented his colleague as a witness to the Court because of a "depressive mood" is not convincing (the medical certificate, with which the witness H excused his absence from the court hearing cites "anxiety disorder with panic attacks").

e) The Labour Appeals Court assumed without any error of law susceptible to revision that the validity of the dismissal did not require a warning. The Labour Appeals Court found that an employee, for whom a colleague had registered the entry on the premises, could not reasonably assume that his employer would merely issue a warning for such behaviour. This evaluation does not leave the scope of judgment of the court appellate court. The argument of the plaintiff that in another case the employer simply issued a warning instead of dismissing the employee is not convincing. As the Labour Appeals Court established, both cases are not comparable. Apart from the fact that the plaintiff has no right to equal treatment in this respect, his breach of duty is of such gravity, because of his initial denial, that he could not reasonably assume the defendant would react with a mere warning.

f) The balancing of the interests of the parties by the Labour Appeals Court shows no error of law. The Labour Appeals Court considered the plaintiff's vested rights on the grounds of his social status, his age, his years of service, his maintenance obligations and even his health that later led to the recognition as a handicapped person. Contrary to the depiction by the plaintiff, the Labour Appeals Court did take into account that the defendant had issued a warning previously and had thus not objected to the behaviour of the plaintiff before declaring the dismissal. The Labour Appeals Court correctly considered that the breach of duty by the plaintiff concerned a sensitive part of the employment relationship, that the defendant risked other employees following suit, if he did not react, and that the plaintiff initially denied his actions and then lied with intent on several occasions. The Labour Appeals Court did not abandon its scope of its judgment in finding that the interests of the defendant in terminating the contract of employment prevailed over the interests of the plaintiff in his employment.

III. The decision on the costs is based on § 97 ZPO.

Hungary

National report

Mr. Zoltan Nemeth
Capital Labour Court,
Budapest

1. According to the Hungarian civil procedure law in the first trial the labour court is obliged attempt to reconciliate between the parties. Shall the reconciliation fail, the labour court immediately proceeds with the first sesssion of the trial. Besides these are no other bodies involved neither before the court proceeding nor at the court. There is one other exceptional possibility for presiding judge to call either one or both parties for personal audition whose aim is to collect declarations or other written evidences for the later stage of the trial.

2. No, there is no other official involved but the judge and the two lay-members.

3. Yes, in the first instance, the composition of the court panel consits of one professional judge and two lay-members. The lay-members are not delegated either by employer's or empoyee's organisations. According to the Hungarian Constitution the lay-members have the same rights and obligations during the trials as the professional judges. In theory, they can overrule the professional judge's opinion, however in practice it is very rarely the case. The lay-members main contribution is that they conrribute with a civil point of view to the decision-making

4. In Hungary, both the decision (judgement) and its justification (reasoning) is written by the presiding judge. At the trial where the decision is made, the presiding judge reads out loud the written decision followed by a brief oral description of the justification. The presiding judge is oblige to put the decision and its justification into writing within 30 (23 days accordingly to the latest regulations) that is sent out to both parties by regular mail.

5. The Hungarian legal system is based on written law. The main sources for the decisions are the Labour Code, the Civil Procedure Act, and other particular acts The Supreme Court makes decisions in controversial issues, some of these decisions are binding for the lower courts. In the reasoning of the decisions it's common that the presiding judge makes

references to EU legislation, to previosly taken decision of the same court and to the case law but a hardly ever to the legal literature.

6. Normally the presiding judge does not express his/her personal opinion unless law provides for it. e.g. Section 100 Subssection 4 the Labour Code as a consequence of the unlawful termination of employment 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 earnings to the employee.

Judgement

The Capital Labour Court
1027 Budapest, Gyorskocsi street 52

13.M. 1672/2008/8.

IN THE NAME OF THE REPUPLIC OF HUNGARY

The Capital Labour Court

Dr. Kis Géza attorney (Kis and Co. Law Office, 1015 Budapest, Batthyány u. 3.) represented
Kovács Béla (1037 Budapest, Orbán Balázs str. 25. I/3.) plaintiff against

Dr. Kovács Pál attorney (Kovács and Co. Law Office, 1077 Budapest, Wesselényi u. 16/A.) represented
Ground Handling Hungary Ltd. (1675 Budapest, P.O. Box 122.) defendant,

decided in the process of **unlawfully termination of a working contract** the following

J U D G E M E N T:

It is determined by the court that the defendant unlawfully terminated the plaintiff's employment relationship with notice on 14 March 2008. július 29.

The court obliges the defendant to reinstate the employee in his original position.

The court obliges the defendant to pay the plantiff the court cost of the proceedings in the amount of 30.000 HUF.

The court obliges the defendant – on special call – to pay the Hungarian State registering costs int the amount of 30.000 HUF.

Time for appeal is fifteen days from the disclosure of the decision that shall be sent in writing in triplicate to the Capital Labour Court addressed to the Capital Court of Budapest.

The court informs the parties that upon common request of both parties made within the appeals deadline the appeal can be adjudge out of session. Shall the appeal refer either to the costs of proceedings or to the justification of the judgement the second instance court may adjudge out of session if none of the parties are against the judgement of the appeal out of session.

J u s t i f i c a t i o n:

The court decides the facts of the case on the basis of the following: plaintiff's complaint, defendants counterclaim, legal positions presented by the parties, witnesses István Csökli's testimony and other annexed documents.

The plaintiff started his employment as a logistical assistant at the defendant on 28 February 1994. The Trade Union of Logistical Professionals (FORTISZ) was founded on 30 October 2002. The plaintiff has been member of the Trade Union's Management Board from its start. The defendant terminated the plaintiff's employment relationship by ordinary dismissal on 14 March 2008. The reason for the notice was several times failure of the duty of appear at the workplace at the start at the daily working time.

The plaintiff made a complaint to the court to determine the lawfullness of the notice on 8 April 2008. First, he reffered to the fact that as a Trade Union's official his position is protected by law, however, the defendant failed to request the prior consent of the Trade Union. Second, he referred that the reason for the notice was not authentic. As a result, he requested the reinstatement of his employment in his original position. The plaintiff did not claim either his lost wages or other emoluments, but requested the reimbursement of the costs of proceedings.

The defendant requested the dismissal of complaint in his counterclaim. First, the defendant doubted the plaintiff's being a Management Member of the Trade Union. After the plaintiff's proved his membership as a Management Board member, the defendant first claimed that the plaintiff did not carry out activities that would reveal his position. Second, the defendant claimed that the Trade Union did not inform the defendant about its officials' identities. Furthermore, the defendant claimed that the plaintiff failed to inform about him being Trade Union official at the time of the notice. The defendant also claimed that the reason of the notice was authentic. The defendant requested the reimbursement of the costs of proceedings.

The plaintiff's complaint is lawful.

According to the Section 28 Subsection 1 of the Labour Code the consent of the immediately superior trade union body is required for the termination of any elected trade union officials *by way of ordinary dismissal. The relevant trade union body's opinion shall be requested prior to termination of the employment relationship of such an official by ordinary dismissal.*

The court examined firstly the protection of a Trade Union officials against termination of employment by ordinary dismissal.

The plaintiff provided the court with the minutes taken at FORTISZ (Trade Union) foundation meeting on 30 October 2002. Furthermore, the plaintiff provided the court with the Trade Union Chairman's Mr. Gábor Peres declaration from 4 April 2008 stating that the defendant did not request prior consent regarding the plaintiff's termination of employment. Gábor Peres, Trade Union's chairman also submitted his declaration that states the plaintiff as official of the Trade Union from its start, has been serving as financial manager since Trade Unions foundation.
In the light of the above, the court determined that the plaintiff was Trade Union official at the time of the termination of employment. Thus the court had to examine whether the defendant fulfilled its obligation referred int he Labour Code Section 28 Subsection 1.

The defendant did not claim that he requested prior consent from the Trade Union. He reffered to the Trade Union's obligation to inform the employers about official's identitiy. He also claimed that the plaintiff did not carry out activities that would reveal his position as a Trade Union official.

The court decides the following:

According to the jurisdiction, the protection by law against Trade Union's official's ordinary dismissal is an objective fact independent from the employers' knowledge. The fact that the Trade Union did nor inform the defendant about officials' identities is not relevant in this case. Furthermore, the plaintiff was not obliged to inform the defendant about his position as official of the Trade Union at the time of the notice.

The witness of the case, HR Director of the defendant, Mr. István Csökli declared that he had no information that revealed the plantiff being an Trade Union official. Had he known this fact, the notice would have never taken place. The witness, Mr, István Csökli provided the court with the correspondence between the Chairman of the Trade Union Mr. Gábor Peres and himself and concluded that the latter was not cooperative.

The court determined that the defendant should have requested the Trade Union officials prior consent. The failure to do so cannot be substituted by the correspondence á posteriori concerning Trade Union official's identity between Mr. Gábor Peres and Mr. István Csökli.

As a result, the court came to the following conclusion: The defendant terminated the plaintiff's employment relationship unlawfully. The court did not further investigate the authenticity and substantiality of the reasoning of the notice.

According to the Labour Code Section 100 Subsection 1 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. According to the Subsection 2 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. According Subsection 3 point b) the provisions of Subsection (2) shall not be applied if the employer has terminated the employment relationship of an employee under labor law protection prescribed for elected trade union representatives in violation of the provisions of Subsection (1) of Section 28.*

The court obliges the defendant to reinstate the plaintiff's employment in his original position. The court did not have to decide on reimbursement of lost wages as the plaintiff declared having received all his salaries and emolument up to 15 July 2008 and did not claim any lost wages.

The court decided that the defendant as the defeated party shall cover the costs of proceedings according to the Civil Procedure Act Section 78 Subsection 1 whose amount is aestimated on the basis of 32/2003 (VIII.22.) Ministry of Justice regulation Section 3 Subsection 2 point b).

According to the 6/1986 (VI.26.) Ministry of Justice regulation Section 2 Subsection 1 point f) the defendant as the defeated party shall cover the registry costs of the proceeding á posteriori.

The appeal is regulated by the Civil Procedure Act Section 233 Subsection 1, the adjudgement of the appeal either at or out of session is regulated by Section 256/A.

Budapest, 14. July 2008

Dr. Szabó Katalin
Presiding Judge,
on behalf of the not-signing Kocsis Géza and Kovács Péter lay-members.

Testifying the autenticity of the judgement:
Testifyer

Iceland

National report

Helgi I. Jónsson
Vice President,
Labour Court of Iceland

1. Is the case decided immeditately upon the main hearing, or is a separate session held for that purpose?

First of all it must be noticed that the role of the Icelandic Labour Court is as follows:

1. To pass judgements in cases arising on account of charges concerning violation of the present Act and loss sustained due to unlawful stoppage of work.

2. To pass judgements in cases arising on account of charges concerning violation of a work agreement or due to disagreement relating to the interpretation of a work agreement or its validity.

3. To pass judgement in other cases between workers and employers which the parties concerned have agreeed to refer to the Court, provided that the least 3 of the judges be agreed upon such að procedure.

Referring to this role of the Court dismissal cases on grounds of breach of the employers work duty are not handled in the Court but as ordinary civil cases.

As an answer to this question the general rule in the Labour Court of Iceland is that the case is decided in a separate session held for that purpose.

2. Is there a presenting official involved in the process?

The answer is negative.

3. Does the composition of your court include lay members?

According to the Act on Trade Unions and Industrial Disputes, No. 80/1938, with subsequent amendments the Labour Court consists of five persons appointed for terms of three years as follows: One by the Confederation of Icelandic Employers, one by the Icelandic Federation of Labour, one by the Minister of Social Affairs from three persons nominated by the Supreme Court and two by the Supreme Court, one of whom shall by specially nominatied to be the Presedent of the Court. Those two who are appointed by the Supreme Court shall have completed a university degree in Law.

In practice all the judges sitting on the bench have completed a university degree in Law so there is in fact no experience of using lay members in the Court.

4. To what extent does the presiding judge take part in writing the decision?

Usually it is the President of the Court who writes the judgement after the case has been pleaded verbally and the judges have have discussed the case and expressed their views on it.

5. What are the main legal sources you use in deciding a case, especially a difficult one? In the reasoning of the decision, do you make express references to legal literature, case law, previous decisions of your own court, etc.?

The main legal sources is the state law issued by the Parliament and precedents by the Court which decrees and judgements are final and will not be appealed. There is no tradition for making express references to legal literature.

6. Is it customary to express the personal views of the judge in a decision?

Upon determining awards the plurality of votes will decide issues and in case of even votes the President's vote will decide issues. In case of the decision is not unanimous the minority (one ore two judges of five) is entitled to express his/their personal view/s which is also made public.

7. Are there any further comments you wish to make on the subject?

No.

Judgement

District Court of Reykjanes
20 February 2004

[*Translated from Icelandic*]

[.....]

The plaintiff has been a ground service worker at Keflavík Airport since 1991, alternately as foreman and airport worker, first with Flugleiðir Ltd, but since 2000 with the respondent, which is a subsidiary of Flugleiðir Ltd. He was chiefly engaged in loading and unloading aircraft. He was for a number of years shop steward for the Sandgerði Workmen's and Seamen's Union, and served in that capacity when the events occurred that gave rise to this case.

[.....]

II

The plaintiff bases his claims on an alleged breach by the respondent of his legal and contractual rights as an employee and shop steward. In general terms, an adequate justification of termination of employment without notice had been lacking, and moreover, the conditions required for termination of a shop steward's employment had not been fulfilled.

The plaintiff had never, that is, for more than 11 years, been cautioned by his employer, and he had received no warning by reason of the event that caused the respondent to terminate his employment. Nor could it be seen that the respondent reasonably investigated the occurrence in question or otherwise obtained adequate information on the facts before the decision was taken to terminate the plaintiff's employment without notice.

The plaintiff absolutely denies having attacked the respondent's foreman or physically assaulted him, as the respondent asserts. The assertion that the plaintiff failed to obey his foreman's lawful instruction in the manner stated is also challenged. He had however reacted to an act of the said foreman that was unrelated to their work, with a past history stretching long back in time. Also, neither the plaintiff nor other workers had shown any reluctance in commencing work as soon as those in charge called them to do so.

[…..]

III

The respondent bases his request for being found free of the plaintiff's claims on the assertion that the seriousness of his breach made a termination of his employment necessary. By reacting to his superior's lawful order to the employees by assaulting him, striking the coffee cup from his hand and subsequently attacking him physically, the plaintiff violated his duty of obedience and loyalty to the respondent so seriously that an immediate termination of his employment, without warning, was justified.

Obeying the lawful instructions of his employer or those in directing work on his behalf is one of the chief duties of any employee. An employee who compounds a breach of this duty by physically assaulting a person directing the work, as the plaintiff had done, removes the preconditions for continued employment. The plaintiff acknowledged having walked to his superior, the respondent's foreman, stricken a coffee cup out of his hand, and demanded of him that he let the employees' television set alone. In the respondent's opinion this conduct alone involved a breach by the plaintiff, serious enough to justify rescission of his employment contract.

It would be fair to expect the respondent, as a shop steward, to evince conduct worthy of emulation and take care to observe reasonable and sound procedures at work. In this he failed so seriously that he forfeited the special protection against termination of employment which Article 11 of the Trade Unions and Labour Disputes Act, No. 80/1938, has been deemed to provide for shop stewards.

The event in question had occurred during working hours, in the presence of a large number of employees. The respondent's foreman, in his capacity as director of the work to be done, had been fully in his right to turn off the employees' television set at the moment he called them to work. The plaintiff's references to previous events and relations with the foreman are challenged as irrelevant for the resolution of this case, and also as incorrect.

The respondent furthermore bases his case on that the plaintiff should have proceeded lawfully in carrying out his duties as shop steward. His belief that he was acting in that capacity could not justify his conduct; on the contrary, it made his responsibility graver. By his unlawful conduct he had grossly exceeded his powers as shop steward. Therefore he could not base his claims on that he was exercising his lawful duties as such in the disputed instance.

It is furthermore maintained that the termination of the plaintiff's employment was totally irrelevant to his position as shop steward.

[…..]

Findings:

[…..]

It is recognised in the field of labour law, that shop stewards should provide a good example for other workers, and that the special protection they enjoy under Act No. 80/1938 will not avail them if they commit a breach of their duties at work. In the opinion of the court, his reaction in the instance in question did not befit him as shop steward. He should have used other means in order to attempt redress for the employees in their relations with the foreman. On the other hand it can not be maintained at all that the conduct he evinced and was of such seriousness, or of such nature, that his employment could justly be terminated without notice and in the absence of prior warnings. A simple warning should have been adequate in this case. It can not be accepted that his termination without notice can be traced to his duties as shop steward.

Accordingly, it is accepted that the plaintiff is entitled to compensation from the respondent on account of the unlawful termination of his employment, corresponding to full monthly wages during the notice period of three months, in addition to the period remaining of October when his employment was terminated. As noted above, the amount if this claim is not disputed, and it will consequently be awarded in the amount of ISK 529,087 in total, with interest as provided for in the Conclusion. The plaintiff's claim for vacation pay in the amount of ISK 63,861 is not disputed, and will therefore be awarded, with interest as provided for in the Conclusion. The plaintiff's claim for payments to his pension fund is not disputed as regards its amount, but the respondent considers that the relevant pension fund is the proper party to the claim. This view is sustained, and consequently the claim will not be considered in this case.

[…..]

Conclusion:

The respondent, the Keflavík Airport Service Company Ltd, shall pay the plaintiff, Magnús S. Magnússon, ISK 618,039 with overdue interest according to Chapter III of the Interest and Price Indexation Act, No. 38/2001, on ISK 39,706 from 1 November 2002 to 1 December 2002; on ISK 202,833 from that date to 1 January 2003; on ISK 365,960 from that date to 1 February 2003, and on ISK 618,039 from that date to the date of payment, and legal costs in the amount of ISK 350,000.

This judgment was affirmed by the Supreme Court 2 December 2004.

Ireland

National report

JudgeKevin Duffy,
Chairman, The Labour Court
Dublin

Question 1.

In the Irish Court there is a single hearing at which the parties adduce evidence and make submissions. Following the hearing the members of the Court have a preliminary discussion on the case. A general consensus may or may not emerge at that stage depending on the complexity of the case. If a decision is not reached the members hold a further meeting approximately one week later. Generally a decision is reached at that stage. There is no further involvement of the parties after the hearing of the case. Any further sessions are between the members of the Court who meet in private.

Question 2.

There is no presenting official in the Irish system.

Question 3.

The Court consists of members appointed on the nomination of the Trade Union Congress (Worker Members) and members appointed by the Employers Organisation (Employer Members). There is also a Chairman and a number of Deputy Chairmen who are independent of both employers and trade unions. The Court sits in divisions of three, comprising the Chairman, or a Deputy Chair, one worker member and one employer member. Under the procedural rules of the Court all members are equal and have an equal input in the decision of the Court. In reality the main input of the ordinary members is in relation to the findings of fact in a case. The application of the legal principles is generally left to the Chair of the Division.

The contribution of the ordinary member is generally constructive and while they are appointed to represent employer or worker interests they generally take an objective stance in cases and try to establish a fair result on the evidence.

Question 4.

The Chair of the Division always writes the decision.

Question 5.

The Court decides cases involving employment rights and duties by application of the relevant law. In that regard the Court must follow the applicable domestic and European law. The Court follows its own decisions, those of the higher domestic courts, and decision of the ECJ where applicable. The Court would also consider decisions of similar courts in other jurisdictions in apposite cases.

The Court regularly cites legal authority in the reasons for its decisions.

Question 6.

The Labour Court issues a single decision and no dissenting opinion is allowed.

Question 7

It may be important to point out, as I have at meetings in the past, that the Irish Labour Court has a different role to that of other European Labour Courts. In addition to dealing with disputes concerning the legal rights and duties of workers and employers it also deals with collective industrial disputes between employers and trade unions in matters of interest in respect to which there are no legal rights at issue. In the exercise of this latter jurisdiction the Court issues recommendation as to how the dispute should be resolved. The parties are not bound to accept the recommends of the Court in these cases but in practice they do accept them in almost all cases.

In matters were legal rights are at issue the Court makes legally binding decisions, which can be appealed to the High Court on a point of law.

The procedures referred to in this questionnaire related to cases involving disputes concerning legal rights.

Judgement

Employment Appeals Tribunal

[2006] 17 E.L.R. 303
Edward Murphy (claimant) v. Games Workshop Limited (respondent); UD241/2005

Court: Employment Appeals Tribunal
Judge(s):
Date: (January 17, 2006)

([2006] E.L.R. 303)

Unfair dismissal—Whether fair procedures followed—Unfair Dismissals Acts 1977 (No.10) to 2001 (No.45)

Facts

The claimant worked for the respondent as a sales assistant in its store in Blanchardstown, Dublin for around two and a half years. Over a period of time he was said to have reported late for work several times and to have failed to notify managers, as was required, when he was going to be late or absent. The claimant contended that on the days he was ill he informed his employer but that there were two occasions when he physically could not get to a phone. On February 27, 28 and 29, 2004 the claimant stated he was in hospital. He said he was too ill to contact the company and they received no correspondence regarding any illness. A number of medical certificates were furnished which were described as being vague. The claimant stated he was absent due to illness on a number of occasions and he suffered from nausea, muscle pains and he thought that he had a heart problem. He stated that no problem arose over his employment until a new manager was employed by the respondent. He felt victimised and intimidated by this manager. After the claimant stated he was in hospital he was issued with a letter of concern by the respondent. An issue then arose about the cash handling process being followed after a cash shortfall of €59.20 was discovered and warnings were given to staff. The respondent scheduled a meeting with the claimant in February 2004 over his lateness. He attended, with a representative, but the respondent's manager did not arrive. Meetings were then scheduled for April 2004, at which he received a written warning, and thereafter in July 2004. He was dismissed following the hearing in July. His representative was unable to attend the latter hearing until shortly before it concluded. The claimant stated that he did not make use of his right to appeal the respondent's decision to dismiss him as he had no faith in the company.

Determined by the Employment Appeals Tribunal:

(1) The claimant was fairly dismissed due to his unsatisfactory conduct.

(2) The employer put in place and used fair procedures in arriving at the decision to dismiss the claimant. The claim under the *Unfair Dismissals Acts 1977* to *2001* fails.

No cases referred to in the determination

The full text of the Tribunal's determination was as follows:

Respondent's case

The former manager in the Blanchardstown store told the Tribunal that he commenced employment as a sales assistant over four years ago with the respondent company. In February/March 2004 he was appointed training manager and he took over as store manager at the end of April 2004. He worked with the claimant, as sales assistant and then became a trainee manager. He encountered a few difficulties with the claimant regarding his lateness and absences. Certain aspects of the claimant's job were not completed to an acceptable standard. Any issues that the company had with an employee were discussed with them. If an employee provided poor customer service they were asked to give a reason for this and were given guidance on how to improve. At the time that he was trainee manager he gave the claimant advice on how to deal with various issues. The procedure in place for a member of staff who did not report to work at the approved time was to call the store within an hour of the start time. The claimant was aware of the procedure and the respondent clarified this with the claimant. If the store did not open for business customers became irate and the manager of the shopping centre could terminate the lease. The claimant had access to the manager's personal telephone numbers and during this time three full-time staff were employed. The claimant continued to report late for work and he did not adhere to procedures, which the store manager discussed constantly with him. The claimant was co-operative for the most part and the reasons that the claimant gave for his absences were very contradictory. He initially gave one reason and then gave another, which contradicted the original reason. Any time that he had an issue with staff he contacted the line manager or HR and obtained guidance from them. On February 27, 28 and 29, 2004 the claimant stated that he was in hospital. The claimant was too ill to contact the company and no correspondence was received from the hospital regarding the claimant's illness. The claimant furnished two or three medical certificates, which were vague. The witness issued a letter of concern to the claimant.

An issue arose with the cash handling process when a shortfall of €59.20 was discovered and he told staff to be more vigilant in dealing with money. He prepared notes for the claimant's first hearing but he did not have any further involvement in the claimant's case. He had recorded in his diary a summary of all the incidents that involved the claimant. He had more issues with the claimant than with any other employee. The claimant attended a meeting with the manager and another colleague in which he outlined to the claimant that he had nothing against him but that he had issues with him based on his performance in the store. The claimant seemed relieved with that. At that point they agreed to start afresh but after the meeting there was no improvement. A disciplinary meeting, which was scheduled to take place, had to be cancelled due to the illness of manager. The hearing was then rescheduled for another occasion. The witness heard through the grapevine that the claimant and a friend intended to batter him. The witness did not say that the claimant was going to be sacked. He was not party to the decision to dismiss the claimant. As far as he could recollect he adhered to company procedures at all times. He had no personal animosity towards the claimant. The witness left the company in June 2005.

In cross-examination the witness stated that the medical certificates, which the claimant furnished, were very vague. On one occasion when the claimant was ill the witness told him to go home. The claimant did not request a witness.

A letter was issued to all staff regarding the shortfall of €59.20.

The HR adviser was with the respondent company for the past two and a half years and told the Tribunal that she was in regular contact with the Irish operation. The company employed a staff of 120. If store managers had issues they contacted the HR, which consisted of a team of three. The procedures that the company had in place regarding meetings was that the hearing was confirmed in writing and an employee could bring a trade union member or work colleague to the meeting. A hearing that was due to take place with the claimant in April 2004 was scheduled. The information that the company used was a sequence of events including lateness and absence, policies and procedures regarding the letter of faith, which was produced at the hearing. If a member of staff were absent for a period of time their manager questioned the reason for this absence. If the illness was recurring a medical report was obtained. The company had hoped that the claimant would improve. The trainee manager was quite new to his role and he contacted HR on a regular basis and kept them informed of happenings in the store. Staff were always given 48 hours notice in advance of a meeting and staff were told verbally. The claimant had the right of appeal but he did not appeal the decision to dismiss him.

In cross-examination the witness stated that she did not give the claimant a verbal warning.

The training co-ordinator on behalf of the respondent company told the Tribunal that he was the area manager for Scotland. He was contacted in July 2004 and he brought a clear fresh perspective to the situation. He met the trainee manager at some point. On July 21, 2004 he attended the hearing accompanied by the HR manager. The evidence that he had with him was a record of the claimant's absences, which were made clear to the claimant. The training coordinator prepared a list of questions and handed these to the claimant at the meeting. Procedures were clear. The whole point was to try and improve the claimant's performance. At the time a final warning had no positive effect and he discussed it with the HR adviser. The claimant's inconsistencies were not acceptable and the onus was on the claimant to contact his employer if he was unable to attend work and this he failed to do. The training co-ordinator decided to dismiss the claimant and he told the HR director.

In cross-examination the training co-ordinator stated that he was aware of the procedures. The claimant had the opportunity to respond but he did not appeal the decision.

An area manager for the respondent company told the Tribunal that he was area manager for a group of stores and at the time of the issue with the claimant he was cell manager. A copy of a letter, which the claimant sent to the personnel department on April 27, 2004 in which the claimant outlined his grievances, was forwarded to him. He acted as company witness at a disciplinary hearing at which the claimant attended on July 21, 2004. He only participated if asked.

a question. He contacted his predecessor and spoke to him about issues. He also spoke to a former manager and he was satisfied that the claimant was dealt with in a professional manner. The witness talked to both sides. When he spoke to the claimant he was not sure that the claimant was totally satisfied.

In cross-examination the witness stated that he could not recall if the claimant was informed approximately 10 minutes before the meeting of the content. The witness agreed that as part of the respondent's policy an employee was entitled to be represented at a meeting. The claimant's representative arrived late for a meeting on July 21, 2004.

Claimant's case

The claimant told the Tribunal that the respondent company employed him. He stated that the company tried to paint a picture that he was never in work. He worked for two and a half years without a problem. The claimant was absent due to illness on a number of occasions and he suffered from nausea, muscle pains and he thought that he had a problem with his heart. He never encountered a problem until a new manager was appointed. The claimant stated that he was accused of theft and this was not dealt with. He made a comment that security was lax and his manager accused him of mentioning someone's name. The claimant demanded an apology. The claimant sent a letter to the personnel department on April 27, 2004 in which he outlined his grievances. He felt victimised and intimidated by the manager. The claimant felt that he was not given a chance and he had no confidence in the Irish company. A meeting that was due to take place around February 2004 was cancelled. The claimant contacted a former sales manager Mr B who told him that he would officiate at a meeting. The claimant attended the meeting along with a witness at 7 p.m. The claimant worked that day. The claimant and his witness waited until 9 p.m. and were not told that it was going to go ahead. The manager did not attend and it was cancelled. The meeting was rescheduled for April 30, 2004. Present at the meeting were the cell manager, the HR advisor and the claimant accompanied by a friend. At the meeting the claimant's dress code was discussed as well as his tardiness in reporting for work.The claimant said that he was not given a proper uniform or money to replace clothes. He received a first written warning. He dealt with cash as part of his duties. The claimant stated that on two occasions he was unable to get to a telephone to contact his employer. On the days that he was ill he informed his employer. There were two occasions when physically he could not get to a phone. He was given a written warning. The claimant stated that he was only late two or three times for work. As part of his duty the claimant handled cash. At the meeting on July 21 the hearing was adjourned until 2 p.m.

In cross-examination the claimant stated after a certain amount of time on sick leave he had to provide a medical certificate. The claimant stated that if he were ill he could not work. He reiterated that the manager caused him stress and he went to the doctor. He told the Tribunal that he was late only three times over two and a half years. Regarding a number of absences in May and June 2004 the claimant stated that if he were ill that he could not work. He did not have a problem with a verbal warning that he received in November 2003. When asked who informed him that he was accused of theft he responded a former manager. The claimant was informed verbally that money was missing. When asked that there was no evidence other than hearsay to suggest that he was accused of theft he responded that he made a point in his letter on April 27, 2004. He was verbally told about this and he was told that his manager investigated this at the time. Disciplinary procedure was not documented in the letter of concern but the claimant accepted that the letter of concern regarding the missing money was circulated to all staff. The only issue dealt with on April 30, 2004 related to lateness and absence. The claimant stated that his representative could not attend the meeting on July 21, 2004 until 1 p.m. and he requested that the meeting be deferred until this time. He asked for a postponement at approximately 1 p.m. as his representative was in work. He could not say exactly at what time he found out that his representative could not attend the meeting at the scheduled time. The claimant notified his representative approximately two weeks previously about the meeting. When asked why he did not appeal the decision to dismiss him the claimant responded that he had no faith in the company. The claimant stated that he did not raise the issue of theft until the morning of the hearing as he was told to give his own evidence. He sent a letter to HR, as he was unhappy.

He commenced employment five or six weeks ago as a courier and he earns €500 gross. He commenced in October 2005 and he looked for work in various places but he could not recall where. He registered with FAS but he did not attend a FAS office. The claimant was unemployed for nine months.

A witness on behalf of the claimant told the Tribunal that he attended a disciplinary meeting on April 30, 2004. On arrival at the meeting he received a letter from the cell manager regarding the claimant's treatment. The witness told the cell manager that he had previously arrived for a meeting, which did not take place. He was aware that a former manager was not coming to the meeting as the claimant had spoken to the former manager. Another company employed the witness. On July 21, 2004 he was in work and he could not leave for the meeting until after 12 p.m. He contacted the claimant and informed him that he was on his way to the meeting. When he arrived at the meeting it had commenced and at that stage everything was being finalised. And there was nothing more that the witness could say.

In cross-examination the witness stated that he was aware that the meeting on April 30, 2004 related to lateness. He did not see the letter dated April 14, 2004, which summoned the claimant to the meeting on April 30. The claimant informed him that he had to attend the disciplinary meeting on the afternoon of July 21, 2004. He was there as a witness and his role was to support the claimant. On July 21, 2004 the witness could not get time off but he was aware that he had to attend a disciplinary meeting as the claimant's representative. He contacted the claimant and told him that he would get there as quickly as he could. When the witness arrived he was not aware what was said at the meeting and everything was finalised. He was there as a witness and his role was to support the claimant.

Determination

The Tribunal has decided that the evidence shows that the claimant was fairly dismissed due to his unsatisfactory conduct. Furthermore the Tribunal finds that the employer put in place and used fair procedures in arriving at the decision to dismiss the claimant. The claim under the *Unfair Dismissals Acts 1977* to *2001* fails.

Division of the Tribunal: *Mr Guiney (Chairman), Mr Walsh, Mr Woods*

Representation

For the claimant: The claimant in person

For the respondent: *Alex White BL* instructed by *A & L Goodbody Solicitors*

Judgement

JudgeKevin Duffy,
Chairman, The Labour Court
Dublin

The Labour Court
Tom Johnson House
Haddington Road
Dublin 4

An Chúirt Oibreachais
Teach Thomás Mac Seáin
Bóthar Haddington
Baile Atha Cliath 4

ED/04/19 **DETERMINATION NO. EED062**

SECTION 77, EMPLOYMENT EQUALITY ACT, 1998

PARTIES:
A GENERAL PRACTITIONER
(REPRESENTED BY ORPEN FRANKS SOLICITORS)
- AND -
A WORKER
(REPRESENTED BY IRISH NURSES ORGANISATION)

DIVISION:

Chairman:	Mr Duffy
Employer Member:	Mr Grier
Worker Member:	Mr Nash

SUBJECT:

1. Application for redress under Section 77(2) of the Employment Equality Act, 1998

BACKGROUND:

2. The Labour Court investigated the above matter on the 4th April, 2006. The Court's determination is as follows:

DETERMINATION:

Background

The Complainant is a Registered General Nurse and a Registered Midwife. She was employed as a Practice Nurse by the Respondent between 22nd April 2003 and 20th April 2004, when her employment terminated. The Complainant contends that she was dismissed in circumstances amounting to discrimination on the disability ground.

The Respondent contends that the Complainant was employed on a fixed-term contract of one year duration. He claims that the contract was not renewed for reasons which were unrelated to the Complainant's disability and that it had never been intended that her employment would be extended beyond one year.

The Complainant referred a complaint to the Court pursuant to Section 77 of the Employment Equality Act 1998 (the Act).

Facts

The material facts, as admitted by the parties or as found by the Court are as follows:

The Respondent is a Doctor in private practice. He has been a sole practitioner for many years. At the time material to this complaint the Respondent had a large number of patients and was devoting long hours to his practice. He was contemplating retirement and with that in view was actively considering engaging another Doctor to share the workload and gradually take over the practice.

The Complainant came to work for the Respondent having previously been employed in a senior medical position with a Health Board. Her partner introduced her to the Respondent with whom he was acquainted. The Respondent appears to have been impressed by the Complainant's experience and qualifications. He considered employing her as a practice nurse to take on some of the clinical work of the practice. The Complainant was interviewed by the Respondent and his Practice Manager who is the Respondent's wife. The Respondent offered the Complainant employment on the basis of an initial one year contract which could be renewed by agreement between the parties. In the event of one party opting not to renew the contract one months notice to that effect was required.

The practice was located in premises comprising two consulting rooms. One room was used by the Respondent and the other by the Complainant. The Respondent told the Court, and the Court accepts, that he had plans to obtain a larger premises or to adapt his existing premises so as to provide a third room which could accommodate a second Doctor. These plans did not, however, materialise.

At the time the Complainant was employed the Respondent intended to employ another Doctor. In the event of his doing so he did not intend to retain the Complainant. He told the Court that this was one of the reasons why he inserted the "break" clause in the Complainant's contract of employment.

The Complainant was initially employed on a salary of €25,000 per annum. This was later increased to €30,000 per annum. Her standard working week was 20 hours but she often worked beyond her normal finishing time when the exigencies of the practice so required.

The Complainant contends that on or about February 2004 the Respondent confirmed that her employment was of indefinite duration. It appears that this arose in circumstances where the Complainant was seeking a mortgage and required confirmation from the Respondent as to her salary and employment status. The Respondent does not recall the content of the form which he signed and a copy has not been seen by the Court. However, on balance, the Court accepts that the form did contain the statement recalled by the Complainant but that it was made only for the purpose of facilitating the Complainant in obtaining a mortgage.

On 2nd March the Complainant became ill in the course of her work and was admitted to hospital. On 4th March the Complainant underwent a hysterectomy. The Complainant did not inform the Respondent of the exact nature of her illness and the initial medical certificate furnished by her Doctor merely referred to her having undergone a surgical procedure. However the Court is satisfied that the Respondent did become aware of the nature of the procedure which the Complainant had undergone. While she was on sick leave her pay was reduced by approximately one-third. This arose because the Respondent understood that the Complainant would receive Social Welfare Disability Benefit and deducted the equivalent amount from her pay.

The Respondent told the Court that shortly after the Complainant became ill he had discussed the future arrangements for the practice with his wife. They were conscious that the anniversary of the Complainant’s employment was approaching and if her contract was not being renewed they would have to give the notice required by the contract. It appears that a decision was taken to actively pursue the option of recruiting another Doctor to work in the practice. That in turn reopened the question of the accommodation in the practice. It was decided that rather than renew the Complainant’s contract in its then current terms the Respondent should offer her the possibility of working reduced hours during which she could use one of the consulting rooms at the practice when it was not being used by the proposed new recruit.

The Respondent told the Court that a letter was drafted to the Complainant setting out this offer. This was posted to the Complainant on 18th March 2004 with her wages cheque. There was a postal strike at the time and it appears that while the wages cheque was received the letter was not.

The Complainant wrote to the Respondent on 23rd March taking issue with the deduction made from her salary. This letter was hand delivered to the practice. She pointed out that she had no entitlement to Social Welfare Benefit. On receipt of this letter the Practice Manager, who was also the respondent’s wife telephoned her to discuss its content. The Complainant pointed out that because she paid PRSI contributions at a reduced rate in her previous employment she had no entitlement to State Disability Benefit.

It appears that in the course of the telephone call the Practice Manager did not enquire as to the Complainant’s state of health or indicate any concern for her well-being. This was a source of some annoyance to the Complainant. Moreover, in the course of this conversation the Practice Manager made reference to a letter which had been sent to the Complainant offering her reduced hours. The Practice Manager told the Court that due to the impending anniversary of the Complainant’s employment she needed to know if the Complainant was prepared to accept the amended terms since otherwise the employment could not be continued. She asked the Complainant for a response to the letter. On being told that the Complainant had not received the letter the Practice Manager insisted on reading its content to the Complainant over the phone.

There were significant differences of recollection between the Complainant and the Practice Manger as to what ensued. The Practice Manager contended that the Complainant made derogatory remarks concerning both herself and the Respondent. The Complainant forcefully denied having made any comments which could be so construed. The Complainant contended that the Practice Manager was impolite and uncaring regarding her illness and was belligerent. For the purpose of this determination it is sufficient for the Court to accept that there was an acrimonious exchange between the parties without the need to ascribe responsibility for that exchange.

Following this conversation the Respondent wrote to the Complainant withdrawing the offer of a reduced hours contract and giving notice of his intention not to renew the Complainant's contract. The stated reason was the Complainant's failure to accept the offer of reduced working hours. However in the course of the hearing the Respondent confirmed, and the Court accepts, that the real and dominant reason for this decision was the exchange between the Complainant and his wife. The Respondent has since employed another Doctor and has not replaced the Complainant.

Position of the Parties

The position of the parties can be briefly stated as follows:

The Complainant's Case

The Complainant contends that the Respondent would have known that the Complainant required a lengthy recuperation period of up to 14 weeks. It was submitted on her behalf that in light of this knowledge the Respondent decided to terminate the Complainant's employment. It was further suggested that in offering the Complainant reduced working hours the Respondent was seeking to coerce her into terminating her employment. The argument was advanced on behalf of the Complainant that in the absence of any reasonable explanation for the termination of her contract the Court should infer that it was because of her illness.

The Respondent's Case

The Respondent submitted that the decision not to renew the contract at issue was wholly unrelated to the Complainant's illness. The Respondent submitted that the contract terminated on the expiry of its term and it was not renewed because the Respondent intended to recruit another Doctor for whom the room used by the Complainant was required.

It was further submitted that the Respondent offered to discuss with the Complainant a reduced hours contract which would have made it possible to accommodate both her and another Doctor in using the same room. However following the altercation between the Complainant and the Practice **Manager it was decided to withdraw that offer.**

The Law Applicable

The Respondent does not deny that the Complainant's illness constitutes a disability within the meaning of Section 2(1) of the Act.

Article 2 of Directive 2000/78 (Equal treatment in employment and occupations) provides that the principle of equal treatment shall mean that there shall be no direct or indirect discrimination <u>whatsoever</u> on the grounds of disability (*emphasis added*). It is well settled that in interpreting national law the Court must do so in light of the wording and purpose of a Directive so as to achieve the result pursued by the Directive (see *Marleasing S.A. v La Commercial Internacional de Malimentacion S.A.* [1990] ECR 4135). While the events giving rise to this complaint occurred before Directive 2000/78 was transposed into Irish law, the recent Decision of the ECJ in Case C-144/04 *Mangold v Helm* [2006] IRLR 143, makes it clear that this rule of harmonious interpretation applies from the time a Directive enters into force.

Thus if it is established that the decision not to renew the Complainant's contract of employment was in any sense whatsoever based on her disability she would be entitled to succeed. In that regard it matters not that the Respondent was contractually entitled not to renew the contract. If the exercise of that entitlement was influenced by the Complainant's disability the decision would be tainted by discrimination and unlawful.

Burden of Proof

It is now well settled that in cases of discrimination it is for the Complainants to prove the primary facts upon which they rely in asserting that they have suffered discrimination. If those facts are proved and they are regarded as sufficient to raise an inference of discrimination, the onus shifts to the Respondent to prove the absence of discrimination. In all cases the standard of proof is the normal civil standard; that is to say the balance of probabilities.

Conclusions of the Court

The only issue for consideration by the Court is whether the Respondent's decision not to continue the Complainant's employment was influenced by her disability. The Court is not required to decide if the Complainant was unfairly dismissed or if the Respondent acted unreasonably in not renewing her contract. If the Court was concerned with those questions, by the application of normal standards of reasonableness, the Respondent might have some difficulty in justifying the manner in which he came to the decision to terminate the Complainant's employment.

It is for the Complainant to prove, as a matter of probability, the primary facts upon which she relies in asserting that the decision to terminate her employment was tainted by discrimination on grounds of her disability. The putative facts relied upon are, in essence, that the impugned termination occurred while she was absent due to illness and following her complaint concerning sick-pay. It is further alleged that the Respondent acted unreasonably in withdrawing the offer to continue the Complainant's employment on reduced hours without giving her any or any adequate opportunity to consider the offer.

The coincidence in timing between the termination of the Claimant's employment, her illness and the telephone conversation of 23rd March may give rise to some suspicion. However, these events must be viewed in context. The anniversary of the Complainant's employment was 21st April 2004. It was at this time that the break clause would operate. The Respondent was required to give one months notice if the contract was not being renewed. The Court accepts that the Respondent was contemplating engaging another Doctor to assist in the practice and this would have impacted on the amount of time that the Complainant could work at the practice. The Respondent was thus required to make a decision on the Complainant's future employment by the end of March 2004 at the latest.

With regard to the assertion that the Respondent was motivated in terminating the Complainant's employment by the prospect of having to pay her salary during her recuperation, it is of some relevance that the Respondent was not contractually obliged to pay sick pay during this absence. If the Respondent was concerned not to incur the costs of paying the Complainant during this period he could have lawfully declined to pay her salary during her absence. Equally, the mere absence of the Complainant from the practice could not credibly be suggested as a motive for the impugned decision since the Respondent did not replace her and has not since found it necessary to engage a practice nurse. Moreover, it is clear on the evidence that the decision to offer the Complainant continued employment on reduced hours, which was later withdrawn, was made in the knowledge of the nature of her illness and the likely recuperation time which she would require. Such an offer would not have been made if the Respondent considered these factors to be an impediment to the Complainant's continued employment.

The Court accepts that the reason given by the Respondent for the decision not to renew the Complainant's contract, namely the altercation between her and his wife, is not a good or reasonable reason for a dismissal. In considering that aspect of the case the Court has had regard to the Judgment of O'Sullivan J in *Mulcahy v Minister for Justice Equality and Law Reform and Waterford Leader Partnership Limited* [2002] 13 ELR 12.

This was an appeal to the High Court against a decision of this Court under the Employment Equality Act 1977. In that case the Complainant contended that her dismissal was on grounds of her pregnancy. The Court found that the employer had acted unfairly and unreasonably in relation the dismissal but it nonetheless declined to infer from this fact alone that the real reason for the dismissal was her pregnancy. Counsel for the Complainant in that case submitted that because the Labour Court had acknowledged that the employer may have acted unfairly and unreasonably in relation to the explanation offered, as a matter of law it was bound to reject such reasons as being clearly not the real reasons. Thus the Complainant contended that the Court was left with the only other candidate for the real reason, namely pregnancy. In dealing with the submissions that the Court had erred in law in that regard the Judge said the following:

"I do not, in fact, agree that it is erroneous either in law or in logic to say that because a person offers a bad reason this necessarily means that the bad reason is not the real one. Rather that seems to me a commonplace observation: one may well truly give as ones reason for dismissing an employee the fact that one doesn't like her. This 'bad' reason may well be repugnant, precisely because it is the real reason. In my view that is all the Labour Court is saying in the sentence under analysis".

Having regard to the countervailing factors which it has found in this case, the Court does not consider that the coincidence of the Complainant's illness and the termination of her employment are of sufficient significance to raise an inference of discrimination. Further, the Court is satisfied that the unreasonableness of the Respondent's response to the altercation between the Complainant and his wife is not, in itself and without more, sufficient to raise an inference of discrimination.

In these circumstances the Court has come to the view that the Complainant has failed to prove facts from which discrimination may be inferred. Accordingly she cannot succeed.

Determination

It is the determination of the Court that the Respondent did not discriminate against the Complainant. The complaint herein is not well founded and the complaint is dismissed.

Signed on behalf of the Labour Court

Kevin Duffy

24th April, 2006
JB.

____
Chairman

NOTE

Enquiries concerning this Determination should be addressed to Jackie Byrne, Court Secretar is be addressed to Jackie Byrne, Court Secretary.

National report
The Equality Tribunal, Ireland

Introduction

The Equality Tribunal is the specialist first-instance forum for claims of discrimination in the workplace or in access to goods and services. Under its governing legislation, the Tribunal hears or mediates cases brought by employees or service users. Claims of discrimination may be made on 9 grounds: gender, marital status, family status, age, disability, sexual orientation, religion, race (including nationality) and membership of the Traveller community. Tribunal members sit alone (i.e. not in tri-partite session). Their decisions must be in writing, must give reasons and must be published. A database of all Tribunal decisions can be found on the website www.equalitytribunal.ie

As the specialist court for employment-related discrimination, the Tribunal can hear claims in relation to access to employment, equal pay, equal treatment, harassment and sexual harassment, victimisation, dismissals (where the dismissal is alleged to have been for discriminatory reasons) and pensions. The Tribunal's decisions are legally binding but may be appealed to the Labour Court.

The Tribunal also hears claims alleging discrimination in relation to provision of goods and access to services in relation to access to places, facilities for finances, entertainment and transport, access to education, and the provision of health and accommodation services. The Tribunal's decisions are legally binding but may be appealed to the Circuit Court.

SPECIFIC QUESTIONS:

1. *Is the case decided immediately upon the main hearing, or is a separate session held for that purpose?*

   The case is not decided immediately upon the main hearing. By law the decision must be in writing and must give reasons. It is normally sent to the parties by post after the hearing.

2. *Is there a presenting official involved in the process? If yes, please describe the formal and factual role of the official.*

There is no presenting official involved. The Tribunal hears both sides – the claimant and any witnesses, and the respondent (employer/service provider) and any witnesses. Either party may be represented or may attend on their own.

3. *Does the composition of the court include lay members? If yes, please give a description of their role in the deliberation leading to the decision, with a view to the interplay between the chair and the lay members. What is in your experience the main contribution of the lay members in the decision-making process?*

The Tribunal sits as sole members; there is no tripartite system of chair and members. The person hearing the case (called by law an Equality Officer) sits alone to hear a case. Indeed, because of the scarcity of administrative resources, there is no provision for a "court clerk" or other record-keeper.

Equality Officers are not required to be legally qualified although in practice a majority either possess or are acquiring legal qualifications. All of them have received a very high degree of specialist legal training and almost all are also professionally accredited as mediators.

While Equality Officers may seek advice on complex aspects of legislation or case law, their contribution to the decision-making process is 100%.

4. To what extent does the presiding judge take part in writing the decision?

The Equality Officer is solely responsible for writing his/her own decisions. The governing legislation clarifies that equality officers are entirely independent in hearing and deciding a case (section 75, Employment Equality Acts 1998-2004).

5. *What are the main legal sources you use in deciding a case, especially a difficult one? In the reasoning of the decision, do you make express references to legal literature, case law, previous decisions of your own court, etc.?*

a. Main legal sources: apart from Irish statutes and European Directives, we use precedents from relevant Irish case law (Labour Court, High Court, Supreme Court), European Court of Justice cases, and we take note of persuasive case law from other jurisdictions, notably the UK.

b. Express references: yes, we make express references to legal literature, case law, previous Tribunal decisions, etc.

6. *Is it customary to express the personal views of the judge in a decision?*

Tribunal decisions are written directly by the judge and include a summary of the relevant evidence and a record of his/her conclusions. It is customary to avoid personalising the decision.

7. Are there any further comments you wish to make on the subject?

No.

Judgement

The Equality Tribunal, Ireland

The Employment Equality Act 1998

Decision No: DEC-E2007- 040

Shelley -v- Europa Hotel

File No: EE/2005/099
Date of issue: 13 July 2007

TABLE OF CONTENTS

1. CLAIM

1.1 The case concerns a claim by Ms. Mary Shelly that the Europa Hotel, Co. Louth, discriminated against her on the gender ground in terms of section 6(2)(a) of the Employment Equality Act, 1998 in contravention of section 8 of the Act in relation to her dismissal.

2. BACKGROUND

2.1 The complainant claims that she was discriminated against on the gender ground in that she was dismissed due to her pregnancy. The respondent submits that the complainant was granted health and safety leave and that it only issued the complainant's P45 to her as she had not indicated her intention to return to work after the cessation of her maternity leave. The respondent denies that it discriminated against the complainant on the gender ground.

2.2 The complainant referred a complaint under the Employment Equality Act 1998 to the Director of the Equality Tribunal on 23 March 2005. On 19 September 2006, in accordance with her powers under section 75 of that Act, the Director delegated the case to Mary Rogerson, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part VII of the Act. A submission was received from the complainant on 31 August 2006 and from the respondent on 4 October 2006. A joint hearing of the claim was held on 27 June 2007.

3. SUMMARY OF THE COMPLAINANT'S SUBMISSION

3.1 The complainant submits that on Wednesday, 28 May 2003, she informed the Manager of the respondent hotel (Mr. R) that she was pregnant and she was asked to state it in writing which she did. She also undertook to provide details in writing from her doctor. She submits that on Friday, 30 May 2003 after giving Mr. R her note stating that she was pregnant, he told her it would be in her best interest to quit the job or go on sick leave as she was working part-time casual at the time. He then told her to go home and think about it.

3.2 The complainant submits that she and her husband went back to the hotel the same evening, Friday, 30 May 2003 after she had got advice on the matter. She was advised to seek health and safety leave and when she raised this with the Manager, he replied that he would have to speak to Mr. C, the owner of the hotel. She submits that she was not informed at the time that he had already replaced her with a Chinese girl for the shift the next day. She submits that Friday, 30 May 2003 was the last day that she worked once the Manager found out that she was pregnant.

3.3 The complainant submits that on Tuesday, 3 June 2003, she submitted an official note from her doctor confirming that she was pregnant. On Thursday, 5 June 2003, she submitted a health and safety form to be filled in. She inquired about the form many times and she was repeatedly told next week by the Manager. He told her there was nothing he could do and to contact, Ms. E, the bookkeeper to whom it had been given. The complainant submits that when she contacted, Ms. E, she was informed that the form was on her desk but that she did not have time to fill it in.

3.4 The complainant submits that when she reviewed the form, the dates were incorrect and when she contacted Ms. E, she refused to change the dates and she told her she was not entitled to 21 days health and safety leave as she could not get paid for days that she had not worked. She submits that she approached Mr R to advise him that the form was incorrectly completed and he said he could not do anything. She submits that she was eventually paid health and safety leave on 26/06/03 and 03/07/03. She states that she was absent for over a month before she received the pay and she submits that during this time, she had been trying to obtain her annual leave and holiday pay.

3.5 The complainant submits that on 9 November 2003 she started her maternity leave and it was due to finish on 15 March 2004. She submits that she posted a letter dated 12 February 2004 to the respondent to inform them of her return. She submits that on 16 March 2004, her husband handed in a doctor's note stating that she would not be able to return to work until further notice. She submits that the letter was left with the head barman as the reception was closed.

3.6 The complainant submits that she had contacted the respondent in relation to her entitlements under the Maternity Protection Act and no one assumed responsibility in relation to her queries. The complainant claims that on 24 April 2004, the respondent was informed that she would be taking proceedings to a Rights Commissioner. She submits that she was given a date for hearing of 10 September 2004 and that during the intervening period, she had been sending in sick notes. She submits that at the hearing before the Rights Commissioner, all the monies owed were settled and from her perspective, when she got clearance from her doctor, she would return to work..

3.7 The complainant submits that on 17 October 2004, she arrived home from holidays and she received a postal note in relation to a registered letter. She was subsequently informed by the postal authorities that the letter was from the respondent and it had been returned to them. The complainant submits that on Tuesday, 19 October 2004, she received an unregistered letter containing her P45. The date of leaving was stated to be 23 February 2004 which was during her maternity leave. She submits that the letter stated that they never received her return to work note and they considered that she dismissed herself. She submits that this was the case even though they continued to receive her sick certs and they never implied that she was out of work at the Rights Commissioner’s hearing. She submits that her last sick note was dated 1 October 2004.

4. SUMMARY OF THE RESPONDENT’S SUBMISSION

4.1 The Manager of the respondent submits that the complainant informed him that she was pregnant and was unable to carry out the duties that were expected of her in her position. He submits that he spoke to the complainant as a friend and he informed her that her health and her baby’s health were more important than the job and that she should consider leaving or claiming sick benefit for the safety of herself and her child.

4.2 The Manager submits that he met the complainant and her husband in the hotel on the same evening. They advised him that they had contacted the Equality Department and were advised to claim Health and Safety leave. He informed them that he would speak to the proprietor of the hotel and when he did, it was arranged there and then. He accepts that the complainant was replaced as he needed someone to make beds, hoover and do general cleaning.

4.3 The respondent submits that on 5 June 2003, he received a letter from the complainant dated 29 May 2003 stating that she was unable to carry out her duties. The respondent submits that he had no difficulty with the complainant being pregnant but for her safety, they could not allow her to work because her letter stated that she could not perform her duties.

4.4 The respondent submits that from her last weekly wage, there was only a gap of one week before her health and safety leave was paid. The respondent submits that her health and safety leave was sorted out as soon as possible and the complainant’s statement that it took weeks is incorrect. The complainant was not over a month without wages.

4.5 The respondent states that a medical certificate was handed in on 16 March and it stated that the complainant was unfit for work until further notice. Company policy is that medical certificates are to be submitted to the respondent on a weekly basis. It submits that it let the matter go as the complainant was not long after giving birth. On 21 April 2004 after a month in which there was no contact from the complainant, they sent her the details of the company policy in relation to medical certificates. The next medical certificate received was dated 1 August 2004.

5. CONCLUSIONS OF THE EQUALITY OFFICER

5.1 In this case, the complainant alleges that the respondent directly discriminated against her on the gender ground in relation to her dismissal. She alleges that the respondent discriminated against her when it advised her to pack in her job or go sick and that she was eventually dismissed from her job. I will consider whether the respondent directly discriminated against the complainant on the gender ground in terms of section 6(2)(a) of the Employment Equality Act, 1998 and in contravention of section 8 of the Act in relation to her dismissal. In making my Decision in this case, I have taken into account all of the evidence, both written and oral, submitted to me by the parties.

5.2 Section 6(1) of the Employment Equality Act, 1998 provides that:

"*Discrimination shall be taken to occur where, on any of the grounds mentioned in subsection (2) (in this Act referred to as "the discriminatory grounds"), one person is treated less favourably than another is, has been or would be treated*."

Section 6(2) provides that as between any two persons, the discriminatory grounds are, inter alia:

(a) that one is a woman and the other is a man (in this Act referred to as "the gender ground"),

European Court of Justice jurisprudence in relation to pregnancy discrimination

5.3 The European Court of Justice established a number of years ago in a case which concerned the refusal to appoint a woman on the grounds of her pregnancy that pregnancy discrimination was direct discrimination on grounds of sex and stated:

"*... only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex.*"[7]

In Webb, a case which concerned dismissal whilst pregnant, the European Court of Justice stated:

"*there can be no question of comparing the situation of a woman who finds herself incapable, by reasons of pregnancy ... of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons. … pregnancy is not in any way comparable with a pathological condition,*"[8]

5.4 A number of years later, the Court went on to find that:

"*... protection against dismissal must be afforded to women during maternity leave, the principal of non-discrimination, for its part, requires similar protection throughout the period of pregnancy. ... dismissal of a female worker during pregnancy for absences due to incapacity for work resulting from her pregnancy is linked to the occurrence of risks inherent in pregnancy and must therefore be*

[7] Decker v. Stitching Vormingscentrum voor Jong Volwassenen Plus Case C-177/88 8 November 1990 para 12

[8] Webb v. EMO Air Cargo (UK) Ltd Case C-32/93 14 July 1994 paras 24 and 25

regarded as essentially based on the fact of pregnancy. Such a dismissal can affect only women and therefore constitutes direct discrimination on grounds of sex."[9]

The Court continued:

"*... where a woman is absent owing to illness resulting from pregnancy or childbirth, and that illness arose during pregnancy and persisted during and after maternity leave, her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave cannot be taken into account for computation of the period justifying her dismissal under national law. As to her absence after maternity leave, this may be taken into account under the same conditions as a man's absence, of the same duration, through incapacity for work.*" [10]

5.5 Whilst these cases related to appointments and dismissals, the approach adopted in these cases has also been recognised as extending to the terms and conditions of employment. The European Court of Justice has stated:

"*It must therefore be held that a woman who is accorded unfavourable treatment regarding her working conditions, in that she is deprived of the right to an annual assessment of her performance, and, therefore, of the opportunity of qualifying for promotion as a result of absence on account of maternity leave, is discriminated against on grounds of her pregnancy and her maternity leave. Such conduct constitutes discrimination based directly on grounds of sex within the meaning of the Directive.*"[11]

5.6 Whilst the Court has acknowledged the special circumstances which pregnant employees find themselves in and recognised that special protection should be afforded to such women, it also acknowledged that such special protection cannot prevail for an indefinite period and that it ceases at a particular point in time. Thus a female employee is protected from less favourable treatment that results from her pregnancy throughout the pregnancy and all the way through to the end of her statutory period of maternity leave.

The complainant's dismissal

5.7 The Manager on behalf of the respondent in this case accepts that when the complainant informed him in writing on 30 May 2003 that she was pregnant and that she could not pull or lift anything heavy or hoover, he said that she should consider leaving or claiming sick benefit for the safety of herself and her child. Later that evening, the complainant raised the issue of health and safety leave with the Manager and the matter was left in abeyance with the complainant anticipating that the Manager would revert to her once he had checked the position with the owner. The complainant stated that later on 3 June 2003, she submitted a note from her doctor confirming that she could not do certain tasks during the course of her pregnancy. Another person was employed to do the complainant's duties the day after she gave the respondent a written note confirming that she was pregnant. That person was a

[9]Brown v. Rentokil Ltd. Case C-394/96 30 June 1998 para 24

[10]Brown v. Rentokil Ltd Case C-394/96 30 June 1998 para 27

[11]CNAVTS v. Evelyne Thibault Case C-136/95 30 April 1998 para 32

casual in the hotel and she was transferred to the complainant's duties the next morning. The complainant heard about her replacement and did not attend for work or enquire about whether there was work for her. The complainant did not have regular hours each week and worked depending on the respondent's requirements. Subsequently, the complainant was paid three weeks health and safety leave (75hours) by her employer based on an average of the hours worked over the previous thirteen weeks.

5.8 The complainant was due to return to work from her maternity leave on 16 March 2004. The respondent disputed receiving the complainant's letter indicating that she was due to return to work. On 16 March 2004, the complainant subsequently handed in a medical certificate dated 15 March 2004 indicating that she was suffering from post natal depression and was unable to attend work until further notice. The respondent wrote to the complainant on 21 April 2004 advising her that the company policy was to submit medical certificates on a weekly basis. The complainant also submitted medical certificates dated 1 August 2004 and 1 October 2004 indicating that she was unfit for work until further notice. The complainant was dismissed from employment by letter dated 24 September 2004 and the reason for the dismissal is stated to be her failure to follow procedure in notifying the respondent one month prior to the date of the end of her maternity leave (16 March 2004). That letter refers to such a requirement being "*stated clearly*", however, there is no reference to where it is stated clearly. The respondent did not submit any policies in support of its actions and it confirmed that there was no written policy in relation to providing medical certificates and it did not have a maternity policy.

5.9 The Manager of the hotel submitted that there was no malice in the statement he made to the complainant when she told him that she could not do certain duties and he was speaking to her as a friend when he said she should consider leaving or claiming sick benefit. The actions of the respondent were not compliant with fair procedures and good practice. It did not have any policies to refer to or to refer the complainant to when she indicated that she was pregnant and could not perform certain duties. In relation to the complainant's dismissal, the reason is stated to be her failure to give written notice of her intention to return one month prior to the return date. The complainant was clear that she had posted a letter to the respondent on 12 February 2002 and provided a copy of that letter which is undated. The complainant submitted that on 16 March 2004, her husband handed in a note and medical certificate indicating that she was unable to attend work until further notice. The respondent received the complainant's medical certificate. It would seem logical that if the respondent was not expecting the complainant to return to work on that date that it would raise the issue with her. However, the respondent did not communicate with the complainant until 21 April 2004 when it informed her that it was company policy to supply medical certificates on a weekly basis.

5.10 In a case where the employer assumed that because the employee was pregnant and moving to live in another part of the country, she was resigning from her employment and where the employee assumed that her employer knew that she would be returning to work, the Labour Court held:

This confusion should have been clarified by the parties. Nevertheless, the greater onus was on the employer. …, there was an onus on the employer to clarify the *situation and to seek confirmation of her resignation particularly as the employee was pregnant and on maternity leave at the time of the purported termination of employment. …. The entire period of pregnancy and maternity leave is a special protected period during which both the Equal Treatment Directive 76/207 and the Pregnancy Directive 92/85 prohibit pregnancy related dismissal on grounds of equality.*[12]

5.11 The respondent did not communicate with the complainant between April and September 2004. On 24 September 2004, the respondent wrote to the complainant and dismissed her on the basis that she did not give notice of her intention to return to work one month prior to the end of her maternity leave. The letter states that as at 16 February 2004, no notice was received and the company therefore assumed that she had decided to leave her employment. At the hearing, the respondent submitted that the reference to February was an error and the letter should have stated 16 March 2004. The statement in the letter dated 24 September 2004 is not consistent with the respondent's letter of 21 April 2004 when it treated the complainant as being in employment and informed her that she should supply medical certificates on a weekly basis. The complainant's P45 which is dated 6 October 2004 refers to the date of leaving as being 23 February 2004.

5.12 In a case which concerned a complainant who had been on sick leave for a considerable period prior to commencing her maternity leave and where the respondent refused to sign a form confirming to the Department of Social Welfare that she intended to return to work and informed her that her employment was terminated, the Labour court held:

Regardless of whatever misunderstanding may have existed in relation to medical certificates, the respondent should have been alert to the possibility that the complainant's absence from work was attributable to her pregnancy. A prudent employer acting reasonably would, at least, have sought to ascertain the true position before treating the complainant's employment as having come to an end. Having regard to all of the evidence the Court is satisfied that he complainant's employment came to an end by dismissal when the respondent treated her as having abandoned the employment by being absent from work due to a pregnancy related illness. There is an abundance of authority for the proposition that dismissal in such circumstances amounts to direct discrimination on grounds of gender.[13]

5.13 In this case, the complainant did not return to work after her maternity leave had ended and she remained absent on sick leave. The respondent did not make any attempt to clarify the position with regard to the complainant's return to work and by letter dated 24 September 2004, the respondent sought to dismiss the complainant retrospectively to the date that she was due to return from maternity leave by reason of her failure to give notice of her return to work. The complainant's dismissal is clearly referable to a protected period of employment arising from pregnancy and I therefore find that the complainant has established a *prima facie* case of gender discrimination in relation to her dismissal which the respondent has failed to rebut.

[12] Dollymount Creche & Montessori School v. Siobhan Finnerty ED/01/22 Determination No. 034 28 January 2003

[13] Parcourt Limited t/a Café Vienna v. A Worker ED/00/18 Determination No. 0211 15 November 2002

5.14 The complainant's working hours varied from week to week, however, the respondent paid her health and safety leave for three weeks on the basis of 25 hours per week which was based on an average of the hours worked in the preceding thirteen weeks. When she was paid her holiday and bank holiday entitlements in September 2004, she was paid on the basis of €7.00 per hour. I have taken these calculations into account when determining appropriate compensation. It is also the case that in awarding compensation, I am constrained by the amounts earned by the complainant.

6. DECISION

6.1 On the basis of the foregoing, I find that the respondent discriminated against the complainant on the gender ground in terms of section 6(2)(a) of the Employment Equality Act 1998 contrary to section 8 of the Act in relation to her dismissal.

6.2 In accordance with section 82(1) of the Employment Equality Act 1998, I hereby order that the respondent:

(i) pay the complainant the sum of €10,000 compensation for the effects of the discrimination. (This award relates to compensation for distress and breach of rights under the 1998 Act and does not contain any element of lost income and is not therefore subject to tax);

(ii) pay interest at the Courts Act rate on the amount of compensation in respect of the period beginning on 24 September 2004 (the date of the respondent's letter to the complainant dismissing her) and ending on the date of payment.

____

Mary Rogerson
Equality Officer
13 July 2007

Israel

National report

Judge Steve Adler,
President,
National Labour Court of Israel

[1] The stages of hearing such a case in the trial instance (the Regional Labour Court) are as follows:

- The petition is filed in the Regional Labour Court
- The Respondent must file his defense within 45 days.
- The Registrar requires the parties to submit all their direct testimony in affidavits and also all documents they intend to submit during the trial.

- The Court holds a preliminary hearing before a Registrar to set the agreed facts, questions in dispute and explore the possibility of reaching an agreement.
- In some cases the parties are referred to mediation, which is done in the court building by lay members trained in mediation. If a substantial amount is involved, the parties are referred to mediation by a private mediator. All mediation is by agreement of the parties and if they do not want it, they do not have to participate in the mediation.
- The hearing is held before a judge and two lay members, all evidence is heard and the parties generally summarize orally. Sometimes, the Court requires written summaries, which are submitted about 30-60 days after the hearing
- A judgment is often written on the day the hearing is completed, but many judges write their judgments weeks or months after the hearing. The judgments are sent to the parties by regular mail. When time is important the judgment is sent to the parties by e-mail or fax. No special hearing is necessary for handing down judgments.

[2] Israel has the Anglo-Saxon adversary legal system, with each party presenting his case.

[3] The Regional Court sits with a judge, one lay member from labour and one from management. The National Labour Court sits with three judges, one lay member from management and one from labour. In very important cases the President may expand the bench, so that two lay members from each side participate. The judge conducts the hearing, but lay members may ask questions. The lay members have the same vote as the judge and may even write their own opinions. Generally, the judge reviews the case with the lay members before the trial and during the decision making process.

My experience is that the lay members contribute from their experience and knowledge, making the judgments practical and acceptable at the work place.

[4] In the Regional Court the presiding judge writes the judgment. Lay members may agree or write their own judgment. Most judgments are unanimous. When there is a disagreement both the majority and minority opinions are handed down.

In the National Court one of the three judges writes the opinion. Lay members may write their own opinion. There may be concurring opinions or dissenting opinions.

[5] The binding legal sources on which judgments may be based are: the Israeli (partial) constitution; statutes; regulations; case law; collective agreements and individual labour contracts. When the judgment is important the court often refers to European and American law, such as the European Court of Justice and the European Court for Human Rights. Sometimes the National Labour Court refers to judgments and statutes of other European labour courts.

[6] Judges express their personal views in judgments when they speak of policy and norms. This is not necessarily personal views, but accepted values and practices. It can often be understood from the judgment what the judge thinks of a parties' behavior or a controversial statute or agreement. In rare instances the court or judge will express the opinion that a law or statute should be amended or changed and order the judgment sent to the proper government body (usually the Attorney General).

The National Labour Court decides on many policy issues and the judges will express their personal views, such as the need to protect "migrant" workers.

[7] One problem of the trial court judges (the Regional Labour Court) is how much time to dedicate to each case, how much to allow the parties to cross examine, to decide what evidence is relevant – in general, to conduct the hearing. At the appellate level (the National Labour Court) only arguments are heard, no witnesses, so that the control of the hearing is mainly by deciding how much to allow the attorneys to argue. Generally, most of the hearing in the appeal court consists of questions which the judges ask the attorneys, since the parties have filed written briefs which explain their arguments.

Another problem which judges must deal with is how long their judgments should be, since there are too many cases to write a long judgment in each case.

Judgement

National Labour Court of Israel
Case 456/2006
Tel Aviv University – Rivka Elisha

Facts:

Mrs Rivka Elisha (hereafter: Rivka), who has a Masters degree in social work, began working in the Dean of Students' office in 1989. In 1992 she became head of the department in the Dean's office which was responsible for administering the budget of the Dean's office, recruiting workers for the office, assisting students, administering grants to students and providing advice. In 2000 Rivka was appointed assistant to the Dean of Students.

A new Dean of Students' was appointed in 2001. Rivka and the new Dean did not get along and there was a series of incidents and disagreements. Rivka claimed that she was performing her work as usual, while the Dean accused her of disobeying instructions. In May 2003 the Director General of the University summoned Rivka for a disciplinary hearing, which culminated in Rivka's suspension from her work.

Rivka filed a case with the Tel Aviv Regional Labour Court, petitioning to be reinstated to her regular position. This is the trial instance of the Labour Courts. There are Regional Courts in Jerusalem, Tel Aviv, Haifa, Nazareth and Beer Sheva. The court sits with one judge and two lay members, one from management and one from labour. At the court hearing the judge suggested that the parties have a mediation session with a court mediator, which does not involve cost to them. A mediation session took place but the parties failed to reach an agreement.

The hearing before the Regional Court continued and the University said it was considering dismissing Rivka. She then petitioned the court to forbid the University from continuing with the dismissal procedure, but her petition was denied.

On January 12, 2004 the Director General of the University sent Rivka a letter that she was dismissed, as of January 17, 2004.

On January 13 Rivka petitioned the Tel Aviv Regional Labour Court to prohibit her dismissal. This petition was heard together with her existing case and it was agreed that the court would decide on all petitions in its' final judgment. This turned out to be a mistake, since the parties brought several witnesses, there were about 4 sessions and the last witnesses were hearf about one year later. Generally, there is a brief session to decide on the temporary injunction and the judgment is given shortly after the case was filed. However, since the parties agreed to combine the temporary and final petitions, the judgment was handed down about two years after the case was filed.

Regional Court judgment:

The Regional Court judgment, handed down in May 2006, accepted Rivka's petition and ordered the University to return her to her regular position in the Dean's office, to pay her a sum equivalent to the salary she would have earned during the period between her dismissal and return to work and also to pay her 50,000 IS (about 10,000 Euro) for grief caused her and 75,000 IS (about 15,000 Euro) court costs..

Appeal to the National Labour Court and its' judgment:

The University filed an appeal to the National Labour Court and also petitioned for a delay of returning Rivka to work and making the payments, until judgment is handed down by the court. This highest appeal court in the Labour Court system sits in panels of three judges and two lay members, one from labour and one from management.

At the National Labour Court preliminary hearing the judge suggested that the parties negotiate a settlement and try to return Rivka to a suitable position not in the Dean's office. The negotiations continued from December 2006 until October 2007, during which a few "preliminary hearings", mediation sessions, were held before a National Labour Court judge who tried to assist them to reach an agreement. Those participating in these mediation hearings were the attorneys, Rivka and a senior official of the University. Unfortunately, the parties failed to reach an agreement. The University offered Rivka to return to several positions, but Rivka claimed they were of a lower rank than her regular position.

The National Labour Court judgment, handed down in February 2008, held as follows:

[1] The Court upheld the Regional Courts finding that Rivka's dismissal was unlawful. The entire panel held that the dismissal was unlawful because the procedures set down in the collective bargaining agreement were not followed and the hearing before the Director General was faulty. Rivka should have been given a notice why she was being dismissed and told that the meeting was to allow her to convince the administration they she should not be dismissed. One judge's opinion said that Rivka had done nothing wrong which would justify her dismissal. Another judge wrote that the distrust and bad working relationship between Rivka and the dean justified separating them. It was not unreasonable for the administration to keep the dean in her position and transfer of dismiss Rivka. When there develops a relationship between a worker and her supervisor which prevents them from functioning properly, the employer may dismiss one of them. This is possible, even when both of them are good workers, because of the necessity of the work being carried out properly. Who was "right" or "wrong" in their deteriorated relationship was not relevant. The administration could legitimately decide on the basis of ensuring that the conflict between Rivka and the dean did not disturb the proper functioning of the dean's office. The importance of a workplace functioning properly is a legitimate consideration which management may base its' decision to dismiss the worker. The University, however, was not acting in good faith when it dismissed Rivka without making an effort to find Rivka another position. Both judge's opinions agreed that the University should pay damages to Rivka for her improper dismissal.

[2] The regular remedy for unlawful dismissal is the payment of damages. Return to work is a possible remedy when there are special circumstances justifying it. However, in this case return to work might prevent the proper functioning of the administration because of the deterioration of her relations with the University senior administration; there was no suitable position available for Rivka; and the University was in the midst of a collective dismissal of part of its workforce.

[3] Financial damages were a reasonable manner of compensating Rivka for her unjust dismissal.

[4] The appeals court made moderate changes in the financial damages which the University was required to pay Rivka, in the following manner: [a] a one time payment equal to 24 months' salary; [b] 30,000 IS (about 6,000 Euro) for grief caused her; [c] 50.000 IS (about 10,000 Euro) for court costs.

Petition for clarification of the Judgment:

Following the National Court's judgment an unusual petition was filed. The University requested a "clarification" of the judgment to settle a dispute between the parties as to the method of calculating the damages which the University was ordered to pay, especially with regard to the interest and linking of the amounts and whether vacation pay should be included in calculating the one time payment equivalent to 24 months salary. The parties submitted written briefs, no oral hearing was held and the court handed down a "clarification" judgment.

The Supreme Court of Israel:

There is no appeal against judgments of the National Labour Court. However, a party may petition the Supreme Court, sitting as the High Court of Justice, to hear such a petition. It is very infrequent for the Supreme Court to agree to hear such a petition.

In this case, no such petition was filed.

Italy

National report

Judge Aldo Dematteis
Corte di Cassazione

1. Immediately

2. a lawyer, as in the civil proceeding

3. No.

The composition of our first instance Labour Court is a single professional judge.

Italian Appellate Labour Court (ALC) is composed of professional judges only. We have two appeal instances: Corte d'Appello and Corte di Cassazione.

Corte di Cassazione by 5 professional judges.

When the Italian labour trials born, by an Act of the year 1893, it was based on the conseils des prud'hommes, coming from France, with a professional judge and two lay-men. Then lay judges were appointed from each of the social partners until 1928, but only in the first instance.

The present labour law disputes legal system has been in place since 1928, when the fascist regime abolished the previous arrangement; now in labour Courts there are just professional judges.

Lay members sit in our first instance court with professional judges in the following matters: criminal trials for most important crimes (two professional judges and six lay judges); agricultural disputes (three professional and two lay judges), which in many Courts are dealt with by labour judges; Minors Tribunals (three professional and two lay judges, psychologist and similar); in the above mentioned kind of disputes the Appellate Court has the same mixed composition; the Corte di Cassazione is instead composed of professional judges only.

When the bench is composed of professional and lay judges, both have the same powers; of course in agricultural disputes (with which I have esperienced) the technical contribution of lay judges is most appreciated.

The lay members could outvote the professional judges in decision making, but it never happens.

Lay judges are selected for administrative appointment, for 3 years (renewable).

They have not special training.

The lay judges don’t disagree; they give technical information professional judges don’t have, and integrate the legal science of the professional judge for a common decision.

4.In first instance and in appellate court yes, in corte di cassazione no.

5.Laws, collective and individual agreements, case law. Code of procedure forbids to make references to legal literature.

6. Code of procedure forbids it. It is admitted to make references to “fatto notorio” (notorious facts, for instance the banking rate of loans) and “massime di esperienza” (common experience) which, indeed, are a limit to the proibition of using personal knowledge and culture.

7. By studies on the historical experience of conseils des prud’hommes from 1893 to 1928, by my experience in agricultural disputes with lay judges, and by my experience as a single judge in first instance, 3 professional judges in Appellate Court, and five judges in Corte di Cassazione, I do believe that the administration of justice in our labour law disputes would be improved by the presence of lay judges, for the following reasons:

a. a better knowledge of the labour environment (particularly needed, for instance, in disputes on job evaluation);

b. a better calibration of the decision that bears in mind justice within the context of the firm;

c. because an extension of the chamber to representatives of both parties should make the decision more acceptable, and reverse in this way the legal system from a piramidal system, in many instances, to an horizontal one.

> The problem all of us have is to give a decision accepted as fair and authoritative, within a reasonable time. This result has been researched in continental countries, France, Germany, England, Spain, Italy, through a vertical model, which multiplies the number of instances, on the presumption that the court ultimately can amend the mistakes of the preceding court, and that the final judgement is perfect.
>
> Sweden has chosen an horizontal model, in which the authoritativeness of the decision is reached by enlarging the bench with three professional judges and four lay men, taken from the work world. It rules in a unique instance for collective disputes, and in second and final instance for the individual ones.
>
> The first model has many inconveniences: it takes a longer time; the further the trial goes from the first instance, the more the court loses the perception of the real facts; the legal system of appeals multiplies the technical requirements and the possibilities of losing the case for legal procedural reasons far from a fair solution to any case.

Nowdays when Italian labour judges need technical informations, they can appoint a "technical consultant" of the Court, or ask cross-informations to the Unions (of the employees and of the employers).

Judgement

An employee of Poste Italiane, the Italian Post company, was dismissed for carrying out an armed robbery in a bank. The robbery was performed outside of the employee's working hours.

The employee challenged his dismissal before the Labour Court of [inserire nome città], claiming that his dismissal was contrary to the terms of the collective agreement regulating his employment relationship with Poste Italiane. The collective agreement states expressly that the employer may dismiss the employee only where a court found him guilty by means of a "sentenza di condanna". A "sentenza di condanna" is a judgment that fully ascertains the facts and sentences the defendant to jail or other sanction. The employee claimed that in his case the criminal court had found him guilty not by means of a "sentenza di condanna" but by means of a "sentenza di patteggiamento", i.e. a judgment delivered after a plea bargaining. As recognised by the Supreme Court itself, a "sentenza di patteggiamento" is different from a "sentenza di condanna" because it does not contain a full ascertainment of the facts.

The Labour Court ruled that the collective agreement must be interpreted according to the same principles that apply to contracts between private parties, and, in particular, according to the intention of the parties. Accordingly, the Court found that the technical term "sentenza di condanna" should be interpreted extensively so as to include also the "sentenza di patteggiamento" because in the public opinion, which is reflected in the intention of the parties, there was no difference between the two terms.

Therefore, the Labour Court rejected the employee's claim and dismissed the application.

The employee appealed eventually before the Supreme Court.

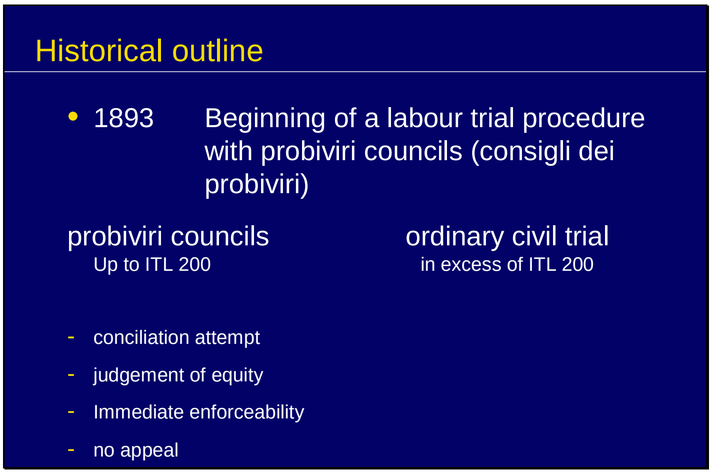
The Supreme Court ruled that, despite at that time it could not directly interpret the collective agreement itself (at present this is instead possible), it could however check whether the

Labour Court had correctly applied the legal criteria on the interpretation of contracts and whether its reasoning was logical.

The Supreme Court ruled in this regard that, pursuant to the Italian Constitution, every criminal sanction requires a personal liability and this is true for both “sentenze di condanna” and “sentenze di patteggiamento”. Therefore, the Supreme Court concluded that the lower Labour Court correctly found that in the public opinion (which is reflected in the intention of the parties) there is no difference between “sentenze di condanna” and “sentenze di patteggiamento.”

For this reason, the Supreme Court upheld the ruling of the lower Labour Court and dismissed the appeal.

NOTA BENE: l’art. 455 cpp stabilisce che “salve diverse disposizioni di legge, la sentenza [di patteggiamento] è equiparata a una pronuncia di condanna”.



1928-2002

- 1926 New Act on collective disputes, based on corporative system, in force till 1944 (fall of fascist regime)
- 1928 Probiviri councils were abolished and jurisdiction was attributed to the professional magistrate (giudice ordinario) in all labour cases
- 1973 New labour trial procedure adopted, still in force

Judicial bodies

- Tribunale (single judge)
- Corte d'Appello (3 judges)
- Corte di Cassazione (5 judges)

(no filters, no discretion of judge a quo)

Individual disputes involved

- employees (rapporti di lavoro subordinato)
- self-employed workers (lavoratori autonomi con rapporto coordinato, personale e continuativo)
- civil servants (dipendenti pubblici)
- agricultural workers (rapporti agrari)
- Landlord/tenant relationship, since 1995 (Rapporti di locazione di immobili urbani e affitto di aziende,)

Collective (?) disputes involved

Union's claims against employer's acts against their freedom of acting in working places (condotte antisindcali, art. 28 Act 300 of 1970)

Payment of union's contributions

Reference for preliminary ruling to the Corte di Cassazione for direct interpretation of the collective agreements just of civil servants (Act 80 of 1998)

Main Features of Labour Trial

Introduction of the dispute

1. Plaintiff's application to the court vs. writ of summons (ricorso e non atto di citazione)

2. Scheduling of hearing (fissazione dell'udienza)

3. Defendant's pleading (costituzione del convenuto)

Defendant's pleading

Deadlines and statutory limitations (preclusioni e decadenze) pursuant to which defendant's rights will lapse if he/she does not in his/her first written pleading:

- make any counterclaim (domande riconvenzionali)
- raise preliminary objections that cannot be raised by the judge on his/her own initiative (eccezioni non rilevabili d'ufficio);
- identify relevant evidence (mezzi di prova)
- contest the facts specifically – burden of rebuttal (principio di non contestazione)

Hearing (udienza)

appearance of both parties (comparizione personale delle parti)

free examination (libero interrogatorio)

conciliation attempt (tentativo di conciliazione)

Admission of evidence (ammissione dei mezzi di prova)

Inquiry (Istruttoria)
- Powers of the judge (poteri istruttori di ufficio)

Discussion and decision

Immediate reading of operative part of judgment (lettura del dispositivo in udienza)

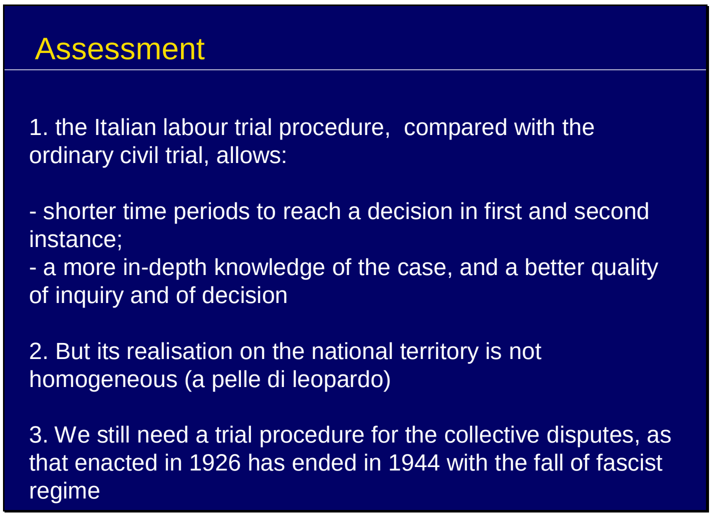
Immediate enforceability of judgment (immediata esecutività)

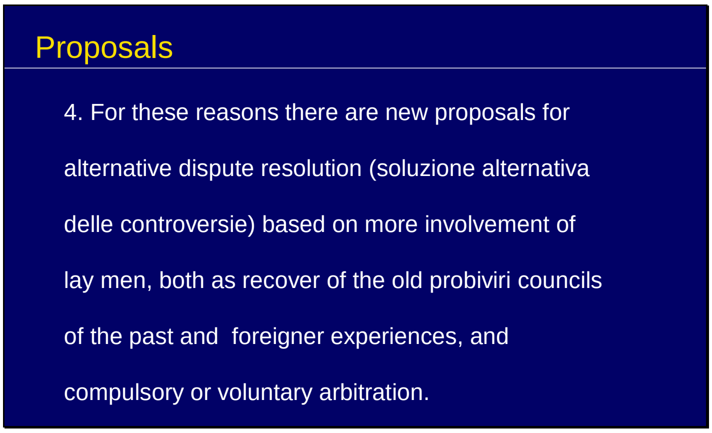
Monetary revaluation (rivalutazione monetaria)

Appeals

- Appeal judges will decide only on contested parts of the judgment (principio devolutivo dell'appello)
- Cassazione will control both:
  - the correct interpretation and application of the law, and
  - the reasoning of the judgment

Conclusions





Slovenia

National report

Judge Miran Blaha
Supreme Court of the Republic of Slovenia

Proceedings before labour and social courts in the Republic of Slovenia are regulated by the Civil Procedure Act (ZPP) and the Labour and Social Courts Act (ZDSS). Proceedings thus follow the same rules as civil procedure in civil disputes, taking into account the particularity of labour and social disputes.

1. Is the case decided immediately upon the main hearing, or is a separate session held for that purpose?

As a rule, as soon as the main (public) hearing is complete the panel withdraws for consultation and voting and decides on the case. In principle the judgment should be rendered (issued) and announced immediately, and only in more complex cases should it be rendered (issued) in writing. In practice, however, this has become the rule, and judgments are rendered (issued) in writing (the law stipulates a time limit of 30 days for the issuing of a judgment in writing). The court panel adopts decisions at a session at which only the members of the panel and the recording clerk are present.

The court of second instance decides on appeals at a session of the court panel. If the court of second instance conducts a main hearing, the same rules apply to decision-making and the issuing of the judgment as in the first instance proceeding. The revision court takes decisions on extraordinary legal remedies at a session of the panel.

2. Is there a presenting official involved in the process? If yes, please describe the formal and factual role of the official.

Proceedings before courts also involve law clerks (legal advisers) and assigned judges.

In individual cases law clerks examine (interrogate) parties, witnesses and experts outside the main hearing, carry out more demanding preparations for the main hearing, report at sessions of court panels, draw up drafts of court decisions, conduct main hearings under the guidance of the judge and carry out other work at the order of the judge.

In proceedings before a court of first instance, law clerks can carry out certain procedural acts: they can issue orders on the allocation of costs and orders connected to the preparation of the main hearing or orders outside the main hearing (corrections of applications, service, appointment of an expert, court fees, etc.).

In proceedings at the second and third instance (before the Higher Labour and Social Court and the Supreme Court), law clerks collaborate by preparing drafts of decisions and other material necessary for the decision and, as a rule, also report on these matters at sessions of the court panel. They do not however take part in the decision-making process (although they are present).

Assigned judges are judges assigned to the Supreme Court of the Republic of Slovenia who participate in the exercising of judicial authority by reporting at sessions of panels of the Supreme Court and drawing up court decisions, preparing, at the request of the chair of a Supreme Court panel, more demanding expert opinions on individual legal questions and carrying out other more demanding work. Assigned judges cannot participate in the process of making decisions on cases under the jurisdiction of the Supreme Court.

3. Does the composition of your court include lay members? If yes, please give a description of their role in the deliberation leading to the decision, with a view to the interplay between the chair and the lay members. What is in your experience the main contribution of the lay members in the decision-making process?

Under the Constitution of the Republic of Slovenia, the circumstances and form of the direct participation of citizens in the exercising of judicial power are regulated by law (Article 128). The ZDSS-1 thus envisages the participation of lay judges in proceedings before courts of first instance, both in individual and collective labour disputes and in social disputes.

In courts of first instance less important cases are decided by a single judge. Less important cases include disputes where the value of the subject of dispute does not exceed the amount for which revision is permitted (EUR 4173,00 from 1 October 2008 EUR 40 000.00), and certain expressly listed disputes (e.g. probationary work, overtime, holidays, disciplinary procedures).

When first instance decisions are taken by a court panel, this panel consists of a professional judge and two lay judges. In labour disputes one lay judge is elected by workers' representatives and one by employers; in social disputes one lay judge is elected by the insured persons and the other by social insurance institutions.

Lay judges do not take part in appellate and revision proceedings, where decisions are made exclusively by a panel of three (before labour and social courts) or five (before the Supreme Court) judges.

Lay judges play an equal part in proceedings and decision-making but the professional judge is always the chair of the court panel and the person who conducts the main hearing or proceeding and the consultation and voting, and who also votes last. Lay judges can ask direct questions to witnesses, experts and parties. A majority of votes is necessary for every decision. This can lead to the lay judges outvoting the professional judge (although this is rare in practice).

The use of lay judges is designed to guarantee the participation in the trial of citizens with specific life experiences in the spheres dealt with by the court. They are undoubtedly of assistance to the professional judge in this. Furthermore, this composition of court panels is also an exercising of the principle of the participation of social partners in decision-making, in which the latter must be impartial. The greatest danger here is that the lay judge can too uncritically take the side of one ("his" or "her") party to dispute.

4. To what extent does the presiding judge take part in writing the decision?

In first instance proceedings it is always the chair of the court panel who writes the decision (judgment or order). As a rule the chair of the panel writes the decision alone, but may do so with the help of an law clerk or assigned judge.

In the case of appellate and revision judgments, the decision is written by the judge rapporteur and not the chair of the panel, who however signs the decision. In this way the chair of the panel can have a certain influence on the content of the written decision, which is however only based on arguments. The chair may not formally refuse to sign the decision. In the end this is a decision of the (entire) panel, which is reflected both in the ordering part and in the statement of grounds (ratio decidendi).

5. What are the main legal sources you use in deciding a case, especially a difficult one? In the reasoning of the decision, do you make express references to legal literature, case law, previous decisions of your own court, etc.?

The legal basis of the decisions of labour and social courts are, above all, regulations (the Constitution, laws and executive regulations) and collective agreements. In social disputes the legal basis also includes the acts of social insurance institutions (e.g. the Pension and Disability Insurance Institute and the Health Insurance Institute). EU regulations and the decisions of the European Court are also taken into account as regulations.

Court decisions are not a legal source. The Constitution of the Republic of Slovenia, however, guarantees the equal protection of rights in proceedings before a court as one of the fundamental human rights. (All) courts are therefore obliged to observe a uniform court practice (precedents), which by law is guaranteed by the Supreme Court. Courts therefore refer to this court practice in their decisions, while the Supreme Court refers to its own previous decisions in identical or similar cases. In their decisions courts also take into account the decisions of the Constitutional Court.

In specific cases, particularly those that are more important for court practice, courts also refer to literature (legal theory), and sometimes to comparable legal regulation and decisions in other countries with a similar legal system.

6. Is it customary to express the personal views of the judge in a decision?

It is not customary and it is also rare in practice. A judge judges according to the Constitution and law and his decision may not be (should not be) influenced by his personal beliefs and value judgments about the dispute or even about the parties.

Judgement

Supreme Court
Republic of Slovenia

The principle *in favorem laboratoris* – extraordinary termination of employment contract

Legal basis:

Employment Relationships Act, Articles 82, 111/1-2

Universal Declaration of Human Rights, Article 24

International Covenant on Economic, Social and Cultural Rights, Article 7

ILO Convention No. 158 concerning Termination of Employment at the Initiative of the Employer, Articles 4, 7, 9/2

RULING

The revision is rejected.

Headnote:

Pursuant to Article 111 of the Employment Relationships Act the disciplinary procedure and an extraordinary termination of the employment contract are two different legal institutes, each of which has its own legal characteristics and consequences and therefore they cannot be compared. The principle in favorem laboratoris is not applied automatically in making decisions in all disputes but only in individual cases (for example when establishing legal basis for legal norms of the same level, in the case of doubtful legal contents of an individual norm and similar).

Pursuant to the second indent of the first paragraph of Article 111 of the Employment Relationships Act "abuse of the director and swearing at him, an insulting attitude towards other workers" constitutes a substantiated reason for the termination of an employment contract, if the insult is considerable or if the working process suffers because of an insulting attitude towards other workers.

R e a s o n i n g

The court of first instance rejected a claim to annul an extraordinary termination of employment contract, to put the plaintiff back in employment and to pay him salary and allowances. The court established that on the basis of the second indent of the first paragraph of Article 111 of the Employment Relationships Act (hereinafter: the ERA), the defendant justifiably terminated the employment contract of the plaintiff, because on 20 November 2003 he abused the director and swore at the director and because in general he likes to quarrel, has an insulting attitude towards other workers and threatens them. With the stated acts the plaintiff committed a serious violation of contractual and other obligations from the employment and the continuation of the employment is not possible.

The court of second instance rejected the plaintiff's appeal as unjustified. It accepted the conclusions about the evidence and the legal weighing by the court of first instance. It established that the reasoning by the court of first instance was correct when it states that the continuation of employment was not possible. The conduct of the plaintiff seriously violated the contractual and other duties pursuant to the second indent of the first paragraph of Article 111 of the ERA. The defendant – the employer – is the one to make a judgement regarding a disciplinary procedure for which the plaintiff claims that the defendant should have launched.

Against the final ruling by the court of second instance the plaintiff filed a revision for a material breach of the civil procedure provisions pursuant to the first and second paragraph of Article 339 of the Civil Procedure Act (hereinafter: the CPA) and for erroneous application of substantive law. He proposed that the revision court reverses the rulings of the second and first instance courts and returns the case to the court of first instance for retrial. He stated that the court of first instance did not take into account the mitigating circumstances and that the plaintiff's attitude towards other workers is not related to the event of 20 November 2003. It should be taken into account that the plaintiff worked for the defendant for 33 years, that he worked in shifts, that he has long-standing work experience, that in his work he saved people from risk to their lives and that the work of a fire-fighter is difficult on a day to day basis. The "verbal situations" of the plaintiff and other workers took place only in relation to work. In the procedure it was not taken into account that the plaintiff had an employment contract for an indefinite period of time and the director for a definite period of time. The event on 20 November 2003 happened because the plaintiff did not receive a meal allowance. The plaintiff overreacted to the situation. The director of the defendant did not do anything regarding the payment of the meal allowance. In the procedure at the defendant several violations were made. The defendant should have launched a disciplinary procedure. At the meeting to put up a defence the director and the secretary were present. The minutes were not signed by the plaintiff and the defendant. The plaintiff was not instructed that he could have asked for a consultation with the trade union. The institute of a disciplinary committee was abused because the disciplinary and other responsibilities cannot be established by the person who took an active part in the event of 20 November 2003. The passed sentence had a considerable influence on the life of the plaintiff because he will not have the right to unemployment benefit and he will find it difficult to survive. The court should have applied the principle *in favorem laboratoris* and decided to the benefit of the weaker party, that is the worker – the plaintiff. When deciding the court did not take into account the statute of the defendant and the provisions of Conventions 158 and 166 which regulate in detail when the conduct of a worker constitutes a sufficiently serious and justified reason upon which to establish the basis for an extraordinary termination of the employment contract.

The revision is unjustified.

The revision as an extraordinary legal remedy is allowed against final decisions (as an exception also against court decisions – Article 384 of the CPA) of the courts of second instance only under the conditions stipulated by Article 367 and for reasons exhaustively listed in Article 370 of the CPA. The revision may not be launched for an erroneous or incomplete establishment of the actual situation (third paragraph of Article 370 of the CPA). The revision court tests the challenged ruling only in the part which is challenged by the revision and within the reasons given in the revision. *Ex officio* it pays attention to the correct application of substantive law (Article 371 of the CPA).

The revision lists under item I a material breach of the civil procedure provisions pursuant to the first and second paragraph of Article 339 of the CPA, however, it does not give the circumstances and does not justify the violations in the challenged ruling which were allegedly the violations of the stated provisions of the CPA. With regard to the aforementioned provision of Article 371 of the CPA the revision court therefore did not test the challenged ruling in this scope.

As has been stated earlier, the revision may not be filed for erroneous or incomplete establishment of the actual situation. Due to this principle, the revision court therefore has to take into account the actual situation which was established by the court of first instance and as it was tested and accepted by the court of second instance. Due to the aforementioned provision, the revision court was not allowed to take into account the statements in the revision referring to the actual situation, in particular to the work carried out by the plaintiff. These statements are partly irrelevant (for example in relation to the disciplinary procedure), because they do not refer to the termination of the employment contract.

The Employment Relationships Act separates the reasons for an extraordinary termination of the employment contract by the employer (regulated in Article 111) from the reasons and conditions for establishing disciplinary responsibility of the worker (Articles from 174 to 181 of the ERA). These are two different legal institutes, each with its own legal characteristics and consequences and can therefore not be compared. The court of second instance was therefore correct to establish that the employer decides on its own whether to launch a disciplinary procedure or not. On the basis of the provisions of the second paragraph of Article 83 and the first and second paragraph of Article 177 of the ERA, both procedures have in common only the provision that in the case of an extraordinary termination of the employment contract the employer has to inform the worker about the reasons of the termination ("written charge") and provide him with an opportunity to defend himself. In this direction the revision has no objections. The reason for the extraordinary termination of the employment contract and the circumstance that the employment cannot continue have been proven (first paragraph of Article 110 of the ERA).

Substantive law was not erroneously applied.

The revision erroneously interprets the meaning and purpose of the institute *in favorem laboratoris* (also *favor laboratoris*). This principle may be used in particular on the basis of Article 24 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Economic, Social and Cultural Rights (Official Gazette of SFRY – MP, No. 7/71, in relation to the Act on Notification of Succession, Official Gazette of RS – MP, No. 9/92) when interpreting individual institutes with certain limitations and under certain conditions. When interpreting legal norms and contracts (in particular employment contracts) of labour law the principle is not applied automatically and not all interpretations can be made to the benefit of the worker (because this would be contrary to the principle of equality before the law – Article 14, and equal protection of rights – Article 22 of the Constitution of the Republic of Slovenia). The principle may be applied at the time and in a manner that for example different legal norms of the same level are interpreted to the benefit of the worker (for example with regard to the prescribed period of notice in the third paragraph of Article 51 and the fifth indent of the first paragraph of Article 111 of the ERA), that the legal norm (irrespective of its level) which is to the benefit of the worker is applied, if cogent legal norms are not at issue, that for example in the case of employment contracts the entire contract is not considered null and void but only some of its provisions, etc. (*cf. prof. dr. Nikola Tintić, Radno in socialno pravo, 1. knjiga – radni odnosi, Narodne novine, Zagreb 1969, pages 98, 103 and 104*). An interpretation to the benefit of the worker is for example possible also when with regard to the absence of the worker from the work it is not clear from the acts and orders of the employer which days were working days, or if it is not clear when the prescribed period of notice for the termination of the employment contract started (regarding the provisions of the second paragraph of Article 110 in relation to the first paragraph of Article 112 of the ERA). With regard to the termination of the employment contract, for example, some countries adopted the position that the presumption exists (to the benefit of the worker) that the termination was not imposed for a serious reason (compare *J. Novak, Delovni spori, GV Založba, Ljubljana 2004, pages 178, 240, 278 and 320).*

The stated reasons for the application of the principle *in favorem laboratoris* in this dispute do not exist, therefore the party filing the revision may not successfully invoke them.

Pursuant to the provision of the second paragraph of Article 82 of the ERA, the substantiated reason for an extraordinary termination of the employment contract may be proven by the party which terminated the employment contract. In the case under discussion this is the employer. In accordance with Article 4 of the ILO Convention No. 158 concerning the Termination of Employment at the Initiative of the Employer (Official Gazette of the SFRY SFRJ – MP, No. 4/84, in relation to the Act on Notification of Succession, Official Gazette of the RS – MP, No. 15/92, hereinafter the ILO Convention No. 158), an employment may be terminated also when serious reasons concerning the conduct of the worker are proven. These reasons have to be proven by the employer (item (a) of the second paragraph of Article 9 of the ILO Convention No. 158). On the basis of Article 7 of the ILO Convention No. 158 the employer has to provide the worker with an opportunity to put up a defence if the worker's employment is terminated due to his conduct. The court of first instance established that a serious reason for an extraordinary termination of the employment contract exists (abuse of the director and swearing at him, an insulting attitude towards other workers) and that the possibility for the continuation of the employment does not exist. The court of the second instance adopted this conclusion on the basis of evidence. In the case law of countries which ratified the ILO Convention No. 158, the position is taken that the reasons for the termination of an employment contract are given due to the conduct of the worker if it is proven that the worker was violent, aggressive, that he used insulting words and similar (compare *Protection against unjustified dismissal, International Labour Conference, 82nd Session 1995, International Labour Office, Geneva 1995, pages 37 and 38).*

The German case law adopted the position that each insulting of the employer or superior is not such that would justify the termination of the employment without the prescribed period of notice. The insult has to be considerable or important (ruling by the Laender Labour Court in Köln, 30 January 1998, NZA 1998, 1284, cited under *Kittner, Däubler, Zwanziger, KschR, Kündigungsschutzrecht, Band-Verlag, Frankfurt/Mein 1999, pages 932 and 933*). Whether such a strong/important insult has taken place is to be judged on a case by case basis, taking into account all actual circumstances important for the decision. In the same case law it has also been established that the insulting of other workers has labour law significance only when the work process in the plant suffers because of it (*ibidem, page 933*).

The findings of the court regarding the plaintiff's inadequate attitude towards other workers have been proven and are also important for considering the possibility of continuing the employment. Other statements in the revision are therefore not acceptable.

The interpretation of the provision of the second paragraph of Article 83 in relation to the first and second paragraph of Article 177 of the ERA is also a part of substantive law application. These provisions were not violated during the procedure against the plaintiff. As the evidence-taking procedure showed, the plaintiff was acquainted with the reasons for an extraordinary termination of the employment contract and was given the opportunity to put up a defence. The application of the aforementioned provisions of the ERA can influence the lawfulness of the extraordinary termination of the employment contract only if a substantiated reason for the termination was proven and if it is proven that the employment cannot continue anymore (compare reasoning parts in cases VIII Ips 87/2004, 215/2004 and 267/2004, which refer to the extraordinary termination of the employment contract). Because it has been proven that the aforementioned provisions of the ERA were applied correctly and that the plaintiff's rights in the procedure of the extraordinary termination of the employment contract were not violated, it is not possible to accept objections referring to the above mentioned provisions of the ERA.

In the revision there are also unacceptable claims regarding the participation of the trade union, the application of the statute provisions of the defendant, and the need for the defendant to launch a disciplinary procedure against the plaintiff. Pursuant to the provision of the first paragraph of Article 85 of the ERA, the worker has to demand from the employer to inform the trade union about the procedure of ordinary or extraordinary termination of the employment. From the evidence taken it is clear that the plaintiff did not make such a demand. The legal basis for an extraordinary termination of the employment contract is regulated by the ERA, therefore the provisions of the statute of the employer cannot influence the lawfulness of the employer's decision to terminate the employment contract. Legal institutes of the disciplinary procedure and the extraordinary termination of the employment contract cannot be compared. The extraordinary termination of the employment contract is an institute for which the employer independently decides. The termination is lawful if the worker is guaranteed the rights from the second paragraph of Article 83 of the ERA, if the reasons for the termination and the impossibility of continuing the employment have been proven. The court of second instance correctly established that the employer decided independently to launch a disciplinary procedure and that the worker cannot influence this decision. The claims in the revision that the defendant was obliged to launch a disciplinary procedure therefore cannot influence the decision.

The revision court establishes that the reasons for which the revision was filed do not exist, and that the reasons to which it pays attention *ex officio* also do not exist, therefore the revision has been rejected as unjustified (Article 378 of the CPA).

Spain

National report

Antonio Martín Valverde
Judge of the Supreme Court, Spain
Bartolomé Ríos Salmerón
Emeritus Judge of the Supreme Court (ret.), Spain
Miguel-Ángel Limón Luque
Legal Counsel of the Supreme Court

1. Is the case decided immediately upon the main hearing, or is a separate session held for that purpose?

The general rule is that decision of the case in labour trial court is immediate upon the hearing (in the term of 5 days, according art. 97.1 de la *Ley de Procedimiento Laboral (LPL)-Social ProcedureAct*). However, the judge a) may withheld the judgement in order to practice new necessary evidences (art. 88.1 LPL: *pruebas para mejor proveer*), and b) is obliged to withheld the judgement when one of the litigants has presented a criminal claim for false document that may be influential upon the case (art. 86.2 LPL).

2. Is there a presenting official involved in the process? What is his factual and formal role?

A representative of the General Attorney (*Ministerio Fiscal*) is party in the proceeding in which a worker or a union claim for a) violation of a "constitutional right", or b) violation of the trade-union freedom (art. 175.3 LPL).

A representative of the General Attorney declares his legal position about the controversy in all the labour processes before the Supreme Court (*Tribunal Supremo*) (arts. 212.2, 223.1 y 224.2 LPL). Besides, the litigants and the General Attorney can initiate a special last resort process before the Supreme Court, named *casación para unificación de doctrina* (art. 218 LPL). As a matter of fact, the General Attorney seldom uses this last resort.

3. To what extent does the presiding judge take part in writing the decision?

Traditionally the writing of the decision for the majority is up to the "reporter" (*ponente*) (art. 203.1 *Ley Orgánica del Poder Judicial (LOPJ)- Organic Judical Power Act*)*;* the name of the reporter is indicated in the text of the judgement. The presiding judge and the others members of the chamber can make (and make usually) proposals for the drafting of the judgement. If the text of the reporter is not approved the presiding judge charges the making of the decision to other member of the chamber (art. 206.2 LOPJ).

4. Does the composition of your court include lay members?

No. The Spanish Constitution only establishes lay members in the courts in criminal procedure (art. 125 CE).

5. What are the main legal sources you use in deciding a case, specially a difficult one?

Legal rules (interpreted according criteria of juridical hermeneutics) + analogy or general principles expressed in case-law + constitutional principles. The selection of the applied analogy or principles is oriented by equity.

In the reasoning of the decision, do you make express references to legal literature, case law, previous decisions of your own court, etc. ?

The Spanish judgement style is concise, but not moulded by the French *phrase unique*. It is not usual to introduce in the decision references to legal authors. To the contrary, the references to case law are not mandatory but very frequent.

6. Is it customary to express the personal views of the judge in a decision?

The declaration of the personal view of the judge is only foreseen in case of dissenting opinion of the reporter or of anther member of the chamber (art. 260 LOPJ). The reporter is obliged to express his position when the making of the decision is charged to other member of the chamber (art. 206.1 LOPJ).

Judgement

Supreme Court Decision[14]
(Labor Chamber, First Section)
of June, 16th, 2006[15]

Appeal for the unification of doctrine

Jurisdiction: Social

Reporter: His honor Supreme Court Magistrate Mr. Mariano Sampedro Corral

Unfair dismissal: worker under temporary sick leave who does not report to the company his provisional imprisonment.

The Supreme Court dismisses the appeal for the unification of doctrine (No. 5306/2004) brought by "G" Inc. against Judgement of the Superior Court of Catalonia, dated on 08-10-2004, delivered in a procedure promoted by Mr. Inocencio against the appellant, on dismissal.

At the City of Madrid, June the sixteenth, two thousand and six.

Having regard to these procedures, pending before this Chamber, under appeal for UNIFICATION of doctrine, instituted by Mr. Joan Esq, on the behalf of "G", Inc., against the judgement of the Superior Court of Catalonia, dated on October 8th, 2004 in the appeal No. 3843/2004, brought by Mr. Inocencio against the judgement of the Labor Judge No. 2 of Gerona on February 16, 2004 (procedure 820/2003) followed at the request of Mr. Inocencio on dismissal.

It is respondent Mr. Inocencio, represented by Mr. Jordi, Esq.

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[14] Unofficial translation made by Antonio Martín Valverde, Bartolomé Ríos Salmerón and Miguel Ángel Limón Luque.

[15] In this case the Supreme Court finally confirms the decision of the Superior Court of Catalonia declaring that the dismissal of the employee was unfair. We know that we were asked to send a case in which the employee´s action was dismissed. But, to our opinion, this case was more recent and interesting in order to discuss it in an international meeting, and as same time, makes reference to previous cases in which the action of the employee was dismissed because the imprisonment was decided in a final judgement.

It is acting as Reporter Judge His honor Mr. Mariano Sampedro Corral.

FACTS AND PROCEDURE

FIRST.- The Judgement issued by the Labor Judge No. 2 of Gerona contained the following facts:

1. - Mr. Inocencio started to provide services for the company “G”, Inc. on 7-19-1999, under the professional category of driver-mechanic, earning a salary of eur 1.767,30 per month as annual average (not controversial).
2.- On 7-23-03, the plaintiff started a period of temporary leave of absence due to non-occupational illness, situation in which he remains (not controversial).

3.- Mr. Inocencio was confined in provisional imprisonment on 8-6-03 and did not communicate that fact to the company (not controversial). However, he sent three faxes dated on 8.23.03 (leave of absence confirmation due for illness on August), 8-29-03 (communication of new current account for debit the subsidy regarding the sick leave) and 9-17-03 (sick leave confirmation reports of September). (pages 164 and over of the procedures).

4.- On 10-8-03, the company knew that the plaintiff was in prison, as an information obtained by a third party (confession).

5.- A disciplinary inquiry initiated on 10-9-03, resulted in the dismissal of the plaintiff on 11-5-03 under this company statement: "We let you know that, once analyzed the contradictory inquiry, the Company´s Direction decided to proceed with your disciplinary dismissal with effect from today. The facts giving rise to such a decision are as follows: On October 8th, 2003 the company was made aware that you were deprived of freedom since the day of August 6th, 2003 (provisional imprisonment in the Gerona premises). Despite having been under this situation since August 5th, 2003, you never communicated this situation to the company; also, as a defending argument presented in the disciplinary inquiry, you recognized the fact that you failed to notify this situation. It is clear that notify this situation was your obligation in order to allow the Company to suspend your employment contract under provisional imprisonment. Failure to notify the above situation of detention to the company during the period 8-6-2003 to 8-10-2003, in which you were in sick leave, and prior to the situation of detention, has led you to continue unlawfully profiting during such period of the amount that you receive under complementary benefit by the provision regulated in the Section 24 of the Collective Agreement of transportation of goods in the province of Gerona, as the situation of inability to work did not depend anymore on the situation of sick leave, but on the deprivation of liberty, and the suspending effects of this situation do not include the payment by the Company of any complementary benefits or additional salary. "

6.- The plaintiff is worker representative (not controversial).

7.- On 11-20-03, the plaintiff initiated a conciliation procedure before the Conciliation, Mediation and Arbitration Council, being held on 12-4-03, resulting in WITHOUT agreement between the parties.

8.- During the period 8-6-03 to 10-8-03, the plaintiff earned the Company´s complementary benefit which provides Section 24 of the Collective Agreement of transportation of goods in the province of Gerona.

9.- It were granted to the plaintiff provisional release on 12-3-03 (not controversial). The ruling part of that judgement is as follows: "dismissed the action brought by Mr. Inocencio against “G”, Inc. and declare that the dismissal was fair, validating then that the employment relationship was lawfully terminated without the right to compensation or backpay. It has been part of this procedure the Wages Guarantee Fund”.

SECOND.- The judgement of the Social Chamber of the Superior Court of Justice has maintained full account of the facts of the judgement of first instance. The wording of the operative part of the judgement of supplication is as follows: "To estimate the use of supplication by Mr. Inocencio against the judgement of February 16th, 2004, issued by the Labor Judge No. 2 of Gerona, at the request of Mr. Inocencio against “G”, Inc. and Wages Guarantee Fund, in the procedure No. 820/2003, which revoked. Declaring that the dismissal of November 5th, 2003 was unfair, and stating that the Company “G”, Inc. must respect this decision, and condemning the Company, at the employee choice, to be reinstated according Law or to terminate the contract, being entitled to a compensation amount of euros 11,266,53, without being entitled to backpay because of his situation of sick leave and without prejudice to the right to supplement (according to Section 24 of the above mentioned Collective Agreement) the leave of absence benefit as long as such situation maintains".

THIRD.- The appellant regarded that this decision is inconsistent with the judgement rendered by the Labor Chamber of the Superior Court of Madrid, dated on February 5th, 1998 (Rec. 5719/97); having been provided timely certification of it.

FOURTH.- The appeal was registered in the General Register of the Supreme Court on December 17th, 2004. It alleges as the plea the offence of ‘Sections 54.2.d), 45.1.g) and 45.2 of the Statute of the Workers.

FIFTH.- By order of this Chamber issued on November 8th, 2005, the appeal was admitted pending the arguments of the defending party. During the term of ten days which the defending party is entitled to no allegations were made.

SIXTH.- Following the proceedings to the public prosecutor report, he ruled that the appeal was inappropriate. Once informed HH. Judge Reporter, he declared completed the procedure, indicating as day to vote and decide June 8th, 2006.

AS TO THE LAW

FIRST.- 1.- According to the facts of the judgement the plaintiff was in sick leave when joined in provisional prison on August 6th, 2003, which did not report to the employer, who knew the fact on October 8, 2003. During the time spent in jail the worker continued to send confirmation forms of his sick leave situation and receiving the amount stated in the collective agreement on the concept of a complement to the sick leave subsidy.

The entrepreneur started a disciplinary inquiry the day after that he was aware that the plaintiff was imprisoned for the double failure to communicate the worker the circumstances of the imprisonment and to have continued to receive the sick leave supplement. The inquiry ended with the disciplinary dismissal of the worker, who holds the post of representative of the workers, with starting effects on November 5th, 2003.

The first instance Labor Judge dismissed the claim for unfair dismissal, and accordingly, the worker appealed to supplication, which articulated in a "unique plea", in which alleged violation of Articles 54.1 and 54.2.d) of the Workers' Statute. He argued that "in the case that concerns us now the worker is already in a state of sick leave, which justifies by itself his absence from work, so it is not unreasonable to share the view that a majority of workers (including plaintiff), unaware that they have an obligation to inform the company on his imprisonment, acted therefore without knowledge that his conduct violated any rule" and, then, "there are not present conditions of gravity and responsibility"; and this was added, without being discussed that "by applying the gradualist theory, the plaintiff is worth a lesser punishment by the collision of a fault of lesser gravity, and in turn that the company is in full right to demand repayment of the sums received by the actor."

The judgement in supplication upheld the appeal of supplication and declared unfair dismissal condemning the employer to the legal consequences that it entails.

2. Combating the previous judgement the company has brought this appeal for the unification of doctrine in which he cites and brings as contrary judgement one of the Social Chamber of the Superior Court of Madrid, dated on February 5th, 1998.

A comparative assessment between both contested judgements shows the existence of substantial identity between them, manifested in the triple identity of facts, reasoning and claims for litigants in the same legal status. Indeed, even in the contrary judgement the worker, when he was in a position of sick leave, was imprisoned, without notify the matter to the employer. He also forwarded, from jail, confirmation documents of sick leave and perceived by the employer the supplement to the sick leave subsidy. In spite of this essential identity statements have been different, because the contrary judgement declared that the dismissal of the plaintiff was fair.

SECOND.- Once verified the existence of the contradiction between judgements it is mandatory to analyze the 'grounds of appeal': 'Articles 54.2.d), 45.1.g) and 45.2 of the Workers' Statute, and contradiction with the judgement of the Superior Court of Madrid dated on February 5th, 1998.

The appeal should be rejected under the following reasoning:

1. The situation of temporary sick leave arising from non-professional illness produces, according to article 45.1.c) of the

Workers´ Statute, the suspension of the employment contract along with its consequence (second coma) of the exemption "of mutual obligations to work and remunerate work". This exoneration of the mutual obligations between employer and worker remains and does not terminate by the fact of appearing a new cause for suspension, as the subsequent status of interim imprisonment, because under the terms of Article 131.bis.1 of the General Law on Social Security, the right to grant the sick leave subsidy only is extinguished by surpassing the temporary limits set forth for sick leave; by medical decision of recovery the work ability; by the recognition of a retirement pension; by missing without reason any calls for medical tests regarding his illness; or, finally, by death.

2. The fact of having happened during the situation of sick leave a new suspension cause, as defined in section 45.1 g), adds nothing, nor finishes the situation of sick leave, neither affects the suspension of the employment relationship or even affects the right to obtain the sick leave subsidy and the complementary benefit to be paid by the employer. From the employer point of view, the suspension of the employment contract remains, without detriment of the right to receive the complimentary benefit recognized in the collective agreement. Perhaps the lack of communication to the employer of the situation of detention could have legal effects whether after declaration by the doctors of ability to work, the worker continues deprived of his liberty, in which case the lack of communication because of the new legal cause of suspension might be relevant regarding the absence of work under a cause not known by the employer.

3. Finally, as the Public Prosecutor states “the appeal can not succeed for the simple reason that although (the plaintiff) had not been in prison, he would have been unable to work because of his illness, regardless that in any case he should have reported the situation of deprivation of liberty to the employer".

The lack of communication, once persisting the effects of suspension of the employment relationship by the temporary disability, should not be described as very serious infringement, that could deserve the penalty of a fair dismissal. Also, it could not be considered infringement the fact that the plaintiff continues to claim the supplement allowance for sick leave during the period when he was temporarily deprived of his liberty, especially when, as stated in the appealed judgement, Section 26 of the applicable collective agreement, when establishes the supplement to the sick leave subsidy, does not restrict its perception by the circumstance of arrest or detention, which means that the supplement is still due while continuing the situation of sick leave.

4. The admission to prison, then, on an interim basis, does not alter the effects annexed to the situation of sick leave, so that, while this situation is not extinguished the employee is relieved of providing labor services to the employer, and the worker is entitled to receive the Social Security benefit or allowance, and also the employer supplement agreed in the collective bargaining.

The interim measure consisting on temporary arrest or detention ("until there is a conviction judgement" in the legal expression) is a restriction which affects the fundamental right to personal freedom (STC 14/2000) as described in Section 17th of the Constitution and the right to presume the innocence protected by the same Section of this Fundamental Act, and it is a exceptional measure, so it is only deemed justified when other judicial measures are insufficient to ensure the needs of the investigation (article 502.2 of the Criminal Procedure Act provides that "the provisional imprisonment shall only be taken when objectively necessary, as provided in the following sections and when there are no other measures less burdensome for the right of personal freedom through which it would be possible to achieve the same ends”); its duration is restricted to “the minimum mandatory time" to achieve their ends, always taking into account the maximum duration of the measure specified in Section 504 of the Criminal Procedure Act; being this concept of "minimum mandatory time" undetermined, so it does not even allow the worker to inform to the employer of the exact duration of the provisional imprisonment.

Undoubtedly, the conceptualization of "deprivation of liberty, in the absence of conviction" as a cause suspension of the employment relationship is based on the criminal principle of "presumption of innocence" during the criminal procedure and up to the reach of a final conviction. This is the reason that explains that the provisional imprisonment does not lead to the same effect that legally produces criminal conviction. Specially when, as it has been said before, the new fact of provisional imprisonment does not affect in any way, the legal status of the employee, whose employment relationship is already suspended for the previous reason, and afterwards concurrent cause, of sick leave.

As it declares the judgement of this Chamber of the Supreme Court of February 18th, 1994 (Rec. 1501/1993) and of February 28th, 1990, which resolve a claim for dismissal brought by a worker convicted by final judgement, "the final condemning decision of the Criminal Court, deprives the worker of the justification for the absence so far and as a guarantee of the right to presume innocence set forth under Section 45.1. g) of the Workers’ Statute, and hence since the moment that the judgement becomes final, the absence to work ceases to be protected and has to be considered as a breach of contract punishable by the employer under section 54.2.a) of the Workers’ Statute". This effect obviously does not occur in the situation of preventive detention.

Third.- Under the above, and taking into account that the judgement was according to the Law, and that it is not considered as a breach in the unity of doctrine, the action must be rejected, as well as the condemnation of the appellant to pay the costs and loss of the deposit paid in order to appeal, maintaining the interim measures made to ensure compliance of this resolution.

Accordingly, on the behalf of His Majesty The King and the authority conferred by the Spanish people,

WE DECLARE

Dismiss the appeal for UNIFICATION of doctrine, instituted by the Mr. Joan Esq. on behalf of "G", Inc., against the judgement of October 8th, 2004 of the Social Chamber of the Supreme Court of Catalonia in the appeal No. supplication. 3843/2004, brought by Mr. Inocencio against the judgement on February 16th, 2004 by the Labor Judge No. 2 of Gerona in the proceedings No. 820/2003 followed at the request of Mr. Inocencio on dismissal. We condemn the appellant to pay the costs, within the legal limits, and loss of deposit to appeal, maintaining the interim measures made to ensure compliance of this resolution.

Please return the proceedings to the Court of origin, along with the certification and communication of this resolution.

This is our judgement, which shall be inserted in the Collection of Cases, after ruling and signing.

PUBLICATION.-In the same day the previous judgement was read and published by the Hon. Judge Mr. Mariano Sampedro Corral, after having taken place the Public Hearing Room at the Social Chamber of the Supreme Court, which as Registrar I certify.

Sweden

National report

The Labour Court
Stockholm

1. Is the case decided immediately upon the main hearing, or is a separate session held for that purpose?

Under Swedish procedural law, the court is obliged to start its deliberations after a main hearing on that same day or on the next working day. In the Labour Court, this means that for practical reasons the discussion commences directly after the main hearing. If the main hearing is finished in the evening, it is quite normal that a separate session is held for further deliberations. Such a separate session for continued discussion is also quite frequently held in more complicated cases. In those cases, a first draft judgment is often sent out to the members of the Court before the session. In some cases, several sessions are held so that all problems can be sorted out.

2. By a **presenting official** we suppose that the question refers to a secretary to the Court with legal education. An official of this kind is always involved in the Court´s decision-making, though his or her role during the deliberations after a main hearing is not very conspicuous. This official is in most cases a junior judge.

3. **Lay members etc.** The Swedish Labour Court is composed of seven members. Four of these are lay members in the sense that they are not professional judges and need not be educated lawyers. However, they are not lay members in the normal sense of the word, but expert members with practical experience of labour law problems. Each of these four

members has one vote, just like the remaining three members of the court. The lay members are sworn judges and have the same duty to be objective and impartial as a professional judge. They are appointed by the Government after having been proposed by the leading labour market organizations. The lay members role in the deliberation is to take part in the discussions just like the other members. In practice, the presiding judge initiates the discussion by structuring the items to be discussed and by presenting the content of the legal material (statutory law, case-law etc.). Thereafter, the actual discussion is in fact often begun by the lay members. The discussion is nowadays very open and informal. The lay members make very important contributions concerning attitudes and values that prevail on the labour market. This is of special importance in cases concerning dismissals and cases concerning interpretation of a collective agreement. Even when they are not educated lawyers – though many of them are – they are in most cases well trained in the kind of logical, and sometimes formal, thinking that normally has to be the basis of judging cases.

4. The presiding judge takes part very actively in **writing the decision**. In most cases the presenting official makes a draft, which is then amended by the presiding judge (who very often himself or herself has been a presenting official in the Court). Writing a decision is by most judges seen as a very personal matter, and every individual has his or her view on how a decision should be shaped. A typical decision consists of 15-25 pages, of which about half is the Courts own deliberations. In the Swedish Labour Court, a very great amount of work is laid on writing the decisions. All seven members of the Court read the presiding judge´s draft, and they often make suggestions for minor changes in the text.

5. **The main legal sources** when deciding a case in the Swedish Labour Court is the applicable law and the preparatory work that led to issuing the law. Previous decisions by the court or other courts are also an important source. Comments in legal literature can in some cases be of interest.

In the reasoning of the decision the court often make references to the legal sources used, in particular to the applicable law and its preparatory work and previous decisions by the court.

6. **Personal views**. It is not customary for a judge to express personal views in a decision.

7. At this stage we have no further comments on the subject.

Judgement
Swedish Labour Court

SWEDISH LABOUR COURT | Judgement no. 58/02
Case no. A 119/01

Summary

Question of whether there were objective grounds for giving notice to an employee at a building Company who, according to results of the investigation, on three occasions refused to perform tasks that he was under obligation to carry out.

PLAINTIFF

Svenska Byggnadsarbetareförbundet, 106 32 STOCKHOLM

Legal counsel: lawyer Peter Kindblom, Advokatfirman Lindh Stabell Horten KB, Box 7315, 103 90 STOCKHOLM

DEFENDANT

Stefan Allbäck Byggnads AB, Gruvgatan 2, 421 30 VÄSTRA FRÖLUNDA

Legal counsel: lawyer Ingemar Nyman, Hamilton & Co Advokatbyrå Göteborg HB, Stora Nygatan 33, 411 08 GÖTEBORG

CASE

Dismissal/giving notice

There is a collective agreement, a so-called local collective agreement, between Svenska Byggnadsarbetareförbundet (Swedish Building Workers Union, hereinafter "Union") and Stefan Allbäck Byggnads Aktiebolag (hereinafter "Company"). The local collective agreement refers to the currently applicable agreement of a collective nature between Swedish construction companies and the Swedish Building Workers Union. Among other things, a national agreement exists between these parties: the building agreement. Included in this are regulations for negotiations, and in Section 10 item 3 there are rules concerning when the minutes taken at negotiation meetings shall be verified. As an appendix to the building agreement there is an employment security agreement, which inasmuch as they apply to the events in this particular case, contain rules that correspond to the rules in the Security of Employment Act.

The Company, which at the time of this dispute had 14 employees working under a collective agreement, carried out operations consisting of reconstruction and extension primarily in the Göteborg area.

Sven-Göran Berntsson, who is a member of the union, was employed at the Company in 1989. The dispute arose as a result of the Company relieving Sven-Göran Berntsson from his employment. Negotiations have taken place without the parties being able to reach an agreement.

The union has petitioned the Swedish Labour Court to oblige the Company to

A. pay Sven-Göran Berntsson

- financial damages or salary and holiday pay amounting to SEK 12,287,
- general damages of SEK 80,000 for the humiliation to which he has been subjected, and
- general damages of SEK 6,000 for error of form

B. pay the union general damages of SEK 15,000 for omitting to give notice and verify the minutes within the allowed time period.

In addition to these amounts, interest is claimed in accordance with Section 6 of the Interest Act from the date of service of a writ of summons, 14 August 2001, until payment is made.

The Company has contested the lawsuit charge in its entirety. The financial damages have been certified as reasonable. With respect to the general damages, the Company finds reasonable SEK 5,000 for breach of regulations in the collective agreement concerning the contents of the notice papers and the way in which these were handed over, and SEK 1,000 for omitted notice and verification of the minutes. In other respects the Company has not accepted any general damages as a reasonable. The Company finds the interest claimed reasonable.

The parties have claimed compensation for court costs.

The parties have mainly pleaded the following as an elaboration of the suit.

Union

Union member Sven-Göran Berntsson was employed at the Company from 1989. He is known to be a skilled tradesman. He has suffered from back problems since 1996 or 1997 and has had some trouble performing tasks that are heavy on his back. This has been known to his employer since 1997. He has also been off sick a number of times due to his back problems and has had treatment for this condition.

In December 2000 Sven-Göran Berntsson was working at the Stora Torp site. Sven-Göran Berntsson's task was to fix plywood to a wooden shed and carry out some finishing work. When Sven-Göran Berntsson came to work on Friday 15 December 2000 to complete the work, his workmates Erik Eriksson and Fredrik Sjöling were there doing construction work. Erik Eriksson said that Sven Göran Berntsson should bury two sleepers. Sven-Göran Berntsson realised that there would be a large risk of his having problems with his back if he carried out the task. He said as much to Erik Eriksson, who said that Sven-Göran Berntsson had to call Stefan Allbäck about the situation. Sven-Göran Berntsson called Stefan Allbäck and said that there would be a risk of hurting his back if he carried out the work. Stefan Allbäck answered that he had to do the job and if not "he would have to see what happened on Monday." Sven-Göran Berntsson took that as a threat and took it badly. He tried once again to contact Stefan Allbäck. Sven-Göran Berntsson then said that there were other jobs that he could carry out. He received the same answer and became very upset. He went home and after a telephone call to the union department in Göteborg he reported sick for the rest of the day, since he felt very bad. He called the Company and explained this.

On Sunday 17 December Sven-Göran Berntsson contacted Stefan Allbäck and they decided to meet at the company office on Tuesday 19 December.

In the evening of 18 December, Stefan Allbäck called Sven-Göran Berntsson. Stefan Allbäck said that he had considered the situation and that there was no point in continuing, and that Sven-Göran Berntsson would have to quit. Stefan Allbäck told Sven-Göran Berntsson to come to the company office and hand over the company car and his tools. Stefan Allbäck also said that he would send a written document of notice. Sven-Göran Berntsson protested but Stefan Allbäck insisted.

The notice of termination of employment, which Sven-Göran Berntsson eventually received, dated 18 December, contains the following text: “This is to confirm the termination of 621007-4859 Sven-Göran Berntsson’s employment with Stefan Allbäck Byggnads AB for personal reasons.” It is also stated that a copy of the document had been sent to union department 12 and to Lasse Bengtsson, an employee at the Company. This confirms the fact that there was contact on 18 December at which time the serving of the notice of termination took place.

Sven-Göran Berntsson contacted the Union to obtain advice. He was advised to return the car and the tools when the employer had requested that. On 19 December he went to the Company office and handed over the car and the tools. Not much was said on that occasion.

Sven-Göran Berntsson once again contacted the Union and on 21 December he declared the notice of termination to be invalid. On the same day, the union department requested a written report from the Company describing the reasons for the dismissal. In the union request it was stated among other things that the Company had given notice of termination verbally to Sven-Göran Berntsson. The Company submitted a report of the grounds for notice of termination and Sven-Göran Berntsson refuted these.

Dispute negotiations were held locally on 29 January 2001 and centrally on 2 May 2001. Under the heading “factual circumstances” in the minutes, it was stated that on 18 December Stefan Allbäck verbally dismissed Sven-Göran Berntsson from his employment with immediate effect. There was no objection to this statement from the Company when the minutes were verified.

Not until 11 July 2001 were the minutes of the central negotiations received by the Union, duly verified by the Company.

Sven-Göran Berntsson was reemployed on 9 January 2001. The claim of invalidity has therefore been withdrawn and instead a petition for financial damages or salary and holiday pay has been put forward.

The Company dismissed Sven-Göran Berntsson without even objective grounds for giving notice existing. The Company has thus breached Section 17 of the employment security agreement, which – as far as grounds for dismissal are concerned – corresponds to Section 18 of the Security of Employment Act. Should the Swedish Labour Court not find that dismissal took place, Sven Göran Berntsson has certainly been given notice of termination without objective grounds existing. The Company has then breached Section 9 of the employment security agreement, which – on the issue of objective grounds – corresponds to Section 7 of the Security of Employment Act. Should the Swedish Labour Court not find that Sven-Göran Berntsson had been given notice of termination, he has certainly been relieved from employment during that time period 18 December 2000 until 9 January 2001. Not until 28 February 2001 did the Company send information to Sven-Göran Berntsson saying that he was obliged to work. By then it was too late. Sven-Göran Berntsson is entitled to financial damages or salary and holiday pay for the time period from 18 December 2000 until 9 January 2001.

The Company has not submitted any so-called grievance report, i.e. it has not stated what Sven-Göran Berntsson must observe or what he must do to be able to claim that the dismissal or notice of termination was invalid or to claim damages. Thus the Company has breached Section 18 or alternatively Section 10 of the employment security agreement, which in this respect puts the same demands as Section 19 or Section 8 respectively in the Security of Employment Act. Nor has the Company handed over notification of the dismissal or notice of termination to Sven-Göran Berntsson personally. The Company has thus breached Section 19 or Section 12 respectively of the employment security agreement, which in this respect puts the same demands as Section 20 or Section 10 respectively in the Security of Employment Act.

By omitting to inform Sven-Göran Berntsson and warn the union department about the measures considered, the Company has also breached Section 26 in the employment security agreement, which in this respect puts the same demands as Section 30 in the Security of Employment Act.

By not verifying and returning the minutes of the meeting in time, the Company has breached Section 10 item 3 of the building agreement. According to that regulation, the minutes of a meeting must be made available to the appointed minutes-checkers within one month of the last negotiation meeting and the minutes must be verified and made available to the other party at the latest within one month of receipt, unless agreed otherwise.

The Company

The Company carries out construction work on a contract basis. Work is of a varied nature and is carried out simultaneously at different sites. The Company's management consists of Stefan Allbäck, who leads and allocates work by continuously giving instructions on how work is to be carried out. The Company's operations put large demands on flexibility in order that the Company's resources can be utilised in a correctly businesslike and financial manner. The employees must be prepared to carry out their tasks at different work sites, to carry out varied types of tasks and to assist each other in carrying out different types of work.

Stefan Allbäck has on different occasions had extremely trying problems in persuading Sven-Göran Berntsson to carry out the instructions he has been given. These problems became worse during his time of employment and in November and December 2000 they became very serious.

On 3 November Sven-Göran Berntsson refused to lay gravel around a cooling room building on the building site at Isdala despite being told to by the Company manager.

On 8 November Sven-Göran Berntsson refused to help the excavator Jan Gripenberg to lay drainage pipes, despite being told to by the Company manager, on the building site at Sisjön. Sven-Göran Berntsson left the building site instead.

On 8 December Sven-Göran Berntsson refused to carry out floor casting at the building site at Inägogatan, despite being given clear and straightforward orders from the Company management.

All of these tasks had to be carried out by other employees at the Company. On these occasions, Sven-Göran Berntsson was given clear and straightforward work orders by Stefan Allbäck or the person or persons delegated by him. After Sven-Göran Berntsson had refused to carry out these duties, Stefan Allbäck told him that his refusal to carry out work could not be accepted. The Company has tried to analyse and solve the problems that Sven-Göran Berntsson's attitude has caused by giving him work that he can carry out alone. He was also given the use of his own car in order to be able to work alone.

The last event took place on 15 December at the building site at Stora Torp. At about eight o'clock in the morning, Sven-Göran Berntsson called Stefan Allbäck and was aggressive. He swore and said "I won't do this sort of bloody shit jobs". Sven-Göran Berntsson also said that he did not want to carry out the work involving him and two other employees carrying two sleepers into position. He said that he would not carry out the work even if he were assisted by his workmates. Sven-Göran Berntsson then left the building site. Later, around 11 o'clock, Sven-Göran Berntsson called Stefan Allbäck again and said that he had reported in sick and that he was at home. Stefan Allbäck interpreted the situation to mean that Sven-Göran Berntsson refused to carry out work that was part of his obligation. Sven-Göran Berntsson did not give any valid reasons for his refusal to carry out the tasks at work.

On the evening of Sunday 17 December, Sven-Göran Berntsson called Stefan Allbäck and asked where he should go to work on Monday. Stefan Allbäck answered that since Sven-Göran Berntsson was off sick he had not planned any work for him. The telephone conversation finished at that point.

On Monday 18 December there was no contact between Stefan Allbäck and Sven-Göran Berntsson. Stefan Allbäck did contact union department 12, however, and was put through to the ombudsman, Mats Gröndal. He explained the problems and the unacceptable situation and asked for advice about how a document for notice of termination should be structured. Stefan Allbäck made notes on the information he received from Mats Gröndal about what he should write. He then went to the office and had the notice of termination written out, which he sent to Sven-Göran Berntsson's home address on the same day.

On the morning of Tuesday 19 December, Stefan Allbäck met Sven-Göran Berntsson, who had handed over the car and keys and was just leaving the Company premises. They only briefly greeted each other.

The Company did not tell Sven-Göran Berntsson to return the car and keys. He did this on his own initiative. The Company remarked on this attitude in the comments on the minutes from the local dispute negotiations.

It was admitted that the Company did not verify and return the minutes from the central negotiations on 2 May 2001 in time. The reason for this was that the minutes were not sent to the Company's representative but to Stefan Allbäck, who was away for a long period of time. The minutes were verified as soon as Stefan Allbäck returned.

Sven-Göran Berntsson was given notice of termination by letter on 18 December 2000 for personal reasons and the Company did not stop him from working in a way comparable with dismissal. The grounds for giving him notice were that Sven-Göran Berntsson had on many consecutive occasions refused to carry out orders given to him concerning work that was within his obligations. His refusal to work was characterised by an unreasonable attitude and general unwillingness on the part of Sven-Göran Berntsson. This led to the Company being forced to hire other employees to carry out work given to him. This caused financial damage to the Company. The notice of termination was based on objective grounds.

The Company admits that the notice of termination did not contain the information that it should have contained according to the collective agreement, that the notice of termination was not handed to Sven-Göran Berntsson in person despite there being no obstacles to this, and that information and advance warning were not given. The Company also admits that it did not verify and return the minutes from the central negotiations within the time period stated in the building agreement. These omissions took place through oversight and have not brought about any risk of loss of rights for Sven-Göran Berntsson. More damages should not be paid than those already accepted by the Company.

The Union

The Union contests that Sven-Göran Berntsson has been guilty of any refusal to work. The organisation of the Company is such that only Stefan Allbäck was able to give Sven-Göran Berntsson work orders. If his colleagues have given him tasks at work, there is no issue of refusal to work. If the Swedish Labour Court should find that there has been a refusal to work, this does still not constitute reason for dismissal or notice of termination.

Reasons for judgement

Union member Sven-Göran Berntsson was employed at the Company from 1989. His employment was indisputably terminated by the Company. However, the parties have different opinions of how this took place. The Union has claimed firstly that Sven-Göran Berntsson via a telephone call with the Company's manager, Stefan Allbäck, on 18 December 2000, was dismissed and secondly that he, as the Company has claimed, was given notice and that Sven-Göran Berntsson was removed from work under conditions that did not even constitute objective grounds for giving notice of termination. The Company has claimed that Sven-Göran Berntsson was given notice of termination from his employment through a document that Stefan Allbäck wrote on 18 December 2000 and sent the same day by post to Sven-Göran Berntsson, and that the notice of termination was based on objective grounds.

The case has been settled after main proceedings. At the request of the Union, questioning under oath took place with Sven-Göran Berntsson and examination of witnesses Mats Gröndal and Leif Johan Karlsson. At the request of the Company, questioning under oath took place with Stefan Allbäck and examination of witnesses Erik Eriksson, Fredrik Sjöling, Thomas Wikström, Jan Gripenberg and Thomas Elfstrand. The union has also cited some written evidence.

<u>Was Sven-Göran Berntsson dismissed or given notice?</u>

The union has claimed firstly that the Company's representative, Stefan Allbäck, dismissed Sven-Göran Berntsson through a telephone call on 18 December 2000. According to the union, Stefan Allbäck said during the telephone call that there was no point in continuing and told Sven-Göran Berntsson to return the company car and tools. The Company has contested that any such telephone conversation took place, and has stated that Sven-Göran Berntsson returned the car and the tools on his own initiative.

Sven-Göran Berntsson claimed during the hearing of the case that the conversation did take place as stated by the union and that Stefan Allbäck has denied that any such conversation took place. Thus, it is word against word. The Union has referred to the contents of certain documents, notice of termination and negotiation minutes, which could possibly, but not necessarily, be interpreted such that the Company admits that a telephone call took place. According to the opinion of the Swedish Labour Court, it cannot be considered proven against the objection of the Company that on 18 December 2000 there was in fact a telephone call with the contents stated by the Union. The Swedish Labour Court therefore assumes that the Company – as it claims, and as the Union too maintains in the case that dismissal is shown not to have taken place – gave notice to Sven-Göran Berntsson through the letter signed on 18 December 2000.

The question is then whether Sven-Göran Berntsson, as the Company claims, was guilty of refusal to work, which would constitute objective grounds for giving him notice of termination.

<u>Is Sven-Göran Berntsson guilty of refusal to work?</u>

The Company maintained that Sven-Göran Berntsson refused to carry out tasks at work in November and December 2000 at the building sites at Isdala, Sisjön, Inägogatan and Stora Torp.

Isdala

The Company maintained that on 3 November Sven-Göran Berntsson, despite being told to, refused to lay gravel around a cooling room building at the building site at Isdala, resulting in the work having to be carried out by another employee. The Union's standpoint is that Sven-Göran Berntsson did not receive an explicit order from Stefan Allbäck but that it was other employees who gave him the tasks of work, and for this reason it cannot constitute refusal to work.

Sven-Göran Berntsson stated that Stefan Allbäck did not tell him to lay gravel. Stefan Allbäck stated that he, perhaps the day before this event, instructed Sven-Göran Berntsson to lay a roof on a small cooling room that was under construction and to lay gravel around the building. Erik Eriksson stated that he received a telephone call from the city leisure and recreation department, the commissioner of the work, saying that the gravel had not been laid and that he called Sven-Göran Berntsson, who replied, “I don’t do any shit work like that”. Fredrik Sjöling has stated that he showed Sven-Göran Berntsson where the material was that should be used. Stefan Allbäck also stated that he had spoken with Sven-Göran Berntsson after this event, who could then not give any reason for his actions.

It is therefore indisputable that Sven-Göran Berntsson did not carry out the task of laying gravel. Sven-Göran Berntsson has explained this by the fact that he did not receive an explicit order from Stefan Allbäck to do this, which Stefan Allbäck has stated that he did. Even if one accepts Sven-Göran Berntsson’s statement that he had not received an explicit order regarding the task, his actions appear reprehensible. Considering the information given about the Company’s activities, it must have been obvious to Sven-Göran Berntsson that he should assist with and carry out tasks of work at the building site where he was present. Sven-Göran Berntsson’s statement to Erik Eriksson also speaks for the fact that there was reluctance on the part of Sven-Göran Berntsson to carry out certain tasks.

Sisjön

The Company maintained that at Sisjön building site on 8 November Sven-Göran Berntsson refused to help the excavator Jan Gripenberg lay a drainpipe and that instead he left the place of work. The Union has maintained that no order had been given by Stefan Allbäck, but instead by another employee.

Stefan Allbäck stated that the day before this event he gave Sven-Göran Berntsson clear instructions about what was to be done and that he must assist the excavator. Sven-Göran Berntsson stated that he only knew he had to hold an instrument at the building site and that he did not know what else he should do. Erik Eriksson stated that there was a telephone call from the excavation company that the excavator worked for, saying that there was a person at the building site who did not want to work. Jan Gripenberg stated that Sven-Göran Berntsson was to help laying the pipe, “keep the height” and lay out a mat, and that when Sven-Göran Berntsson was asked to do that he answered, “I won’t do that” and left the building site. Stefan Allbäck stated that after this event he had a serious talk with Sven-Göran Berntsson, who promised to improve matters.

According to the opinion of the Swedish Labour Court, in this case too it must have been obvious to Sven-Göran Berntsson that he should assist with tasks to be done at the building site. It would appear to be inconceivable that Sven-Göran Berntsson had been sent to the site only to hold an instrument at the same time as somebody else would need to be sent there to help the excavator with general work. Sven-Göran Berntsson's statement to the excavator would appear to indicate that it was more Sven-Göran Berntsson's dislike of the tasks that was behind his actions.

Inägogatan

The Company initially maintained that on 8 December at the Inägogatan site, Sven-Göran Berntsson had omitted to carry out removal of surface filler when water damage in a shower room had to be rectified. During the hearing of the case, however, the Company changed its standpoint and maintained instead that Sven-Göran Berntsson had refused to cast a floor.

Stefan Allbäck stated that after the drying process had been carried out he asked Sven-Göran Berntsson to go to the site and cast a so-called rough cast, but he had not done the work. Sven-Göran Berntsson stated that he had demolished walls and taken away surface filler, and that it would take a while since the place had to be dried out, and that Thomas Wikström a few days later asked about the size of the surface to be filled and then cast it. Thomas Wikström stated that Stefan Allbäck called him and said that Sven-Göran Berntsson had started the work but did not want to cast the floor.

In the light of the different information that has been presented by the Company in this case and that the investigation cannot be said to have given a clear decision on what took place, the Swedish Labour Court finds that it cannot be considered proven that Sven-Göran Berntsson was guilty of refusal to work in this case.

Stora Torp

The Company maintained that on 15 December at the Stora Torp building site Sven-Göran Berntsson had refused to assist in putting two sleepers in place. The standpoint of the Union is that Sven-Göran Berntsson could not carry out the work due to his back problems.

Stefan Allbäck stated that Sven-Göran Berntsson's task was to build a wall for an outhouse, and for this a foundation was required consisting of two sleepers that required an excavation of approximately 5 cm, that Sven-Göran Berntsson called him and without giving any explanation said that "I won't do this sort of shit work", and that he told Sven-Göran Berntsson to do the work, which he refused despite the fact that Erik Eriksson and Fredrik Sjöling, who were at the site, offered to help out with the job. Sven-Göran Berntsson stated that when he had a telephone conversation with Stefan Allbäck that he said that it was due to his back problems that he refused to do the work, and that he thought that he was subjected to humiliation and went home. Erik Eriksson stated that Sven-Göran Berntsson said to him that Stefan Allbäck had said that Sven-Göran Berntsson did not need to do the work with the sleepers, that Stefan Allbäck in a discussion to verify the situation had said that that was a lie and that Sven-Göran Berntsson had said that he would not do such “shit work”. Fredrik Sjöling stated that Sven-Göran Berntsson had not mentioned anything about problems with his back.

According to the opinion of the Swedish Labour Court, the investigation of this situation shows that Sven-Göran Berntsson refused to carry out work with the sleepers. In the court he explained his actions by saying that the work could have caused him problems with his back. However, the investigation indicates that at the time, Sven-Göran Berntsson did not state any such reason and the Swedish Labour Court thus considers that it can ignore this explanation, especially since Sven-Göran Berntsson’s statements to Stefan Allbäck and Erik Eriksson indicate that in this case, too, it was Sven-Göran Berntsson’s dislike of the task that was behind his actions.

Did the Company have objective grounds for giving notice?

The investigation shows, therefore, that Sven-Göran Berntsson on three occasions was guilty of refusal to work. The investigation also shows that the Company had to engage other people to carry out the tasks that Sven-Göran Berntsson refused to do. Erik Eriksson stated that he had to drive from Kungsbacka to lay the gravel at the Isdala building site. The tasks at Sisjön building site that Sven-Göran Berntsson refused to do were performed, according to Erik Eriksson and Fredrik Sjöling, by themselves after they had to go to the site. Obviously, the tasks at Stora Torp building site were executed by other employees. One conclusion that must be drawn from the investigation is that Sven-Göran Berntsson through his actions caused the Company inconvenience and costs, even though the size of the costs cannot be established. The completion of the work may also have been delayed, which may have influenced the relationship with customers. The investigation also shows that other employees’ working conditions were influenced by Sven-Göran Berntsson’s behaviour and that he was considered as disloyal by other employees.

From preliminary work to the Security of Employment Act (pr. 1973:129 p. 124) the following is indicated. In the assessment of whether refusal to obey orders constitutes objective grounds for giving notice, the assessment should not be aimed so much at what happens in any individual case as at the conclusions about the employee’s suitability that may be drawn from the events. Not until there are clearly documented cases of unsuitability should the demand of objective grounds be considered as fulfilled. A refusal to obey orders should not be automatically considered as constituting objective grounds for giving notice. Circumstances in each individual case may have been such that the employee had reasons for his refusal, which may be reasonable enough to consider. If an employee’s refusal to obey orders appears to be an expression of a general unwillingness to accept an employer’s instructions, then objective grounds may be considered to exist. In cases where an employee has neglected his work, it would appear to be justified to take into consideration such circumstances as how long the employee has been employed, that he has not previously neglected his work or that what happened appears to be a temporary sidestep from the standpoint of the employee.

According to the opinion of the Swedish Labour Court, it appears that Sven-Göran Berntsson's actions on three occasions in refusing to carry out tasks that he was obliged to perform at least together constitute a serious disregard of his obligations towards his employer. It does not appear that Sven-Göran Berntsson had any reasons for his refusal that should be taken into consideration. From what he has expressed in conjunction with the three occasions, it appears that his actions have been due to a general unwillingness to carry out certain tasks, which he has not considered to be sufficiently specialised for him. Sven-Göran Berntsson has, according to what the investigation indicates, caused his employer inconvenience and extra costs. According to the opinion of the Swedish Labour Court, Sven-Göran Berntsson's neglect of his obligations towards his employer would in general terms constitute objective grounds for giving him notice.

However, the Union has also claimed that the Company had not clarified for Sven-Göran Berntsson that he risked his employment through his behaviour, which according to the practice of the Swedish Labour Court may be demanded for objective grounds for giving notice. According to the Company, Stefan Allbäck did clarify for Sven-Göran Berntsson that his refusal to work could not be accepted.

Stefan Allbäck stated that there had been great problems with Sven-Göran Berntsson who did not wish to do as Stefan Allbäck wanted, that he had had a number of discussions with Sven-Göran Berntsson about this fact, that Sven-Göran Berntsson had promised to improve matters but the opposite was true, and that he had had discussions with Sven-Göran Berntsson after the events but that these discussions had not been documented.

With due consideration to the problems that Sven-Göran Berntsson's actions caused, it would appear to be less credible that Stefan Allbäck would not take up these issues with Sven-Göran Berntsson, especially as his actions to a large extent influenced other employees' conditions, as well as relationships with other companies and customers. According to the opinion of the Swedish Labour Court, even though no discussions had been documented it must have been clear to Sven-Göran Berntsson even after the first two events that his employer could not accept his behaviour. Sven-Göran Berntsson must have realised that he was causing his employer inconvenience and extra costs through his actions. Despite this fact he did not change his behaviour. Considering these facts and the unwillingness to perform certain tasks that Sven-Göran Berntsson showed, it is the opinion of the Swedish Labour Court that it would have been unlikely that reprimands or reminders from the employer after the event on 15 December 2000 would have led to any decisive improvement in Sven-Göran Berntsson's behaviour. The demands that can be put on an employer before giving notice for warning an employee and reminding him that he is risking his job through his behaviour should naturally also depend on what the employee has done in the past. Particularly stringent demands for such warnings should not be put if the employee has on repeated occasions in a serious fashion neglected his fundamental and clear obligations in accordance with the employment agreement and the employer has not given the employee reason to assume that the employer accepts the employee’s behaviour.

In the overall assessment of what has taken place, the Swedish Labour Court finds that the Company had objective grounds for giving notice to Sven-Göran Berntsson. The fact that Sven-Göran Berntsson had been employed for an unusually long time period for the industry should not be allowed to assume major significance when the issue is repeated cases of refusal to work.

The Union’s plea for general damages for Sven-Göran Berntsson’s dismissal or notice without objective grounds existing is therefore rejected.

<u>Other petitions</u>

The Union has also petitioned for financial damages or salary and holiday pay for Sven-Göran Berntsson for the time period from his receiving notice until he gained other employment on 9 January 2001. In the Company’s document for notice of termination, the period of notice was not stated and from the investigation of the case it is clear that the Company did not inform him that the period of notice was four months until he had gained further employment and that the Company considered him to be under obligation to work during this time period. In view of this situation, the case should be considered as claimed by the Union, namely, that the Company must be assumed to have relieved Sven-Göran Berntsson from work during the period of notice. The Company should therefore be ordered to compensate Sven-Göran Berntsson for loss of income during this period as the petition states. There is no dispute over the sum involved. With due consideration to the assessment, the compensation should be considered as salary and holiday pay.

The investigation indicates that in its relationship to Sven-Göran Berntsson the Company breached the regulations in the security of employment agreement or the equivalent regulations in the Security of Employment Act through omitting to hand over a grievance report, omitting to hand over the notice of termination personally, and omitting to inform him in advance of the measures considered. The investigation also indicates that the Company, in relation to the Union, neglected its obligation in accordance with the employment security agreement to notify the Union of the actions considered and its obligation in accordance with the building agreement to verify and return the negotiation minutes within a certain time period. The latter omission was not the result of any unwillingness to fulfil obligations, but due to the fact that the Company’s representative was away during the time in question. The Company’s failure to inform Sven-Göran Berntsson in advance and to communicate to the Union notice of termination being given is more serious. Damages should be set at the amount claimed, i.e. SEK 6,000 to Sven-Göran Berntsson and SEK 15,000 to the Union.

Court costs

Both parties have won. What the Company has lost must be considered to be of minor significance. The Company should receive full compensation for court costs. There is no dispute over the amount.

Judgement

In rejecting the plea of the Swedish Building Workers Union for general damages to Sven-Göran Berntsson for breach of Section 17 or alternatively Section 9 of the employment security agreement, the Swedish Labour Court orders Stefan Allbäck Byggnads AB to pay Sven-Göran Berntsson

salary and holiday pay to the amount of SEK twelve thousand two hundred and eighty-seven (12 287) and interest in accordance with Section 6 of the Interest Act from 14 August 2001 until payment is made and general damages of SEK six thousand (6,000) and interest in accordance with Section 6 of the Interest Act from 14 August 2001 until payment is made

and to pay to the Swedish Building Workers Union general damages of SEK fifteen thousand (15,000) and interest in accordance with Section 6 of the Interest Act from 14 August 2001 until payment is made.

The Swedish Building Workers Union shall compensate Stefan Allbäck Byggnads AB for court costs to the amount of SEK eighty-three thousand (83 000) for legal representation costs and interest in accordance with Section 6 of the Interest Act from the date of this judgement until payment is made.

Members: Hans Tocklin, Charlotte Abrahamsson, Palle Landin (opposing), Carl Magnus Pontén, Göran Gräslund, Inger Öhrn Karlsson, Jarl Karlsson

Secretary: Karina Hellrup

Judgement appendix
for case no. A 119/01

Opposing view of Palle Landin.

In this case it has been made clear that Sven-Göran Berntsson did not carry out tasks on at least three occasions that he was obliged to perform in accordance with the employment agreement. This behavior is reprehensible, particularly as Sven-Göran Berntsson must have realised that his behaviour caused the Company inconvenience and extra costs. In this case it is not proven or completely investigated that the employer's manager, Stefan Ahlbäck, in his discussions with Sven-Göran Berntsson clearly communicated that Berntsson's job would be jeopardised if he did not change his behaviour. In the light of this and Sven-Göran Berntsson's long period of employment with the Company, notice of termination would appear to be too serious a measure for the events that took place.

In a newly issued judgement, 2002 no. 44, the Swedish Labour Court has treated the issue of how important clarity is from the employer's side towards an employee in conjunction with measures being considered which will have serious consequences for the employee. The following is stated in the judgement, among other things:

"In preliminary work on the Security of Employment Act it is emphasised as natural that an employer should remind an employee that unsatisfactory circumstances from the employer's standpoint have significance for the continuance of the employment situation. The intention of the legislator is that notice of termination should not be surprising or unmotivated, and for this reason such notifications and warnings should be part of the employer's dealing with misdemeanours at the place of work that could lead to notice of termination of employment. It is the practice of the Swedish Labour Court to put great significance on the employer acting in this fashion when the issue of objective grounds is disputed. As the Swedish Labour Court pleaded in judgement 1986 no. 160, the more detailed demands that should be placed on a clarification of the type referred to here must naturally be judged ultimately with respect to the circumstances of each individual case, but as a rule it must be required that the employee has at least received an unequivocal warning that his employment is at risk."

As indicated by the investigation, with respect to Sven-Göran Berntsson the Company has breached the regulations in the employment security agreement or equivalent regulations in the Security of Employment Act by not giving a so-called grievance report, not handing over the documents of notice personally and not informing him in advance of the measure being considered. It is also clear from the investigation that the Company neglected its obligation to inform the union of the measure being considered. This omission on the part of the Company also contributed to the fact that Sven-Göran Berntsson did not fully understand that the employer intended to give him notice as a result of his refusal to carry out certain tasks at work.

Through not notifying the Union of the measure being considered, the opportunity of negotiations between the employer and the union organisation to find an alternative solution to giving notice was lost.

This issue, too, is treated in detail in AD judgement 44/02, in which the following is stated, among other things:

"In Section 30 first paragraph of the Security of Employment Act it is made clear that an employer who wishes to give notice to an employee on the grounds of personal circumstances related to the employee must inform the employee of this at least two weeks in advance. If the employee is a member of the union, the employer must at the same time inform the local employees' organisation to which the employee belongs. In the second paragraph of the same section, it follows that the employee and the local employees organisation to which the employee belongs have the right to discussions with the employer regarding the measure that the information and notice refer to; one assumption here is, however, that the discussion is requested at the latest one week after the information or notice was given. If a discussion has been requested, the employer may not execute a notice of termination until the discussion has been completed, in accordance with the third paragraph."

In my opinion, the notice given by the Company to Sven-Göran Berntsson was not based on objective grounds.

Outvoted in this respect, I am in other respects in agreement with the majority.

Venezuela

National report

Judge Juan Rafael Perdomo,
Vice Presidente,
Sala de Casación Social
Tribunal Supremo de Justicia
Caracas

1. Is the case decided immediately upon the main hearing, or is a separate session held for that purpose?

The Venezuelan procedural system developed by the Procedural Organic Law of Labor consists on the following steps:

1) Presentation of the complaint before the Court.

2) Admission of the complaint.

3) Notification to the defendant.

4) Hearing process:

a) Preliminary hearing: after being notified, the involved parties come to the hearing and mediation takes place. If a favorable mediation is achieved, an official report is issued and homologated with the partial or total agreements accepted by the parties. If the mediation is not favorable, the mediation is concluded. The contestation to the complaint is produced five days after the mediation is concluded. At this moment, the defendant consigns the evidences, since the defendant already includes them with the petition. The mediation that takes place in the preliminary hearing is private, not binding and confidential. This is a professional judge that knows the technique of mediation and tries the parties to solve the case through dialogue. This judge does not decide about the bottom of the matter.

b) Trial hearing: The trial hearing is presided by a professional judge. The judge's job is to examine, approve and value the evidences and then, once the evidentiary debate of the hearing is over, to orally make a decision. The sentence of this judge determines the solution of the case once the judge has examined the facts and valued the evidences. In this phase, it is also possible that the judge, considering the concrete case, may suggest that the parties mediate on the case.

c) The judge pronounces the sentences orally. The sentence must be published in writing five days later. Then, the sentence may be appealed by the losing party before a Superior Court, so the judge knows the cause and who is deciding it.

d) This sentence has the appeal before the Superior Labor Judge who knows the second instance. That judge decides the case in a unique hearing.

e) This sentence may be challenged through an appeal to the court of cassation as long as its necessary amount surpasses three thousand tributary units.

2. Is there a presenting official involved in the process? If yes, please describe the formal and factual role of the official.

No, there is no presenting official involved in this process. The only one involved in this process is the judge, who presides the hearing and who is in charge of deciding the cause in that hearing.

3. Does the composition of your court include lay members? If yes, please give a description of their role in the deliberation leading to the decision, with a view to the interplay between the chair and the lay members. What is in your experience the main contribution of the lay members in the decision-making process?

No, there are no lay members. All members are professional; therefore, we do not have any experience with that kind of lay member in Labor Courts. However, the Constitution of the Bolivarian Republic of Venezuela, when referring to the Judicial System, states two important ideas: on one hand, that justice emanates from the citizens, it is given in the name of the Republic by authority of the Law and, on the other hand, that the justice system is constituted by the Supreme Court of Justice, other Courts indicated in the Law, the Attorney General’s Office, the defense Attorney’s Office… the alternative means of justice, the citizens that participate in the administration of justice according to the Law and the lawyers authorized to exercise.

In my opinion, this norm allows to compose Labor Courts with lay members as long as it is determines by the Law and when it is required by the circumstances. For now, there are no lay members in any Labor Court of the Republic.

4. To what extent does the presiding judge take part in writing the decision?

The Organic Law of the Supreme Court of Justice attributes to its President and the other Presidents of the other rooms, the right to intervene and participate in the writing the decisions pronounced in each room. Moreover, the President may save his/her vote when he/she is not the rapporteur of the decision of the case or cases.

5. What are the main legal sources you use in deciding a case, especially a difficult one? In the reasoning of the decision, do you make express references to legal literature, case law, previous decisions of your own court, etc.?

According to the Organic Law of Labor, the sources that a judge must use to make a decision, whatever its nature, are: International standards of the International Labor Organization, the Constitution of the Bolivarian Republic of Venezuela, the Organic Law of Labor, the Procedural Organic Law of Labor and the maxims of experience.

6. Is it customary to express the personal views of the judge in a decision?

Yes, it is possible. This must be done by dissenting vote or concurrent vote. When there is a difference in criteria with the rest of the senior judges to solve the problem, such difference is expressed separately from the decision in what is called a dissenting vote.

7. Are there any further comments you wish to make on the subject?

According to the Procedural Organic Law of Labor in the Bolivarian Republic of Venezuela to solve labor cases, in force since August 13th 2003, it is established in the constitutional norms that oral testimonies and other alternative means to solve conflicts were incorporated to the process as a fundamental instrument of justice, which allows a considerably higher number of solved cases. Nowadays, 85% of the incoming causes in the different Courts of the Republic are solved. The period of solution of causes through mediation varies from a month to fourteen months, including the cassation, which brings an absolutely new briefness through a mixed process: oral and written testimony.

Judgement

LA REPUBLICA BOLIVARIANA DE VENEZUELA
EN SU NOMBRE
EL TRIBUNAL SUPREMO DE JUSTICIA

SOCIAL CASSATION DIVISION

Proposal of the Senior Judge Doctor **JUAN RAFAEL PERDOMO**

In the procedure of qualification of dismissal followed by citizen **JOSÉ DESIDERIO ROMERO RIVAS,** against the **ALCALDÍA DEL MUNICIPIO BARUTA DEL ESTADO MIRANDA**, the Superior Labor Court sustained the motion.

This division, given the opportunity, publishes the written judgment, after taking into consideration the following:

The plaintiff alleges that he worked for the “Instituto Autónomo de Salud de la Alcaldía del Municipio Baruta” (Autonomous Health Institute of the Mayor’s Office of the Municipality of Baruta) from January 25th, 1994 to January 7th, 2002, taking the position of transportation driver from 7:00 a.m. to 7:00 p.m., when the “Mayor’s Office of the Municipality of Baruta” delivered him a letter that manifested that he had been justifiably dismissed.

Moreover, the plaintiff attests that, in the letter, the facts that materialize such serious faults in the service imposed by the work relationship are not detailed and that the letter only details the days when the plaintiff had been seen consuming alcohol, all this without explaining what was the serious fault. The letter does not express the exact time when the plaintiff abandoned the work position, nor does it specify who saw the plaintiff or who was with the plaintiff at that time.

Based on these facts, the plaintiff claims the reinstatement to the previously held position and payment of the salaries missed until the effective date of reengagement.

In the opportunity of answering to the complaint, the defendant admits that the plaintiff worked as a transportation driver in the Autonomous Health Service of the Mayor's Office of the Municipality of Baruta. The defendant also confirms that the date of the dismissal notification was January 7th, 2002.

The defendant denies that the dismissal notification does not express the facts that materialize the serious faults to the obligations imposed by the work relationship and abandonment of the work position due to the fact that the defendant transcribes this in their plaintiff's libel.

Moreover, the defendant denies the obligation of specifying the exact time when the facts occurred. However, the dismissal letter does include the time when the facts that favored the dismissal of the worker happened. The defendant also denies the obligation of detailing in a letter of notification of dismissal the obligations of the worker that is being dismissed through such notification.

Then, according to Article 135 of the Procedural Organic Law of Labor, the regime of distribution of the probative charge in terms of labor shall be established according to the way in which the sanctioned party answers to the complaint.

In this concrete case, the existence of a work relationship, its duration and salary, as well as the occurrence and dismissal date have been established from the analysis of the libel and the contestation, so the controversy lies in determining if the dismissal was justified or not.

The defendant is in charge of proving the facts that justify the dismissal and that the days and hours in which the facts tool place were specified in the letter of notification of dismissal.

Once the terms of the controversy were established, this division analyzes the evidence promoted and produced by the parties.

Evidence produced with the original libel of the dismissal letter is marked with the letter "A". The dismissal letter was emitted from the Mayor's Office of the Municipality of Baruta, dated January 4th, 2002 and delivered to the worker on January 7th, 2002. The letter notified the dismissal according to the literals "i" and "j" of the article 102 of the Organic Law of Labor, which express the serious fault of obligations imposed by the work relationship, which is weighted and deserved probative value.

In the period of promotion of evidence marked as "A", a Collective Convention of Labor was subscribed before the defendant and the Union of Health Workers and Similar of the State of Miranda. The Collective Convention is constituted by forty (40) folios.

In terms of the juridical nature of the collective conventions, the division clarifies in the sentence Nº 535 of the year 2003 that even if collective conventions have their origins in an agreement of will, it is also true that once the agreement is achieved, it has to be necessarily subscribed and presented before an organization of public competence, specifically before the Labor Inspector, who not only can formulate the observations and recommendations that he/she considers, but also has to subscribe and present the collective convention. If the Inspector does not subscribe or present the collective convention, the latter is of no legal effect whatsoever. These special requirements give the collective convention a juridical nature different from the rest of the contracts and allows the collective convention to be assimilated to a normative act that, due to the requirements that must converge to its formation and validity, must be considered as law and not as simple facts subjected to the general rules of the charge of allegation and evidence that rule for the rest of the facts adduced by the parties in trial. Therefore, by being law and not facts subjected to allegation and evidence, its valuation is not justified.

Evidence produced with the contestation of the complaint:

1) Marked as “B”, original, notification of dismissal effectuated before the Fifth Labor Court of First Instance, which is weighted.

2) Marked as “C”, original, letter of notification of dismissal.

3) Marked as “D”, request of dismissal of the Supervisor of Health.

4) Marked as “A”, “B” and “C”, report addressed to the Supervisor of Health.

5) Promoted testimonies.

From the continuous exams to the evidence, it was established that the citizen José Desiderio Romero Rivas abandoned his work position on December 21st and 28th of the year 2001 during working hours – from 6:30 to 6:40 p.m. – to consume alcohol in a place located approximately 50 meters from the main office of the S.E.R.B.A.

Article 116 of the Organic Law of Labor disposes that: “OMISSIS”

Article 102 disposes: “OMISSIS”

In this concrete case, the defendant party demonstrated that they did present the dismissal before the competent officer, fulfilling what is established in article 116 of the aforementioned law. Moreover, the dismissal was based grounds established in article 102 of the Organic Law of Labor.

The plaintiff worked as a transportation driver in the Autonomous Health Service and was responsible of transporting ill people in ambulances during a work schedule.

The division considers that, given the responsibility of the plaintiff due to the type of job that the plaintiff does, it is a serious fault to the obligations imposed by the work relationship to consume alcohol in working hours and to abandon the work position since this affects the motor capacity of people at the moment of driving a vehicle and constitutes justified causes for dismissal. For the reasons aforementioned, the petition is overruled.

DECISION

For the reasons aforementioned, the Supreme Court of Justice, the Social Cassation Division, giving justice in the name of the Republic and by authority of the law, **OVERRULES** the petition. There are no court orders to pay attorney’s fees.

Given, signed and stamped in the Division of the Bureau of the Social Cassation Division of the Supreme Court of Justice in Caracas, on the thirteenth (13^{th}) day of June of the year two thousand and six, year 196 of the Independence and 147 of the Federation.