

**Tenth Meeting of European Labour Court Judges
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The Role of Collective Bargaining

Questionnaire

**General Reporter: Judge Harald Schliemann,
Federal Labour Court of Germany**

ISRAEL

**National Reporter: Judge Elishava Barak, Vice President
National Labour Court**

Parties to a collective agreement

In order to define the parties to a collective agreement we have to specify the kinds of collective agreements in Israel. Israel has a law that defines what a Collective Agreement is, who the parties to a Collective Agreement are and what turns an agreement to be an official Collective Agreement. It specifies the special requirements for an agreement to be an official one. The requirements are very strict.

A Collective Agreement is an agreement between an employer or an association of employers on one hand and a trade union, an employee organization. There are two kinds of Collective Agreements. One is a general Collective Agreement. It applies to the whole area of the State or a part thereof, in respect of particular branches of employment, for example, the branch of industry, the branch of hotel keeping, the branch of construction. Collective agreements, which apply to the whole area of the State are payment of travel expenses, payment for hotels during the paid vacation and adjustment of the wages to the cost of life, to the index. Those agreements are between the representative trade union and an association of employers of the brunch of employment or area concerned, as the case may be.

The other kind of Collective Agreement is a specific Collective Agreement. It is in respect of a particular undertaking or employer and the representative trade union of the employees to whom the agreement is to apply. Thus the parties in this case are an employer or an employers association, which represents the employer and representative trade union of the employees to whom the agreement is to apply.

According to the Collective Agreement Law all the provisions of a collective agreement concerning terms of employment and termination of employment, and personal obligations imposed on, and rights granted to, will be regarded as part of the personal contract. Thus a collective agreement is a contract between the parties. This is the obligatory aspect of the collective agreement. In addition it determines rights and duties of the employees concerned. Those employees are not a party to the agreement. This is the normative aspect of the collective agreement.

Who has the capacity to negotiate

Not every association of employees has the capacity to negotiate a collective agreement. The law chose the system of representation and not the way of agency.

A representative trade union for the purpose of a specific collective agreement is the employees' union representing for the purpose of such an agreement the greatest number of organized employees to whom the agreement is to apply.

A representative trade union for the purpose of a general collective agreement is the employees' union comprising the greatest number of organized employees to whom the agreement is to apply.

In granting one trade union the capacity to negotiate towards a collective agreement the legislator achieved the goal that there is only one body, unit, which is negotiating, only one negotiating unit.

The importance of the representation by the trade union is in the obligation of the employers to consult the representative unit, namely the trade union representing the greatest number of organized employees. The laws that define social rights of the employees are use cogence. Many of them include an obligation imposed on the employer to consult the representative unit. According to our jurisprudence, the obligation to act in good faith requires such a consultation even if the law does not require such a consultation with the union.

A change in the trade union after a collective agreement has been made, does not affect the validity of the collective agreement.

Other collective agreements or arrangements besides the formal collective agreements

As I mentioned, for an agreement to be considered a collective agreement as defined by law it should comply with very strict rules. All other agreements, which do not comply with part of those rules, are not defined as collective agreements. Thus they are called "collective arrangements". The court recognized several types of collective arrangements. One category is the distinction between what is defined as "one sided collective arrangements" and "two sided collective arrangements". The first type includes managerial instructions. The second includes different contracts that for some reason do not comply with the strict demands of the Collective Agreements Law.

There is no "work council" German type in Israel. Most working places have a chosen group of employees representing them. This body is not a trade union neither is it a German type "work council". Agreements signed with those bodies do not comply with the law and therefore are not considered to be collective agreements. The body that is a party to those agreements does not have the capacity to be a party to collective agreements. Other reasons for agreements not to be recognized as collective agreements are cases in which other formal demands of the law are not fulfilled. They still might be contracts according to the contract law.

The role of union agreements

Since 1957 there were 1,366 general collective agreements registered. Since 1982 there were 10,433 specific collective agreements registered. 56% of the workers, namely 1,200,000 workers are bound by collective agreements. By now there is no data about the number of companies that are bound by collective agreements.

As to collective arrangements, since 1985, 13 such arrangements were registered in the public service that has more than 100 employees. Many others in the public and private sector were not registered.

The issues union agreements are dealing with

The main issues the collective agreements are dealing with are:
Engagement of employees

- Termination of employment
- Terms of employment.
- Labour relations.
- Wages.
- Social rights, accompanying rights, e.g. paid vacation, sick vacation, paid hotels during vacation, work.
- Working hours.
- Pension rights.

The law determines most of those issues.

The law indicates that a collective agreement may add to rights of employees laid down by law, but not derogate from them. Nevertheless there are some old collective agreements that provide rights that are worse than the rights laid down by law. Others determine much better rights than the standard rights. Such are the collective agreements of the branches of electricity, water supply, communication, industry of security that fabricate army appliances.

Validity and force of union agreements

A. Dispute resolution

Due to the special features and character of labour relations it is a very suitable area of the law to resolve conflicts in alternative ways outside the courtroom. This is true especially in the area of collective relations. Thus the area of collective labour law was the first legal area in which the law defined ways of dispute resolutions.

In a dispute between an employer and his employees or part of them the parties to the dispute are the employer and the trade union representing the majority of the employees concerned in the dispute. If there is no such union, than the body that represents the employees elected by the majority of them.

The Minister of Labour and Social Affairs appoints a Chief Labour Relations Officer (henceforth - Chief Officer). The chief officer is in charge of dealing with settlements of collective disputes. The law determined ways of dispute resolutions:

Bargaining – obviously the first means to resolve disputes is bargaining and trying to achieve a compromise. This is the most important means in labour relations.

Conciliation - Any party to a labour dispute may give a notice to the chief officer. He may choose to conduct the process of conciliation. The law grants quite wide authority to the Chief Officer. Everything said in the conciliation is confidential and will not be used as evidence in the case that no compromise will be achieved. In a way the conciliation defined by the law in collective disputes is similar to mediation.

Arbitration -. Any labour dispute may be debated in way of arbitration by consent of the parties.

Mediation. -Lately the judiciary in Israel developed very much the route of mediation. It applies to collective dispute as well.

Strike- . Israel did not enact yet social rights in its constitution, in its bill of rights.

Therefore there is no constitutional right to strike. But since the existence of the state of Israel in 1948 the jurisprudence both of the Supreme Court and the labour court considered the right to strike as a basic right of the trade union. A strike includes also a partial strike, picketing, boycott and any other means. As any human right, this right is not absolute. It is balanced vis-à-vis the damage caused to the employer, to a secondary employer and to the public at large. The law demands from a party to a dispute to give the other party and the

Chief Officer notice of every strike or lockout at least fifteen days before the beginning of the strike or lockout as the case may be. There is no illegal strike. There is only an illegitimate strike. Thus if the court is asked by the employer to issue an injunction, it balances between the different conflicting rights. The court considers inter alia if the party starting a strike acted in good faith. The criterion is objective, namely the courts looks into the behavior of the party and defines if it was reasonable, if the means used were proportional. Even if all the legal requirements are fulfilled, there could still be a reason to issue an injunction. On the other hand even if one or more of the legal requirements are not fulfilled the court might weigh the conflicting interests and decide that on balance it should not issue an injunction.

The roll of the labour court in dispute resolution

On principle labour courts are not involves in dispute resolution. However the court tries most of the times to bring the parties to a compromise. A judge might sometimes also try to mediate. Judges are not entitled to act as arbitrators.

The validity of union agreements

The Collective Agreement law has very strict formal requirements for an agreement to be valid as such. All other agreements are considered as collective arrangements and not official collective agreements.

The requirements are:

- A collective agreement and any variation or extension thereof shall be in writing.
- A special collective agreement may also be made by
- Signing an instrument of accession to rules agreed upon between a trade union and an employers organization on matters likely to be the subject of a collective agreement.
The signing of an instrument of accession to an existing special collective agreement.

A collective agreement has to be registered by the Minister of labour and social affairs. There is a time limit for the agreement to be submitted for registration.

The subjects to whom the collective agreements are binding

A general collective agreement applies to:
The parties to the agreement.

The employers in the branch or area included in the agreement, who at the time of signing the agreement were members of the employers' organization which is a party to the agreement, or who became members thereof during the period of validity of the agreement, except members expressly excluded from the agreement.

All employees of the classes included in the agreement that are employed in trades or functions included in the agreement by employers as specified above.

A special collective agreement applies to

The parties to the agreement.

The employers represented for the purpose of that agreement by an employers' organization that is a party to the agreement.

All employees of the classes included in the agreement that are employed in trades or functions included in the agreement or who are represented in the agreement as specified above.

Thus the terms of collective agreements are valid for all the employees of an employer to whom the collective agreement applies.

The interpretation of collective agreements

The interpretation of a collective agreement is performed as the interpretation of any other legal instrument. We learn about the purpose of the collective agreement from the language as well as from the circumstances. Namely if the language is not clear, if the language does not make a reasonable sense, we learn about the intent from the circumstances.

For this purpose the court might be assisted by evidence from the parties to the collective agreement. This evidence is not conclusive but serves as one of the tools of interpretation.

The interpretation of collective agreements takes into account the special character of this instrument. As a collective agreement is a contract it is interpreted as such. Thus the interpreter of the obligatory aspect of the collective agreement puts more emphasis on the subjective intent of the parties to the agreement. On the other hand collective agreement is a legal instrument that determines rights and duties of the employees who are not parties to the collective agreement. This is the normative aspect of the collective agreement. Those rights.

Those rights and duties are considered to be included in the personal contract of every employee with the employer. This is the normative aspect of the collective agreement. In interpreting the normative aspect of the collective agreement, the rights and duties of the employees, we put more emphasis on the objective aspect.

In interpreting both aspects of the collective agreement we look at the language, at the purpose objectively and also subjectively but the emphasis is different when the interpretation concerns the obligatory or the normative aspects.

The legitimacy of changing terms of collective agreements by a judge

.. A judge may extend or restrict the terms of a collective agreement by way of interpretation, namely, if the language of a term of the collective agreement does not make sense, if we understand from the background and circumstances that the purpose of the term according to a reasonable interpretation is different then the words, a judge may interpret the term in the reasonable interpretation.

A judge may change or annul terms of collective agreements if they contradict public policy or the demand of good faith. Thus if a collective agreement has discriminating parts the court may consider them as being against public policy. For example, the Supreme Court annulled a collective agreement that had a different retirement age for men and women.

Another one has a younger retirement age for stewards in an air flight company and all the other employees of the company. The court might read in the equality term instead of annulling the whole collective agreements.

The frequency of the interpretation of collective agreements

The jurisdiction of the labour courts in Israel is very broad. The labour courts are dealing with all labour and employment disputes – collective and individual disputes, all disputes vis-à-vis the Social Security (work accidents, handicaps, old age, children, and much more) and with disputes rising of the National Health Law. Therefore the percentage of collective disputes vis-à-vis the percentage of all other disputes is about 1%. Many of them demand some kind of interpretation. But those disputes consume much more time by the court than the other disputes.

Internal collective agreements

I referred to this subject in the beginning of my paper. As mentioned those Internal collective agreements were developed by our common law. Those are all the residual contracts that are not official collective agreements as defined by law.

Their interpretation follows the same route as the interpretation of collective agreements.

The validity of the Internal collective agreements and all other collective arrangements in the individual contract

Formal collective agreements

According to the Collective Agreement Law all the provisions of a collective agreement concerning terms of employment and termination of employment, and personal obligations imposed on, and rights granted to, will be regarded as part of the personal contract of every employee.

A collective arrangement

As mentioned those arrangements are a product of Israeli jurisprudence. The court decided that the rights and duties that are mentioned in the collective arrangements will be regarded as part of the personal contract as implied terms. As of 1973 Israel has a contract law that adopted the good faith principle (as in section 242 of the BGB). Today we do not use any more the common law notion of implied terms. The reason is that we have now in our law the obligation to act in good faith. Thus out of the duty to act in good faith rises the duty to refer to the rights and obligations mentioned in the collective arrangements as part of the personal contract.

The theory of interpretation of those arrangements is similar to that of collective agreements taking into account the fact that its terms are not imposed by law as part of the personal contract of every employee, but the obligation rises from the duty to act in good faith.