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European labour courts: Current issues

Proceedings of the Second Meeting
of European Labour Court Judges
(Herzlia, Israel, December 1987)
on the internal organisation and functioning
of labour courts and on disputes concerning
termination of employment.

Edited by Werner Blenk



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International Labour Office Geneva

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Foreword

Labour courts play a crucial role in many of the world's major industrial relations systems. In spite of this, labour courts have not often been the subject of research or inquiry by industrial relations academics or practitioners.¹ This volume, in addition to a similar volume prepared on the basis of a meeting of European Labour Court Judges in Szeged, Hungary, in 1984,² constitutes an effort to remedy the relative lack of documentation on labour courts.

In fact the initiative for the meetings on which this and the former volumes are based was that of the judges themselves, who requested the ILO to help in organising the meetings. It is the late and memorable Zvi Bar-Niv, former President of the National Labour Court of Israel, to whom we should attribute the genesis of this inspiration. Together with Presiding Judges Otto Kissel of the Federal Labour Court in the Federal Republic of Germany and Ake Bouvin, formerly of the Swedish Labour Court, Judge Bar-Niv provided the dynamic impetus for the take-off of this now almost institutionalised exercise. The present organising group of judges, no less distinguished and dynamic, is composed of Presiding Judges Stein Evju (Norway) and Menachem Goldberg (Israel), and Vice-President Dirk Neumann (Federal Republic of Germany).

What we tried to do in these meetings was to provide for discussion of items of common interest to all or most of the participants. Thus, in the Szeged meeting, the judges discussed first the place and role of labour courts in the judiciary and in the labour relations system and, secondly, problems of case load. For the Tel-Aviv meeting, which is the subject of this volume, the organising group of judges decided that the discussions would centre around two themes, one procedural and one substantive. Thus this volume reflects the discussion of the internal organisation and functioning of labour courts and that of the role of the courts in disputes concerning termination of employment. It may be added that, for the third meeting of judges to be held in Paris in September 1989, the participants will discuss innovations concerning rules of procedure (with particular reference to evidentiary rules) and the role of labour courts in respect of strikes, lock-outs and other forms of industrial action.

The meetings are not aimed at reaching conclusions or recommendations. Their purpose is to provide a forum for an exchange of information on problems faced by labour courts and the various measures taken to resolve those problems. The ultimate aim is to contribute to the better functioning of labour courts and hence to their ability to administer industrial justice.

¹ Two notable early exceptions were *Labour courts: An international survey of judicial systems for the settlement of disputes* (Geneva, ILO, 1935) and *Labour courts in Latin America* (Geneva, ILO, 1949). See also A. Gladstone (ed.): *Industrial courts in English-speaking developing countries* (Geneva, International Institute for Labour Studies (IILS), 1976) and A. Gladstone and O. Sorgho (eds.): *Tribunaux du travail en Afrique francophone* (Geneva, IILS, 1978).

² The proceedings of the Szeged meeting are reflected in B. Essenberg (ed.): *Labour courts in Europe, Proceedings of a meeting organised in Szeged, Hungary, 1984* (Geneva, IILS, 1986).

The present volume includes the various national papers contributed by the participating judges on the themes mentioned above, as well as a synthesis of the two themes of the meeting prepared by my ILO colleague, Werner Blenk. It is our hope that the wide dissemination of this volume will be of interest and assistance to those throughout the world who are concerned with the role and function of labour courts and of similar institutions in our societies.

March 1989.

Alan Gladstone,
Director,
Industrial Relations and
Labour Administration Department,
International Labour Office.

Contents

Foreword, Alan Gladstone	v
Part I. Internal organisation and functioning of labour courts	1

A. Comparative overview, Werner Blenk	3
B. Country papers:	
Denmark, Johannes Bangert and Niels Waage	11
Finland, Jorma Pelkonen and Olli Huopaniemi	15
Federal Republic of Germany, Dirk Neumann	18
Israel, Stephen Adler	22
Norway, Stein Evju	28
Spain, Juan Antonio Linares Lorente	32
Sweden, Ove Sköllerholm	35
United Kingdom, The Hon. Mr. Justice Popplewell	39

Part II. Disputes concerning termination of employment	45
---	-----------

A. Comparative overview, Werner Blenk	47
B. Country papers:	
Denmark, Johannes Bangert and Niels Waage	55
Finland, Jorma Pelkonen and Olli Huopaniemi	56
Federal Republic of Germany, Dirk Neumann	58
Israel, Menachem Goldberg	62
Norway, Stein Evju	67
Spain, Miguel Campos Alonso	72
Sweden, Ove Sköllerholm	75
United Kingdom, The Hon. Mr. Justice Popplewell	78

List of participants	83
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List of tables

1. Pre-trial procedures	7
2. The decision	8
3. Dissenting opinion	9
4. Computerised information facilities	10
5. Disputes concerning termination of employment	53-54

A. Comparative overview

Werner Blenk, International Labour Office

Pre-trial procedures

It emerged from the discussion that pre-trial procedures were generally of great importance and seen as more than a formal requirement before a judicial decision could be taken. They would in many instances considerably ease the workload of courts and produce rapid and agreed solutions between the parties. They were resorted to widely and had a high success rate. In Spain and Israel, for example, about 40 per cent of the cases could be settled at this stage, and in Sweden about 35 per cent. Norway, where preliminary hearings would only be carried out occasionally, was an exception in this respect. It was felt there that, in anticipating the possibility of pre-trial conciliation, the parties would deploy less effort to arrive at a solution in joint procedures which preceded the judicial stage.

As a general rule, pre-trial procedures would be carried out orally so as to assure direct contact and a free exchange of views among the parties and between the parties and the judicial officer. Pre-trial procedures which usually took the form of mediation or conciliation could be part of the judicial process or be separate from it. For example, the industrial tribunals in the United Kingdom had themselves no competence to settle a conflict by means of conciliation. This function was entrusted to a separate body, the Advisory Conciliation and Arbitration Services (ACAS). In Finland the court had the power to confirm a settlement at the pre-trial stage. At this stage it would also be decided which issues were to remain in dispute and only those issues would be dealt with in the main hearing. In Denmark, the Federal Republic of Germany, Israel and Sweden the courts themselves would try to promote an amicable settlement. In some instances, however, it was necessary in order for a case to come before the labour court, that certain extra-judicial procedures be exhausted. In Spain, for example, an attempt at mediation must have been made by the Institute for Mediation, Arbitration and Conciliation (IMAC) before the case could be submitted to the labour court. In Norway and Sweden, "dispute bargaining" must have taken place between the parties to the collective agreement on which the chain is based.

Another question was whether pre-trial conciliation (where this was practised) should be undertaken by the professional judges only or by them together with the lay members of the court or, finally, by the lay members only. With the exception of France, where the lay members were involved in conciliation, this task was usually carried out by professional judges, who would subsequently be called upon to decide the case if conciliation had failed. The participant from Israel reported that the possibility of involving lay members at the pre-trial stage was being considered. He felt that they could play a useful role in bringing together the parties, considering that they had ample practical experience in labour matters and "spoke the language" of

the parties. Moreover, devolving pre-trial activities to lay members alone would save judges' time and avoid situations where judges would have to take clear stances for either party. This was undesirable at the pre-trial stage, since they had to decide the case afterwards. On the other hand, there were important advantages if the professional judges promoted pre-trial settlements. In Denmark and the Federal Republic of Germany, for example, the parties could agree at the preliminary session to entrust the judge to decide the case without further hearing and thereby ameliorate a final decision. In addition, having the same person (the judge) active at both the conciliation and the decision stage would make the judge thoroughly familiar with the details of the case from the very beginning. This would also expedite proceedings.

Dissenting opinions

The judges pointed out that, in comparison with ordinary courts, the question of dissenting opinions had a special quality in labour courts: in many instances the benches consisted of professional judges who were assisted by lay judges. As a rule, the latter were appointed by public authorities for a certain period of time, often on the basis of nominations by workers' and employers' organisations. In some instances, they were jurists, in others not; sometimes they would devote much of their working time to labour court activities, in other instances they would work full time, either inside or outside the organisations they were affiliated to. While their role normally implied neutrality, it was equally clear that their experience and background influenced their views and opinions and that there might be a certain psychological need to justify their decisions vis-à-vis their groups. It was therefore not surprising that in a certain number of cases, dissenting votes occurred, amounting, for example in Finland, to 25 per cent and in Sweden to about 15 per cent.

Another question was whether dissenting opinions would be published. In some countries dissenting opinions were not published, while others adopted the opposite approach. For example, in the Federal Republic of Germany and Denmark, dissenting votes were not made public, whereas the judges from the other countries indicated that dissenting opinions were part of the written decision. An interesting practice had been established in Israel, where dissenting views were published only when the vote itself coincided with the majority decision. While in most countries the dissenting judge would prepare his opinion, in others it would be drafted by the chairman or with the assistance of the chairman. Sometimes the name of the dissenting judge would be identified, sometimes a dissenting opinion would be given without indication of name.

Some judges felt that the publication of dissenting opinions strengthened the impact of labour court decisions, whereas others expressed certain reservations. Those participants who supported publication emphasised the potential positive effects of publication on the development of the law. Dissenting opinions demonstrated that labour law could not always be arrived at by consensus. They brought to light certain elements which could not be reflected in the majority decision, which was often a compromise, and thus might well contain elements for future consensus with different majorities and judges. They pointed out that dissenting opinions might strengthen a feeling of personal responsibility in judges for the decision in question

and alert their legal conscience by removing the cloud of anonymity often typical for unidentified majority decisions. In general, in the view of some, full transparency of decisions was called for in democratic societies. On the other hand, it was observed that dissenting opinions might well weaken the authority and impact of labour courts. The publication of dissenting views might encourage individualistic attitudes in judges at the expense of a more co-operative atmosphere. Moreover, with a view to avoiding a show of disunity in public, the court might feel compelled to reach compromises which were not entirely adequate.

The decision

The judges observed that expeditious decisions were particularly important in labour disputes. For individual workers it was of paramount importance to obtain speedy relief on vital matters such as dismissal. Collective issues, such as strikes, directly affected the community at large, likewise creating a need for rapid judicial decisions. The participants agreed that in many instances there were delays, and that these had to be reduced. It was necessary to speed up proceedings as far as possible, while preserving the essentials of a sound administration of justice. Labour court procedures were indeed fashioned so as to expedite the handling of cases. They were less formal than ordinary court procedures and allowed, for example in the taking of evidence, for great flexibility. Other elements, too, such as the immediate rendering of decisions at the end of the hearing, as was for example the practice in the Federal Republic of Germany, Norway and the United Kingdom, favoured the expeditious handling of cases. In other countries, a few days, and sometimes several weeks, could elapse before decision was rendered.

The judges concurred that lay members, where they existed, had an important influence on the final decision. In many instances, the chairman or president (i.e. the professional judge) drafted the decision which was subsequently submitted to the lay members and finalised together with them. The content and structure of decisions was different from country to country. While in all countries decisions included essential points of fact and law, the elements to be included in the final decision, as well as their depth of treatment, differed considerably: in countries such as the United Kingdom or Israel, decisions were rather succinct, averaging, for example, three to four pages in the former country. In Norway, too, lengthy discussions of precedent and of doctrinal views were avoided. In other countries, such as Sweden or the Federal Republic of Germany, decisions were usually more extensive. They contained the facts, the claims of the parties, their main arguments, the actual ruling and the grounds. In the Federal Republic of Germany, references were frequently made to precedents and to specialised literature which had a considerable impact on the development of the law. It was felt by some that the submissions of the parties had to be discussed thoroughly in the judgements. Also, when in Sweden attempts had been made to reduce the content of decisions by abridging a discussion of the positions of the parties, the unions objected, considering that their views should be reflected and discussed in some detail. Nevertheless, in an attempt to expedite proceedings, there was a

legislative proposal before Parliament to enable the court to render decisions without giving the reasons therefor.

It was observed that industrial action frequently required particularly speedy action, since it tended to produce serious economic and political consequences, in particular if, in addition to the economic issues involved, doubt about their legality persisted. Interim measures were available to rule on the permissibility of ongoing strike action while a final decision was being prepared.¹ In a broader vein, it appeared that collective disputes often had to be given priority over individual claims in the scheduling of cases.

In an attempt to further expedite procedures, computerised information retrieval systems existed or were being installed almost everywhere and many judges had started using personal computers in their daily work. In Finland and the Federal Republic of Germany, information retrieval systems containing legislative material, judicial decisions and specialised literature on labour law were available to give judges immediate access to important resource material. In other countries general information systems existed which had no special labour law component but which were accessible to labour courts and the parties. In Sweden, for example, the parties usually had access to "Lawdata", the national retrieval system, although the court had not yet subscribed to it. In other countries, such as Israel, Denmark and Spain, systems were at present being developed. The rather slow introduction of computerised systems was due to budgetary problems in particular and could only in a very few individual cases be attributed to a certain reluctance by judges to use modern technologies.

Existing systems mainly stored national reference material. Most judges observed that they would not use foreign material to any great extent, with the occasional exception of ILO Conventions and Recommendations and, in the case of the EEC, legislative and judicial pronouncements emanating from the community organs. The participant from Israel, on the other hand, observed that appreciable use was made of foreign sources in the daily work of the court.

¹ The subject of judicial action, both of an interim as well as a more permanent nature, is to be considered in detail at a future meeting of European labour court judges.

Table 1. Pre-trial procedures

Country	Where?	Who conducts the session?	Form	Main purpose
Denmark	In court	President or vice-president	Oral hearing(s)	Compromise settlement. Clarify points of fact and law.
Finland	In court	Chairman and secretary	Oral hearing(s)	Confirm compromise settlement. Clarify points of fact and law.
Federal Republic of Germany	In court	Presiding judge	Oral hearing	Compromise settlement.
Israel	In court	Registrar or judge	Oral hearing(s)	Compromise settlement. Preparation of the hearing.
Norway	1. Dispute bargaining 2. Occasionally preparatory meeting in court	President	Usually in writing only	Compromise settlement.
Spain	1. IMAC 2. In court	Judge	Oral	Compromise settlement.
Sweden	1. Dispute bargaining 2. In court	Chairman	Written or oral hearing (mostly oral)	Clarify points of fact and law. Determine court hearing.
United Kingdom	1. ACAS 2. Occasionally in court	Chairman	Oral	Clarify the issue

Source: Table by Dirk Neumann and Werner Blenk.

Table 2. The decision

Country	Rendering of the decision	Final version of the decision	Main content of the decision
Denmark	Oral	Drafted by the president and finalised by all members	Ruling, claims, facts, pleadings, grounds and conclusions.
Finland	Oral or mailed to the parties after session in which finalised	Drafted by the legal secretary, completed in sessions within the court, signed by chairman	Ruling, claims, main points of law and fact.
Federal Republic of Germany	Oral after the hearing	Drafted by the professional judge, finalised and signed by all members	Ruling, main points of law and fact. Claims, pleadings, reference to appeal possibilities. References to precedents and specialised literature.
Israel	Mailed to the parties; sometimes oral	Drafted by the professional judge and finalised and signed by all members	Ruling, main points of law and fact.
Norway	Parties are informed by telephone immediately after the decision. Written version by mail within one week	Drafted by president and finalised and signed by all members	Ruling, claims, main points of law and fact.
Spain	Written decision 3-5 days after hearing	Drawn up by professional judge	Ruling, main points of fact and law.
Sweden	Written decisions by mail 4-8 weeks after hearing	Drafted by chairman, finalised with other members	Ruling, claims, main points of law and fact.
United Kingdom	Oral at hearing; sometimes decision is reserved and mailed to the parties later	Prepared by chairman, then finalised with industrial members	Ruling, main points of fact and law. Three to four pages (in Scotland longer). Summary reasons in most cases.

Source: Table by Dirk Neumann and Werner Blenk.

Table 3. Dissenting opinion

Country	Publication	Who writes dissenting opinion?	Dissenting judge identified by name?
Denmark	No	–	–
Finland	Yes	Dissenting judge	No
Federal Republic of Germany	No	–	–
Israel	When result coincides with majority decision (i.e. rationale differs from majority)	Professional judge	No
Norway	Yes	President or dissenting judge	Yes
Spain	Yes	Dissenting judge	Yes
Sweden	Yes	Dissenting judge often with assistance of chairman	Yes
United Kingdom	Yes	Dissenting judge or chairman	Yes

Source: Table by Dirk Neumann and Werner Blenk.

Table 4. Computerised information facilities

Country	Name of system	Labour law content	Main purpose
Denmark	Being developed		
Finland	Finlex register	Titles of labour court decisions since 1977, full decisions since 1982.	Immediate access to precedents.
Federal Republic of Germany	JURIS	Abstracts since 1954, full texts since 1987, literature since 1972.	Immediate access to case law and specialised literature.
Israel	Being developed		
Norway	Lawdata	None specifically.	Occasional information.
Spain	Being developed		
Sweden	Lawdata	Inter alia, labour law decisions. Court has not yet subscribed to it.	
United Kingdom	Lexis	Not available to industrial tribunals as such.	

Source: Table by Dirk Neumann and Werner Blenk.

B. Country papers: Denmark

Johannes Bangert, Judge at the Supreme Court, Deputy Chairman,
Industrial Court, and Niels Waage, Judge, First Secretary, Industrial Court

The Danish labour court consists of 20 members elected by employers' organisations, 20 members elected by trade unions, one president and five vice-presidents. The president and vice-presidents are elected by all members of the court. The assignment is not a full-time job. The members are normally chairmen of trade unions or executives of firms or employers' organisations. The president and vice-presidents are, as a rule, judges of the Danish Supreme Court of Justice. The seat of the labour court is in Copenhagen. According to article 9 of the Labour Court Act, the following matters have to be referred to the labour court and cannot be dealt with by ordinary courts: (a) breach and interpretation of general agreements concluded between the Danish Employers' Confederation and the Danish Federation of Trade Unions, and of corresponding general agreements and settlements; (b) breach of collective agreements on wages and working conditions; (c) legality of notified industrial action or warnings given of such action, provided the central organisation of the party affected, or, where the affected party is not a member of any such, the party itself, has, by registered letter within five days, protested to the organisation or undertaking concerned against the legality of the industrial action or warning thereof; (d) whether a collective agreement exists; and (e) the legality of industrial action in support of enhancing an agreement in spheres where it has not yet been concluded.

Preparation of the case for hearing by the court

An action is brought by submitting a written complaint to the court. The secretary of the court sends a copy of the complaint to the defendant and requests a written reply from him. Further exchange of correspondence may take place. The law does not prescribe rules as to the contents of the complaint or of the rejoinder, but the complaint is normally drawn up like a writ of summons in an ordinary civil case, containing the relief sought and the facts of the case.

During regular meetings the secretary of the court and representatives of the Danish Employers' Confederation and of the Danish Federation of Trade Unions discuss the cases received and schedule them for a preliminary session. However, this does not apply to urgent cases (e.g. those concerning ongoing unlawful strikes or lock-outs), where the date and hour of the preliminary session is fixed as soon as the case is received by the labour court.

The preliminary sessions always take place on Thursday afternoons in the courtroom in Copenhagen. At the preliminary sessions, the president or one of the vice-presidents sits alone to hear the case. The main purpose of the preliminary session is to make an attempt at conciliation and mostly the parties come to an

agreement. Sometimes the parties agree to entrust the president (or vice-president) to decide the case without further hearing (in order to avoid a hearing before the full court). The president then pronounces his decision, which is recorded without stating the grounds. At the preliminary session the president (or vice-president) may request the parties to make further statements or to provide more information, and the case may be postponed to a later preliminary session. If the president (or vice-president) ascertains that it is impossible to reach agreement between the parties, a date and hour for a hearing is fixed. As a rule, the president (or vice-president) who has dealt with the case at the preliminary session will preside at the hearing of the case.

Conduct of the hearing

During the hearing the president (or vice-president) sits together with three members elected by employers' and three members elected by employees' organisations. If a party is not a member of the Danish Employers' Confederation or the Danish Federation of Trade Unions, the secretary of the court selects the members to deal with the case. If a case is of special interest, the presidency of the court may be assured by three members instead of one. The principles applicable under the provisions of the Administration of Justice Act to ordinary cases apply to the procedure of the labour court with the necessary adjustments. In practice the conduct of the hearing is rather informal. While the preliminary sessions are held *in camera*, the public can normally attend the hearings.

In civil cases the parties are represented by attorneys. There are no restrictions on the right of the parties to be represented in the labour court by power of attorney. Normally the organisations are represented by their agents in the labour court.

After the opening of the hearing the representative of the plaintiff presents the case before the court. The representative of the defendant may add his observations. After these presentations the witnesses are examined. The representatives of both parties and each member of the court, including the president, may question the witnesses. Taking the oath is abolished in all Danish courts, including labour courts, but the witnesses are informed that not telling the truth involves criminal liability. After hearing the witnesses and producing further evidence, if necessary, the representatives of the parties deliver their pleadings. Thereafter the hearing is closed by the president. Immediately after the hearing the seven or nine members of the court sit *in camera* to discuss the decision and to give their votes. First, a member elected by the employers' side gives his vote and explains his reasons. Then a member elected by the opposite side takes the floor, and finally the president gives his vote. Lastly, a date for the final adoption of the decision is fixed.

Form and preparation of the decision

Before the final meeting of the seven or nine members of the court, the president prepares a draft decision. Copies of the draft are sent to the other six members of the court. On the fixed date the case is discussed again, and the other members of the

court may propose modifications. The decision and its final wording are adopted by a majority of votes and the president pronounces the decision in the courtroom in public. Dissenting opinions, if any, are not referred to in the decision, nor are they published. Thus the decision appears unanimous, although dissenting opinions occur very often. The members of the court are prohibited to reveal to anybody what has been discussed *in camera*. The decision is drawn up in the tradition of Danish law. It contains an exposition of the claims of the parties, an account of the facts as they have been presented to the court and a short record of the declarations made by the witnesses and of the pleadings made by the representatives of the parties. The court states on which facts and legal rules and principles the decision is based, and the reasons for the decision are given together with the conclusions of the court. Decisions pronounced by the court cannot be appealed and they are published in a yearbook.

Use of information retrieval systems and of international sources

Until now, the Danish labour court has used only traditional legal information sources, i.e. statute books, collections of labour court decisions, decisions of other courts and labour law literature. A database containing labour court decisions and other labour law decisions is being established in Denmark, although so far the labour court has not found it necessary to have access to it. Very few Danish labour law cases have international aspects, so the Danish labour court has no experience of using international sources. The Danish labour court, however, receives the yearbooks of the Norwegian and Swedish labour court decisions.

Access to the court

Preconditions

Before a case is brought to the labour court it is, as a rule, negotiated between the organisations. If the parties are members of the Danish Employers' Confederation and of the Danish Federation of Trade Unions it is provided (in article 10 of the general agreement between the two organisations) that the matter shall be discussed at a joint meeting. A party has to participate in a joint meeting if the other party asks for it. Many other general agreements contain rules of a similar nature. In most cases it is a condition for imposing a fine for breach of an agreement that a joint meeting has been held before the case is brought before the labour court.

Parties to the dispute

Cases are brought by and against the relevant employer or employee organisation, regardless of whether the breach was committed or collective industrial action was threatened or commenced by or against individual members of the organisation. Where an organisation is a member of a larger organisation, the case is conducted by and against the latter. Where the employer party is an individual establishment which is not affiliated to an employer organisation, the case is conducted by or against the

individual establishment. An employee cannot bring a case before the labour court but is entitled to bring an action in respect of outstanding wages in the ordinary courts unless his organisation, in proceedings before the labour court, has renounced the right on his behalf, or when non-payment of the wage is due to disagreement of an industrial character. Disputes between a worker and his union are brought in the ordinary courts.

Impact of court workload and time needed to reach final decision

The workload has grown considerably during recent years and especially since 1985. In 1976 about 250 cases were brought before the labour court whereas in 1987 the total exceeded 500 cases. This represents the greatest problem of the labour court today. The court has made contact with the Employers' Confederation and the Federation of Trade Unions and some small changes have been made in handling the cases. There are, however, limitations on what can be done within the present structure of the court and more far-reaching changes are not likely to take place. At the end of 1987 there were 350 undecided cases. Of these, a considerable number had not yet been dealt with at preliminary sessions. Where a hearing has to take place, the period between submission and decision is at present eight to nine months on average. If the case can be dealt with at a preliminary session, the period is two to three months. Special attention is given to cases concerning unlawful strikes or lock-outs. These must immediately be reported to the organisations and a joint meeting is to be held the day after the beginning of the strike or lock-out. If the work stoppage continues, a preliminary hearing will take place the following Thursday and, if necessary, a hearing before the full court will follow, normally within 14 days. At this hearing a preliminary court order to resume work may be issued.

Finland

Jorma Pelkonen, President, and Olli Huopaniemi, Vice-President,
Labour Court of Finland

Preparation of the case for hearing by the court

Action in the labour court is initiated by a written application for a summons, to which the respondent is requested to submit a written rejoinder. Prior to the actual hearing of the case, it is prepared both in writing and orally. The purpose of the preliminary oral hearing is to ensure that the hearing of the case complies with basic procedural principles, which require proceedings to be oral, direct and concentrated. The purpose of the preliminary hearing is to ascertain which claims and facts are subject to dispute and which are undisputed. The purpose of the main hearing, which follows the preliminary hearing, is to deal only with issues that remain subject to dispute.

During the pre-trial preparation of a case, the plaintiff is requested in writing to submit a written statement dealing with the respondent's rejoinder. This exchange of briefs may be further continued, if the clarification of a point so requires. It is followed by a preliminary oral hearing, which is attended by the parties or their representatives as well as by the chairman and the secretary of the labour court. In the preliminary hearing the parties must state the facts of their case as well as their views on the facts alleged by the other party. The parties likewise have to present all the evidence in their favour as well as the names of witnesses they intend to call at the main hearing. It is the duty of the chairman to establish the disputed facts about which the witnesses will be heard.

There may be more than one preliminary oral hearing. It is quite common that a party requests another preliminary oral hearing in order to establish new facts. Even though the preliminary hearings are conducted orally, the parties may present written briefs on an issue and reply to each other's briefs in writing. When the parties have made all their arguments, the chairman declares the preliminary oral hearing closed and sets the date for the main hearing. The parties are summoned to the main hearing at the preliminary hearing. At the end of the preliminary hearing, of which a written record is kept, the chairman has various options. He may order that the case be dismissed if the parties have failed to appear at the hearing, if the parties so request, or if the plaintiff withdraws his complaint. He may also refuse to hear a case, if it is barred by a fact which cannot be remedied; or he may confirm a settlement reached by the parties, or decide the case on the basis of the facts admitted by the parties.

If a preliminary hearing is not granted, a party may, within a prescribed period of time, submit the matter for decision to the full labour court. If a party at the main hearing wishes to rely on evidence not introduced at the preliminary hearing, he has to inform the other party and the chairman of the new evidence and of its purpose and of the grounds prohibiting him from presenting the evidence at the preliminary hearing. Even though the preliminary hearing will already be closed at this point, a

new preliminary hearing will normally be arranged in such cases to allow the other party to give his view regarding the new evidence.

Conduct of the hearing

The main hearing is attended by the parties, the chairman, the members and the secretary of the labour court. The witnesses are present only while they are giving their testimonies. The hearing is open to the general public.

At the beginning of the main hearing, the representatives of the parties make their opening statements, usually limited to the claims they have presented earlier. The members of the court will have received in advance all the material compiled during the pre-trial. Hereafter, the witnesses are heard, after having sworn an oath or given a solemn affirmation to tell the truth. The witnesses are questioned one at a time by the chairman and the representatives of the parties. The other members of the court may also question the witnesses. After the hearing of the witnesses, the representatives of the parties deliver their closing statements. Thereafter the main hearing is declared closed.

The decision of the court is normally mailed to the parties, although the court may also declare its decision immediately after the main hearing. In practice, the latter occurs if the dispute relates to the breach of a peace obligation which is continuing during the main hearing. The main hearing is conducted orally. This means that there is no reading of written briefs or submitting of written documents to the court. However, when the witnesses are being examined, it may at times be necessary to resort to written documents, tables or figures. The testimonies given by the witnesses are recorded and subsequently typed.

Form and preparation of the decision

If the decision is not issued orally, the court shall reconvene for a so-called negotiation session. Before this session, the secretary prepares a draft decision to be checked and corrected by the chairman, after which the draft is mailed to the members of the court. In the negotiation session, the grounds for the draft decision are presented to the court members and the draft is discussed. If necessary, two or more negotiation sessions may be arranged. When the members have stated their opinions, they either agree to the decision or a vote on the matter is called. If a dissenting opinion does not call for a different reasoning, it is recorded in the negotiation session. This is usually the case when it concerns the amount of compensation or of a compensatory fine. Should a dissenting opinion contain elements not presented in writing so far, the normal practice is for the members in question to draw up the dissenting opinion after the session.

After the content of the decision has been decided upon, the secretary prepares the decision which contains, *inter alia*, the claims of the parties as well as their reasoning. Decisions of the labour court normally contain the following elements: the date and number of the decision; the names of the parties; the provisions of the

collective agreement which have been applied; the grounds for the complaint; the claims contained in the complaint; the grounds for the rejoinder; the claims contained in the rejoinder; the claims for compensation of litigation costs; the grounds for the labour court decision; the actual decision of the court; and dissenting opinions, if any.

When the decision is ready, copies signed by the chairman are mailed to the parties. The date of the decision is the date of mailing.

Use of information retrieval systems and of international sources

Within one month of the date of the decision, labour court decisions are stored in the Finlex register, a data bank administered by the Finnish Ministry of Justice. Finlex contains, among other things, the most important pieces of Finnish legislation, the decisions of the Supreme Court, the Supreme Administrative Court, the Courts of Appeal and the special courts, as well as references to other court cases. Finlex contains the titles of labour court decisions since 1977 and the decisions in full since 1982. The Finlex registers are stored in the main computer of the State Computer Centre, and they are accessible through terminals. The computer is fed a key word typical of a case under preparation, and it then searches the cases containing a reference to the key word.

The use of international sources is not very common, although the labour court studies Nordic, and, in particular, Swedish case law in the field of labour law.

Federal Republic of Germany

Dirk Neumann, Vice-President, Federal Labour Court

Preparation of the case for hearing by the court

Two types of proceedings before the labour courts have to be distinguished, namely the proceedings leading to a judgement and the proceedings leading to the pronouncement of a court order (section 2, paragraph 5, and section 2a, paragraph 2, of the Labour Courts Act (Arbeitsgerichtsgesetz, ArbGG)). Issues for which the labour courts have exclusive jurisdiction, and which may lead to a judgement, include collective disputes regarding legislation on collective bargaining and on individual employment relationships. Proceedings leading to the pronouncement of a court order mainly concern legal disputes in respect of industrial relations. While the proceedings leading to a judgement follow the general concepts of civil procedure, the proceedings leading to a court order resemble to a certain extent the arbitration of disputes in the framework of non-contentious proceedings, where the facts of the case have to be clarified *ex officio*.

As in general civil proceedings before local and Laender courts, the labour court proceedings leading to a judgement are instituted by filing suit (section 46, paragraph 2 of the ArbGG). After the action has been brought, the presiding judge who is in charge pursuant to the organisational chart, immediately schedules a conciliation hearing. After the date for the conciliation hearing has been fixed, the statement of claim is served upon the defendant and both parties are summoned to appear at the hearing.

Both in labour court proceedings leading to a judgement, and in general civil proceedings, the so-called “principle of party-presentation” applies. It means that the matter under dispute is introduced into the proceedings by the parties alone, that the parties (by contesting or not contesting) decide whether or not there is a need for a judicial determination of the facts, and that they have to help with the determination of the facts by providing evidence to the court. The parties have to give complete and truthful statements of the facts. The presiding judge is obliged to make sure that the parties make comprehensive statements, file the relevant applications, complement insufficient information on alleged facts and indicate their pieces of evidence. For this purpose, the presiding judge questions the parties. The presiding judge’s right to interrogate the parties is of particular importance in labour court proceedings, because the court is often faced with persons not versed in the law who will only present the facts which may substantiate their claims and objections in reply to questions and arguments put forward by the presiding judge.

The proceedings before a labour court are to be pursued expeditiously (section 9, paragraph 1 of the ArbGG). This provision aims above all at protecting employees who are normally economically dependent on their wages or salaries from waiting

over an extended period of time due to a lengthy legal dispute. The provision that the presiding judge should prepare the hearing on the dispute in such a manner that the conclusion of the hearing becomes possible on the same day (section 56 of the ArbGG) corresponds to this aim. If appropriate, he should particularly: (a) request the parties to complement or explain their preparatory pleadings and to present documents and other objects appropriate for deposit with the court; he should in particular fix a time limit for providing an explanation on certain issues requiring clarification; (b) request authorities or persons holding a public appointment to provide notification of documents or official information; (c) order the personal appearance of the parties; (d) summon experts and witnesses to whom a party has referred in the oral proceedings.

Evidence submitted by one of the parties outside the deadline fixed by the court leads to its exclusion, unless the decision is not delayed by this belated presentation or unless the party has a sufficient excuse for the delay (section 56, paragraph 2 of the ArbGG).

Conduct of the proceedings

In labour court proceedings an attempt is made to show a certain consideration for inexperienced parties not versed in legal matters. Therefore, no decision is taken without an oral hearing (section 46, paragraph 2 of the ArbGG) and conciliation proceedings have to be carried out prior to the commencement of the proceedings (section 54, paragraph 1 of the ArbGG). Conciliation proceedings take place in the presence of the presiding judge of the labour court; no associate judges are present. The purpose of these proceedings is to come to an amicable settlement. In the conciliation proceedings the issues in dispute are discussed in detail, with the purpose of bringing about an amicable settlement being borne in mind. The conciliation proceedings may also be terminated by a withdrawal or waiver of the action or by recognition of the claim, i.e. the defendant states before the court that he accepts the asserted claim. If it is impossible to come to an amicable settlement between the parties, the legal dispute is continued on that day, or another, before the chamber of the labour court, which is composed of three judges.

Honorary judges participate in all oral hearings before the labour courts which take place after the conciliation hearing. The chambers of the labour courts, as the courts of first instance, and the chambers of the Laender labour courts, as courts of second instance, are composed of one professional judge acting as presiding judge and two associate judges, one from the employers' side and the other from the employees' side (section 16, paragraph 2 and section 35, paragraph 2 of the ArbGG). In the senates of the Federal Labour Court, as the third and last instance, three professional judges, one acting as the presiding judge, and two associate judges from the employers' and the employees' side, conduct the hearing and take decisions (section 41, paragraph 2 of the ArbGG).

Form and preparation of the decision

The hearing starts with the plaintiff's demand for legal relief. If it is not possible to establish all the facts, a formal procedure for taking evidence has to be carried out (judicial inspection, hearing of witnesses, request for an opinion, production of documents and, if necessary, interrogation of the parties under oath). If the parties reach an agreement, the proceedings are terminated by settlement. In all other instances, a judgement has to be handed down. As a rule, the judgement is pronounced on the day of the hearing; in exceptional cases it may be pronounced within a very short time after the hearing (section 60 of the ArbGG). The judgements are served on the parties ex officio (section 50, paragraph 1 of the ArbGG).

In proceedings leading to the pronouncement of a court order, the court establishes the facts of the case ex officio on the basis of the applications and it may take evidence ex officio (section 38, paragraph 1 of the ArbGG). In these proceedings the court does not decide by pronouncing a judgement but by issuing an "order" (section 84 of the ArbGG).

For persons not versed in the law, it is important to know that an instruction about their right to appeal is compulsory in the case of decisions which can be contested through an appeal limited in time. If this instruction is not given, the period for appeal does not run (section 9, paragraph 5 of the ArbGG). Instead a period of one year applies in principle.

Use of information retrieval systems and of international sources

The legal information system of the Federal Government (Juristisches Informations-system des Bundes – JURIS) makes it possible for the judges to obtain information on labour legislation rapidly and comprehensively. JURIS was developed following a decision of the Federal Government of 12 September 1973. Initially the main responsibility for the development of the system lay with the Federal Minister of Justice. The Federal Labour Court, amongst other institutions, contributed greatly to the development of the system, as it is responsible for the documentation of the decisions of the labour courts and for labour court publications in general. According to a cabinet decision of 18 July 1984, the tasks of the legal information system of the Federal Government were partly taken over by the newly founded JURIS-GmbH.

JURIS is an information and documentation system to which public and private users have access. JURIS aims at accelerating and improving decision-making procedures. This should generally increase confidence in the law and guarantee a rapid dissemination of new legal concepts. Formal (bibliographic) and content-related (head words, key words, standards and annotations) descriptions are available to users of the system, who have direct access by means of remote data transfer. The replies appear on the screen and they can also be obtained as a printout.

Approximately 530,000 documents – court decisions, academic literature and administrative orders from all judicial authorities – are available to JURIS-users. There are approximately 19,500 decisions of the labour courts (Federal Labour Court: 8,000 decisions, Laender labour courts: 8,500; labour courts: 3,000) and approximately

27,000 articles and books (from 1970) dealing with labour law. International reference documents are stored to a minor extent in JURIS, with the exception of the case law of the European Court of Justice. When trying to establish what legal provisions apply elsewhere (cf. section 293 of the Code of Civil Procedure), it is at the discretion of the courts whether they turn to foreign institutes or proceed in accordance with the European Convention of 7 June 1968 (Federal Gazette II 74, 937). Pursuant to this convention the contracting States, at the request of a court, provide legal information free of charge on the application of their civil and labour law. The Federal Ministry of Justice is the transmitting agency for the Federal Courts. In all other cases the Laender Ministries of Justice are responsible.

Stephen Adler, Judge, National Labour Court of Israel

Preparation of the case for hearing by the court

Pre-trial preparation of cases has been developed and emphasised in the regional labour courts since the inception of the labour court system in 1969. The regional labour courts are the trial courts of the system and the National Labour Court is the appeal court.¹ The panel of the regional court consists of one professional judge, one public representative from the labour sector and one public representative from the management sector. The national court panel consists of three professional judges, one public representative from the labour sector and one public representative from the management sector. When the national court hears collective disputes, the panel has seven members: three judges and two public representatives from each sector.

There were several reasons for developing the pre-trial preparation to a greater extent than was done by the general court system: (a) to facilitate efficient conduct of hearings; (b) to give claimants and defendants who are not represented by attorneys the possibility to prepare their cases; (c) to take advantage of the freedom from procedural restrictions granted to the labour courts; (d) to provide a fairer trial, with fewer surprises, and more complete presentation of the facts and documents.

The labour courts were granted more leeway to develop the pre-trial procedures than the general court system. Section 13 of the Labour Courts Law, 5729-1969 grants judges the following powers concerning preparation of trials: (1) to examine whether the pleadings have been properly drafted; (2) to permit or direct an amendment of the pleadings; (3) to draw up a list of the points at issue; (4) to prescribe the stages of the proceedings in the action, and the order in which questions of fact or law shall be considered, as well as the matters to be determined; (5) to issue any procedural directions calculated to simplify or facilitate the proceedings.

The flexibility of the labour courts to develop pre-trial procedures was fixed by section 33 of the Labour Courts Law, which stipulates that: "In any procedural matter not provided for by this law or by regulations thereunder, the court shall adopt whatever course it deems best for the just handling of the case". These provisions of law were the basis for the development of "judges' rules" concerning pre-trial preparation of cases.

The late president of the National Labour Court, Judge Bar-Niv, issued the judges' rules as non-binding directions to the regional court judges; the current president of the National Labour Court, Judge Goldberg, has continued the practice of issuing "judges' rules". The ability to issue "judges' rules" grants the labour court flexibility to initiate procedures for the modernisation of civil procedure. The general court system, unlike the labour court system, has its procedural rules issued by the

¹ For general information concerning the Israel labour courts, see: "The Israel labour courts", in *Labor Law Journal*, Jan. 1977, p. 13.

Minister of Justice. However, the current president of the Supreme Court, Judge Shamgar, has also adopted a limited system of "judges' rules", in the form of non-binding directions to judges on matters not governed by the Rules of Civil Procedure. We shall now describe the procedure which has developed on the basis of these rules.

The pre-trial procedure begins by the registrar checking the papers filed. The registrar, an attorney appointed by the president of the National Labour Court, after consultation with the Minister of Labour and approval of the Minister of Justice [section 17 of the Labour Courts Law] checks the following:

- (a) whether there is a problem of local jurisdiction. Each of the regional labour courts has jurisdiction over a fixed territory. If a case is filed in the wrong territory, it is preferable to raise this issue immediately, allow the parties to express their position, and then decide whether the case should be transferred to another court;
- (b) whether there is another obvious problem which requires immediate attention. An example of such a problem is a complaint in which it is unclear whether the labour court has substantive jurisdiction. In such a situation the registrar writes a decision stating the problem, requests an answer from the parties and brings the case to a judge for immediate decision;
- (c) whether the complaint has all the elements required to state a cause of action. If further facts or documents are required, the registrar requires the plaintiff to submit them;
- (d) whether the defendant shall be required to file an answer; this decision is made by a judge, not a registrar. It is rare that a defendant is not required to do this, so that in practice this is a routine decision;
- (e) the registrar checks whether the defendant's answer has been filed within the time allotted. When the defendant's answer is received, the registrar checks it for preliminary motions. When the defendant has preliminary motions, the registrar requires him to submit them as part of the pre-trial procedure. When documents or facts are missing, the registrar may require their submission.

The next step is a pre-trial hearing, which is a crucial element of the pre-trial preparation. The court secretariat sets a date for a pre-trial hearing. It should be noted that the pre-trial procedure is dependent on the efficiency and co-operation of the court secretariat. The pre-trial hearing is generally conducted by the registrar, although the judge who will hear the case has the option to conduct it himself. The parties are required to appear at the pre-trial hearing. When a party is represented by an attorney, the attorney must appear. The decision requiring attendance at the pre-trial hearing states that the litigant should be accompanied by his attorney or that the attorney shall be empowered to discuss a compromise of the case. The parties are also required to bring all relevant documents to the pre-trial hearing. Prior to the pre-trial hearing, the registrar must review the papers submitted, and the relevant law and decisions.

At the hearing the registrar discusses with the parties the possibility of a compromise settlement. When a settlement is achieved, it is written and signed at the

pre-trial hearing. The registrar is empowered to give this settlement the authority of a judgement. If the parties do not reach a compromise, the registrar helps them to determine the agreed facts which need not be proven. The questions at issue in the trial are agreed upon; if there is no agreement, the registrar sets them out. As part of the preparation of the case for trial, the registrar usually decides at the pre-trial hearing that the parties are required to submit the direct testimony of their witnesses in the form of an affidavit. In addition, he requires the parties to submit all the documents they intend to introduce as evidence during the trial. At the conclusion of the pre-trial hearing the registrar writes whatever further information he thinks should be brought to the attention of the court which will hear the case. He also notes the date when the parties are required to submit their affidavits and documents; this enables the court secretariat to bring him the file on that date. If there is anything else the registrar thinks he should check, or if he decides to set a date for the continuation of the pre-trial hearing, this is also noted.

Holding a second session of the pre-trial hearing has been found most effective. Between sessions the parties consider the possibilities of reaching a compromise and also examine the affidavits and documents submitted by the other party. They also check the legal problems which the registrar has pointed out in the first pre-trial hearing. Therefore, at the second session, many compromises are made, because the parties are more aware of their chances of success. When a compromise is not reached, the second session is helpful for the fixing of further agreed facts. Since each party has been compelled to submit affidavits of its version of the facts, and has received the other party's version, it becomes apparent that many facts are not contested. Thus, the registrar writes down the facts agreed upon and also the reduced number of contested facts about which the court shall hear testimony.

At the appeals level, in the National Labour Court, little has been done to develop pre-appeal procedures. Parties are sometimes required to submit written briefs prior to the oral appeal. However, there is no pre-appeal hearing to explore the possibility of a compromise settlement and to prepare the appeal.

Conduct of the hearing

The conduct of the labour court hearings is governed by the Civil Procedure Rules of the labour courts, which are less complicated and more flexible than those of the general courts. However, the hearing is similar to that of the general court system.

Collective disputes are governed by special regulations, which emphasise quick and efficient hearings; most evidence in collective disputes is submitted by affidavit, with the court deciding whether the witnesses shall be cross-examined. All collective agreements and documents relevant to the collective dispute are submitted with the statements of claim and defence.

Hearings on appeals under the National Insurance Law, against legal errors in Medical Committee rulings, follow a procedure established by "judges' rules". The president of the National Labour Court directed that a special procedure be established for these cases. According to this special procedure, after the parties have submitted their claims and legal arguments in writing, the registrar conducts a pre-trial

hearing which clarifies to the claimant what legal problems his appeal raises (if any) and records the parties' arguments. The court decides whether the parties shall be permitted to present their arguments before the court, with the standard procedure being the submission of arguments in writing without a court hearing.

Like judges of the general court system, labour court judges are appointed until the mandatory retirement age of 70, by the same Appointments Committee which appoints judges of the general court system. This Appointments Committee consists of three Supreme Court Justices, the Minister of Labour, the Minister of Justice, two Members of Parliament and two members of the Bar Association.

The Minister of Justice and the Minister of Labour jointly appoint the public representatives, after receiving names of candidates for labour representatives from the labour federation and names of suggested candidates for management representatives from the various employers' organisations. The Ministers are not limited to appointing public representatives who are recommended by the labour federation and employers' organisations. While public representatives are not bound by the stringent rules of non-involvement in public affairs to which judges are subject, the Labour Court Law states that "in judicial matters" the public representatives are "subject to no authority other than that of the law". Section 16(b) of the Labour Court Law further states: "In exercising his functions as a member of the Court, a public representative shall act in accordance with his conscience and shall not regard himself as owing allegiance to the organisation in consultation with which he was appointed or to the section of the public which he represents."

The judge presides at the hearing. The public representatives, like the judge, may ask questions during the hearing. Witnesses who have submitted affidavits are cross-examined and then re-examined. Those witnesses who refuse to submit affidavits give their entire testimony before the court. The mandatory oath has been eliminated in all Israeli courts, but all witnesses are warned by the presiding judge that perjury is a criminal offence. The testimony is written in long-hand by the judge or a court employee. The court has all the powers granted to the general courts to require parties and witnesses to appear and submit evidence. After the court has heard the testimony, the parties summarise their case. Usually this is done orally, but the parties sometimes ask if they can submit written summaries when there are complicated legal or factual problems.

Section 47 of the labour courts' Rules of Procedure require the court to hand down its decision in writing, either at the conclusion of the hearing or within 30 days. In addition, section 47 requires judges to report each month, in writing, to the president of the National Labour Court, the cases waiting more than 30 days for a decision to be written, and the reasons for the delay.

In practice, many judges are behind in their decision-writing and it sometimes takes months until decisions are handed down. Many judges have difficulty apportioning their time between hearing trials and decision-writing. Furthermore, the labour courts are understaffed and overworked. Only some of the judges file the report within the time period required by section 47.

Form and preparation of the decision

Decisions are in writing and contain the facts, the issues, the court's reasoned decision on every issue, and the result. Trial court judges are not encouraged to write long legal dissertations, but are required to write reasoned opinions, with enough information and a full explanation of the verdict.

In the appeal court (the National Labour Court), there is generally no consultation among the judges prior to the oral arguments. However, after the oral arguments, the panel consults and each member expresses his opinion. A similar procedure is followed at the trial level, except that in the event of cases which continue for more than one hearing, the panel sometimes discusses the testimony after the hearings.

After presenting the testimony at the trial level, the parties generally summarise orally. Sometimes the court agrees to the parties' request to summarise in writing. At the appeal level, the parties present their case orally when the case is not difficult: if there is a difficult issue, or when the court feels it is appropriate, the parties submit written summaries and then argue orally. Infrequently, the Appeals Court decides that all the argument shall be in written form.

Draft decisions are written by the professional judge, typed, and sent to the public representatives. The latter may agree, sign and return the decision, or request a consultation of the panel, or write his own opinion. The judge and the public representatives have equal say in the decision process.

Decisions are signed by the entire panel. If there is a minority opinion, the Labour Court Law prohibits the identification of the holders of the minority and of the majority opinion. This eliminates any possible outside influence and allows the public representatives to decide according to their conscience. If there was no minority opinion, the court may state who wrote the decision, but generally does not. On the other hand, it is common knowledge that the professional judge writes unanimous decisions. The signed decisions are sent to the parties by mail. Sometimes the parties are summoned to the court to hear the decision read, but this is unusual in the trial court.

Use of information retrieval systems and of international sources

At the present time the Israeli court system has no information retrieval system in operation, but such a system is being developed by the Supreme Court. The labour courts hope to use an information retrieval system for general case-law and for the development of a labour law information base. At the current time there is no budget for such a project.

International sources are available in the library of the National Labour Court. The regional labour courts have a modest supply of international sources. The National Labour Court frequently uses international sources. Such sources are used as non-binding precedents, when there are no Israeli cases in point; for new ideas and answers to problems which are common to many labour law systems; and as non-binding precedents when the laws of both nations are similar. In such cases, law

review articles and books are also used. The *International Labour Law Reports* are sometimes referred to.

In the library of the National Labour Court there are various publications of the International Labour Organisation. These are sometimes referred to as a basis for comparative law research. The ILO Conventions and Recommendations are often referred to in cases of the National Labour Court, not as binding precedents, but as principles to which Israel has agreed by ratifying the Conventions in question.

Norway

Stein Evju, President of the Labour Court

The Norwegian labour court is a small and specialised court. Its jurisdiction comprises only collective disputes of rights, i.e. disputes concerning the validity, interpretation and application of collective agreements, the lawfulness of industrial action and suits for damages for breach of collective agreements and the peace obligation. Generally, only the organisations being the parties to the collective agreement in question may act as plaintiff and defendant. Individual members may, however, in some cases be sued alongside the organisations, e.g. in suits for damages.

The labour court is composed of seven members: the President and two other professional judges, and four lay judges appointed from among nominees of the major labour market organisations. The court is organised as a one-division court; each case is heard by the full court and decided by majority vote. The President is the only judge in a full-time position with the court; its office staff consists merely of one secretary.

The labour court system also includes local labour courts (the ordinary County or City Courts) which have jurisdiction in collective-agreement disputes of a local or regional character only. Due to the highly centralised system of collective agreements in Norway, these courts are, however, very rarely called upon and will not be further dealt with here.¹

Procedural provisions are laid down in the Labour Disputes Act (LDA, *arbeidstvistloven*, of 5 May 1927). They are neither numerous nor detailed. The more comprehensive and specific statutory rules on ordinary civil procedure are not directly applicable. They are, however, applied by analogy to the extent that they are suitable and compatible with the provisions of the LDA. In this process the labour court is granted a certain freedom from procedural restrictions, and thus the proceedings are somewhat simpler and less formalised.

Preparation of the case for hearing by the court

Proceedings before the labour court are instituted by filing suit. The plaintiff must submit to the court a writ (LDA Section 18, No. 1) containing, inter alia: an account of the case and the claims which the plaintiff wishes to make; a specification of the evidence which the plaintiff intends to present, the manner in which he proposes to procure the evidence and the facts which he proposes to establish thereby; and a specification of the evidence which the plaintiff wishes to procure from the other party himself or with the assistance of the court.

¹ For further information concerning the Norwegian court system in general and the labour courts, see "The Labour Court of Norway", in B. Essenberg (ed.): *Labour courts in Europe* (Geneva, ILS, 1986, pp. 44-47), and the Prefatory Note on Norway, *International Labour Law Reports* (Dordrecht, Martinus Nijhoff), 1987, Vol. 5, pp. xxxv-xxxix.

When the writ is received by the court, the President checks whether it complies with all formal requirements and, in particular, whether the requirement of prior dispute bargaining (see below) has been met. When found in order, the writ is served upon the defendant(s), who, at the same time, is requested to reply in writing stating the claim(s) to be made on his part and giving specifications concerning evidence in line with the above provisions applying to the plaintiff. Normally, the defendant will be required to submit his reply within 21 days of his receiving the writ.

The preparation of the case in most cases includes a further exchange of trial documents between the parties, administered by the court's President. For each submission of new documents a similar time limit of 21 days is normally applied. When the President is satisfied that the case is sufficiently prepared, he will fix a time and a place for a hearing.

Basically, the principle of "party presentation" applies in labour court proceedings, as in civil law proceedings. This means that the parties define and limit the scope of the dispute by their formulation of the claims. The parties also decide – by contesting or not contesting – to what extent relevant facts are controversial and to what extent they find it necessary to substantiate their assertions by the presentation of evidence. However, a certain duty of securing full information is imposed on the labour court (LDA, Section 19, No. 3). For that purpose the court may, for example, summon witnesses and order the presentation of documentary evidence. The authority to do so during the preparation of a case is vested in the President. The President may, and in practice frequently will, intervene by questioning the parties on points of law and fact, requesting clarifications to be made or supplementary evidence to be produced. Generally, this is done in written form in conjunction with the transmission of trial documents.

Cases are usually prepared in writing only. There are no statutory provisions for a pre-trial hearing or meeting as part of the preparatory process. A prerequisite for bringing a case to the labour court is that the dispute has been subject to "dispute bargaining" between the parties to the collective agreement involved (or, that the plaintiff has endeavoured, in vain, to enter into such bargaining; LDA, Section 18, No. 2). The statement of claim must be accompanied by a transcript of the bargaining records. This is based on the idea that the parties should clarify the disputed issues and facts in order to facilitate a subsequent preparation for, and hearing by, the court. In practice, however, the actual dispute bargaining very frequently does not entirely fulfill this purpose. In these circumstances the President may, as an alternative or as a supplement, summon the parties to a "preparatory meeting", in which the possibility of reaching an amicable settlement may be explored. This is done in a few cases. In practice there are no traditions or general criteria with respect to using pre-trial meetings in the preparation process.

It is a fundamental consideration that cases before the labour court should be handled expeditiously. The President shall fix a time and a place for the hearing of a case as quickly as possible (LDA, Section 18, No. 4). Even if the preparation of the case is extended, the hearing will normally be fixed to take place within three to five months of the court receiving the initial writ. "Urgent cases" – for example, cases concerning the lawfulness of on-going or intermittent industrial action – are handled

more rapidly. The hearing will be held within five to ten days of receiving the suit. In such cases the President will fix a date for the hearing when serving the writ upon the defendant(s), or shortly afterwards, following consultations with the parties involved.

The parties, witnesses, etc., are entitled to one or two days' notice when being summoned to appear in the labour court. Preliminary or interim decisions on questions of substance are not made in practice. It is a pending legal question whether injunctions can be delivered in cases falling under the jurisdiction of the labour court. Preliminary decisions on the preparation of the case, presentation of the evidence, summoning of witnesses, etc., are made by the President during the preparation process.

Conduct of the hearing

The hearing is in all cases oral and is conducted in accordance with the so-called principle of "direct presentation of evidence": documentary evidence must be read to the court, even if it is, as it should be, included in the trial documents. Witnesses and representatives of the parties giving testimony are examined, cross-examined and re-examined. The testimony is not taken down in writing nor is it tape-recorded. At all stages it is up to the judges, and particularly the one who is to write the decision, to record what he considers necessary. Formalities and the parties' formulation of their claims are entered into the official record by the court clerk.

First, each party (or their attorney) introduces the case, pointing out the disputed matters as seen by that party. All documentary evidence which is to be considered by the court is read, the legal problems are pointed out and, most frequently, argued rather extensively. Finally, the claim made by the plaintiff is formally lodged in an oral presentation. The attorney for the plaintiff speaks first, then the attorney for the defendant. Thereafter, the testimony of parties' representatives and witnesses is heard. Finally, the parties summarise their case and present or complement their arguments. Each attorney may speak twice. All pleading is oral; written summaries on legal or factual problems cannot be submitted. Hearings are conducted in relative informality. Questioning is freely carried out by all judges at any stage of the hearing. Also, at any time during the hearing the court may explore the possibility of an amicable settlement.

The labour court is located in Oslo and, as a rule, hearings are conducted there. But at times hearings are held at "the scene of the action" – for example, if an inspection of a work-site or working processes is considered desirable for supplying sufficient evidence or, in a few cases concerning unlawful industrial action where the court's presence on the spot may be useful.

Form and preparation of the decision

All decisions are in writing. They contain a "nutshell presentation" and then a more extensive introduction providing the full background of the case, based on the undisputed facts and quoting relevant source material and significant documentary

evidence; a summary of the arguments proffered by the parties and quotations of their claims; the opinion of the court; and the result.

The trial documents are transmitted by the court secretary to all judges some days in advance, but there is no consultation among the judges prior to the hearing. As in other courts, the judges convene in chambers to discuss the case, immediately following the closing of the hearing. The President summarises the case, he points and discusses the issues, and concludes by stating his opinion as to the result. Then the other judges state their opinion – first the professional and then the lay judges, in order of seniority – and subsequently a more informal discussion on specific questions may take place.

On the basis of this consultation a draft decision is written. The draft is transmitted to the judges, who then convene again, normally a few days later. The draft is read aloud by the President, discussed, and adjustments or alterations are made, if necessary. The decision is then finalised and signed by all judges. The parties (or their attorneys) are immediately informed by telephone of the result by the court secretary, and the written decision in full is sent to the parties by mail.

The labour court shall, as a general rule, pronounce judgement within one week of the conclusion of the hearing (LDA, Section 25, No. 1, paragraph 2). This requirement is complied with in almost all cases. In urgent cases judgement is pronounced on the day of the hearing or within the next one or two days.

Generally, decisions are written by the President. If there is a minority opinion, he may include a draft of the minority's opinion in the draft decision; however, a draft may also be presented by the judge(s) in minority. Minority opinions are included in full in decisions, stating the name(s) of the judge(s) in minority.

Use of information retrieval systems and of international sources

The labour court has recently subscribed to a national legal information system, LOVDATA. LOVDATA is a documentation and information retrieval system containing current updates of all national acts and regulations, Supreme Court decisions since 1945 – partly in full text and partly in abstracts – and the case law of other courts on some selected topics. It does not contain international sources, information on literature or labour court decisions. Due to this, and to the specialised nature of the disputes before the court, LOVDATA is rarely used by the labour court. Access to other information systems, national and international, will probably be established in the near future, coupled with the facilities of the Ministry of Labour and Municipal Affairs. International sources, which are only occasionally used, are available to some extent in the modest library of the labour court and in greater measure in readily accessible libraries.

Juan Antonio Linares Lorente, Judge, General Council for the Judiciary

In Spain, the dispensation of labour justice is considered as a state service, which is performed by professional judges who are full members of the judiciary. Under the Spanish Constitution labour courts are specialised in, and devoted exclusively to, labour and social security conflicts. There are, in addition, civil, criminal and administrative courts.

Labour conciliation boards are normally provincial in scope, although there are several in certain important cities and areas within some provinces. These boards issue judgements for all labour and social security conflicts. In the majority of cases, their decisions may be appealed through a twofold process: before the Supreme Court for matters of great importance, either because of their economic impact or for other major reasons (e.g. dismissal of workers' representatives); or before the Central Labour Court, which is competent for all other appeals, provided that the value in dispute exceeds Pts.200,000. Most appeals come to this court, which has its headquarters in Madrid and is competent for the whole territory. There is a considerable backlog of pending matters, since some 30,000 appeals are filed yearly.

If the value in dispute is under Pts.200,000, the corresponding judgement may not be appealed against and the labour judge's sentence is final, unless the matter affects a large number of workers or of social security beneficiaries, in which case an appeal may be filed with the Central Labour Court. Every year some 300,000 suits are filed with the labour conciliation boards, of which over 100,000 concern social security matters. They are dealt with by some 200 labour conciliation boards; thus, the workload for each labour judge is considerable.

Courts are staffed by civil servants. The judicial bodies are presided over by judges (one single judge in the conciliation boards, and benches of judges in the Central Labour Court and Supreme Court), who are assisted by a secretary (who holds a law degree and is a civil servant, too) and by several officials, assistants and judicial agents.

The "Ley Orgánica del Poder Judicial" (Basic Act concerning the Judiciary) of 1 July 1985 reformed the organisation of the labour courts and established a structure different from that described above. The main purpose of the reform was to respond to a constitutional provision whereby each one of the 17 autonomous communities has to be the seat of a Superior Court of Justice (Art. 152 of the constitution of 1978). Under the new Act, the judicial bodies dealing with labour matters are as follows:

- (a) social courts, which assume practically the same function as the current labour conciliation boards, with the exception of disputes which are likely to exceed their territorial competence;
- (b) the social tribunal of the Superior Courts of Justice, whose principal authority is to hear appeals filed against the sentences of the social courts and which also

hears, as a court of first instance, collective disputes and disputes concerning the validity of collective agreements, whenever they are likely to exceed the territorial competence of the social courts;

- (c) the social tribunal of the National Court of Law, which has jurisdiction for Spain as a whole and has its headquarters in Madrid, hears cases on collective disputes and disputes concerning collective agreements whose scope of application is larger than the territory of an autonomous community;
- (d) the fourth social tribunal of the Supreme Court hears appeals concerning errors of law or breach of a procedural right filed against judgements concerning collective or trade union disputes decided by the National High Court or the Superior Courts of Justice. It also has the important function of maintaining unity in the case law of the courts. To this end, an appeal may be filed whenever contradictory sentences are issued on an identical matter by different superior courts. In this special procedure, the department of the Public Prosecutor, the trade unions and employers' associations are represented in addition to the parties.

This new system has not been enforced as yet. It needs confirmation by the "Ley de Planta y Demarcación" (Organisation and Demarcation Law), which has already been drafted by the Ministry of Justice and dealt with by the General Council for the Judiciary. A five-year period is foreseen for the gradual establishment of the new judicial bodies.

As can be seen from the above, workers' or employers' representatives do not sit in the labour courts. The Spanish constitution provides for juries only in criminal cases and only when it is specified by law. The participation of trade unions and employers' associations will only be possible in these extra-judicial bodies. The absence of unions from the current conciliation body, the Institute for Mediation, Arbitration and Conciliation (IMAC), is a result of the vertical nature of past authoritarian political rule in Spain. The democratic system would appear to demand a more horizontal composition of dispute settlement bodies, leaving aside labour courts proper.

The procedure laid down in labour law is very simple: after an obligatory attempt at conciliation has been made before IMAC, an action may be brought. Claims against public bodies of the administration are not admissible, nor are social security claims. If conciliation is unsuccessful, a claim may be filed before the labour conciliation board. The judge will examine the claim and inform the party of any problems, requesting it to remedy the claim within a period of four days. Then the date for the trial is set and the parties are summoned to appear before the judge.

The procedure before the labour court is based on the principles of "oral hearing", "concentration", "celerity", "gratuitousness" and "procedural balance". In the first instance, the parties need not be legally represented. They are, however, required to be represented by a lawyer in the Central Labour Court and in the Supreme Court. In the summons the parties are notified of their obligation to appear with all the necessary evidence to prove their case, in order to avoid delays in the proceedings.

The proceedings start with an attempt at judicial conciliation and the judge advises the parties of those rights which they have by law. This is quite efficient in general, and serves the purpose of permitting the judge to become aware of the real nature of the conflict. In the hearings, the judge has more ample authority for procedural direction and more powers to intervene in the examination than in civil suits. He may interrogate the parties and witnesses; request the production of evidence, and limit the number of witnesses. The judge has quite an active position, although the plaintiff plays a key role in the course of the proceedings. The rejoinder is verbal (although the claim is filed in written form), and all arguments, of both form and substance, may be advanced therein, together with any countercharge (autonomous action on the part of the defendant against the claimant). The production of evidence may be requested before or during the proceedings.

In the final phase of the proceedings, the parties draw conclusions and analyse their evidence and that submitted by the other party. They may even alter their claims on the basis of the results obtained from the evidence submitted. A brief summary of the proceedings is drawn up by the judicial secretary, specifying the pleas of the parties, the evidence proposed and submitted, and the conclusions given by the parties. The latter may express their disagreement with the contents of the summons. Within three to five days the judgement is issued, stating the proven facts, which reflect the judge's view of the case. The legal basis of the judgement must include a legal reasoning by the judge in application of the corresponding legal norms. Appeal possibilities must be specified in the judgement.

The main problem which affects the labour courts is the lack of an effective system of extra-judicial solution of labour conflicts. Reference has already been made to the IMAC, before which the parties must appeal prior to the filing of a claim in the courts. This body is highly bureaucratic. There is no provision for the participation of trade unions or employers' associations. Notwithstanding, numerous conflicts are conciliated by this body. There are also provisions for mediation and arbitration in the Decree Laws of 4 March 1977 and of 26 January 1979. They are, however, seldom used, since they have little influence on labour relations, their standards being insufficiently developed. It would be desirable to introduce mechanisms that would help conflicts to be resolved through the joint participation of workers and employers. The various agreements made between trade unions and employers' associations in the past few years include understandings in this respect. In 1985, the UGT (General Workers' Union) and CCOO (Workers' Commissions Trade Unions), and the CEOE (Spanish Federation of Employers' Associations), arrived at a basic understanding, which was set out in a document that was never signed, due to differences of opinion among the participants as to the specific system to be applied. The General Council for the Judiciary is interested in promoting these mechanisms, which must be based on an agreement among social partners, and supported by a normative, administrative and economic coverage to be supplied by the public authorities.

Sweden

Ove Sköllerholm, Chairman, Labour Court

*Preparation of the case for hearing by the court*¹

When the labour court is sitting as a court of first instance, the procedure is, on the whole, the same as applies to trials in assize courts in discretionary civil actions. An action is brought by a written application for a summons. The application is channelled to one of the court's three chairmen following a system based on the order in which the applications come to the court, regardless of the type of case. It is the chairman's responsibility to prepare the case for hearing by the court. The application for a summons is scrutinised by the chairman and one of his two clerks. It must contain the plaintiff's petition, the facts upon which the petition is based and also the facts that establish the competence of the court. The plaintiff may be ordered to complete his application to avoid the risk of having it rejected. If and when the application is in order, the court issues a writ of summons which is served on the defendant. Generally the defendant is called upon to give his written reply within three weeks. After receiving it, the chairman decides whether the preparation of the case is to be continued in writing or in an oral hearing. The latter is by far the most commonly used alternative. The parties are called to a meeting before the chairman. At this meeting each party presents its case as far as is necessary to allow subsequently for a court hearing. On the basis of the chairman's questions and taking into account the opposite party's presentation of fact and legal arguments, each party is called upon to present its case carefully. The chairman seeks to identify the facts and the questions of law disputed by the parties. At the end of the meeting, a date is fixed for the court hearing, which will generally take place at least six weeks later. The parties are ordered to specify their evidence, if possible at the pre-trial meeting and otherwise in writing within two or three weeks. Furthermore, the parties are orally summoned to the court hearing. After the pre-trial meeting, the clerk produces a very detailed record, which is communicated to the parties. Witnesses, if any, are summoned to the court hearing. The chairman decides the composition of the court, having regard to the type of case. Then the members of the court are invited to the court hearing by the secretariat of the court, following a pre-established system which, however, is very often subject to change due to other engagements of the members. Members are never "hand-picked" for certain cases. About one week before the court hearing, all the documents of the case are sent to the members of the court, together with an agenda for the hearing, prepared by the clerk.

When the labour court is sitting as appellate court, the case has already been tried by an assize court. In cases of appeal, the pre-trial hearings before the labour

¹ See also A. Bouvin, "The court procedure in labour disputes in Sweden", in: B. Essenberg (ed.): *Labour courts in Europe* (Geneva, ILS, 1986, p. 52 et seq.).

court are almost always conducted in writing. The questions arising during the preparation of appeal cases generally concern the admissibility of new evidence or new facts. If it is not obvious that new evidence or new facts are admissible, these questions are decided by the court, which, for these matters, is usually composed of the chairman and two lay members. When the pre-trial hearings are completed and such questions are decided, the parties and the witnesses, if any, are summoned to the court hearing.

Conduct of the hearing

When the labour court sits as court of first instance, it examines first of all whether there is any obstacle for the court hearing, such as, for example, the absence of a witness. If any such obstacle is found, the court decides, after hearing the parties, whether the hearing is to be postponed or may nevertheless commence but be continued later. The hearing starts with the plaintiff's presentation of his petition, and is followed by the defendant's reply. Thereafter, the plaintiff and the defendant respectively present their case. In principle, at this stage the parties only present alleged facts and inform the court of what each of them will try to prove by introducing evidence. Written evidence is generally submitted in connection with this presentation of alleged facts. The next step is the submission of oral evidence. If the parties are to be heard as evidence, the plaintiff is heard first and then the defendant. Thereafter the witnesses, if any, are heard. Generally those nominated by the plaintiff are heard first. In most cases, the parties are allowed to conduct the hearing of the witnesses, while the court assures the orderly conduct of the procedure. If necessary, it will ask complementary questions. After the submission of oral evidence, each party pleads his case. Usually, the parties summarise their views on the conclusions that may be drawn from the evidence and they present their views on the legal questions of the case. Again the plaintiff comes first and then the defendant. Then the parties demand that costs be paid by the opposite party, depending on the outcome of the case. Finally, the hearing is closed and the court sets a date for the decision. In most cases, this date is set four to eight weeks after the day of the court hearing.

When the labour court sits as an appellate court, the hearing follows, on the whole, the same pattern as outlined above. When the hearing commences, the chairman gives a short account of the decision of the lower court. Witnesses that have been heard in the lower court are not always heard again in the labour court. If a witness is not heard again, a transcript of the tape recording of his or her statement before the lower court is read to the labour court. However, if the outcome of the case depends on a particular witness, she or he must generally be heard again. Otherwise the decision of the lower court may normally not be altered. In preparing the case, the chairman has a responsibility to point this out to the appealing party, if it does not ask for the rehearing of such a witness.

Form and preparation of the decision

When the labour court sits as court of first instance, its decision is set out in writing. It consists mainly of four parts: a short presentation of the case, including the plaintiff's petition and the rejoinder; an account of the arguments of both sides; the court's findings and reasoning; and the court's decision on substance and on the costs. Depending on the complexity of the case, the volume of the document may range from 10 to 40 pages, with an average of 15 pages. Immediately after the court hearing is closed, the court discusses and decides the case. In cases of great complexity the discussion may be continued at a later date and the case decided then. It is the task of the chairman to produce a written draft decision. A preliminary draft is written by the clerk who has been serving as secretary during the court hearing. The clerk's draft is scrutinised and more or less rewritten by the chairman. When the chairman has finished his draft, it is sent to the vice-chairman for his or her approval. When the vice-chairman has approved of it, it is sent to the other members of the court for their approval. After all members have approved the draft, it becomes the written decision of the court. If one or more members have opinions at variance with those of the majority, the dissenting opinion is laid down by a member of the minority, often with the assistance of the chairman. The dissenting opinion, too, is sent to all members of the court. Sometimes this leads to a new discussion of the case and a final casting of votes.

When the majority decision has been made in writing and has been approved, it is produced in about 300 copies together with the minority vote, if any. On the date set for the decision of the court, each party receives at least one copy, which may be obtained from the court's secretariat or is sent to the party by mail. Other copies are sent to persons, organisations and news agencies subscribing to the court's decisions. The copies addressed to the parties are signed by the chairman for the court. Later, the original document containing the decision is circulated among the members of the court for their signature. The decisions are published in the yearbook of the labour court. Since the court uses a word processor to set up its written decisions, these are transmitted to the printer by telephone.

When the labour court sits as an appellate court, the procedure for deciding the case and producing the written decision of the labour court is in principle the same. The written decision of the lower court is attached to the written decision of the labour court and therefore the latter's decision can be made much shorter than in cases where it is sitting as a court of first instance. In appeal cases, too, the decisions of the labour court are published in the yearbook, together with the decisions of the lower courts.

Use of information retrieval systems and of international sources

In Sweden there is a computerised information retrieval system for legal matters, containing, among other material, court decisions, including those of the labour court. At least for the time being, the labour court has not found it necessary to subscribe to this information retrieval system. In preparing cases and in the decision-making process, the labour court uses statute books, its own yearbooks, the yearbooks of the

Supreme Court, the yearbook of the Administrative Supreme Court, legal literature and other sources. The use of international sources is not very common, because of the nature of the cases before the court.

United Kingdom

The Hon. Mr. Justice Popplewell, President, Employment Appeal Tribunal

The labour courts in the United Kingdom are of two types. Firstly, there are the industrial tribunals who sit throughout England, Wales and Scotland and Northern Ireland. From them an appeal lies to the employment appeal tribunal, a division of which sits in London and another in Edinburgh. Appeals from industrial tribunals in Northern Ireland are heard by the Court of Appeal.

Industrial tribunals: Preparation of the case for hearing by the court

A case is started before the industrial tribunal by the applicant's putting in a claim. Broadly, claims must be brought within three months. The employer then has 14 days to put in his answer, which is called a Notice of Appearance. Following receipt of the respondent's Notice of Appearance, the Tribunal fixes a day and Notice of Hearing is then issued; the parties are given 14 days' notice. In complicated cases, the parties will be consulted about suitable dates for the hearing. Interlocutory applications are heard by the chairman of the tribunal; he will not usually be the same chairman who sits on the hearing of the proceedings. The tribunal exercises control over the proceedings by monitoring the progress of the proceedings and ensuring that the parties proceed with proper despatch. They also provide such assistance as either party may require in the preparation of his or her case. Thus the tribunal may make Orders for particulars for discovery, inspection of documents and issuing witness orders to witnesses. These are usually made upon the application of the party requesting them, but in certain instances they may be made by the tribunal of its own motion, if a chairman considers it necessary for the fair determination of the proceedings. Sometimes the chairman will order a pre-hearing so as to clarify the triable issues and ensure that the parties have made the necessary arrangements for the hearing, i.e. ensure that there is an agreed bundle of documents and discuss the estimated length of the hearing and the number of days necessary to be set aside. It is also helpful for an unrepresented party to be made aware of what the procedure is and what the other side's case is all about.

Conduct of the hearing

A tribunal hearing is conducted by a chairman and two members; the documents which they have before them at the commencement of the hearing are a copy of the applicant's Originating Application and of the respondent's Notice of Appearance. Copies of agreed bundles of documents are provided in advance of the hearing and are usually read by the tribunal beforehand. The legally qualified chairman is

responsible for controlling the proceedings. He sits with two lay members, who fulfil all the functions of an industrial jury. They are appointed from both sides of industry because of their industrial experience, and they have an equal vote with the chairman on issues both of fact and law. Decisions are taken by a majority.

The legally qualified chairman is responsible for controlling the proceedings. He gives rulings on points of law and procedure and is responsible for taking a full note of the proceedings. The chairman's notes form the official record of the proceedings; there is no tape recording or shorthand note.

The clerk of the tribunal is a clerical officer responsible for the administration of the paperwork before the hearing for the maintaining of records of the events at the hearing.

The hearing is conducted orally on the basis that each party in turn calls his witnesses to give evidence in chief. The witnesses are then cross-examined by the other party and then re-examined by the party calling him, and then, if necessary, questioned by members of the tribunal. The end of the evidence having been reached, the parties each address the tribunal in turn on issues of fact and law to be taken into consideration by the tribunal in reaching its decision. There is provision in the *Rules of the Industrial Tribunal* for evidence which would not strictly be admissible in other courts to be allowed. It is the intention of the proceedings before an industrial tribunal that they should be flexible and free of legalism where possible, and there is a wide discretion given to the chairman as to admissibility of evidence. The tribunal is empowered under its rules to conduct the hearing in such a manner as it considers most suitable to the clarification of issues before it and generally in the just handling of the proceedings. The proceedings are conducted on an adversarial basis, which is traditional in the common law jurisdiction of the United Kingdom. But, particularly where the parties are not represented, the chairman will adopt an inquisitorial role if he considers that this is necessary in the interest of justice in order to arrive at a just conclusion.

Form and preparation of the decision

The form and preparation of the decision is in the hands of the chairman. He is responsible for the preparation of a decision even if the decision and the reasons for it are announced to the parties at the conclusion of the hearing in the form of an oral judgement; the tribunal must issue a written decision setting out the decision of the tribunal and the reasons for it. The decision of the tribunal is not enforceable until a written decision is promulgated, and the time for appeal runs from the date of promulgation of the written decision. The tribunal always publishes a written decision setting out its reason; this is considered to be of importance in industrial relations so that those in industry can determine their relations on the basis of published material and also so that decisions can be published to the general public. The tribunals have always taken the view that it is very important that the decision should be given as expeditiously as possible. The general practice among chairmen in the preparation of the decision is to retire with his members at the conclusion of the hearing and to discuss the case. Either there will be unanimity, or there may be dissent. The usual

practice is for the chairman to write out, or to dictate, the decision and send a copy to the industrial members for their approval. If there is a dissent, as sometimes there is, the dissenter may write out his own decision; sometimes he will allow the chairman to do it on his behalf.

The form of the decision varies from chairman to chairman, but generally it is set out in three or four pages of judgement. The relevant case law will be set out; the findings of fact and the conclusions will all be set out. In Scotland, because it is not usual for the chairman's Notes of Evidence to be available before the employment appeal tribunal, it is customary for the evidence to be set out at greater length in their decisions. While the authorities referred to by the parties are mentioned in the decision, it is not customary for them to be set out in very great detail in the decision; indeed, industrial tribunals are discouraged from giving over-lengthy and legalistic judgements.

In 1985, provision was made for the issue of written reasons in summary form, except in cases of sex or race discrimination or a complaint of unreasonable expulsion or exclusion from membership of a trade union. If the parties want a full written reason, they have to apply within 21 days.

Use of information retrieval systems and of international sources

Unlike the civil courts, it is the responsibility of the chairman to have regard to all relevant issues of law whether they are addressed for his attention or not. This is because the parties may be unfamiliar with the legal issues arising from the determination by the tribunal. The tribunal does not have the benefit of the Lexis system or any other computerised retrieval system. The chairman must have recourse to original source material (legislation and reported authorities) and to published text books. He is also assisted by the Chairman's Handbook and the Appeal Case Index, which are publications prepared and circulated internally, and regularly updated, drawing attention to points of law and procedure in a readily accessible form. If a party wishes to cite an authority other than the text of the legislation, it is the responsibility of the clerk to ensure that a copy of the authority is available to the tribunal during the course of the hearing. The chairman is expected to be familiar with the general principles of European Community law and of course has access to the reported decisions both of the European Court and of the national courts in dealing with directives from the Community.

Employment Appeal Tribunal: Preparation of the case for hearing by the court

The Notice of Appeal is received in the general office and immediately acknowledged. A Notice of Appeal which is received out of time, that is, say, not within 42 days, will be rejected. The case will be allocated to a case work clerk who will check that the appeal is within time, obtain the relevant documents from the industrial tribunal, and decide whether the Notes of Evidence prepared by the chairman are necessary. The

respondents will be sent a copy of the Notice of Appeal and will be given 14 days to put in an answer. On receipt of the answer, the copy will be served on the appellant and the case will then be ready for listing. Normally the case will then be referred to the listing officer for a date to be fixed. The listing officer will, after liaison with the parties, fix a date for the hearing and advise the parties of that date.

Conduct of the hearing

The hearing is before a High Court judge and two industrial members. Any party can be represented by a properly qualified legal adviser (i.e. a barrister or solicitor, a trade union representative, an industrial consultant) or he may represent himself or have a friend to speak on his behalf. In cases which do not appear on the face of the documents to contain a reasonable arguable point of law, the case will be put in for hearing under a "special procedure" before the employment appeal tribunal. This "special procedure" is designed to avoid cost and expense. Unless the appellant has a reasonable arguable point of law, the employment appeal tribunal has no jurisdiction. The "special procedure" allows the appellant to argue his case *ex parte* – that is to say, without the respondent being present – and to seek to persuade the tribunal that there is a reasonable arguable point of law. If he does so, then the case is sent for a full hearing on another day before another tribunal, with the respondents present. If he does not succeed, the case is dismissed there and then, because the employment appeal tribunal has no jurisdiction.

The hearing is conducted orally and in public. The appellant is invited to address the tribunal and to argue his points, which are contained in the Notice of Appeal. He will not normally be allowed to go outside the points raised in the Notice of Appeal or to introduce fresh evidence. The employment appeal tribunal will not normally interfere with findings of fact by the industrial tribunal and is discouraged from so doing. The employment appeal tribunal is necessarily somewhat more formal than the industrial tribunal but considerably less formal than hearings before a court. The tribunal will always seek to assist an unrepresented litigant in his application.

Form and preparation of the decision

At the end of the hearing, the presiding judge and the two industrial members will retire and consider their decision. They may give their decision there and then orally; it will be recorded and a copy sent to the parties thereafter. The tribunal may, however, reserve its decision. If it does so, it is customary for the judge to prepare the tribunal's decision and to send it to the members for their approval; after further discussion, a final draft is prepared and is given at a later date. In the event of a dissent, the tribunal, when it gives its decision at once, may either give the dissent through the judge, or the dissenting member may himself say why he dissents. In the event of judgements being reserved, the presiding judge may express the dissenting member's views himself, or invite the dissenting member to prepare his dissenting judgement.

Use of information retrieval systems

The employment appeal tribunal does not have immediate access to Lexis. Almost all the cases which are cited to the tribunal are already familiar to the tribunal. Judges suffer not from too few authorities but from too many. They have access to the decisions of the European Court and judgements of both the Court of Appeal and the House of Lords, and of course to legislation and published text books.

A. Comparative overview

Werner Blenk, International Labour Office

Source of regulation

The participants emphasised the double role of judges in administering labour law. They were simultaneously called upon to promote social peace by fostering harmonious relations between workers and employers and to protect individual workers. In respect of termination of employment disputes the second task was very important. In fulfilling it, judges were to varying degrees guided by rules which laid down, *inter alia*, criteria for their decision. At the same time, these rules determined to a great extent which segment of a complex social relationship between workers and employers they had to focus on. In some of the countries represented at the meeting (Denmark, Israel) the primary source of regulating termination of employment conflicts was collective agreements, i.e. rules which had emerged from union-management negotiations. Other countries, such as Norway, Spain, Sweden and the United Kingdom, relied primarily on statutory protection which had been conceived in the political arena. In a third group of countries (Finland, Federal Republic of Germany) both legislation and collective agreements formed the normative basis of protection. The judges agreed that the source of regulation had significant repercussions on the content, type and scope of protection against dismissal.

Bodies with jurisdiction over termination of employment disputes

In most countries with legislative protection against unjustified dismissal, an appeal against a dismissal may be brought to a judicial body. This is sometimes an ordinary civil law court, as in the case of Norway, Sweden (for non-unionised employees) and Finland (for disputes other than those concerning collective agreements). In the Federal Republic of Germany, Israel and Spain, special labour courts deal with termination of employment matters. In the United Kingdom, there are industrial tribunals, which have been established by statute. In Denmark, on the other hand, there are special boards set up to deal with termination disputes as they develop.

In all countries, with the exception of Spain where labour courts are exclusively made up of professional judges, the courts or tribunals are composed of one or more professional judges and a varying number of lay members. In contrast with ordinary courts where lay members, where they exist, are usually representatives of the interests of the public at large, they are, in labour courts, the representative of their respective interest group, i.e. of workers or employers. In many instances the lay judges (or assessors) are familiar with labour matters and termination of employment questions without, however, having had any formal legal training. The judges indicated

that, in a large number of cases, lay members from both “sides” and professional judges arrived at a common decision. (In this respect, it is interesting to note that a reason for unanimity advanced was that any dissenting opinion proffered by lay judges might have to be legally defended vis-à-vis the professional judges.)

Preliminary attempts at settlement

The participants emphasised the importance of pre-trial mechanisms to resolve the conflict. These could considerably decrease the workload of courts and often resulted in speedy and agreed solutions for the parties concerned. In some countries, such as the Federal Republic of Germany, there is a mandatory conciliation hearing prior to the legal proceedings proper. In Israel and the United Kingdom, there are prior hearings and in Norway and in Sweden the parties are requested to negotiate before a date is set for the court session. This offers the parties an opportunity to review the justification of dismissal in the light of the legal standards applicable and the likelihood of winning or losing the case before the competent court or tribunal. It was pointed out that preliminary attempts at conciliation were particularly useful in the case of smaller enterprises where internal mechanisms to resolve termination and other conflicts were often not fully developed. The same was true for non-unionised enterprises. Negotiated or conciliated settlements were particularly numerous in situations where production and/or assessment of evidence were difficult to achieve or where the parties anticipated that legal proceedings would be lengthy and/or expensive. In addition, a negotiated settlement would often allow for a more flexible solution than could be offered in a judgement.

The parties to the dispute

The participants identified three basic approaches regarding the right to contest unjustified dismissal and to act as a party in legal proceedings. It may be vested either in the individual worker or in the trade union representing the worker, or there may be a concurrent right of the individual and of the union. In Norway, for example, the right of appeal is a strictly individual one which can only be exercised by a party to an employment contract. Unions may only provide legal aid and assistance. In general, it would appear that in countries where dismissal protection is incorporated in legislative provisions, it is principally for the individual aggrieved by a violation of these provisions to complain thereof (e.g. Federal Republic of Germany, United Kingdom). In other countries the trade union must present or take on the dispute for it to be heard by the court. For example, this is the case in Denmark and, to a certain extent, in Israel. In these countries, dismissal protection is to a large extent based on collective agreements and it is assumed that trade unions are vested with a right to appeal in cases where these agreements may have been breached. It was pointed out that this tended to reinforce the position of the trade union and provided a powerful incentive to membership. It also made for a situation where frivolous or unsubstantiated complaints could be filtered out at an early stage. However, the requirement

of union representation or approval presented a certain risk that workers might be deprived of judicial access for reasons extraneous to the merits of the case. In other countries the capacity to be a party, and questions of jurisdiction, depend on whether the aggrieved worker is a member of a union or not. For example, in Sweden organised workers are represented by their union in the labour court, whereas unorganised workers may address themselves to the ordinary courts where they may be represented by a lawyer. In Finland, non-unionised workers would have to address themselves to the ordinary courts, whereas union members could choose between labour courts and ordinary courts.

Continuation of employment during procedure before the labour court

The judges observed that there is wide diversity concerning the continuation of employment and of the employment relationship during the procedure of appeal against the dismissal. In some countries, such as Denmark, Finland and Spain, there is no legislative basis which would enable courts or tribunals to suspend the effects of dismissal and, consequently, dismissed workers would not work during the period in question. In other countries, such as the Federal Republic of Germany, Norway and Sweden, provision is made for continuation of the employment relationship, pending a final decision on the merits of the case. These systems seek to have the employer bear the burden of continuing the employment relationship rather than having the worker bear the burden of a break in that relationship, pending a decision by the competent courts or tribunals on whether dismissal is justified, at least in certain types of cases. In particular, the participant from Norway emphasised the crucial importance of continued employment during legal proceedings. If the dismissed person could not continue to work until the judgement was pronounced, then there was a danger that he would have had to seek another job and/or the employer might have taken on someone else. In these cases, reinstatement could easily raise many problems.

Two alternatives were identified to guarantee continued employment. One provides for the automatic suspension of the effect of a dismissal upon the institution of proceedings contesting the dismissal under certain conditions; the other for the possibility for the courts or tribunals to order the suspension of the effects of a dismissal on request by the worker during these proceedings. These two systems co-exist in some countries, one applicable to dismissal with prior notice, the other to summary dismissal.

In respect of dismissal with advance notice, automatic suspension of the effects of a dismissal is provided for in the Federal Republic of Germany, Norway and Sweden. In the Federal Republic of Germany this depends upon the position taken by the works council to which dismissals must be notified. If the works council objects to a dismissal within a given time-limit and the worker institutes legal proceedings against the dismissal, the employment relationship must be continued pending a final decision by the courts. In such cases, however, the employer may request the court to

release him from the obligation to continue the employment relationship. In Norway and Sweden, suspension of the dismissal does not depend upon the position of workers' representatives respecting the dismissal, but solely upon the worker. If the worker institutes legal proceedings against his dismissal within a given period following notice, the dismissal is automatically suspended and the employment relationship must be continued pending a final decision by the courts. Here, too, the employer is entitled to request the court to release him from this obligation.

In cases of summary dismissals in Norway and Sweden, the worker is entitled to request the court to suspend the effects of the dismissal and to order continuation of the employment relationship pending a final decision on the justification of the dismissal. There is no automatic suspension and the court may, in its discretion, grant interim relief or not. Summary dismissals are usually declared for serious reasons and the participants felt that the employer should not automatically and in all circumstances be forced to continue the actual work relationship. It was felt in general that interim measures posed difficult problems of law and fact, in particular for lay members, since they rested on complicated evaluations which often had to be made in the absence of full evidence.

Remedies

In case dismissal is found unjustified, there are essentially two types of remedy: those involving the continuation of the employment relationship, which may take the form of an order annulling the dismissal or an order of reinstatement or both, and remedies involving compensation for unjustified dismissal. For example, in Sweden, it would appear that reinstatement is the main remedy. However, the employer may object, in which case he may be required to pay compensation. However, in the Swedish situation, a judgement ordering reinstatement is not executory since it concerns individual rights which are not subject to mandatory execution. The participants from Finland and Israel reported that, in their systems, financial compensation was the principal remedy for unjustified dismissal. In Israel, only a few categories of employees, such as pregnant women and war victims, enjoyed employment security on a statutory basis. At present, legislation is being discussed to enlarge the scope of the law.

Most participants indicated that they had discretion in granting either reinstatement or compensation (Denmark, Federal Republic of Germany, United Kingdom) or could, as in the case of Norway, impose both reinstatement and damages. Nevertheless, in choosing the appropriate remedy, the judges were guided by certain criteria. They referred to some elements which usually indicated that a continuation of the employment relationship would not be appropriate. Reinstatement was, in particular, not appropriate when it was to be feared that a normal work relationship based on mutual trust could no longer be taken for granted. Court procedures sometimes eroded the scope for future co-operation, since the parties tended to invoke arguments to support their cause which implied a negative evaluation of the other party. In an equally large number of cases the worker had already taken steps to secure alternative employment. The participant from Norway pointed out that

continued employment was facilitated in cases where the worker remained on the job during court proceedings. Thus, at the time of judgement the court could see whether the main problems had been sorted out. In other instances, the worker himself expressed an interest in financial compensation and it appeared difficult for the court to disregard his preference. It was also pointed out that negotiated settlements carried out at a pre-trial stage tended to result in financial compensation rather than reinstatement. Finally, some workers feared that an order to reinstate could not really guarantee continued employment, since there was a danger that the employer would again dismiss the worker or exercise pressure in other ways.

Where reinstatement was granted, it usually involved an obligation to place the worker as far as possible in the position he would have been in if he had not been dismissed. This entailed reinstatement in the post previously held while preserving the former conditions of employment, although in some countries the competent bodies were authorised to order reinstatement in another post. It also generally entailed an entitlement to the payment of wages lost, usually for the entire period of enforced absence from work but occasionally subject to a given maximum, often less any wages earned in the meantime in other employment (or which might have been earned in suitable alternative employment which a duly diligent worker would have been able to obtain), as well as assured continuity of service. It was pointed out that sometimes compensation had the double purpose of indemnifying the individual concerned and, more generally, of deterring employers from resorting to unjustified dismissals.

Compensation for unjustified dismissal, whether in lieu of reinstatement or as the sole possible remedy, involved the payment of an amount of money intended to compensate for the loss or prejudice incurred, as determined either at the discretion of the competent court or tribunal or in accordance with criteria laid down by law. Compensation is generally distinct from other sums due in connection with the dismissal, such as wages in lieu of a period of notice and severance allowance, and may be additional to these allowances or include amounts corresponding to these allowances plus an additional amount of compensation.

The participants indicated that they had a certain degree of discretion in determining the amount of compensation. There are a number of factors which are usually taken into account in determining the amount. Thus, the participants concurred that length of service and the monthly income of the dismissed worker served invariably as benchmarks in calculating compensation. Where compensation results at the conciliation stage, then the chances of the parties of winning the case could be an important factor. In other instances, the likelihood of the worker to find alternative employment, the age of the worker, the events leading up to the dismissal, the economic situation of the plaintiff, and the determination of the employer to sever the employment relationship would constitute additional criteria. The judges from Denmark, Finland, the Federal Republic of Germany, Spain and Sweden indicated that legislation stipulated a minimum and/or maximum amount of compensation. In the Federal Republic of Germany, for example, article 10 of the Employment Protection Act stipulated that a worker with 15 years' seniority would be awarded up to 15 monthly salaries, going up to 18 months in the case of a worker with a minimum

of 20 years service. This was not, however, applied by all courts (as a rule of thumb, one month's salary has been granted for two years of service). The judges agreed that it was necessary to award compensation which sensibly alleviated the situation of the worker, in particular in times when it was difficult for the dismissed worker to secure alternative employment.

Sources:

ILO: *Termination of employment at the initiative of the employer*, Report VIII(1), International Labour Conference, 67th Session, Geneva, 1981.

Falke, J. et al.: *Kündigungs praxis und Kündigungs-schutz in der Bundesrepublik Deutschland*, 2 vol., Bonn, Der Bundesminister für Arbeit und Sozialordnung, 1980.

Table 5. Disputes concerning termination of employment (continued on the next page)

	Principal source of regulation	Parties	Bodies with jurisdiction in termination disputes	Lay members
Denmark	Collective agreements Statutes for certain groups	Organisations	Agreement-based board	Varying composition
Finland	Statutes Collective agreements	Organisations	Ordinary courts Labour court	Yes
Fed. Rep. of Germany	Statutes Collective agreements	Individuals	Labour courts	Yes
Israel	Collective agreements	Individuals or organisations	Labour courts	Yes
Norway	Statutes	Individuals	Ordinary courts	Yes
Spain	Statutes	Individuals	Labour court	No
Sweden	Statutes	Individuals or organisations	Ordinary courts and/or labour courts	Yes
United Kingdom	Statutes	Individuals	Statute-based tribunals	Yes

Table 5. Disputes concerning termination of employment (*conclusion*)

	Pre-trial hearings	Continuation of work during proceedings	Remedies	
			Annulment of dismissal/ reinstatement	Financial compensation
Denmark		Normally not	Yes, with possibility of granting termination	Yes, if employment is terminated
Finland		Not possible		Yes
Fed. Rep. of Germany	Conciliation hearing	Possible for dismissals with notice	Yes, with possibility of granting termination	Yes, if employment is terminated
Israel	Hearing	Possible	No (with some exceptions)	Yes
Norway	Party bargaining	Mandatory for dismissal with notice, optional for summary dismissals	Yes, with possibility of granting termination	Yes
Spain		Not possible	In principle, yes, depending on nature of dismissal	In principle, yes, depending on nature of dismissal
Sweden	Party bargaining Hearing at labour court	Possible	Yes	Yes, if employee refuses continuity of employment
United Kingdom	Hearing possible, but rare		Reinstatement, re-engagement or compensation, at the tribunal's discretion	

Source: Table prepared by S. Evju and W. Blenk.

B. Country papers: Denmark

Johannes Bangert, Judge at the Supreme Court, Deputy Chairman,
Industrial Court, and Niels Waage, Judge, First Secretary, Industrial Court

Cases of unjustified dismissal will normally not be brought before the labour court. According to the general agreement between the two federations, a special board deals with such cases. The board consists of members elected by the organisations and of one president and two vice-presidents. The latter are members of the presidency of the labour court. If the board finds the dismissal unjustified, it can order annulment and reinstatement, unless the dispute has rendered future co-operation impossible between the employer and the employee. If the dismissal is unjustified and reinstatement is not ordered, the board may order payment of compensation for an amount not exceeding 39 weeks' wages. Relatively few cases are decided by the board, as most cases are settled between the organisations themselves. The most difficult issue before the board is normally the question of future co-operation between the employer and the employee. In smaller firms such co-operation will quite often be difficult to achieve and the employee himself does not wish to be reinstated.

Jorma Pelkonen, President, and Olli Huopaniemi, Vice-President,
Labour Court of Finland

Access to the court

The most important prerequisite for bringing an action in the labour court is that the matter falls within the jurisdiction of the court. It covers disputes arising out of collective agreements for the private, public or parastatal sectors. This note deals only with the functioning of the labour court with regard to collective agreements concluded in the private sector.

If the associations, under the provisions of a collective agreement, have to conduct negotiations in order to settle a labour dispute, the matter may not be brought before the labour court until these negotiations have been held, except when failure to negotiate is not due to the plaintiff.

The plaintiff in a case brought before the labour court is a workers' or employers' association or an employer who is party to a collective agreement. The association acts as the plaintiff in its own name and also on behalf of those bound by the collective agreement concluded by the plaintiff. Those not parties to a collective agreement may appear as plaintiffs only if the association that is party to the collective agreement in question has authorised them to do so or has refused to bring an action. An association that is party to a collective agreement appears as the plaintiff in its own name and also on behalf of the employees whose individual employment contracts refer to the collective agreement in question. The employees do not have the right to sue in their own name, even if the association which is party to the collective agreement refuses to bring an action or to authorise the employees to bring an action.

The respondent in the labour court is an employer or an association that is party to the collective agreement in question. The association responds both on its own behalf and on behalf of those bound by the collective agreement it has concluded. An association, employer or employee, against whom a claim is presented in a case, has to be granted a hearing. If the complaint concerns wilful breach of a collective agreement, the employer or employee in question, however, appears as the respondent himself.

The jurisdiction of the labour court does not cover cases concerning individual employment contracts, which are tried in ordinary courts of law. A case relating to an ongoing labour dispute will normally be heard within a fortnight from the bringing of the action. Cases dealing with illegal notice take approximately three months. The average periods for all cases in recent years were 1984: 5.7 months; 1985: 4.8 months; and 1986: 4.5 months.

¹ The procedure of the Labour Court of Finland is discussed in more detail in J. Pelkonen and K.-P. Tiitinen, "The labour court of Finland", in B. Essenberg (ed.): *Labour courts in Europe*, Geneva, ILS, 1986, pp. 14-17.

Remedies for unjustified dismissal

If an employer dismisses an employee without justification, the employment relationship is terminated, irrespective of whether the grounds for the dismissal are legal or not. The bringing of an action does not prevent the termination of the employment relationship, nor does the labour court have the power to order it to continue.

An employee whose employment relationship has been terminated without justification is awarded damages consisting of his wages or salary for a minimum of three and a maximum of 20 months. This is to cover both his economic and his intangible losses. The employer will be ordered to pay a minimum salary of three months even if the employee has not suffered any economic loss. The purpose of this provision is to deter illegal termination of employment relationships.

If the labour court considers that the prerequisites to continue the employment relationship exist, it may order the employer to pay either the compensation referred to above or, in case the employer allows the employment relationship to continue, a lower amount of compensation which may be less than the three months' salary. The court also has the alternative of granting no compensation at all in cases where no loss has been incurred. If the labour court has chosen one of the latter two alternatives, the employer, by allowing the employment relationship to continue, may pay to the employee a "small" compensation or no compensation at all, if so ordered by the court. If the employer does not allow the employment relationship to continue, he will always have to pay the "higher" compensation. The purpose of this arrangement is to put pressure on the employer to withdraw an illegal dismissal.

Federal Republic of Germany

Dirk Neumann, Vice-President, Federal Labour Court

Access to the court

In the Employment Termination Act of 25 August 1969 (Kündigungsschutzgesetz or KSchG), the first and foremost aim of protection against dismissal is to maintain the employee's contract of employment. Under the KSchG, it is unlawful to dismiss an employee who has been employed by a company for a continuous period of at least six months if the dismissal is "socially unjustified", i.e. if it is not based on reasons connected with the person or the conduct of the worker or on compelling operational requirements.

If the employee wishes to assert in court that the notice of termination is invalid under the KSchG, he has to bring an action in the labour court within three weeks of service of the notice of termination for a declaratory judgement that the employment relationship has not been dissolved by the notice of termination. By way of exception, the KSchG also allows for the assertion of the invalidity of the termination after the period of three weeks has expired, if the employee, after having been given notice of termination, was not in a position to take legal action in time, in spite of having taken all measures which could be expected of him under the prevailing circumstances, or if he based his action within the three-week period on a reason for invalidity other than that referred to in the KSchG. If the employee has not asserted the legal invalidity of a socially unjustifiable dismissal within this period, the termination of employment will be regarded as legally valid from the beginning, unless it is legally invalid for other reasons under the KSchG. Reasons which make a termination invalid and where no date limit is provided include various special provisions to prevent unsocial dismissal, such as protection against dismissal for severely disabled persons, members of the works council, pregnant women or persons doing their military service, as well as more general grounds such as the violation of moral principles by the dismissal.

Under the KSchG, the legal invalidity of an extraordinary termination, too, can only be argued within the periods fixed in the law. An extraordinary termination in the sense of the KSchG is normally the notice of termination for an important reason pursuant to section 626 of the German Civil Code. According to this section, the employment relationship may be terminated by either party for an important reason without adhering to any period of notice, if there are any facts on the basis of which the continuation of employment until the expiration of the period of notice cannot be expected of the terminating party, taking into consideration all the circumstances of the individual case and the interests of both parties.

For a dispute arising in connection with an apprenticeship, resort to the labour court may be had subject to previously conducted conciliation proceedings (section 111, paragraph 2, of the Labour Court Act). For certain occupational groups, such as

stage artists, actors and seamen, the parties to the collective agreement may exclude the jurisdiction of the labour court by agreements which refer an employment-related dispute to a court of arbitration. However, under certain circumstances an action to reverse the arbitration judgement may be taken to the labour court (section 110 of the ArbGG).

Parties to the case

In principle, the employee and the employer, as parties to the employment contract, are parties in the proceedings concerning termination of employment. The right to assert the invalidity of termination is a strictly personal right to which only a party to the employment contract is entitled, even if a third party is interested in the continuation of the employment contract.

In connection with termination of employment, legal disputes may also arise between works councils and employers. Under the Works Constitution Act (Betriebsverfassungsgesetz, BetrVG), an extraordinary termination of employment of members of the works council, among others, requires the consent of the works council. If the works council refuses to consent, the labour court's authorisation may replace such consent at the request of the employer. Furthermore, the works council can address itself to the labour court with a motion to request the employer to implement the dismissal of an employee in order to keep peace in the company (section 104 of the BetrVG). The labour court's jurisdiction includes any dispute between the employer and the works council on the social plan negotiated on the occasion of operational changes in the company, especially regarding the extent of the social plan payment, agreed upon as redundancy payment for the loss of the job (section 112 of the BetrVG).

Legal representation in court

Under the ArbGG, the parties may conduct the case themselves or be represented in the labour court. In the latter case representation by a representative of a trade union or of an employers' association is admissible. In the Federal Labour Court, the parties must be represented by lawyers. In the case of a Laender Labour Court, representation by a representative of a trade union or, respectively, of an employers' association, is sufficient. A survey of various labour courts conducted in 1985 revealed that an average of 47.3 per cent of the employees are represented by lawyers, 21.1 per cent by a trade union and 31.6 per cent by neither lawyers nor a trade union.

Proceedings at court

Under the ArbGG, legal proceedings concerning the termination of employment are to be given priority. The conciliation hearing is to take place within a fortnight after issue of the writ of summons, provided there is still an available date for a hearing. A violation of this provision has no legal consequences. Furthermore, the presiding judge has to use his influence to expedite the proceedings by setting a time-limit for

the defendant's plea laid down in writing, and, if required, for comment on the defendant's plea. Evidence presented after expiration of these time-limits may only be admitted if this does not delay the proceedings or if the party can justify the delay.

In 1986, 155,225 of the 365,226 cases conducted and settled at the labour court dealt with employment terminations (42.5 per cent, excluding proceedings leading to the pronouncement of a court order). The duration of the proceedings at the labour court was up to one month in 31.12 per cent of the employment termination cases, more than one and up to three months in 36.93 per cent, more than three and up to six months in 18.12 per cent, more than six and up to 12 months in 11.17 per cent and more than 12 months in 2.63 per cent of the cases; 7,867 of the 18,393 appeal decisions of the Laender Labour Court dealt with employment termination proceedings. The duration of the proceedings was up to three months in 38.54 per cent of the employment termination proceedings, more than three and up to six months in 35.88 per cent, more than six and up to 12 months in 19.44 per cent and more than 12 months in 6.13 per cent of the cases; 661 of the 1,762 cases settled at the Federal Labour Court in 1986 dealt with employment termination (37.5 per cent). On average, employment termination cases were settled within one year, whereas other proceedings at the Federal Labour Court took one year and nine months in 1986.¹

Appeals against unjustified dismissals

Protection against dismissal in the KSchG is realised by giving the employee the possibility of obtaining a declaration of the invalidity of the unjustified employment termination. The labour court ascertains in its judgement that the employment contract between the two parties has not been dissolved by the notice of termination. In spite of the declaration of the invalidity of the termination of employment, the court has to dissolve the employment relationship under certain preconditions at the request of one of the parties and to require the employer to pay appropriate severance pay (section 9 of the KSchG). Such a dissolution will be effected at the request of the employee if a continuation of the employment contract cannot be expected of the employee; the labour court has to dissolve the employment relationship at the request of the employer against payment of compensation for loss of employment if there are reasons to believe that no co-operation between employer and employee to the benefit of the company is to be expected in future.

If the court has declared in its final decision that the employment relationship has not been dissolved by the notice of termination, the employee has a right to actual employment as stipulated in his contract, due to the fact that it continues to be valid.

Under certain circumstances, the employee also has a right to remain on the job during the legal proceedings concerning termination of employment. If the works council has opposed the notice of termination, then under the BetrVG the employer is obliged in principle to continue to employ the employee at the request of the latter until the judgement of the legal dispute becomes *res judicata*. The court may dispense

¹ These figures are based on tables 195-197 dealing with the labour court jurisdiction and published in the *Bundesarbeitsblatt* (Federal Labour Gazette), Vol. 6, 1987, as well as in the *Annual Report* of 1986 issued by the Federal Labour Court.

the employer from the obligation to actively employ the plaintiff by provisional injunction either if the legal action brought by him does not offer sufficient chances of success or if continued employment would lead to an intolerable economic burden for the employer or if the opposition of the works council is obviously unjustified.

Furthermore, the employee has a right to continuous employment during the legal proceedings pursuant to the decision of the Federal Labour Court (*Decisions of the Federal Labour Court*, Vol. 48, p. 122) dated 27 February 1985, if the notice of termination is invalid and if predominant employer interests which deserve protection do not prevail. With the exception of an obviously invalid notice of termination, the uncertainty about the outcome of the legal proceedings concerning dismissal puts the employer in a situation which deserves protection, in the sense that the employee, who has been given notice, is not employed during the legal proceedings. This interest normally outweighs the interest of the employee in being employed until judgement has been passed ascertaining the invalidity of the notice of termination. However, as long as such a judgement exists, the uncertainty about the outcome of further legal proceedings alone can no longer substantiate a predominant counter-interest of the employer. In each of these cases there must be additional evidence revealing a predominant interest of the employer not to employ the employee.

If the labour court has ordered the employer to provide continuous employment, the employee concerned can demand the execution of the judgement, as labour court judgements are provisionally enforceable by execution. The labour court may, if necessary, impose financial penalties or coercive detention for the employer at the request of the employee (section 888, Code of Civil Procedure).

Finally, the employee can pursue his claims to continuation of employment and also his wage claims by means of a provisional injunction in the case of an unjustified notice of termination. Besides the general procedural requirements and the preconditions of the substantive claim, there are additional requirements for provisional injunctions. There must be a reason revealing the urgency to expedite the proceedings. Thus, a provisional injunction to enforce wage claims can only be considered if the employee is dependent on the cash benefit, especially to pay for his expenses. The reason for the injunction as well as for the substantive claim must be substantiated in the provisional injunction proceedings. No full proof is required. A declaration in lieu of an oath is considered sufficient to substantiate the claim.

Menachem Goldberg, President, National Labour Court of Israel

In Israel, the general subject of dismissal is not regulated by legislation. Only a few types of employees enjoy statutory protection from dismissal by force of protective legislation: pregnant women or those on maternity leave; newly released soldiers during the first half year of employment, if there was an obligation to re-engage them in their original position; members of safety committees; and disabled veterans in certain occupations.

The sole protection against arbitrary dismissal is found in collective agreements, for those employees to whom the agreements apply, and in the Contracts Law (General Section), 1973, which applies to employment contracts according to which all legal activities, including dismissals, must be executed "in good faith". Hence, the general rule of the labour court is that any employer has the right to dismiss his employees, as long as this right is not limited by collective agreement, collective arrangement, or the individual employee's contract, and as long as it is exercised in good faith.

Remedies in the event of unlawful dismissal are, in addition to a declaratory judgement verifying the unlawfulness, nullification of the dismissal order in the public sector and damages for breach of contract in the private sector.

The Knesset (the Israeli Parliament) is currently evaluating a proposed Contract of Employment Bill, whose provisions, inter alia, contain dismissal procedures and remedies for unlawful dismissal. One of the remedies is, in outstanding cases, nullification of the dismissal order with a resulting enforcement of the labour contract in both the public and private sectors (in contradistinction to the present situation). These proposals have encountered strong opposition from employers and from a good number of Knesset members. It is therefore impossible to predict whether or not the Bill will be passed, and if so, what final form these provisions will take and what the remedies will be for their violation.

The nature of the contractual relationship

The overwhelming majority of employees in Israel are employed according to provisions in general or special collective agreements, the majority of which include dismissal procedures, for each type of dismissal. These provisions in collective agreements are both obligatory and normative, and their breach creates a cause of action both for the trade union which signed the agreement as well as for the individual employee.

It should be noted that "extension orders", by means of which the Minister of Labour may extend the application of collective agreements, do not contain provisions regulating dismissal procedures. This means that the status of those employees to

whom these orders apply is the same as that of those who do not benefit from the coverage offered by the collective agreement, i.e. they are unprotected from dismissal, save for a claim for damages in the case of lack of "good faith" on the part of the employer.

Types of dismissal

It is customary to distinguish between dismissals relating to the individual and those unrelated to him. Naturally, the legal method chosen for challenging unlawful dismissal depends on the cause for dismissal.

Dismissal based on a claim against the individual employee

Dismissal based on this type of claim is possible in two instances: in the event of a serious disciplinary violation by the employee, or when the employee is physically incapable of working, usually for medical reasons. Disciplinary dismissal of civil servants and employees of public authorities (public employees) is covered by a special law, and is possible only when a special disciplinary tribunal determines that the employee may be dismissed on account of the alleged violation. Appeal on a decision of the disciplinary tribunal is not heard before the labour court, but before a single justice of the Israeli Supreme Court. In the private sector, collective agreements which determine the causes for dismissal with or without severance pay (serious disciplinary violation, theft or embezzlement, criminal conviction, etc.), condition disciplinary dismissal on the agreement of both the employee's representative (employee's committee or trade union) and the plant management, and in the absence of such agreement, on the decision of either a parity committee or an arbitrator. Collective agreements in the private sector also permit an employer to suspend an employee in the event of a serious violation, but even this, in the majority of cases, is only for a short period, which may be extended only with the agreement of the employee's representative.

When such dismissals are challenged in the labour court (usually within the context of a suit for damages for breach of contract due to unlawful dismissal), the court first checks whether the necessary steps were followed as dictated by the collective agreement. If they were not followed, this is sufficient grounds to declare the dismissal unlawful, even if the fault of the worker is unquestionable. If they were followed, the court asks itself the following two questions: did the dismissing body act within the scope of its authority, i.e. is the violation which constitutes the cause for dismissal one which indeed justifies dismissal; and secondly, have the principles of natural justice been honoured, i.e. has the worker been granted a fair chance to voice his opinion before the same body? If these two conditions have been met, the dismissal is declared valid; if not, it is declared invalid, and the question of remedy arises.

When there is no collective agreement, the sole question which remains is whether the employer acted in "good faith", with the burden of proof resting on the employee. However, in the vast majority of cases dismissal during the operative period of a contract of employment is considered a breach of contract. Dismissal due to the

employee's incapacity to continue working also requires the assent of the trade union, and in its absence, the assent of either the parity committee or an arbitrator. Even in such a case the court will check, when the matter is brought before it, whether the necessary procedure has been followed, and accordingly, whether or not the dismissal was lawful.

Dismissal unrelated to the individual employee

These are dismissals for economic, structural and technological reasons.

As regards economic dismissal, there is in all collective agreements a provision that "work cutbacks are a sufficient reason for dismissal". The great majority of these agreements establish that the number of dismissals will be fixed by management alone, while a minority establish that agreement must be reached with the employee's representatives regarding the necessity of the dismissal as well as the number of employees to be dismissed. On the other hand, all collective agreements state that the workers to be dismissed will be jointly determined by the management and the employee's representative "according to plant needs and in consideration of the employee's seniority and social situation". When there is no agreement, the decision is made by the parity committee or an arbitrator.

Cutbacks due to structural reorganisation are usually not regulated by collective agreements. However, there are collective agreements which narrowly define the term "work cutbacks" to exclude "reorganisation", e.g. contracting out work formerly done by on-site employees, in such a fashion that reorganisation may be carried out by the management alone (subject, of course, to the condition that it is done in good faith).

In other collective agreements, the term "work cutbacks" will be interpreted as covering even "reduction of the number of workers" due to technological changes in the production or machinery.

The suit of an individual employee in the labour court

The employee himself may address himself to the labour court if he thinks that his dismissal was unlawful. If he was employed in the public sector, the court has the authority to nullify the dismissal. The court often finds a declaratory judgement sufficient, when it is expected that the employer will reinstate his employee. If he was employed in the private sector, covered by "protective legislation" (pregnant women, etc.), the court has jurisdiction to nullify the dismissal. In all other cases, the sole remedy which the court may grant is damages for breach of contract. The reason is that the Contracts Law (Remedies for Breach of Contract), 1970, establishes enforcement as the general remedy for breach of contract, except for, inter alia, contracts for personal employment or personal service.

The criteria for determining the amount of damages for breach of an employment contract covering a specific period of time are different from those used for contracts with unspecified time-limits. When the contract was for a specific period, the calculation is identical to that of any other case of breach of contract: the amount that the employee would have earned had the contract been honoured until its

completion, less the amount that he actually earned during that same period, or that he would have earned had he taken reasonable steps to find employment.

When the contract was for an unspecified period, the method of calculation varies in relation to the circumstances of every case. For the purposes of calculation, the following factors are taken into account: whether the flaw in the dismissal was technical (e.g. no agreement was obtained from the employee's representative), or substantive (arbitrary dismissal, violation of natural justice); whether the employee has chances of finding other employment (a subject which is usually clarified when the case comes before the labour court); the seniority of the employee and his rights thereof; and the rights he lost as a result of leaving his workplace. The amount of damages is determined on the basis of his last monthly salary, with the maximum amount granted to date for unlawful dismissal being a year's salary. It should be noted that damages for unlawful dismissal are unrelated to severance pay which is guaranteed to every dismissed employee under the Severance Pay Law, 1963, in the amount of one month's salary for every year he was employed, regardless of the cause for dismissal or the manner of dismissal (except in cases of disciplinary dismissal).

The procedure and hearing in the labour court of an individual claim

Individual claims for breach of a contract of employment are filed in the Regional Labour Court, and are scheduled in the regular docket of individual claims. Today, the time from filing a suit in the Regional Court to the delivery of judgement varies between one and two years, depending on the workload of the court in question. Parties have 30 days to file an appeal against a Regional Court decision before the National Labour Court. The hearing on appeal, including judgement, is concluded within six to eight months. The individual employee has the right to request a "temporary remedy" which delays the dismissal order until the judgement is delivered. In those cases where the final judgement might involve the nullification of the dismissal and reinstatement, the policy of the labour courts when considering such a request is to maintain a balance between guaranteeing that a decision in favour of the employee will be enforceable, and enabling public bodies to continue functioning without suffering damage. In instances where, despite the dismissal and termination of the work relationship, the employer states his willingness to reinstate his employee if the latter wins his case, the temporary remedy will not usually be granted since its goal will be achieved anyway. When the employer makes no such commitment, the "apparent chances" of the employee's winning the case are weighed, as well as the question as to whom greater inconvenience is caused – the employee or the employer – by granting or withholding the remedy. When a temporary order is issued, the hearing is usually scheduled with special priority, so that the case will be dealt with in the Regional Court within about three months and the appeal in the National Court within about two months.

The procedure and hearing in the labour court of a trade union claim

Trade unions usually file claims in the labour court against economic dismissals, in which large numbers of employees are dismissed simultaneously. However, not infrequently a union may adopt an individual's claim, suing the employer for violation of the dismissal procedures delineated in the collective agreement. Since the court, at least in theory, has jurisdiction to grant the remedy of enforcement when a union is a party to a dispute, the obligation of the employer to observe the terms of an agreement he reached with the union entails, in essence, the enforcement of the individual's contract of employment, even though the latter is not a formal party to the dispute. Special regulations govern the hearing of "organisational disputes" in the labour courts and guarantee a swift and effective hearing. The respondent must file his response within ten days. The hearing is set for not later than 14 days from the date of response, and the judgement is issued one to two months from the date of filing, with a similar schedule for an appeal, if filed. The union is also allowed, at the time of filing, to request "temporary remedies", which are granted more generously than in cases of individual claims, particularly since the hearing is completed within a short time.

Summary of the labour court's role in dismissal hearings

The problem which presents itself before any court is the period of time which passes before the final judgement. The relatively long period of time involved in individual claims has created the need to issue temporary orders, which themselves take time and delay the main trial. There is at least a theoretical alternative of hearing dismissal claims immediately, when the return to work is possible or expected. The problem with this alternative is that other equally worthy claims, such as those for delayed wages or social security, get pushed to the end of the court's docket. It seems, therefore, that under the current strictures, the present system is the fairest one towards both the general public who use the labour court and dismissed employees who seek a speedy remedy. Nevertheless, the issue merits review every few years, since circumstances are changing. If indeed the aforementioned provisions in the Contracts of Employment Bill are passed, calling for nullification of unlawful dismissal even in the private sector, it will be necessary to consider the possibility of giving scheduling preference to dismissal cases, since it is practically impossible to reinstate an employee a year or more after his dismissal.

Norway

Stein Evju, President of the Labour Court

In Norway, legislation is the general and basic source of termination of employment protection. As a starting point, the power to dismiss (with notice, or summarily) rests with the employer. The Worker Protection and Working Environment Act, 1977 (WPA), stipulates comprehensive protection for employees. A requirement of justification applies to all dismissals, whether on grounds related to the individual or not. Additional provisions apply to dismissals in cases of workforce reductions, of sickness or injury, and of pregnancy and maternity leave. The right to hire for a specific period of time or for a specified task is limited. Also, employment contracts stipulating a trial period need justification. The Act furthermore contains provisions on the form of notification of dismissal, on periods of notice and on negotiations when dismissal has taken place, and on the right of the employee to remain on the job following the expiry of the notice period. Similar protection applies to seamen (Seamen's Act, 1975, as amended 1985) and to state civil servants (State Civil Servants' Act, 1983). Leaving aside these special cases, the WPA applies to all employees in the private and in the public sector.

The "normative" provisions of collective agreements are considered to be part of the individual employment contract and will – in this capacity – be applied by the courts in termination disputes as well as in other individual disputes. Leaving aside the period of notice, the statutory provisions on employment protection may not be derogated from by agreement, whether individual or collective. They are, however, to some extent supplemented by collective agreements, particularly by the provisions of general agreements on information and consultations prior to dismissal in the case of workforce reductions. Such provisions are, in this respect, conceived as "procedural"; their violation may be taken into consideration when assessing whether a dismissal is materially justified, but does not in itself provide a basis for separate sanctions.

The provisions of collective agreements on dismissal protection of a "material" character (e.g. in the form of a stricter justification requirement, or otherwise, more favourable to the employee than the statutory provisions) are generally found only as far as shop stewards (elected union representatives at the enterprise) are concerned. Such provisions will apply in addition to, and not in lieu of, the statutory protection: as a principle, the shop steward retains the right to file suit on the basis of the statutory provisions, even if his union files suit with the labour court alleging breach of collective agreement. This is now illustrated by a recent decision by the Supreme Court Appeals Committee, Rt. 1987, p. 98 (to be reported in Vol. 7 of the *International Labour Law Reports*).

Access to the court

Preconditions and parties to the dispute

If notification of dismissal is given by the employer, the employee has the right to file suit – a right that cannot be waived by prior agreement. Suit must be filed with the appropriate city or county court; termination of employment disputes are dealt with by the ordinary courts, *not* with the labour court since they concern the individual employment relationship and are based on legislation. The right to file suit – and later to appeal to a higher court – is a strictly individual and personal right held only by the employee as a party to the employment contract. The employee may obtain legal aid and assistance from his union – as may the employer from his employers' association – but consent by the union to file suit is not required. The organisations as such have no formal standing in the litigation. Before turning to the court, the employee has a right to request individual negotiation with the employer. This must be done in writing and within two weeks of receiving notice of dismissal, either regular or instant (WPA, section 61, No. 1 and section 66, No. 3). The employer shall then arrange a negotiation meeting within a fortnight, and the negotiations should normally be concluded within another two weeks. In practice, they often last longer. During negotiations, the employee may be assisted by a workers' representative or another adviser, possibly a legal counsel. The employer has the same rights. The purpose of these negotiations is to resolve the dispute without going to court, if possible, and if not, to clarify the factual circumstances and the viewpoints of the parties in order to simplify proceedings in court. Negotiations are not, however, a necessary prerequisite for instituting litigation. Furthermore, as opposed to most other individual disputes, preliminary conciliation before a conciliation council, in addition to or instead of negotiation, is not required in termination of employment disputes.

Time-limits; the right to remain on the job

The employee may, according to his own choice, file a suit for annulment of the dismissal, for damages, or for both.

The time-limits for instituting legal proceedings vary according to the remedy sought by the employee. The time-limit for annulment is eight weeks from the day the notification of dismissal has reached the employee, or where negotiations have been carried out, from the day negotiations were terminated. If the employee wishes to claim damages only, the time-limit is six months from the day on which he was notified (WPA, section 61, No. 3).

In cases of regular dismissal with notice the employee has an absolute right to remain on the job. This means that the effects of dismissal are suspended until negotiations are terminated, even if this takes longer than the stipulated period of notice. Following the termination of negotiations, the employee still has the right to remain on the job, provided he has informed the employer in writing, before the expiry of the notice period, that suit for annulment will be filed within the relevant time-limit. The employment relationship is thus continued, pending a final decision by the courts.

But the employer may request the court to release him from this obligation by way of an interim decision. An interim measure will only be granted if the court considers it unreasonable for the employment relationship to remain in force during that time (WPA, section 61, No. 4). The purpose of the system is to relieve the employee of the disadvantages connected with a break in the employment relationship and to counteract any unwillingness of the courts to order annulment of an unjustified dismissal. As regards interim measures, the courts have adopted a fairly liberal attitude towards the wording of the Act, particularly in cases concerning workforce reductions.

As regards dismissals without notice, no such right to remain on the job exists, neither during negotiations nor following their conclusion. But the employee is entitled to request the court to order reinstatement and continuation of the employment relationship pending a final court decision (WPA, section 66, No. 3). The purpose of this is primarily to counteract any evasion of the law, in cases where it is considered unwarranted by the employer to have resorted to dismissal without notice.

Proceedings in court; appeals

Interim decisions and judgements by city or county courts may be brought before a court of appeal, whose decisions in turn may be brought before the Supreme Court or to its Appeals Committee.

Interim decisions may be, and generally are, made on a documentary basis. Hearings on the substance of a case are conducted orally at all levels. The principles of "direct presentation of evidence", with the exception of the Supreme Court and of "party presentation", apply. The courts have no independent powers of inquiry or investigation. As in most other civil law cases, they must reach their decision on the factual basis presented to them by the parties to the dispute.

Apart from WPA, section 63, concerning dismissals during a trial period, the law does not contain specific provisions on the burden of proof. In modification of the rule of adversary proceedings, where burden of proof is placed on the plaintiff, the courts have in practice, even prior to the WPA, placed the burden of proof on the employer. Generally speaking, the employer must establish proof of the circumstances on which his decision to dismiss is based; a burden of proof rests with the employee only as far as he is asserting the existence of circumstances contrary to those substantiated by the employer. The parties to the dispute may conduct the case in court themselves or through their attorney. In practice, the latter is done almost without exception. Unionised employees are in most cases provided with an attorney by their union. Employers' associations normally do the same for their members.

Impact of court workload: time needed to reach final decision

Termination of employment disputes should be given priority: under WPA, section 61C, "the court shall expedite the case as much as possible and if necessary fix the time for handling it out of turn". However, the courts have during recent years been confronted with an increasing workload. Termination cases are not the only ones which need speedy treatment; the same is true for criminal cases and several kinds of

other civil law disputes (e.g. family cases, child welfare cases). Therefore it is often difficult to obtain the intended promptitude in the handling of termination disputes. Regrettably, no reliable statistics are available as to the number and duration of termination disputes handled by the courts. Experience shows that the time needed to reach a decision will vary among the different courts. Obtaining an interim decision by a city or county court on the question of the right to remain on the job may take from four to six weeks and sometimes as much as four to six months. In appeal cases which are decided on the basis of documentary evidence, a final decision is usually obtained within another two to four months.

As for judgements on the substance of a case, a decision by a court of first instance may be obtained within a period of four to six months. Sometimes it takes one year or more. On average it takes nine to 12 months; however in some courts a period of more than one year elapses before the hearing is held. In appeal cases frequently about one more year is needed to reach a decision. Subsequent appeal to the Supreme Court (rare in practice) normally requires another 12 to 18 months.

The time element is of some practical consequence, since it must give the employee a more favourable bargaining position for a friendly settlement and compensation, particularly where the right to remain on the job pending a final court decision is in effect. On the other hand, if the employee has not remained on the job, the time factor may influence the court's consideration of whether to apply the remedy of annulment/reinstatement – even if this is not quite in keeping with the legislative intent.

Remedies for unjustified dismissal

As regards remedies in the case of unjustified dismissal, it has already been indicated that the worker may sue for annulment (including annulment *and* damages), or for damages only. The choice rests with the employee concerned; the courts may not award a remedy not sued for.

If a dismissal, either regular or instant, is found to be unjustified, the court shall normally (if so requested by the employee) declare the dismissal invalid (WPA, section 62 and section 66, No. 4). Here, the concept “invalid” implies that the dismissal is annulled and the employment relationship is continued. If the effects of the dismissal were not suspended pending the court decision, according to the provisions mentioned above, the employee has a right to reinstatement. But if the employee has been out of the job in the interim period he does not have an independent right to full wages for this period and the loss of wages is considered as part of the basis for damages.

If dismissal without notice is found to be unjustified, and the court finds that the conditions for a regular dismissal were present, it may, upon the request of the employer, declare the employment relationship to be terminated (WPA, section 66, No. 4).

In addition, for both regular and instant dismissals, the court may order termination upon the request of the employer, even if a regular dismissal is considered unjustified (WPA, section 62 and section 66, No. 4). This should only be done if the

court, considering the interests of both parties, finds it “clearly unreasonable” for the employment relationship to continue. This solution is intended by the legislator to be used sparingly, in exceptional cases only, and it is specifically stated in the legislative history that the antagonism normally resulting from the disagreement and dispute over a dismissal should not be considered sufficient to invoke it. These provisions have been applied in a number of cases, and the practice of the lower courts is somewhat variable. Generally, the courts attribute weight to the size of the undertaking and to “co-operation problems” that may arise between the parties. They tend to be more liberal in ordering termination where upper management employees are involved.

Damages may be awarded if the dismissal is found unjustified, whether it is declared invalid or not (WPA, section 62, and section 66, No. 5). The amount of such damages is in principle at the discretion of the court. A few vaguely formulated elements are contained in the relevant provisions of the Act. According to the legislative history, damages should mainly cover the economic loss suffered by the worker, but they may also exceed this. The circumstances and conduct of the parties are generally taken into consideration: reproachable conduct by either party, particularly by the employer relating to the form and manner in which dismissal was given, will regularly affect the decision. If the employee has been out of employment, other income in the form of wages or unemployment benefits is taken into consideration, but not strictly deducted from the economic loss suffered by the worker. If termination is ordered, the court will also consider such criteria as the possibility of finding employment elsewhere, career prospects and the economic loss the employee concerned may suffer in future.

Miguel Angel Campos Alonso, President of the Central Labour Court

In Spanish law, the employer does not have the power of discharge “ad nutum”. The dismissal has to be justified by a serious breach of contract on the part of the worker. When no just cause for dismissal exists, the dismissal is inadmissible. The only causes which justify a dismissal are force majeure and breach of contract by the worker.

Because dismissal needs a cause, where the employer must claim and prove the foundations for his action, the cause of the annulment (force majeure; breach of contract) does not operate automatically. It only authorises the party to invoke it, but the employer’s tolerance of the breach of contract is perfectly possible. Once the dismissal has been pronounced, it may be reviewed at the request of the party concerned (not ex officio), through the filing of a claim before the Conciliation Board. This must be done within the deadline established by law.

Judicial review of the dismissal

Judicial review takes place by means of the dismissal proceeding, in which a decision is made on whether the fault committed is proportionate with the sanction imposed. The magistrate examines whether the due form of dismissal has been respected and, subsequently, whether there is justification. Should the form not have been complied with – a notice of discharge in exceptional cases, a letter of dismissal in ordinary cases – then the magistrate will declare the dismissal void. When the dismissal complies with the required formalities, the magistrate will declare the dismissal to be in order whenever the breach of contract claimed by the employer is substantiated to the satisfaction of the magistrate; that is, whenever one of the recognised causes for the dismissal is proven. Otherwise, the magistrate will declare the dismissal inadmissible or not in order, for lack of a legal cause.

With regard to disciplinary dismissals, there are three possible judicial pronouncements – nullity, inadmissibility and admissibility. In legal practice, however, non-disciplinary dismissals, where the annulment of the contract is decided upon by the employer with no claim of cause, or through the claim of an inexistent or invalid cause, other than a disciplinary cause, are quite frequent. Since the law only regulates disciplinary dismissals, it has been frequent for the defendant to make claims intended to elude the legal consequences of disciplinary dismissals in those events where the employer’s decision was not based on any disciplinary cause. Jurisprudence has elaborated a doctrine, now well established, according to which the judicial pronouncements referred to above are applied to all cases of annulment of the employment contract through the unilateral decision of the employer. Were they to be understood as applicable to disciplinary dismissals only, then the worker dismissed

on the basis of causes other than discipline would be deprived of his right to bring an action against the dismissal.

The following constitute grounds to declare a dismissal null and void: a dismissal not respecting the written form, or with formal deficiencies; the dismissal of the workers' legal representatives (both in unitary representative bodies, and in the case of trade union delegates), without a prior hearing in the presence of both parties to the action; the dismissal of a worker whose employment contract should be suspended, unless the dismissal is based on a cause independent of the suspension; and other cases of collective annulment based on force majeure (collective dismissals based on technological or economic causes), whenever the requisite of prior administrative authorisation, either express or tacit, was not complied with.

Spanish law has widened the scope of judicial review by adding a fourth category based on constitutional law. Thereunder, discriminatory dismissals are absolutely null and void and the legal consequences are different for null dismissals and for absolutely null dismissals. Absolute nullity corresponds to dismissals which offend the principle of equality before the law "by reason of birth, race, sex, religion, opinion or any other personal or social condition or circumstance", and which disregard or violate the rights of the person which are deemed to be intangible under article 14 of the Spanish Constitution of 1978 which prohibits any discrimination on account of these reasons. The action against discriminatory dismissals must be brought within the deadline prescribed for other dismissals (Constitutional Court 21/1982, of 12 May). The Constitutional Court has, in accordance with ILO standards and the decisions of the Freedom of Association Committee of the ILO, decided to reverse the burden of proof in these cases. Here, the employer must prove that the dismissal is not discriminatory and that it is based on reasonable motives, not constituting a violation of trade union freedom (sentence of 23 November 1981).

Effects of judicial pronouncements

When a *dismissal has been declared null and void* this entails immediate reinstatement of the worker, and back payment of salaries. Those employers who have not complied with the formal requirements have the opportunity to repeat the dismissal of the worker in due form, within seven days following the judicial pronouncement declaring the original dismissal invalid. According to the Workers' Statute, reinstatement has to be granted when a dismissal has been declared invalid. Notwithstanding the clear wording of the Statute, the subsequent law on labour procedure introduces standards which dilute the duty to reinstate and permit the employer, who has been ordered to reinstate the worker as a consequence of the invalid dismissal, to avoid reinstatement by paying compensation. The legality of this has been challenged, but the Constitutional Court has declared that this does not represent a violation of any constitutional right.

In the case of *absolutely null and void dismissals*, the reinstatement of the worker is obligatory, and includes the right, in any event, to the payment of the salary and to the maintenance of social security coverage. If the worker is re-employed, the employer has to continue to pay salaries and social security contributions indefinitely.

This is neither stated in the Statute nor in Procedural Law, but is based on case law of the Constitutional Court. In cases of *inadmissible dismissals*, the employer may opt to reinstate the worker under the conditions applicable prior to the dismissal, or to compensate him by paying a total of 45 days' salary per year of service, up to a maximum of 42 months. Regardless of the option selected (readmission or compensation), the salaries accruing during proceedings, from the moment of the dismissal until the pronouncement of the judgement, or until the worker finds other employment, must also be paid. In the case of *inadmissible dismissal of personnel representatives and trade union delegates*, these persons have the choice between reinstatement and compensation and reinstatement is obligatory if the worker opts for it. *Non-compliance by the employer with the duty to reinstate in cases of null and void dismissals and inadmissible dismissals*. In the case of null and void dismissals, should the employer not comply with the obligation to reinstate, he has to pay compensation as for inadmissible dismissals. In the case of inadmissible dismissals, where the reinstatement option should be but is not in fact exercised, the rules valid for non-reinstatement are applied.

Collective dismissals

Collective dismissals resulting from plant closings due to force majeure (flood, fire, earthquake, blight, war, etc.) including technological causes such as the necessity of restructuring or reconvertng the company's organisation, and economic causes resulting in a critical state of the company's economic and financial structures, entail the obligation to initiate administrative proceedings in respect of all or part of the company's personnel. Neither the termination of the legal status of a company nor force majeure in all its manifestations result automatically in the annulment of contracts. They constitute the basis for filing a request for an authorisation to dismiss. When the decision is affirmative, it also grants the workers compensation (20 days' salary per year of service, with a maximum limit of 12 monthly wages). The compensation is fixed by the employer but an appeal can be made to the Conciliation Board if the employer does not pay compensation, or if there is disagreement as to the appropriate amount. Should the employer decide to cancel employment contracts as a result of the situation indicated above without complying with the prior requisite of express or tacit administrative authorisation, then his action will be declared void and the consequences foreseen for null dismissals, which have already been analysed above, will follow. Collective dismissals of this kind are different from dismissals on disciplinary grounds. The disciplinary dismissal of a number of workers does not alter the system described earlier for disciplinary dismissals, which is to be applied to each of the workers affected.

Sweden

Ove Sköllerholm, Chairman, Labour Court, Stockholm

Access to the court

Access to the labour court as a court of first instance is granted only when the action is brought by an employers' or employees' organisation or by an employer who is himself party to a collective agreement. If a dismissed employee is a member of an employees' organisation, the organisation can bring and pursue an action on behalf of its member against the employer and his organisation. As a further condition, the parties have to be parties to the same collective agreement or the employee affected by the dispute has to be covered by a collective agreement which is binding upon the employer. The latter rule makes it possible for a "minority" organisation, that has not concluded a collective agreement of its own with the employer or his organisation, to bring an action on behalf of its member in the labour court.

If a dismissed employee is not a member of an employees' organisation, or if his or her organisation prefers not to represent its member by bringing an action in the labour court, the employee is obliged to bring an action on his or her own behalf in the regular courts. The same applies if the condition concerning the need to be covered by a collective agreement is not met. In the latter case, the employee's organisation will normally assist its member in the court proceedings. In all these situations, decisions of the regular court may be appealed to the labour court sitting as appellate court.

Under the Litigation in Labour Disputes Act, an action may not be brought before the negotiations, prescribed in the Co-Determination Act or in a collective agreement, have taken place with a view to resolving the disputed issue. However, a party may bring an action before negotiations have taken place, in order to get an interim decision from the court concerning the continuity of the employment contract in spite of a dismissal. After such a decision, the case is suspended until negotiations have taken place. This is not observed by the court "ex officio", but only on objection from the defendant.

Parties to the dispute

In the labour court, as court of first instance, it is, as mentioned above, the employee's organisation acting as plaintiff that brings and pursues the action in a termination of employment dispute on behalf of its member. However, the employee affected is treated as a party in matters concerning the admissibility of evidence. This means that he or she may only be heard as a witness under the rules applying to a party giving evidence. Furthermore it must be pointed out that the organisation is not, as such, entitled to dispose of the rights of its member. The organisation is, it is true, a party in the litigation, under the Litigation Act; however, it mainly acts as an adviser and a

legal spokesman for the employee. Of course, the employee may grant the representative of the organisation more authority by giving him or her a power of attorney.

In the dispute, the employee's organisation may also have a claim of its own against the employer. It may, for instance, claim damages if the employer, in connection with a dismissal, has violated the terms of a collective agreement concluded with the employee's organisation, or has violated such provisions in the Security of Employment Act that give rights to the organisation, for instance the right of advance notification of planned dismissals.

The action is brought against the employer. If he is a member of an employers' organisation, the organisation itself must also be sued. The employers' organisation can then defend the case on behalf of its member, if he or she does not choose to do so personally. When the employee is obliged to bring action on his or her own behalf in the regular courts, he or she is personally party to the dispute. In these cases the action is brought only against the employer. The situation remains the same when the case is later appealed to the labour court.

Impact of court workload and time needed to reach final decision

Termination of employment disputes are treated with priority if there is a petition for annulment of the employer's action to terminate the employment. In the labour court, as court of first instance, these cases are normally decided within four to six months after the action has been brought. In special circumstances the final decision can be reached in less time. On the other hand, the workload of the court sometimes prolongs the time needed. When the employer has given notice of dismissal and action is brought against it, the contract of employment remains valid until the final decision is reached. In these cases the employer can, however, request an interim decision that the contract of employment cease to exist at the expiration of the notice period, or at a later date. In cases of dismissal without notice, the contract of employment ceases to exist immediately. If the employee's side brings an action for annulment of the immediate dismissal, it may seek an interim decision to the effect that the contract of employment remains valid until the final decision is reached. In these circumstances the importance of a rapid final decision is obvious. Delays may either entail costs for the employer, even if the dismissal is finally found to be valid, or make it more difficult for the employee to return to work if a dismissal is finally annulled. On the whole, any delay of the final decision is harmful. Delays caused by the heavy workload of the court usually engender an even heavier workload, since, when delay threatens, the parties are more inclined to seek interim decisions. A regular court sitting as court of first instance often needs 12 months or more to reach a final decision.

Remedies for unjustified dismissal

Under the Security of Employment Act remedies for unjustified dismissal are annulment and damages. If a dismissal is annulled by the court, this has, in practice, the same effect as an order of reinstatement, if the contract of employment has ceased

to exist before the final decision. However, under the Security of Employment Act, the employer has a possibility of ending the employment in spite of an annulment. In such cases, he has to pay damages to the employee, ranging from 16 months' salary, if the employee has been employed by the employer less than five years (24 months' salary if the employee has reached the age of 60) up to 32 (48 months' salary if the employee has been employed by the employer at least ten years). The employer does not have to pay for more months than the number of months for which the worker has been employed. However, in any case, he has to pay at least six months' salary. Annulment of an unjustified dismissal has not, on the whole, given rise to any special problems for the courts, apart from those connected with the need for rapid final decisions. This may be explained to a large extent by the fact that the rule of annulment is mandatory for the courts if annulment is sought and the dismissal is found to be unjustified.

United Kingdom

The Hon. Mr. Justice Popplewell, President, Employment Appeal Tribunal

Access to industrial tribunals

The industrial tribunals are readily accessible. There are no fees payable and no prescribed forms to be completed. An application must be made in writing; it may be in the form of a letter and frequently is. The only preconditions for recourse of the tribunal are satisfaction of the jurisdiction or limitations, e.g. the application must be made within the prescribed time-limit; the complaint must relate to an issue which is within the statutory jurisdiction of the tribunal to determine; the applicant must not have passed "the normal retiring age"; the applicant must have been employed under a contract of employment and he must not have been employed under a contract under which he "ordinarily works outside Great Britain". The jurisdictional limitations are the source of the greatest technical complexity. In the employment protection legislation, there are no fewer than 30 different time-limits.

Usually, only the employee and the employer are parties to the tribunal proceedings. There are, however, exceptions to the general rule. An application may be made by a recognised trade union for a protective award on behalf of an employee who has been made redundant as a result of inadequate consultation under section 101 of the Employment Protection Act, 1975. A trade union may make complaint under regulation 11 of the Transfer of Undertakings (Protection of Employment) Regulations, 1981, that there was failure to inform or consult a representative of the union upon a transfer of the undertaking. A trade union may be joined as a party in proceedings where it is alleged that the workers exerted industrial pressure on the employer to dismiss an employee because he was a non-unionist (section 10, Employment Protection Act, 1982). Similarly, under section 26 of the Employment Protection (Consolidation) Act, 1978, an award may be made against third parties, often a trade union, where an employee makes complaint of action short of dismissal that was taken against him in connection with union membership or participation in union activities. A person may make a complaint against a trade union that he has been unreasonably excluded from trade union membership where a union membership agreement or closed shop is in force in relation to particular employment (section 4, Employment Act, 1980). Where there is a complaint of sexual or racial discrimination in employment, there is extensive power to institute proceedings not only against the employer but also against the individual for the discrimination, and against trade unions, qualifying bodies, employment agencies and partners in a partnership firm.

The Commission for Racial Equality and the Equal Opportunities Commission may be respondents to an appeal against a non-discrimination notice. A foreign sovereign State may be respondent to proceedings under the State Immunity Act,

1978, where the State or one of its agencies in the United Kingdom was the applicant's employer. Appeals under the Health and Safety at Work Act, 1974, and the Industrial Training Act, 1982, may be instituted by undertakings of all kinds and the respondents to the proceedings are environmental health offices and industrial training boards. Almost anyone directly involved in any aspect of employment may become a party to proceedings before an industrial tribunal.

It is sometimes the practice of the tribunals to invite the Secretary of State for Employment to be a party to proceedings where he may have a direct interest in the outcome of proceedings between an employer and employee, i.e. in redundancy cases; or the Advisory, Conciliation and Arbitration Service (ACAS), which is the government conciliation service, can also be invited to be a party where, for instance, their involvement in seeking to settle proceedings is called in question.

Impact of court workload and time needed to reach a final decision

The industrial tribunals process a case-load of some 32,500 cases each year of which only some 14,000 eventually proceed to a hearing; the other 18,500 cases are either settled as a result of the intervention of a conciliation officer employed by ACAS, the government conciliation service, or by private negotiation between the parties or their representatives, or they are withdrawn by the applicant. The fact that so many cases are eventually resolved without a hearing before a fully constituted tribunal does not mean that they have not occupied the time of the tribunal and its staff. Indeed, many cases are only withdrawn after a considerable amount of work has been undertaken by the tribunal staff and the full-time chairman and most are only withdrawn at a late stage. One of the most intractable problems which undermines the operating efficiency of the tribunals is the late application to postpone a hearing or to remove the case from the list in consequence of a negotiated settlement. If a case is postponed or withdrawn within 14 days of the date fixed for hearing, no other cases can be listed to fill the gaps thereby created. One of the methods of overcoming the problem is by the listing of floaters, i.e. cases which may be taken in any tribunal which happens to be sitting that day in the same building. The difficulty is that it is not possible to predict in advance which cases may settle, as most hearings last for one day or more and no costs are generally awarded. A party whose case is listed as a floater, and who is sent away with his representative and witnesses because his case has not been reached, is understandably aggrieved.

As far as the time needed to reach a final decision is concerned, in practice, about 80 per cent of all applications before industrial tribunals are heard and determined within 12 weeks after the presentation of the application. So far as the other 20 per cent are concerned, it is not possible to put a figure because complaints, for instance of sex and racial discrimination in employment, tend to be lengthy as the proceedings take the form of a judicial inquiry, and equal pay claims also give rise to wide-ranging issues. Multiple applications are the cause of particular problems, particularly where there are hundreds or even thousands of applicants who are not

always represented by the same representative and many of whom may be unrepresented. At the end of the hearing, the Chairman may announce the decision of the tribunal for the parties in the form of an oral judgement. The preparation of the full and written reasons may take some time, particularly if there has been a lengthy hearing and it is necessary to refer to numerous documents. The full-time chairmen are sitting continuously on other cases and they may have to prepare their written decisions outside court hours. As a general rule, most decisions are promulgated within weeks of the hearings, though delays of up to three months have been known to occur in exceptional circumstances.

Remedies for unjustified dismissal

The primary remedy envisaged by section 69 of the Employment Protection (Consolidation) Act, 1978, for an employee who has been found to be unfairly dismissed is that an order should be made for his reinstatement or re-engagement. Consideration is given to a financial compensatory award only if those remedies are inappropriate. This is a form of parliamentary direction which proceeds upon the assumption that any unfairly dismissed employee must necessarily want to resume his employment. Regrettably, it is the experience of the tribunal that in most instances the last thing that an unfairly dismissed employee wants is to return to work with the employer who dismissed him unfairly, and who, he believes and sometimes with justification, will lose no opportunity in finding some other reason to dismiss him which will survive the scrutiny of an industrial tribunal. It is the experience both of the tribunals and of the conciliation services that unless reinstatement or re-engagement is secured during the course of the domestic appeal hearing, or by the intervention of the conciliation officer at the time of dismissal, reinstatement or re-engagement is rarely a realistic remedy. Attitudes change progressively after the severance of the employment relationship. The employer is no longer willing to countenance the return of the employee, who has probably been replaced, while the employee realistically recognises that it is impractical for him to resume employment with the former employer and turns his attention to seeking alternative employment and an award of compensation for unfair dismissal. By the time the case comes on for hearing by the tribunal, even more time has elapsed. Although reinstatement or re-engagement is sometimes a term of an agreed settlement, it is rarely ordered by the tribunal (it is ordered in only about 1 per cent of all cases where the applicant is found to have been unfairly dismissed). As a remedy, it may prove to be effective where the applicant is a shop-floor worker in a large company where he can be set to work under a different charge-hand in a different working environment. It is a remedy which the tribunal will always consider where the applicant is a union official who has been unfairly dismissed for his trade union membership or activities because the reinstatement of the trade union member or official is industrially important. It would not be an appropriate remedy where there has been a breakdown of a confidential relationship, e.g. between a managing director and his personal secretary. Even in instances where an order for reinstatement or re-engagement has been made, the

employers often prefer to pay the additional compensatory award rather than comply with the order.

Continuity of employment is conclusively determined by the provisions of schedule 13 to the Employment Protection (Consolidation) Act, 1978. It is a technical legal concept which does not depend upon the agreement of the parties; indeed, the agreement of the parties is usually irrelevant. Pursuant to paragraph 20 of the schedule, the Secretary of State for Employment has made the Labour Relations (Continuity of Employment) Regulations, 1976, which have the effect of preserving the continuity of employment of the dismissed employee who is reinstated or re-engaged by his employer "in consequence of any action to which these regulations apply". This effectively preserves continuity of the employment if the reinstatement or re-engagement is achieved as a result of the terms of settlement negotiated during the course of tribunal proceedings as a result of intervention by a conciliation officer. The regulations do not apparently extend to a privately negotiated settlement. The continuity of employment is, however, treated as broken if a redundancy payment has been made. It appears, however, that this may only affect continuity for the purpose of determining a redundancy payment entitlement so that the employee does not receive a redundancy payment twice in respect of the same period of employment, and that it does not affect the assessment of the period of continuous employment for other purposes, e.g. qualifying for statutory protection against unfair dismissal. In general, the principles of continuity of employment, although they are complex and illogical, do not give rise to undue difficulty in their application.

From an industrial tribunal an appeal lies to the Employment Appeal Tribunal on points of law.

Access to the Employment Appeal Tribunal

Preconditions

There is no precondition for access to the court save that the notice of appeal must set out a point of law and it must be within time.

Parties to the dispute

The parties to the dispute are almost always the same parties who were before the industrial tribunal. Occasionally, the Employment Appeal Tribunal will invite the Secretary of State for Employment to be made a party to the proceedings in order to get his assistance on the interpretation of a difficult point of law or, for instance, when redundancy is concerned where the Secretary of State may be the paymaster. There are occasions where ACAS has also been invited to be a party. Additionally, the tribunal does have original jurisdiction to hear cases where a trade unionist complains that he has been unreasonably excluded from trade union membership; in that case, the hearing is an oral hearing with evidence called as if the matter were being heard before an industrial tribunal.

Impact of court workload and time needed to reach final decision

The Employment Appeal Tribunal hears about 1,000 cases a year; of these a substantial number contain no points of law and are dealt with by the special procedure. As a general rule, the time needed to reach final decision from the notice of appeal being presented until the decision is given is no more than four or five months, but, inevitably, in complicated and difficult cases the time will be longer. That is partly due to the difficulty in fixing a date for the hearing, partly due to the complexity and length of the hearing itself and then finally, to the time to prepare the decision and to get the approval of the members to the decision.

From the Employment Appeal Tribunal there is an appeal on points of law to the Court of Appeal and to the House of Lords. There are approximately 30 appeals in a year from the Employment Appeal Tribunal to the Court of Appeal and/or to the House of Lords.

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