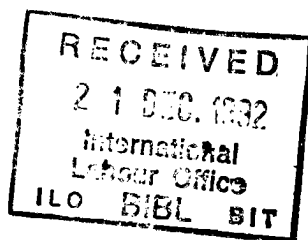


***European labour courts:  
Industrial action and procedural aspects***



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Labour-Management Relations Series No. 77

***European labour courts:  
Industrial action  
and procedural aspects***

***Proceedings of the Third Meeting of European Labour Court Judges  
(Paris, September 1989) on labour courts and industrial action and  
aspects of procedure***

***Edited by Werner Blenk***

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## Foreword

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Interest in the administration of industrial justice in general, and in labour courts and similar judicial or quasi-judicial bodies in particular, has increased in recent years. This is the result of increased recognition that the avoidance or peaceful resolution of labour conflict is a key element in the economic health of nations at all stages of their economic development, as well as during periods of political and economic transformation. This growth in interest can also be attributed to a new or renewed concern for real social justice in many of the countries which are undergoing or contemplating significant structural changes in their society.

In the past few years, the International Labour Office has been active in an advisory capacity in the transformation of industrial relations systems in Eastern and Central Europe, as well as in the USSR. With the transition to a market economy and a pluralistic and democratic society, these countries recognise that the practice of industrial relations implies something very different (even in the absence of massive privatisation) from the systems that are prevalent in highly centralised socialist societies. When the new leaders of these countries approach the ILO for assistance, a first priority has almost always been the prevention and settlement of industrial disputes. Although the ILO advises that such disputes have to be viewed in the context of the industrial relations system as a whole, the ILO's interlocutors attach particular urgency to avoiding and resolving industrial conflict. These discussions inevitably cover the possibility of instituting a system of labour courts, or similar judicial or quasi-judicial bodies, that could remove at least one great source of disputes, namely disagreements respecting rights, or legal disputes, from the arena of open conflict, in the form of strikes or lockouts.

Of course, many Eastern and Central European countries have historic ties with Western European countries and a strong interest in their principles, practices and procedures, which they look to for examples when refashioning their industrial relations systems. However, many other countries, particularly in the lesser developed regions of the world, and those which have recently rid themselves of military and authoritarian regimes, are seeking to establish new industrial relations structures, which often imply the introduction (or re-introduction) of a system of labour courts. Equally significant is the fact that even those West European countries with a long history of effectively functioning labour court systems are facing new problems, both in terms of procedure and substance, for which careful and selective international comparison can be particularly helpful in suggesting modifications and ameliorations.

It is my considered view that in all the cases mentioned, publications such as the present one can be of great value and therefore merit wide dissemination throughout the world. This and the previous volumes published by the ILO and its International Institute for Labour Studies<sup>1</sup> contain a wealth of information and practical experience on labour courts and their functioning.

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<sup>1</sup> A. Gladstone (ed.): *Industrial courts in English-speaking developing countries* (Geneva, International Institute for Labour Studies (IILS), 1976); A. Gladstone and O. Sorgho (eds.): *Tribunaux du travail en Afrique francophone* (Geneva, IILS, 1978); B. Essenberg (ed.): *Labour courts in Europe, Proceedings of a meeting* (Geneva, IILS, 1986); and W. Blenk (ed.): *European labour courts: Current issues* (Geneva, ILO, 1989).

This volume, in the same way as those mentioned above, reflects the discussions and contributions made in a meeting of chairmen, chief judges and other leading judicial officers of labour courts in Europe (and Israel). The initiative for the meetings came from the judges themselves, with the ILO acting as facilitator. This volume is based on the meeting held in Paris in September 1989, the organising committee of which was composed of Judge Stein Evju (Chairman of the Norwegian Labour Court), Judge Menachem Goldberg (President of the National Labour Court of Israel), Judge Dirk Neumann (Vice-President of the Federal Labour Court of the Federal Republic of Germany), and the undersigned. In keeping with our established tradition, the discussions at the Paris meeting concentrated on two themes, one procedural and one substantive. As in previous meetings, an effort was made to choose themes that are relevant to most, if not all, of the courts concerned.

I might add that the meetings are in no way normative in character. Indeed, no effort whatsoever is made to arrive at agreed positions or even consensus on particular points. This must necessarily be the case, since each court and each industrial relations system is a product of its own national history and environment. But at the same time, it is clear that there are a number of common problems, both substantive and procedural, for which solutions can be more easily worked out on the basis of an appreciation of the experience of others who are similarly situated. I think that the participating judges would agree that such an exchange of experiences and views can only lead to an improvement in the administration of industrial justice in their own countries.

This volume has been edited by Werner Blenk, a senior official in the Labour Law and Labour Relations Branch of the ILO, with the assistance of Carl Mischke. It is our hope that its wide dissemination will make a distinct and unique contribution to thinking on this subject.

June 1991.

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

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# General introduction

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Carl Mischke

Social institutions are not the product of chance. Their voluntary appearance or their legal establishment at a particular moment of history is a response to the emergence of certain specific needs. As these needs differ greatly among different countries—as does the possibility of meeting them—it is not surprising that social institutions throughout the world should show a very great variety. Yet, despite this variety, a number of basic social institutions have become a necessary pattern of industrialised societies.<sup>1</sup>

Labour courts are a common feature in the landscape of industrial relations. Indeed, they are a truly international phenomenon.<sup>2</sup> However, their prevalence does not mean that it is easy to make a general evaluation of institutions which are inextricably linked in their functioning to specific national industrial relations systems. It is therefore almost impossible to discuss labour courts *per se*. To do full justice to the topic, a *hermeneutic* or *holistic* approach is called for: labour courts and the role they play can only be fully understood when seen within the context of national industrial relations systems.

The aim of this introduction is therefore modest; to sketch the broad outlines of some of the issues involved in considering labour courts.

## I. The ontology of labour courts

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What exactly are labour courts?

Attempting a definition of these institutions is a hard task. A sensible starting-point would be to try to identify the features that are specific to labour

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<sup>1</sup> J. de Givry: "Labour courts as channels for the settlement of labour disputes: An international review" (1968), 6 *British Journal of Industrial Relations*, p. 364.

<sup>2</sup> For comparative surveys see, for example, B. Aaron (ed.): *Labour courts and grievance settlement in Western Europe* (Berkeley, University of California Press, 1971); B. Aaron: "Arbitration and the role of courts: The administration of justice in labour law", in *Reports and Proceedings*, 9th International Congress, International Society for Labour Law and Social Security, Munich, 1978 (Heidelberg, Verlagsgesellschaft Recht und Wirtschaft, 1979); B. Aaron: "Labour courts and the organs of arbitration", Ch. 16, Vol. XV, *International encyclopaedia of comparative law* (Tübingen/Dordrecht, J.C.B. Mohr/Nijhoff, 1985) (cited as *Labour courts and organs of arbitration*); W. Blenk (ed.): *European labour courts: Current issues* (Geneva, ILO, 1989) (cited as *European labour courts*); B. Essenberg (ed.): *Labour courts in Europe* (Geneva, ILS, 1986) (cited as *Labour Courts in Europe*); A. Gladstone (ed.): *Industrial courts in English-speaking developing countries* (Geneva, ILS, 1976); A. Gladstone and O. Sorgho (eds.): *Tribunaux du travail en Afrique francophone* (Geneva, ILS, 1978); B. Hepple: "Labour courts: Some comparative perspectives" (1988), 41 *Current Legal Problems*, pp. 169ff. (cited as *Labour courts*).

courts and which distinguish them from *ordinary* courts. However, as Professor Hepple points out, "one searches in vain for a clear modern account of the features of labour courts which differentiate them from ordinary courts".<sup>3</sup> As in *ordinary* courts, labour court judges apply the law,<sup>4</sup> and the dispute is usually between two parties (bipolar). Nor are accessibility, informality and speed of procedures distinguishing features: it is possible, Hepple notes, to propose inquisitorial, informal, speedy and efficient systems within the context of the *ordinary* courts.<sup>5</sup> He comes to the conclusion that "the only features which clearly demarcate labour courts from the *ordinary* courts are their expertise and specialisation".<sup>6</sup>

This does not, however, answer the question of why some countries chose "to develop such expertise and specialisation in special courts while others have been content to leave this to *ordinary* courts".<sup>7</sup> Generalisations are inappropriate here: the reasons for the development of labour courts as such lie in the historical and organic growth of national legal and industrial relations systems, as well as in the needs of the societies in which they function.<sup>8</sup>

At the risk of sounding trite, it may be asserted without fear of contradiction that labour courts deal with matters relating to labour, i.e. matters arising from the relationship between an employer and an employee, or matters between collectives of employers and employees. Indeed, it would come as a surprise to find a labour court convicting criminals or granting divorces.

The sole differentiating characteristic of labour courts in general would appear to be the fact that labour courts apply labour law in deciding cases. It may also be submitted that labour courts apply *only* labour law.<sup>9</sup> The only occasion on which a labour court would have recourse to legal principles

<sup>3</sup> Hepple: *Labour courts*, p. 171. He defines "ordinary" courts as "those which exercise general jurisdiction in civil disputes under a particular legal system". According to Professor Aaron, "the distinction between *ordinary* courts and labour courts is, of course, self-evident". B. Aaron: "Settlement of disputes over rights" (Ch. 16), in R. Blanpain (ed.): *Comparative labour law and industrial relations*, 3rd ed. (Kluwer, Deventer, 1987), p. 337.

<sup>4</sup> This statement is not without problems. Modern jurisprudence and legal theory have suggested that judges do more than syllogistically apply the law in deciding cases. In a certain sense, the judge "makes law". See, for instance, O. Kahn-Freund: *Das soziale Ideal des Reichsarbeitsgerichts*, first published in 1931 and reprinted in T. Ramm (ed.): *Arbeitsrecht und Politik* (Neuwied, Luchterhand, 1966), p. 149. An English translation of this monograph is to be found in R. Lewis and J. Clark (eds.): O. Kahn-Freund: *Labour law and politics in the Weimar Republic* (Oxford, Basil Blackwell, 1981), pp. 108-161. See also F. Müller: *Richterrecht* (Berlin, Duncker & Humblot, 1986); C. Norris: *Contest of faculties* (London, Methuen, 1985), especially Ch. 7, "Suspended sentences", pp. 167ff. Also R. Dworkin: "Law as interpretation" (1982), 60 *Texas Law Review*, pp. 527ff., and S. Fish: "Working on the chain gang: Interpretation in law and literature" (1982), in *Texas Law Review*, pp. 551ff.

<sup>5</sup> Hepple: *Labour courts*, p. 178.

<sup>6</sup> Hepple: *Labour courts*, p. 179.

<sup>7</sup> Hepple: *Labour courts*, p. 179. Hepple proceeds to discuss three possible reasons for the development of labour courts (pp. 179-184): (i) tripartism (which has a "strong psychological influence on the workers", but also a legitimating effect, a factor he does not mention explicitly); (ii) expertise (it follows from the tripartite or bipartite structure of most labour courts that practical experience in industrial relations is coupled with legal training); and (iii) autonomy (labour courts as the necessary consequence of an "autonomous" labour law, free from the restraints imposed by the *ordinary* civil law).

<sup>8</sup> See Essenberg: *Labour courts in Europe*, p. 3.

<sup>9</sup> This argument could also be used to differentiate other specialist courts, such as for example tax courts and patent courts. See Lord Wedderburn: "Labour law: From here to autonomy?" (1987), 16 *Industrial Law Journal*, p. 1 (cited as *Autonomy*) and the works of P. Durand and M. Duverger cited there. Support for this argument is to be found in the country reports contained in Essenberg: *Labour courts in Europe*, pp. 11-62.

outside the bounds of labour law would be to search for possible analogies in solving a problem left unregulated by other sources of law.

"Labour law" here is understood to mean the totality of legal provisions contained within a specific legal system which relate to the employment relationship, including statute law, collective agreements and individual contracts of employment. This by no means implies that a "totality of legal provisions" is a hermetically sealed-off body of law, contained in a specific set of statute books. It is an old truism that law is more than that which is written down on paper. Labour law is rooted in industrial relations systems and their dispute resolution procedures. At times, what the law dictates may conflict with sound industrial relations practice. This is why some labour courts<sup>10</sup> have an equitable jurisdiction, which allows them to adapt (or change) the law so as to bring it into conformity with the reality of sound industrial relations.

The relationship between labour law and the rest of the legal system has in recent years come under scrutiny in the United Kingdom and in France. While recognising the fact that labour law "cannot survive in total isolation",<sup>11</sup> some scholars have suggested that:

labour law must break free from the assumptions of underlying institutions of the civil law, the property rights of the employer, through which he controls work and enterprise, the prerogative of the proprietor to organise and distribute work, and the status of subordination attached to the worker. ( . . . ) Above all, labour law was distinguished from civil law by its collective character, its umbilical cord to the social facts. It must deal in categories of collective negotiation rather than contract; the base, and source of the law itself is derived from *l'autonomie collective*. Recognising the social facts of conflict, it must avoid the trap of legally imposed solutions. Providing the required minimum protections, it must recognise the dominant source of industrial negotiation.<sup>12</sup>

This introduction is not the place to discuss these issues at any length. The point, however, is that "if labour law is to escape from the clutches of common law thinking and procedures, the compass seems to point ( . . . ) towards labour courts".<sup>13</sup> In other words, labour courts are regarded by some as an essential precondition for an *autonomous* labour law.

## II. *Labour courts as mechanisms for dispute resolution*

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What exactly do labour courts do?

Just like *ordinary* courts, labour courts resolve disputes. They adjudicate, they do not arbitrate.<sup>14</sup> In order for any court to be able to adjudicate, there

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<sup>10</sup> The comparative studies consulted do not deal with this issue.

<sup>11</sup> Wedderburn: *Autonomy*, pp. 1–2.

<sup>12</sup> Wedderburn: *Autonomy*, p. 3, summarising G. Lyon-Caen "Du rôle des principes généraux du droit civil en droit du travail (première approche)" (1974), in *Revue trimestrielle de droit civil*, pp. 229–231. See also D. Howarth: "The autonomy of labour law: A response to Professor Wedderburn" (1988), 17 *Industrial Law Journal*, pp. 11ff. See also O. Kahn-Freund's essay on Hugo Sinzheimer, 1875–1945, a translation of which appears in R. Lewis and J. Clarke (eds.): *Labour law and politics in the Weimar Republic* (Oxford, Basil Blackwell, 1981), pp. 73–107, especially pp. 79ff. and pp. 93ff.

<sup>13</sup> Wedderburn: *Autonomy*, p. 26.

<sup>14</sup> For a definition of the distinction between adjudication and arbitration see, for example, ILO: *Conciliation and arbitration procedures in labour disputes: A comparative study* (Geneva, ILO,

must be a legal dispute, or, as it is also called, a conflict or dispute over rights. It is not the role of a court to decide which rights should come into existence; this is the task of collective bargaining, and, if need be, of arbitration (whether voluntary or compulsory). Labour courts usually deal with disputes of rights.

As the term implies, disputes over rights involve the interpretation or application of existing rights created by statutes, individual contracts of employment, or collective agreements; theoretically, at least, they are not concerned with efforts to obtain rights that concededly are not presently in being. ( . . . ) The line between disputes over rights and conflicts over interests is not always an impregnable wall; rather, it sometimes is more analogous to a semi-permeable membrane, through which disputes that are nominally of one type pass and are handled under procedures usually reserved for disputes of the other type. ( . . . ) Thus, ( . . . ) in certain contexts conflicts of interests will be disposed of through grievance and arbitration procedures supposedly reserved for disputes over rights, whereas the processes of conciliation and mediation, which in some countries are primarily employed in conflicts of interests, are in other countries routinely applied to disputes over rights.<sup>15</sup>

Another distinction found in some countries is between collective and individual disputes. De Givry points out that this distinction is to be found in France and in many French-speaking African countries.<sup>16</sup> However, he notes that the "importance of the distinction between collective and individual disputes seems now to be declining".<sup>17</sup>

### III. *A definition of labour courts*

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The following is an attempt at a general definition of labour courts:

Labour courts are specialist courts of law which adjudicate collective or individual disputes of rights in terms of the law relating to labour within a given country.

### IV. *Labour courts and industrial action*

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A common feature of industrial relations all over the world is industrial conflict. It has been defined as:

( . . . ) the total range of behaviour and attitudes that express opposition and divergent orientations between individual owners and managers on the one hand and working people and their organisations on the other ( . . . )<sup>18</sup>

1980), pp. 15 and 151. See also A. Söllner: "Schlichten ist kein richten" (1982), 13 *Zeitschrift für Arbeitsrecht*, pp. 1-17. Of course, nothing prevents a court from trying to lead the parties to a dispute to a settlement. This attempt at conciliation often takes place in pre-trial procedures. See, in this regard, Blenk: *European labour courts*, especially p. 7.

<sup>15</sup> B. Aaron: *Labour courts and organs of arbitration*, p. 3. For a British perspective see: *Royal Commission on Trade Unions and Employers' Associations 1965-68*, Cmnd 3623 (London, HMSO, 1968), especially paras. 60, 573 and 568.

<sup>16</sup> J. de Givry: "Prevention and settlement of labour disputes, other than conflicts of rights", Ch. 14, Vol. XV, *International encyclopaedia of comparative law* (Tübingen/Alphen a.d.R., J.C.B. Mohr/Sijthoff & Noordhoff, 1978) (cited as *Prevention and settlement*), p. 5.

<sup>17</sup> De Givry: *Prevention and settlement*, p. 8.

<sup>18</sup> A. Kornhauser, R. Dubin and A. N. Ross (eds.): *Industrial conflict* (New York, McGraw-Hill, 1954), p. 13.

There are many theories which seek to explain the phenomenon of industrial conflict.<sup>19</sup> Interesting and relevant as they are, they need not detain us here. The law focuses its attention mainly on industrial action, and particularly on strikes, lockouts and other forms of action including *go-slows*, *go-sick* and boycotts.<sup>20</sup>

Industrial action is usually well reported in the media, and there is also "some tendency to describe strikes as rather regrettable affairs".<sup>21</sup> Any form of conflict is regrettable, but it cannot be denied that conflict is a fact of life, and particularly of industrial life. Industrial action is rooted in the divergent orientations between owner/managers and employees which are a consequence of living and working in an industrialised age.<sup>22</sup> Although most differences can be resolved by means of negotiation and collective bargaining, these negotiations sometimes break down. That is usually the point at which industrial conflict erupts into industrial action. According to this view, industrial action is "merely a natural continuation of the process of collective bargaining".<sup>23</sup>

Industrial action is a socio-economic phenomenon; its effective regulation appears to start only where outright prohibition ends. The question that arises is *how* this regulation takes place. What is the role of the law in the regulation and resolution of socio-economic disputes over interests? Another question concerns the role of labour courts. What role do these courts play in exercising legal control over industrial action? Is it the task of the law to decide which party is in the right in collective labour disputes?<sup>24</sup> When does (or when should) a judge step into the fray? Related issues include the functions of labour courts in the field of social control and the question of juridification, which enjoys some currency in several countries.<sup>25</sup>

## V. Procedural aspects

There can be no doubt as to the importance of procedural issues in labour courts. The law has always aspired to granting relief as easily, inexpensively and rapidly as possible. Despite the fact that their case-loads have increased, this applies in particular to labour courts.

<sup>19</sup> A summary of some of the main theories is to be found in M. P. Jackson: *Strikes* (Brighton, Sussex/New York, Wheatsheaf Books/St. Martin's Press, 1987), pp. 155ff.

<sup>20</sup> See R. O. Clarke: "Industrial conflict: Perspectives and trends" (Ch. 18), in R. Blanpain (ed.): *Comparative labour law and industrial relations* (Deventer, Kluwer, 1987) (cited as *Industrial conflict*, p. 383).

<sup>21</sup> Clarke: *Industrial conflict*, p. 385.

<sup>22</sup> See A. Fox: "Industrial sociology and industrial relations", in *Royal Commission on Trade Unions and Employers' Associations*, Research Paper No. 3 (London, HMSO, 1966), p. 2.

<sup>23</sup> Clarke: *Industrial conflict*, p. 385. The close link between industrial action and collective bargaining will find many echoes in the country reports contained in this publication.

<sup>24</sup> See Sir John Donaldson: "Lessons from the industrial court" (1975), 91 *Law Quarterly Review*, pp. 181ff., especially p. 192.

<sup>25</sup> See, for instance, W. Däubler: *Das soziale Ideal des Bundesarbeitsgerichts* (Frankfurt/Cologne, Europäische Verlagsanstalt, 1975); T. Ramm in (1961) 16 *Juristen Zeitung*, pp. 273ff. and in (1964) 19 *Juristen Zeitung*, pp. 494ff., 546ff. and 582ff. On the issue of juridification see S. Simitis: "Zür Verrechtlichung der Arbeitsbeziehungen", in F. Kübler (ed.): *Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität* (Baden-Baden, Nomos, 1984). Professor Simitis' contribution is discussed by J. Clark: "The juridification of industrial relations: A review article" (1985), 14 *Industrial Law Journal*, pp. 69–90. Also R. Voigt: "Gegentendenzen zur Verrechtlichung" (1983), 9 *Jahrbuch für Rechtssoziologie*, pp. 17–41.

All kinds of issues arise here. Who, for example, can approach the courts? This is often regulated by substantive law in relation to the jurisdiction of a labour court. It is important, however, to see how labour courts can be approached. Is legal representation absolutely essential, or is the procedure such that the employee can conduct her/his own case? What can a party expect from litigation: an inquisitorial or an adversarial procedure? How is the evidence led?

Certain types of cases may require special procedures. Certain matters (such as industrial action, for example) may have priority over others, since their consequences could be disproportionately harmful if left to await their turn in the ordinary schedule of cases.

*Part I*

---

*Labour courts and industrial action*

# *Comparative overview*

---

Werner Blenk and Carl Mischke

## *1. The legal framework*

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### *The right to strike*

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In some countries the right to strike is explicitly enshrined in the constitution. In France, the 1958 Constitution recognises an individual right of employees to resort to strikes. An individual right to strike is also contained in the Spanish Constitution. However, in Sweden only associations of employees have a constitutionally guaranteed right to strike. In other countries, although the right to strike is not explicitly addressed by the constitution, it is implicitly guaranteed. In the Federal Republic of Germany and Switzerland, the freedom to strike is seen as a basic liberty as a corollary to the right to form associations, which is guaranteed by article 56 of the Swiss Federal Constitution and by article 9(3) of the Basic Law (Constitution of the Federal Republic of Germany). In Germany, the Federal Labour Court and the Federal Constitutional Court have played a fundamental role in interpreting the Basic Law and inferring a right to strike. In Switzerland, however, partly due to the prosperity enjoyed in that country, strikes are very rare indeed and collective labour law has not developed in this regard to the extent that it has in other countries.

In Finland, certain forms of industrial action are expressly prohibited by the Collective Agreements Act of 1946. However, based on the principle that what is not forbidden is allowed, other forms of industrial action are permitted. This principle is also applicable in Norway. In Israel, the freedom to strike has been affirmed by both the labour courts and the ordinary courts. Legislation protects trade unions and workers who participate in strikes. In the United Kingdom, the right to strike is guaranteed neither explicitly nor implicitly. Legal *immunities* are afforded by a number of statutes enacted by the legislature over the years. These immunities serve to protect trade unions from civil liability and criminal prosecution under certain conditions.

### *The right to lock out*

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As far as lockouts are concerned, there are two markedly divergent points of view. In some countries, the lockout is seen as a functional counterbalance to the strike. In trying to maintain a balance of power between employees and employers, it is felt that both parties should be equally armed in industrial

warfare. However, others uphold the view that a strike restores an intrinsic imbalance of power, as the employer is always the stronger party in the employment relationship, and that, with all the power at his or her disposal, the employer does not need to resort to lockouts at all, or only under certain exceptional circumstances.

In Sweden, the right of employers to lock out their employees is explicitly enshrined in the Constitution. In the Constitutions of the Federal Republic of Germany and Spain, the right to lock out is only implied. In certain Scandinavian countries, the right to lock out is implied by legislation, based, as with strikes, on the principle that what is not forbidden is allowed.

### *The peace obligation*

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The participants at the meeting emphasised the close links between collective bargaining and industrial action. In most countries (the exceptions are France, the United Kingdom and Yugoslavia), the rule of *pacta sunt servanda* applies: industrial action is unlawful if a collective agreement is in force. According to this view, a collective agreement implies an obligation for the parties to maintain industrial peace for the duration of the agreement, even if the peace obligation is not actually mentioned in the agreement itself. Nor can this peace obligation be excluded by agreement. Usually, the obligation to refrain from industrial action is relative, meaning that it covers only the matters regulated by the parties in the collective agreement. However, the parties may extend the scope of the peace obligation and make it absolute, so that no industrial action whatsoever can be undertaken.

Some interesting variations are to be found. In Denmark, for example, the legislature can extend the validity of a collective agreement, thereby bringing legal industrial action to an end. In other countries, such as Norway, the distinction between disputes relating to rights and those relating to interests affects the peace obligation. In disputes relating to rights, the peace obligation is absolute and the parties must resort to bargaining or litigation for their settlement. Industrial action is totally prohibited in such cases. However, disputes relating to interests are only subject to a relative peace obligation, and industrial action can be used to pursue matters not contained in a collective agreement. There is no comparable peace obligation in French law. In the United Kingdom, except for the period between 1971 and 1974, when the Industrial Relations Act was in force, collective agreements are presumed not to be legally enforceable contracts. Indeed, they are often *gentlemen's agreements* that do not have a contractual status. An agreement of this nature cannot give rise to a peace obligation restricting recourse to industrial action.

## *II. Jurisdiction of the court<sup>1</sup>*

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In the majority of countries, industrial action falls within the exclusive jurisdiction of the labour courts. In the United Kingdom, however, industrial action is explicitly excluded from the jurisdiction of industrial tribunals by

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<sup>1</sup> For further information in this regard, see B. Essenberg (ed.): *Labour courts in Europe* (Geneva, ILS, 1986).

section 62 of the Employment Protection (Consolidation) Act of 1978. In Switzerland, the parties to a dispute have to resort to mediation and arbitration. In Spain, the courts do not directly determine the legality of industrial action but, if the court has to deal with claims for payment of wages, dismissal, etc. (i.e. individual claims), it may be called upon to decide whether the industrial action which gave rise to the claim was legal or not.

The judges pointed out that, as a rule, labour courts only adjudicate disputes over rights and not disputes over interests. Finland is an exception in this respect; in Finnish law, it makes no difference in principle whether the dispute relates to interests or rights. This is also the case in Yugoslavia.

In most countries, only the parties to the dispute may litigate. Indeed, in Denmark, Finland, Sweden and Norway, the labour courts have jurisdiction in collective disputes only. A single employer may appear before the court if he or she does not belong to an employers' organisation. In Yugoslavia, the parties involved in a case before the Court of Associated Labour are usually employees and the Organisation of Associated Labour. Access to the court in the Federal Republic of Germany is very broad: anybody who is of the opinion that industrial action encroaches on their or her/his rights may take legal action.

### *III. Interim measures*

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The judges made special mention of the fact that the granting of interim measures in industrial action presents inherent problems. In this context, labour courts enter an arena of economic struggle and caution is called for on the part of the judiciary. The court should attempt to induce the parties to the negotiating table, rather than decide the merits of the case. As the term implies, interim measures are granted with the intention of granting temporary relief to a party. However, as some participants pointed out, interim measures may in actual fact decide the issue. If, for example, an employer succeeds in obtaining an injunction against a striking trade union, it is very difficult for the trade union to simply suspend the strike and resume it at a later stage. Industrial action often relies on surprise tactics and, once a strike loses impetus, it is almost impossible to revive. Normally, the granting of an interim order involves balancing interests, which is a hard enough task in itself, rendered even more complicated by the fact that the balance has to be struck within a very short space of time.

Interim measures are available in many countries. A significant exception in this regard is Finland, where the labour court may not issue interim orders or injunctions in cases of industrial action, even if the industrial action is in progress. However, the Finnish Labour Court may decide a preliminary question or part of a complaint in a separate decision, and is usually able to hand down a final decision on the matter within four to six days. However, the position may have to be reviewed, since industrial action often lasts for a very short time, often a matter of hours or, at the most, days. In cases such as these, it was felt that interim measures may be useful. In Norway, the relevant legislation does not provide for interim measures and the application of the ordinary civil procedure presents significant problems of procedure and jurisdiction. However, it was also felt that interim measures are superfluous, since the labour courts should be in a position to react quickly. Usually, a court can deal with urgent matters within 48 hours. In the United Kingdom, the

ordinary courts are empowered to issue injunctions against parties involved in industrial action. However, section 17 of the Trade Union and Labour Relations Act of 1974 restricts the granting of injunctions relating to industrial action. In Switzerland, the law is silent on this issue. The matter should fall within the jurisdiction of the ordinary courts, but this does not actually occur in practice. In Denmark, interim measures are the exception rather than the rule, and the courts only become involved when the strike is over. Sometimes, however, action may be brought before the strike starts, and in these cases the court holds a preliminary session with the trade union and the employer in order to facilitate a settlement of the dispute. In Spain, as a rule, a judge can only pronounce on an issue after the escalation of industrial tension and, unfortunately, the procedures in question are very lengthy. In France, too, the courts are only able to decide upon the lawfulness of industrial action after it has already occurred. However, in the Federal Republic of Germany, interim measures are available if the applicant can prove a prevailing interest.

#### *IV. Time-limits*

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The participants emphasised the importance of dealing with industrial action as rapidly as possible. Industrial action is both the most dramatic aspect of industrial relations and its most potentially destructive. The damage done by long-term industrial action on production and the resources of trade unions and employers, as well as mounting public opposition, makes it essential to resolve the dispute and end the action as quickly as possible.

Industrial action therefore has priority over other cases before the labour courts. In some countries, interim orders may be obtained within a couple of hours. The full decision on the merits of the case is arrived at within days, and at the most within a matter of weeks. In Finland and Israel, there are special rules to facilitate a speedy and efficient procedure.

#### *V. Criteria for lawful and unlawful industrial action*

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There are many criteria that determine the lawful nature of industrial action. In Denmark, for instance, trade unions and employers' organisations have agreed on procedures that have to be followed for industrial action to be lawful. Industrial action relating to disputes over rights (collective or individual) can be excluded from the scope of permitted industrial action, although the distinction between disputes over rights and over interests may at times be hard to draw. Political strikes are prohibited in many countries, as are *wildcat* or unofficial strikes. Prohibitions or limitations on strikes in essential services are also common.

A very important criteria in many countries for the determination of the legality of industrial action, as noted earlier, is the existence of collective agreements placing the parties under an obligation to maintain industrial peace.

Other criteria vary from country to country. In the Federal Republic of Germany and Switzerland, for instance, industrial action is unlawful if its objective cannot be regulated in a collective agreement. In addition, industrial

action may only be resorted to when all existing avenues of negotiation have been exhausted (the so-called *ultima ratio* principle). However, the German Federal Labour Court has ruled that this does not require a formal declaration of the breakdown of negotiations, so that a party to collective bargaining may take industrial action if it considers the opportunities for negotiation to have been exhausted.

In the United Kingdom, a complex network of statutory provisions have to be complied with for industrial action to be legal. Basically, when a trade union calls for a strike, it may become liable for certain torts (*délits*), including inducing a person to break his or her employment contract, intimidation and conspiracy. However, if the strike is called in contemplation or furtherance of a trade dispute (the so-called *golden formula*), section 14 of the Trade Union and Labour Relations Act of 1974 provides a defence, unless this defence has been removed by any one of four subsequent Employment Acts (1980, 1982, 1984 and 1988). In Yugoslavia, the Associated Labour Act sets out the procedure that employees must follow for a strike to be lawful. These provisions (sections 620-624) cover the calling of an extraordinary workers' assembly and the role played by the workers' council.

In Israel, the law requires a trade union to notify the employer and the Chief Labour Relations Officer of the Labour Ministry 15 days before embarking upon a strike. The aim of this *cooling-off* period is to encourage the extra-judicial resolution of the dispute. Similar requirements are found in Norway, Spain and Sweden. Requirements for notification and cooling-off periods again emphasise the close functional link between collective bargaining and industrial action and they help to promote negotiation rather than industrial warfare.

## VI. Conclusion: The role of labour courts in industrial action

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The role of labour courts in industrial action is closely linked to the industrial relations system of a country and to the legal framework within which industrial action takes place and within which the labour court functions. Considerations such as the existence, nature and extent of legislation and other dispute resolution mechanisms are therefore important, as well as the roles played by trade unions and employers' organisations.

In some cases, the courts may establish the rules of the game. They may develop guidelines concerning the behaviour expected from the parties involved in a dispute. In the Federal Republic of Germany, for example, due to the lack of legislation, the Federal Labour Court had to assume the role of substitute legislator. Since its first decision in 1955, it has continued to fill the gap by developing a system of rules for the conduct of industrial action. The law-making function of some labour courts is a phenomenon that gives rise to heated debate.

Labour courts also have an important policy-making function. They help determine what constitutes a reasonable balance of power. In the absence of legislative guidelines, the courts develop their case law on the basis of the general principles of social justice, but also within the framework of the requirements of economic efficiency. The influence of the decisions of labour courts is not generally limited to one case. Legal patterns of thought develop

and contribute to the building up of judicial practice, which may then supplement provisions contained in legislation. Suggestions and recommendations made by the labour courts and by individual judges may also have a decisive effect on the course of legislation.

However, the influence of labour courts does not end with applying the law. They are often a moving force in inducing parties to return to negotiations. The possibility of an award for damages for unlawful action or of the other party obtaining an injunction may serve as a deterrent to parties that are too eager to resort to industrial action. It may persuade them to return to the negotiating table for just one more try. In some countries (Norway and Yugoslavia, for example), the president or chairman of the labour court may use his or her influence to avert industrial action before it starts, or to bring the action to an end. The labour court may also be called upon to interpret a collective agreement in order to prevent recourse to strikes or lockouts.

It was emphasised that industrial action is a social phenomenon. Regardless of the legal framework, it occurs when sufficient social and economic pressures have built up. The social reality of industrial action and attempts at legal regulation are often widely divergent. It is within this arena of socio-economic conflict that labour courts play their role in the prevention and termination of industrial action.

## Denmark

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Johannes Bangert, President, Labour Court, and  
Niels Waage, First Secretary, Labour Court

Industrial action traditionally includes strikes, lockouts, boycotts and blockades. These types of action are lawful, but when a collective agreement has been concluded the parties are generally supposed to have renounced their right to take industrial action as long as the agreement is in force. The possibilities of recourse to sympathy (secondary) action are very broad under Danish labour law, provided that the main action is lawful. Secondary action is normally legal even if a collective agreement has been concluded between the parties to the secondary action. However, picketing and go-slows are not, as a rule, considered to be legal.

Industrial action that takes place while a collective agreement is in force is normally considered to be a violation of the agreement. This principle is often set out in a general agreement between the parties, but even if no such general agreement has been concluded, the principle is assumed to apply through interpretation of the agreement. In Denmark, industrial action is not normally dealt with in statutory regulations. However, legislation has often brought lawful industrial action to an end by prolonging the validity of a collective agreement.

In some cases, the parties have agreed on a long *period of peace* exceeding the duration of a collective agreement. These periods of peace are legally protected in the sense that industrial action which is contrary to the agreement is considered to be unlawful. A long-term general agreement between the Danish Employers' Confederation and the Danish Federation of Trade Unions contains detailed provisions concerning the formal prerequisites for lawful industrial action, including periods of notice before balloting in the event of a dispute. If these provisions are not complied with, the labour court, on the request of the opposite party, will hold that the action is unlawful.

When the collective agreement has expired, both parties are required by law to accept the mediation of the official conciliator, who has considerable powers to try to obtain agreement on the renewal of the general agreement. For example, the conciliator can issue a mediation proposal, which may not be rejected by the parties unless a majority of at least 35 per cent of the members of the organisation in question vote against the proposal.

The labour courts have exclusive competence in disputes concerning the lawfulness of industrial action of any kind.

### *Handling of industrial action cases*

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Before a case is brought before the labour court, negotiations normally take place between the organisations concerned. If the parties are members of the

Danish Employers' Confederation and the Danish Federation of Trade Unions, article 10 of the General Agreement between the two organisations provides that the matter shall be discussed between the organisations at a joint meeting. It is regarded as obligatory for an organisation to participate in a joint meeting, if the opposite party has requested one. Many other general agreements between other organisations contain rules of a similar nature. In most cases, a fine cannot be imposed for breaching the agreement unless a joint meeting has been held before the case is brought before the labour court.

Cases have to be brought by the relevant organisation of employers or employees regardless of whether the breach is committed or the collective industrial action threatened or taken by individual members of the organisation. If an organisation is a member of a higher level organisation, the case has to be conducted by or against that organisation. If the employer is an individual establishment which is not affiliated to an employers' organisation, the case has to be conducted by or against the individual establishment.

Cases are dealt with by one of the presidents of the labour court in one or more preliminary sessions before they are heard by the full court. The main purpose of the preliminary sessions is to seek a solution through conciliation. In most cases the parties come to an agreement at this stage. Sometimes the parties agree to empower the president to decide the case without further hearings (in order to avoid a hearing by the full court). The president then announces his or her decision, which is recorded briefly without stating the grounds. The defendant often admits at the preliminary session that the industrial action in question is unlawful, and the representative of the defendant promises to direct the members of the organisation who have taken part in the industrial action to end their action. In such cases, the president normally makes an urgent appeal to the members to comply with their organisation's call to end the action. If the members of the organisation do not comply with the request immediately, the amount of the fine to which they will be liable increases considerably.

In cases in which the defendant does not accept that the industrial action is unlawful, and when plaintiffs insist on their claim, a full court session is fixed. If the court cannot deal with all the aspects of the case immediately, it can deliver interlocutory orders declaring that the industrial action is in contravention of a collective agreement.

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### *Time-limits*

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When the court is faced with a situation in which industrial action has already commenced, the case is considered on an urgent basis and the first preliminary session is scheduled within a week. If the defendant does not accept that the industrial action is in contravention of a collective agreement, a full court session is normally held within a month (often earlier), and an interlocutory order can be issued following the session. The final decision is normally handed down within two to three weeks. If the industrial action has stopped when the case is brought to court or before the full session of the court is held, the case is handled on a non-urgent basis and the decision is normally handed down between six months and one year after the case was filed.

## *Enforcement of judgements*

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Labour court judgements are covered by the rules of enforcement of the Procedural Code applicable to ordinary civil judgements (Labour Court Act, section 20).

## *The role of the labour court*

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The great majority of the cases which are brought before the labour court concern ongoing unlawful strikes or lockouts. Most of the cases are settled after negotiations in the courtroom during a preliminary session.

There is no doubt that the court plays a very important part in the handling of industrial action cases, and the influence of the court has increased over the past few decades, as it seems to be becoming more difficult for the parties to reach an agreement during their joint meetings. As mentioned above, the fines that are applicable for participating in unlawful industrial action increase considerably in cases in which the action continues after the preliminary session and after the president has appealed to the participants to comply with their organisation's request to stop the action. This increase in the amount of the fine has some effect.

The great majority of cases that come before the labour court concern industrial action. They do not present a major problem in terms of workload, but without them the labour court would not be what it is today. The labour court is seen by the public as the forum in which industrial action should be handled, although that leads some to believe that the labour court is an instrument of the establishment to be used against the working class. When the attention of the public is focused on labour issues, especially during collective bargaining, the labour court may be a target for political demonstrations, mostly outside the court building. Four years ago, however, hundreds of strikers belonging to the nursery schoolteachers' organisation invaded the courtroom and stopped a preliminary session. Although the action was dramatic, it posed little danger.

## *Criteria for lawful/unlawful industrial action*

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*A priori* most forms of industrial action are lawful. They are only unlawful if there is a legal reason why industrial action should not take place. The most important limitation on industrial action is the collective agreement. A collective agreement on wages and working conditions is normally interpreted as incorporating a peace obligation, which remains valid for the duration of the agreement. Parliament normally only interferes in the labour market by means of statutory provisions to prolong the validity of collective agreements, including the period of the peace obligation. Case-law interprets and completes collective agreements. The labour court has exclusive competence to decide whether industrial action is or is not lawful. Only if industrial action is deemed to constitute a violation of the Criminal Code are the ordinary courts competent to deal with the case.

# *Finland*

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Pekka Orasmaa, Vice-President, Labour Court

In Finland, the first collective agreements were concluded after the Second World War, and soon after such agreements became very common. Nowadays, terms and conditions of employment are agreed through collective agreements in all sectors of the economy. The terms and conditions of employment of state and municipal civil servants are agreed upon in collective civil service agreements.

In Finland, the degree of unionisation among workers, employees and civil servants is quite high. Approximately 80 per cent of the total of 2,060,000 salaried employees and wage-earners are covered by collective labour and civil service agreements. Correspondingly, all but very small employers belong to employers' organisations. Employers who belong to employers' organisations employ almost 80 per cent of all workers, employees and civil servants in the country.

Collective agreements are usually concluded in each branch of activity, so that one collective agreement governs the terms and conditions of employment of all the workers in the same branch. White-collar employees have their own collective agreements. In some fields, such as trade and commerce, collective agreements are also concluded by occupation. The periods covered by collective agreements are fairly short, usually one or two years.

More recently, in order to facilitate the conclusion of collective agreements, the practice has been to conclude broad incomes policy agreements, which aim to determine the general factors affecting employment relationships, such as social reforms, price policies and guidelines for taxation. Negotiations for the conclusion of incomes policy agreements, which are not considered to be collective agreements as such, are attended by the central organisations, other interested organisations and the Government. The objective is for the collective agreements in the various fields to comply with the incomes policy agreement, so that terms and conditions of employment, including wages and salaries, follow a similar pattern of development in the various sectors. Maintaining the various collective agreements within the limits of the incomes policy agreement has, however, proven to be problematic.

## *Legal framework*

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Finnish legislation does not include a specific provision guaranteeing the right to strike. The right to strike can, however, be deduced from the legislation on the basis of the principle that what is not forbidden is allowed. The Collective Agreements Act, of 7 June 1946, contains provisions respecting the forms of

industrial action that are forbidden. An *e contrario* deduction leads to the conclusion that other forms of industrial action are permitted.

Under the Collective Agreements Act, associations and employers that are parties to or otherwise bound by a collective agreement are under an obligation to refrain from unlawful industrial action. These associations or employers may not arrange or take part in unlawful industrial action. They are also under an obligation to ensure that their member associations of employers or employees do not undertake unlawful industrial action. The associations covered by a collective agreement are therefore under an obligation to refrain from unlawful industrial action and to ensure that their members do not breach the peace obligation.

The parties to a collective agreement are the employers' and employees' associations or individual employers who concluded the collective agreement, or who later joined the agreement with the consent of the other parties. Employers' and workers' associations which belong to an association that is a party to the agreement are bound by that agreement. Employers or employees who are, or have been, members of an association referred to above during the validity of the collective agreement, are also bound by the agreement.

The obligation to refrain from unlawful industrial action is set out in the Collective Agreements Act, although, subject to the sanctions provided for in the Act, the obligation does not apply directly to individual workers. Liability for action by individual workers lies with the associations to which they belong either directly or through another association.

The unlawful nature of industrial action does not in principle depend on the means used in such action. Finnish legislation is silent on the means of action which would constitute illegal pressure. Industrial action, however, presupposes some degree of concerted action that is related to employment relationships in general. Judicial practice has differed, for example, with regard to the question of whether a boycott of the purchase of the products of a company can be regarded as industrial action. The labour court has deemed such boycotts to be industrial action only if they effectively set out to influence the behaviour of clients.

## *The jurisdiction of the court*

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The labour court has exclusive jurisdiction over disputes concerning the legality of industrial action. The court also decides on sanctions for unlawful action. A collective agreement can stipulate that disputes involving a collective agreement, including breaches of the peace obligation, are to be settled by arbitration. This procedure has been agreed upon, for example, in the graphics industry and for power plants. The question of the illegality of industrial action can only be raised in a court of general jurisdiction as a preliminary issue in a dispute involving labour law.

## *Access to the court*

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Collective agreements can be concluded between employers' and employees' associations or between an individual employer and an employees' association.

The most important collective agreements are usually concluded between employers' and employees' associations. In the labour court, litigation takes place between the parties that have concluded the collective agreement. Cases relating to industrial action and to other matters handled by the labour court have to be brought by an association or employer that is party to the collective agreement. Associations that are parties to a collective agreement represent those who are bound by the collective agreements that they have concluded. Thus, if a strike involves an employer as a member of an employers' association, the association is responsible for bringing the action on behalf of the employer in its own name. However, the employers' association does not need the permission or consent of the employer member to bring the action. If the employers' association refuses to bring an action, an employer who is a member of the association has the right to start litigation in his or her own name. The employers' association may also grant a member permission to start litigation relating to industrial action.

The defendant in a case involving a violation of the peace obligation is always the association that is party to the collective agreement, or an individual employer who has concluded a collective agreement in his or her own name. The defendant appears both on his or her own behalf and on behalf of those who are bound by the collective agreement, but are not parties to it. Member associations, such as local trade union bodies which are bound by a collective agreement, cannot themselves defend an action brought for breach of the peace obligation. A member association can only be heard in a case that is before the labour court if claims are made directly against it. In such cases, the member association has the right to present statements and evidence at the trial. A corresponding procedure applies if an employees' association starts litigation relating to industrial action that has been taken by an employer who is a member of an employers' association.

It is not possible to bring claims in the Finnish labour court against an individual employee. Nor can third parties take part in the process before the labour court as intervenors or present claims for damages. The right of a third party to damages as a result of industrial action by employees or their associations has remained somewhat uncertain in both judicial practice and in jurisprudence. Actions that are brought in relation to industrial action are not governed by any specific procedural conditions.

The jurisdiction of the labour court in cases involving industrial action does not in principle depend on whether the underlying dispute is of a legal nature (a *rights* dispute) or of an economic nature (an *interest* dispute). However, the type of claim is important when considering the lawfulness of industrial action. In cases in which industrial action has arisen as a result of a dispute for which an independent action can be brought before the labour court, the original dispute may be handled at the same trial as the case involving the industrial action. It is not necessary to combine the two cases, but they may, at the discretion of the labour court, be tried separately.

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## *Composition of the court*

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The labour court is composed of the president, one member who does not represent the interests of either the employers or the employees and of two members from each interest group. In cases involving civil servants, the court

also includes two other members with special expertise in civil service matters. The labour court may also handle cases in a plenary session which is attended by all its permanent members. There is no change in the composition of the labour court between industrial action and other types of cases.

## *Interim measures*

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The labour court may decide a preliminary question or part of a complaint by issuing a separate (partial or interim) decision. However, the labour court may not issue interim orders or injunctions in cases of industrial action even if the industrial action is in progress.

## *Remedies*

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The sanction for a violation of the Collective Agreements Act is a compensatory fine. The fine is ordered in lieu of damages. The labour court cannot therefore impose other sanctions together with the fine. The fine is awarded to the party that has claimed it. Under the law, a party which has suffered property damage can claim the compensatory fine for itself, but in practice such cases have not arisen.

Under the Act, the maximum amount of the fine is 102,000 Finnish markkaa. Lower maximum amounts may be agreed upon in collective agreements. When imposing a fine, regard must be had to all the circumstances presented, such as the level of damage, the amount of responsibility, any contribution by the other party to the violation and the size of the association or enterprise. For special reasons, the court may decide not to impose a fine even if labour peace has been breached. In Finland, short strikes of a few days are quite common at individual workplaces. The average fine in such cases varies between 10,000 and 20,000 markkaa, depending on the number of participants and the duration of the strike.

## *Time-limits*

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There are no minimum or maximum time-limits with regard to the various phases of litigation before the labour court. Nor are there any requirements concerning the time-limit within which cases should be handled. Under the rules of procedure, cases involving current industrial action have to be handled on an urgent basis. In the cases decided in 1988, the average period for handling a case was 3.6 months, and 2.6 months in cases involving breaches of the peace obligation. Cases involving ongoing industrial action were handled much more expeditiously than other cases.

## *Enforcement of judgements*

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The labour court is both the first and the last instance in cases that fall within its jurisdiction. The judgement of the labour court is final and not subject to appeal. The Supreme Court may, however, quash a judgement by the labour court if it evidently conflicts with the law.

## *The role of the court*

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A threat to undertake unlawful industrial action may constitute a breach of the peace obligation. The threat of industrial action therefore constitutes sufficient grounds for bringing an action, for the unlawful nature of the planned industrial action to be determined and for those who are found guilty of the unlawful threat to be fined.

In cases involving ongoing industrial action, the strike or other action is often over before the judgement is issued, even if the case is handled on an urgent basis. However, if industrial action continues despite the judgement, the labour court may increase the amount of the fine on each subsequent occasion that an action is brought on the basis of the same industrial action.

The proportion of industrial action cases in the labour court's case-load changes every year. In 1985, 44 out of the total number of 165 cases involved industrial action; in 1986, the ratio was 61 out of 174; in 1987, 80 out of 203; and in 1988, 94 out of 189.

## *Criteria for lawful/unlawful industrial action*

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Under the Collective Agreements Act, in order to be unlawful, industrial action must be directed against a collective agreement in part or as a whole. Under the Act, industrial action is forbidden if it aims to revoke, amend or supplement the contents of a collective agreement. Industrial action has also been deemed unlawful in cases where the aim of the industrial action lies within the scope of matters that are covered by collective bargaining. If, on the other hand, it concerns matters that do not lie within the decision-making power of the employer, such as taxation procedures, legislation in general or matters which have not been agreed upon in a collective agreement, the industrial action is not deemed to be unlawful.

A collective agreement always contains a peace obligation. Such an obligation cannot be excluded by agreement. The parties to a collective agreement may, on the other hand, agree on a stricter, and even an absolute peace obligation. A peace obligation which is stricter than the requirement set out by law does not concern other associations or employers which are bound by the collective agreement, but have not subscribed to the supplementary peace obligation.

The scope of the peace obligation therefore depends on the contents of the collective agreement and covers only aspects agreed upon in the agreement. If industrial action is taken to support demands that fall outside the scope of the collective agreement, it is not directed against the collective agreement as a

whole or against its provisions. The peace obligation is in force only while the collective agreement is valid, although it is customary to agree that a collective agreement will remain in force until negotiations for a new collective agreement have been completed. When no collective agreement is in force, industrial action is lawful.

### *Lawful/unlawful action*

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In Finland, where the incidence of industrial action is relatively high, only a small proportion of such action comes up before the labour court. The aim is for the labour court to handle only the most significant industrial action. For example, in 1985 there were 840 incidences of industrial action, but decisions were handed down in only 44 industrial action cases. The ratio in 1986 was 1,220 to 6; in 1987, it was 800 to 80; and in 1988, 1,350 to 94.

Evaluation of the situation should take into account the fact that one judgement may concern more than one instance of industrial action, which would appear in statistics as separate instances, and that the figures for the total number of incidences of industrial action also include lawful action. The statistics include all industrial action irrespective of its duration or the number of participants.

The very significant role played by the judgements of the labour court in the development of judicial practice is due to the fact that the legal provisions respecting the lawfulness of industrial action are very scanty. It may be said that the line between a lawful and an unlawful work stoppage has been and continues to be drawn by the judgements of the labour court.

# Federal Republic of Germany

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Dirk Neumann, Vice-President, Federal Labour Court

In the Federal Republic of Germany, there are no statutory provisions governing industrial disputes. Although some statutory provisions refer to *industrial action, strikes and lockouts*, these provisions only regulate the consequences arising out of industrial disputes, particularly as regards the social security system. The gap in statutory provisions has been bridged by case law. Only a few months after its constitution, the Federal Labour Court made its first fundamental decision. It unequivocally held that "the freedom to engage in industrial action, the freedom to strike and the freedom to lock out does exist".<sup>1</sup>

Although in the beginning, without differentiating between employers and employees, the freedom to engage in industrial conflict was derived from history, recent court rulings have distinguished between the freedom to strike and the freedom to lock out. The right to strike is considered to be a necessary part of the constitutionally guaranteed autonomy of collective bargaining. Only by means of applying pressure on employers are employees in a position to establish the balance of power in negotiations that are needed for the conclusion of a collective agreement. It is assumed that employers do not need to initiate industrial action to bring the trade union to the bargaining table. As a consequence, employers only have the right to lock out if the opposing trade union is able to achieve a bargaining leverage by specific tactics in industrial action, such as a limited sectoral strike.<sup>2</sup>

In addition to strikes and the lockouts, *boycotts* are considered to be another *traditional* form of industrial action.<sup>3</sup> However, as they have been used only scarcely, they are of minor importance.

Until now there has not been any statutory limitation on the freedom to engage in industrial action. The 17th Act to supplement the Constitution, dated 24 June 1968 (the so-called "Emergency Constitution"), guarantees the freedom to engage in industrial action even in the event of a state of emergency (article 9(3) of the Constitution).

Nevertheless, the general rules of law also apply to industrial conflicts. Industrial conflicts are not privileged, and the courts apply the law of torts. As a consequence, the parties to an industrial conflict may be liable to damages. In 1973, the air traffic controllers' *work to rule (go-slow and go-sick)* was

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<sup>1</sup> Decision of the Large Senate of the Federal Labour Court (FLC)—GS 1/54 of 28 Jan. 1955, FLC reports 1, pp. 291-300.

<sup>2</sup> Federal Labour Court, Judgements of 10 June 1980—1 AZR 822/79—FLC reports 33, p. 140, and—1 AZR 168/79—FLC reports 33, p. 185.

<sup>3</sup> Federal Labour Court, Judgement of 19 Oct. 1976—1 AZR 611/75—FLC reports 28, p. 225.

deemed to constitute intentional injury to the employer, contrary to public policy.<sup>4</sup> Similar considerations apply to so-called *secondary industrial action*. The trade unions have a right to picket in front of strike-bound enterprises in order to appeal to the solidarity of non-strikers not to break the strike. But this right is exceeded if the enterprise is obstructed by actions resembling a blockade, which encroach upon the accepted right to conduct business without undue interference.<sup>5</sup>

For the duration of a collective agreement, industrial action is prohibited in relation to matters settled in the collective agreement. This is the main effect of the so-called "relative duty to maintain industrial peace"<sup>6</sup>. A special agreement between the parties is necessary to establish an absolute duty to maintain industrial peace. These agreements frequently include voluntary mediation agreements.

The procedure by which employers' and employees' associations decide to call for industrial action is regulated by the associations themselves in exercise of their autonomy through "guidelines concerning industrial action".

In addition, industrial action may only be initiated if all existing possibilities to reach consensus have been exhausted (the so-called principle of *ultima ratio*).<sup>7</sup> However, the significance of this principle should not be overestimated. According to recent court rulings, the principle of *ultima ratio* does not require a formal declaration of the breakdown of negotiations. The initiation of industrial action lies within the unrestricted and unverifiable powers of a party to the collective agreement, if that party considers that the opportunities for negotiation have been exhausted.<sup>8</sup>

## *Courts and jurisdiction*

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According to section 2(1)(2) of the Labour Courts Act (LCA), the labour courts have exclusive jurisdiction over "civil proceedings between parties having the capacity to bargain collectively or between such parties and third parties in connection with unlawful acts, in so far as the case relates to measures taken for the purposes of an industrial dispute". Other courts only have jurisdiction concerning marginal matters. For example, the administrative courts have jurisdiction if a civil servant refuses to break a strike to come to work.<sup>9</sup> The general courts have jurisdiction over strike actions that are led, not by trade unions but by other associations of employees that do not have the capacity to be a party to a collective agreement<sup>10</sup> or in the event of disputes between trade unions and their members concerning expulsion.

<sup>4</sup> Federal High Court of Justice, Judgement of 31 Jan. 1978—VI ZR 32/77—FHC reports 70, p. 277.

<sup>5</sup> Federal Labour Court, Judgements of 20 Dec. 1963—1 AZR 428/62—FLC reports 15, p. 211, and 21 June 1988—1 AZR 651/86—and 8 Nov. 1988—1 AZR 417/86.

<sup>6</sup> Federal Labour Court, Judgement of 21 Dec. 1982—1 AZR 411/80—FLC reports 41, p. 209.

<sup>7</sup> Federal Labour Court, Judgement of 12 Sep. 1984—1 AZR 342/83—FLC reports 46, p. 322.

<sup>8</sup> Federal Labour Court, Judgement of 21 June 1988—1 AZR 651/86.

<sup>9</sup> Federal Administrative Court, Judgement of 10 May 1984—2C 18.82—FAC reports 69, p. 208.

<sup>10</sup> Federal High Court, Judgement of 31 Jan. 1978—VI ZR 32/77—FHC reports 70, p. 277.

## Access to courts

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Everybody is guaranteed access to the courts, and therefore anybody who asserts that an industrial conflict encroaches on his or her rights may take legal action. The Federal Labour Court has overruled its previous restrictive decisions, under which only a directly strike-bound employer, but not his or her association, may apply for an injunction to prevent a trade union calling a strike. According to recent court rulings, the parties to a collective agreement may apply in their own right to restrain the other party from unlawful industrial action.<sup>11</sup> The law does not require mediation before legal action is taken. However, peace agreements or so-called *non-victimisation clauses* are generally concluded following industrial conflict to settle the consequences of the conflict, especially by renouncing any legal actions that are pending.

The rules of procedure do not differentiate between the objectives that may be pursued by unions in industrial action. However, this distinction is of great importance in substantive law. According to court rulings, industrial action is only lawful if it is carried out in respect of demands, particularly relating to improvements in working conditions, which may be settled by collective agreement.<sup>12</sup>

## Composition of the court

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The bench is always composed of professional and honorary judges. No exceptions are made for cases relating to industrial action.

## Interim measures

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Interim measures can be taken by the labour courts, although there are no exceptions for cases involving industrial action. However, in some instances it may be difficult to make a decision in a summary procedure and within a short time on extremely controversial issues of law that may have serious consequences. According to the rules of procedure, the applicant has to present *prima facie* evidence for, on the one hand, the unlawfulness of the industrial action (the so-called *entitlement to an interim order*) and, on the other hand, within a balancing of interests, for the need to stop the industrial action (the so-called *reason for an interim order*). Although historically little attention used to be paid to the balancing of interests, the economic damages that may be caused by industrial action now require the clear predominance of the interests of the applicant. If the legal situation has not been the subject of a ruling by the Federal Labour Court, a stalemate of interests has to be assumed which makes it impossible to issue an interim order. A ruling cannot be made by the Federal Labour Court on procedural questions, since appeals against interim measures can only be made up to the labour court of second instance.

<sup>11</sup> Federal Labour Court, Judgement of 26 Apr. 1988—1 AZR 399/86.

<sup>12</sup> Federal Labour Court, Judgements of 5 Mar. 1985—1 AZR 468/83—FLC reports 48, p. 160, and 10 Jan. 1988—1 AZR 219/86.

## *Relief*

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Appeals to courts of second instance are admitted against judgements by courts of first instance. The Higher Labour Court may grant leave to appeal against its judgements to the Federal Labour Court on questions of law. In cases relating to industrial conflicts, appeals are admitted against denials of leave to appeal on questions of law on the grounds of the fundamental importance of the legal issue.

## *Time-limits*

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Specific statistics are not available concerning legal actions relating to industrial disputes. However, by way of illustration, reference may be made to the industrial conflicts in the metal industry in the early summer of 1984. The judgements of the courts of first instance were made in the summer and autumn of 1984, those of the Higher Labour Courts in the spring and summer of 1985, and the decisions of the Federal Labour Court were handed down in the period between December 1986 and the summer of 1987. In this case, the duration of proceedings in the third instance relating to industrial action therefore ranged from ten to 26 months. If necessary, in interim procedures, the court is able to decide within a few hours. In urgent cases, the presiding judge may grant an interim injunction without hearing the defendant (section 944, Code of Civil Procedure).

## *Enforcement of judgements*

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Unless the court explicitly excludes execution of its order, all judgements are provisionally enforceable. If the representatives of a trade union, appointed according to its articles of association, are ordered to refrain from industrial action, they are subject, in accordance with section 890 of the Code of Civil Procedure (which is applicable to all civil legal actions), to an administrative fine of DM500,000, or to imprisonment for up to two years for each infringement of the judgement.

## *The role of courts*

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Although, under the legal system in the Federal Republic of Germany, the courts are authorised to prevent the outbreak of industrial action, in fact they have only a minor immediate influence on its course. The parties to an industrial conflict rarely apply for an injunction. However, the indirect influence of the courts should not be underestimated, since the parties to an industrial dispute are aware that they may be sued for damages after the industrial action has ended.

Cases relating to industrial disputes constitute an insignificant percentage of all legal actions. Moreover, they arise at irregular intervals. Whereas in the period from 1981 to 1986 only a few cases were decided, the Federal Labour Court made 26 judgements in 1988. The outbreak of industrial action may result in a very heavy workload for the courts of first instance. For example, in the industrial conflict of 1984, the trade unions initiated legal action in support of thousands of locked-out employees and paralysis of the courts was only prevented by the identification of model cases.

### *Criteria for lawful/unlawful industrial action*

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The significance of the by-laws of associations in evaluating the lawfulness of industrial action is controversial. A decision by the Federal Labour Court is still awaited. The opinion is widely held that violations of the association's own rules only have legal effect within the association. For example, a strike-bound employer should not be able to apply for an injunction on the grounds of the association's by-laws, for example by arguing that a strike ballot prescribed by the by-laws has not been held.<sup>13</sup>

As explained above, there is a relative duty to maintain industrial peace for the duration of a collective agreement. The extent of this duty is restricted by the matters covered by the collective agreement. This means that industrial action is not excluded if it is directed towards the conclusion of a collective agreement on matters not covered by the collective agreement that is in force.<sup>14</sup>

If, on the contrary, an absolute duty to maintain industrial peace is established in an agreement, such as a mediation agreement, even preparatory acts to industrial action, such as calling a strike ballot, may be inadmissible.<sup>15</sup>

Although in the past they were very reserved, over the past ten years employers' associations and trade unions have increasingly turned to the courts for decisions on controversial questions of law respecting industrial action. For example, the trade unions recently tried, on the basis of the Constitution of Hessen, to obtain a prohibition of lockouts by Hessian employers in the metal industry. Several employers' associations also applied for an injunction against blockades and warning strikes lasting a few hours.

In addition to prohibitory and declaratory actions by parties to collective agreements, actions for financial compensation take on particular importance. Unions usually make wage claims following lockouts which are not compatible with the principle of commensurability. Employers whose establishments are crippled by solidarity strikes or by a lot of strikes, sue striking trade unions and the responsible union officials for damages. Cases are also brought by employees who have disregarded warnings by their employers, and whose actions are recorded in personal files concerning participation in industrial action.

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<sup>13</sup> Labour Court of Düsseldorf, Judgement of 21 Aug. 1972—7 Ca 1995/71—in *Der Betrieb* 1973, p. 876.

<sup>14</sup> Federal Labour Court, Judgement of 21 Dec. 1982—1 AZR 411/80—FLC reports 41, p. 209.

<sup>15</sup> Federal Labour Court, Judgement of 31 Oct. 1958—1 AZR 632/57—FLC reports 6, p. 321.

Criteria for judging the lawfulness of the various forms of industrial action have been derived by the court mainly from the function of industrial action in assisting free negotiations. In order to guarantee an approximate balance of power in negotiations between employers and employees, the courts have partly neutralised the use of lockouts by requiring *proportionality* between the number of employees concerned by the lockout and the number of striking employees.<sup>16</sup>

Industrial actions with objectives that cannot be covered by a collective agreement are unlawful. These include: strikes intended as a political demonstration;<sup>17</sup> sympathy or solidarity strikes intervening in the industrial dispute of a third party;<sup>18</sup> *wildcat* strikes which are not led by a trade union;<sup>19</sup> and, finally, strikes which are aimed at provoking a withdrawal of the measures taken by employers or at supporting demands for employee representation and co-determination, which are to be decided by the courts or by boards of conciliation in the event of disputes.<sup>20</sup>

Due to the lack of courage of the legislator, the Federal Labour Court has been forced into the role of substitute legislature. In so doing, its case law has been developed into a dogma which the legislator could not ignore if codification were to be contemplated. Because of the legislator's inactivity, the Federal Labour Court has encouraged the parties to collective agreements to constitute a collectively agreed system for the regulation of industrial conflicts, which would have priority over case law.<sup>21</sup>

However, the parties to collective agreements have not responded to this initiative. They clearly expect more from case law. But this does not mean that they passively await decisions. The content of the law is hotly contested. All possible means of influencing the jurisdiction are used. By way of illustration, in recent years, one of the parties has on several occasions withdrawn its appeal or deprived the plaintiff of the grounds for the action a few hours before a significant decision is due to be taken. The aim has clearly been to prevent a negative decision against the withdrawing party.

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<sup>16</sup> Federal Labour Court, Judgement of 12 Mar. 1985—1 AZR 636/82—FLC reports 48, p. 195.

<sup>17</sup> Decision of the Large Senate of the FLC of 28 Jan. 1955, FLC reports 1, pp. 291, 300.

<sup>18</sup> Federal Labour Court, Judgements of 5 Mar. 1985—1 AZR 468/83, FLC reports 48, p. 160, and 12 Jan. 1988—1 AZR 219/86.

<sup>19</sup> Federal Labour Court, Judgement of 14 Feb. 1978—1 AZR 76/76—FLC reports 30, p. 50.

<sup>20</sup> Federal Labour Court, Judgements of 17 Dec. 1976—1 AZR 772/75—FLC reports 28, p. 295, and 7 June 1988—1 AZR 372/86.

<sup>21</sup> Federal Labour Court, Judgement of 10 June 1980—1 AZR 168/69—FLC reports 33, p. 185.

Stephen Adler, Judge, National Labour Court

The labour court and the general courts have held that the ability of employees to strike is a basic liberty in Israel. It is a liberty and not a *right* because there is no law granting such a right. The significance of it being a liberty and not a right is that the Knesset may limit a liberty. Most collective agreements limit the union's ability to strike during the duration of the agreement.

*Strikes* have been defined by case law as any change in *regular* work, including: full or partial work stoppages; "slow-downs"; work to rules; and the refusal to work overtime. For a strike to be granted the protections of the various laws described below, the labour court has defined the term *strike* broadly. However, in a recent Supreme Court decision, an *obiter dictum* stated that a strike not called by an authorised union body (the workers' committee is generally not authorised by the union by-laws to declare a strike) may not be granted the protections of the various laws. This concerned an appeal related to the Government Employees' Disciplinary Tribunal, which is outside the jurisdiction of the labour courts. The labour courts have not yet ruled in this matter.

Unions and workers who participate in strikes are protected by various laws. Section 62(b) of the *Civil Wrongs Ordinance (New Version)* prevents legal actions being brought against unions which strike and employers who lock out, where the cause of action is the tort of "inducing a breach of contract". Section 24 of the *Collective Agreements Law* grants a union or employers' organisation immunity from claims for damages relating to a strike that is in violation of a collective agreement. An exception to this rule occurs if a general collective agreement expressly makes the parties liable for damages; however, the author knows of no such clause in a collective agreement. Section 19 of the *Collective Agreements Law* states that participation in a strike is not a violation of an employees' individual labour contract. Section 4(b) 4 of the *Annual Leave Law* states that strike days do not break the continuous work period which determines the number of days of vacation to which a temporary worker is entitled. Section 5(6) of the above Law states that an employer may not declare strike days as vacation. The *Severance Pay Law* (section 2(6)) states that strike days do not break the continuous work period which determines the amount of severance pay to which the worker is entitled. The *Discharged Soldiers (Reinstatement in Employment) Law* requires employers to rehire permanent workers who are drafted into the army. Whether a worker is *permanent* depends on how long he or she worked continuously for the employer prior to serving in the army. Strike days do not break the continuity of the work period.

## *Lockouts*

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The labour court has not referred to the employers' "liberty" to lock out employees. There is no law governing which lockouts are permissible, and all rules in this matter have been determined by case law. There are, however, laws which protect employees who strike or are locked out.

The labour court has held that an employer may not lock out his or her employees as an offensive act. Only defensive lockouts have been declared permissible. However, there is no decision regarding an *economic* lockout. The labour court case which made defensive lockouts legal held that if the employees participate in a partial strike, the employer may refuse to accept this type of labour, which is different from the type of labour that has been contracted, and may therefore close the plant.

## *Limitations on the liberty to strike*

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Until 1969, the Israeli Parliament placed no limitations on strikes. Since then a number of laws have been passed, mainly concerning the procedure a union must follow prior to a strike. Section 5A of the *Settlement of Labour Disputes Law*, added to the Law by an amendment in 1969, requires a union to give notice of a labour dispute to the Chief Labour Relations Officer of the Labour Ministry and to the employer 15 days before going on strike. This *cooling-off* period enables mediation or arbitration to take place with a view to settling the dispute. The Law sets no penalty for failure to give such notice. Notice may only be given by a party to a collective bargaining agreement; workers' committees may not give such notice or conduct a legal strike. Section 37A-E of the same Law, added to the Law by an amendment in 1972, relates only to strikes in the public sector. A strike which is not authorised by a union or violates a collective agreement is an *unprotected strike*, meaning that it is not protected by the law. The by-laws of many unions require a strike to be approved by a decision-making body of the union.

## *Courts and jurisdiction*

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The labour courts have exclusive jurisdiction over collective disputes between unions and management regarding a legal issue. Economic disputes are not adjudicated. The labour courts' jurisdiction includes requests for injunctions to stop a strike, requests to declare a strike *unprotected* or in violation of a collective agreement, and contempt of court actions if a workers' committee member violates a court order.

Tort actions, in which a third party injured by a strike requests monetary damages against a workers' committee or individual strikers, do not come under the jurisdiction of the labour court. Such cases are adjudicated in the regular civil courts.

## *Access to the court*

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The parties to a collective agreement, or a legal body capable of being a party to such an agreement, may be parties to a collective dispute. This excludes workers' committees, who may attend hearings as additional parties with the right to make their position known. An employer or employers' organisation may bring action to obtain an injunction against a strike. An employer or union may bring action for the interpretation of a collective agreement.

One novel action which is looked upon as a positive method of settling collective disputes is for the employer and union to bring a joint action requesting interpretation of the collective agreement. This type of joint action is infrequently used, despite encouragement by the labour courts of such proceedings. There are no prerequisites for filing a collective action, although there are special Civil Procedure Rules governing collective dispute hearings. The petition must include an affidavit setting forth the relevant facts and containing copies of the relevant collective agreements. An answer must be filed by the defendant within ten days and the hearing is held immediately after the answer has been filed.

Collective disputes are generally heard by regional labour courts, and appeals are made to the national labour court. In the rare event of a nationwide strike or a dispute relating to a nationwide collective agreement, the case is heard by the national labour court, as the first and final instance. Appeals cannot be made against decisions of the national labour court. This is one of the rare cases in Israeli law where no appeal may be made against the decision of the court of first instance. The reason for this unusual situation is the need for speed and finality in settling nationwide collective disputes.

It should be emphasised that only legal issues are adjudicated in the courts. Economic questions are not settled by the courts; they are handled through collective bargaining, mediation and arbitration. The Government (as employer) and the Histadrut (as the union representing most government employees) agreed in a collective agreement to establish a permanent arbitration body to adjudicate collective disputes in the public sector. This body has existed since 1977 and its members are appointed for long terms. Three members hear each arbitration and its decisions are published. This is referred to as "agreed-upon compulsory arbitration", which is a contradiction in terms, although in effect the body only hears arbitrations in which the parties agree that the case should be heard. This body has not been used frequently, but has had success in settling most of the disputes brought before it.

## *The composition of the court*

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The labour courts are generally composed of professional judges and public representatives. For trials, there is one judge, one representative of labour and one employers' representative. For appeals there are three judges, one representative of labour and one employers' representative.

The parties to a trial which does not concern a collective dispute may request that the trial be held before the professional judge without public representatives. However, the public representatives have to sit in cases relating to collective disputes and have no right to waive their presence. For cases relating to nationwide and important collective disputes which appear before

the national labour court, labour court law requires four public representatives and three judges.

## *Interim measures*

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Interim measures are one of the most important aspects of the labour courts, since they can determine the outcome of a dispute. The labour court has the power to grant temporary injunctions to stop or prevent strikes or lockouts. This power is set out in labour court law. Another interim measure, used infrequently, is to issue a temporary declaratory judgement. Thus, for example, the court may declare as a temporary declaratory judgement that a strike is unlawful or in violation of a collective agreement.

The case law of the national labour court requires the following to be considered when deciding whether to grant a temporary injunction:

- Does the plaintiff have a reasonable chance of winning the suit? Is there a *prima facie* case that the strike violates a law or collective agreement?
- What damage will be caused to each side by granting or refusing to grant an interim order? Can such damage be compensated in the final judgement?
- Has the strike been declared official by the union, or is it a wildcat strike? In the first instance the tendency is not to grant interim relief, although it is generally granted in the second.
- Will the public be caused irreparable or great injury by the strike or lockout?
- Has the union given the mandatory 15-day period of *cooling-off* notice?

## *Relief*

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The labour court may grant any final relief which may be granted by regular courts, including injunctions and declaratory judgements.

## *Time-limits*

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Collective disputes have priority in terms of the case being heard and decided. Special procedural rules facilitate a quick hearing. Often, a case for interim relief in a collective dispute is heard on the day (or evening) that the case is filed, and a short decision is given at the conclusion of the hearing. Such decisions are often incomplete, indicating only the result and an outline of the reasons; the full reasoning is provided shortly thereafter.

The special procedural rules for collective disputes (not including applications for interim relief) require the hearing to be held immediately after the ten-day period, during which the defendant has to file an answer to the charges that have been made. Hearings continue as necessary and the decision, which has priority, is generally given within a few days to two weeks after the conclusion of the hearing.

## *Enforcement of judgements*

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Labour court judgements are enforced in the same manner as those of the regular courts. The parties have to turn to the Enforcement Office for this purpose. In the event of failure to carry out injunctions or other non-monetary court orders, an application may be made for the violating party to be held in contempt of court. This involves a *quasi-criminal* hearing, in which the public representatives do not participate. The labour court does not encourage such actions and tries to convince the violating party to honour the court order. If the violation continues, the court fines the party that is held to be in contempt of court. The fine is generally low at the outset, but gradually increases if the violation continues.

The approximately 1 per cent of cases in which a labour court injunction is not obeyed are given exaggerated and sensational publicity. Unfortunately, the other 99 per cent of cases where the injunction is obeyed receive little public attention. However, among those who are trained and experienced in labour relations, filing a claim with the labour court is considered to be an effective method of settling a dispute or returning the parties to the bargaining table.

The labour court sees its role in collective labour disputes as convincing the parties to continue or resume negotiations and to suspend strikes or lockouts. The labour courts have been very successful in this connection. Another important role of the labour courts in collective disputes is to interpret collective agreements or give decisions in other matters which have caused a labour dispute. Thus, the court hearing is an alternative to a strike. Although hearings of cases relating to collective disputes form only a small percentage of the labour courts' workload, they are very time-consuming and constitute a burden on the courts' schedule. The procedural aspects of hearings in cases of collective disputes are also a burden for the court administration, which must make quick arrangements to hold the hearing and to process the documents that have been filed.

## *Criteria for lawful/unlawful industrial action*

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The statutory provisions respecting the ability to strike have been mentioned above. Statutory provisions do not inhibit a union's ability to strike in the private sector, where the only limitation is the 15-day period of cooling-off notice by the union prior to the strike. Unions have no problem fulfilling this requirement and its effect has not been to make strikes illegal, provided that they are not prohibited in the collective agreement, but to encourage mediation during the 15-day cooling-off period. Mediation often succeeds and the strike is avoided.

In the public sector, strikes that have not been given the union's official approval (that is, strikes by workers' committees) and strikes in violation of a collective agreement are *unprotected strikes*. The legal remedy for such strikes is not clear, although the general remedy tends to be an injunction. The most frequent and desirable conclusion of hearings in such cases is an agreement by the parties to resume negotiations and end the strike. In the public sector it is possible to fine workers' committee members. Collective agreements often contain no-strike undertakings, which may be general and all-encompassing or

specific and limited. The labour court has held that there is an implied no-strike clause in collective agreements.

## *The significance of judgements*

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The basic policy not to limit strikes has been influenced by the high percentage of union organisation (70 per cent of the working population) and the strength of the Histadrut, the main trade union. Since 1969, the Knesset has placed slight limitations on strikes in the public sector. The labour court has played an important role in implementing the policy adopted by the Parliament. Its most important role has been to set and develop rules concerning the behaviour expected from the parties in a collective dispute.

The labour courts have been a driving force in convincing the parties involved in collective disputes to return to the negotiating table and end strikes. Another important contribution of the labour courts to industrial relations has been the interpretation of collective agreements. The labour courts have, therefore, constituted an alternative method of settling disputes without resorting to industrial action. Three nationwide general strikes have been avoided at the last minute through night-time hearings by the national labour court.

The labour courts have been in existence for 20 years. During this time their judgements and behaviour have had a significant impact on Israeli labour relations. Rules and norms have been established and publicised regarding the way parties may conduct strikes or lockouts. Also, the parties have been encouraged to settle disputes through negotiation rather than court orders.

On the other hand, it should be noted that there is a tendency on the part of management in the public sector to respond to union demands and impasses in negotiations by seeking court orders. The labour courts' reaction has been to exercise caution and to pursue a policy of minimum intervention. The main problem in Israeli industrial relations has been unauthorised strikes in the public sector. The labour courts have followed the expressed wish of the Parliament that these strikes should be limited. However, reduction of wildcat strikes in the public sector also depends on a strong and consistent government policy and the unions' ability to control workers' committees and their rank-and-file members. Although strikes can be settled by the courts and industrial peace guaranteed for short periods of time, the underlying issues causing the dispute have to be settled by the parties themselves through free collective bargaining.

# Norway

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Stein Evju, President, Labour Court

The right to take industrial action is neither granted in the Constitution nor explicitly guaranteed in legislation as a *right*. It is a *freedom* traditionally inferred from the law of contracts and from the principle that what is not forbidden is allowed. It is now held by the legislator and by the courts to be a basic liberty. As such, it may none the less be limited by the Stortinget (Parliament) by means of legislation, which does not occur infrequently in disputes involving interests and through collective agreements.

The freedom to engage in industrial action is implied in the labour disputes legislation, namely the Labour Disputes Act, 1927 (LDA), and the parallel Public Service Labour Disputes Act, 1958 (PSLDA). There have only been minor changes in the legal provisions in this field since the initial Labour Disputes Act of 1915, which was in turn based on the solutions adopted by the social partners in earlier collective agreements. In addition, various laws contain provisions on the status and the continued employment relationship of workers participating in industrial action, even though the legal situation in this respect has not yet been fully clarified.

*Industrial action* is a general concept in Norwegian labour law, covering *strikes*, *lockouts* and *other industrial action*. *Strikes* and *lockouts* are, in legislation and in case law, defined as measures involving full stoppages of work (by all or some of the employees in the establishment(s)). The open category *other industrial action* covers action such as go-slows, *working to rule*, and overtime bans. In essence, the element of concerted action and its purpose is decisive, rather than the form of the action. A decision or threat to take action of any type falls within the category *other industrial action*.

Action by workers, employers, and their respective organisations is judged on an equal footing. A basic principle of the legislation and case law is that of *reciprocity*: the scope of the freedom to engage in industrial action is the same for either party. There are therefore no specific restrictions on the use of actions such as lockouts by employers as an initiating or offensive weapon. The basic limitation on the freedom to engage in industrial action is the (statutory and contractual) *peace obligation*. Generally, the peace obligation is *relative*, applying to the parties that are bound by a collective agreement for the duration of that agreement and in relation to matters settled in the agreement.

Secondary, or *sympathy* action is also lawful, since action in support of a party to a lawful (domestic or foreign) dispute of interests does not ordinarily contravene the peace obligation. Furthermore, a certain freedom to engage in political demonstration action (in practice, political strikes) of a short duration has been recognised by case law.

“Blocking” is a traditional form of supporting action involving measures to prevent an enterprise which is affected by industrial action from recruiting

labour or preventing workers who are participating in industrial action from obtaining other jobs. Blocking is lawful when performed in conjunction with a lawful strike or lockout.

Picketing is one form of blocking. It is lawful as long as it is not carried out in violation of the general rules of law relating to disturbing the peace and the use of violence or force. The same applies to secondary picketing.

A technical distinction is made in Norwegian law between *boycotts* and *industrial action*. In simple terms, action by one party to a labour dispute cannot be deemed to be a boycott in relation to the opposite party. However, action by outsiders may be considered to be a boycott. This may be significant in relation to secondary action, with the exception of straightforward sympathy strikes or lockouts. The legality of boycotting is governed by separate legislation (the Boycotting Act, 1947) which is not confined to labour matters. This Act is of little practical importance today.

Before entering into a strike or a lockout (including sympathy strikes and lockouts) in a dispute of interests, notice must be given to the opposite party and to the National Mediator. The PSLDA stipulates a mandatory cooling-off period (14 days, at the outset); the LDA authorises the National Mediator to impose a cooling-off period. In both cases, the parties are obliged to submit to mediation, and are prohibited from engaging in industrial action during the cooling-off period and until the mediation has been terminated. In fact, mediation is not terminated until four days after a demand for its termination by one of the parties. The cooling-off period is therefore extended beyond the minimum time-limit for as long as the parties do not insist otherwise. Failure to give notice or failure to respect the ban on industrial action during the cooling-off period renders the strike or lockout illegal.

No other specific procedural prerequisites apply to industrial action. There are no particular restrictions as to who may call or engage in industrial action. The by-laws of trade unions and of employers' associations may, and commonly do, require a decision or approval by a certain body of the organisation. Such provisions are, however, in principle considered to be *internal* and not of consequence to the lawfulness of industrial action, unless otherwise stipulated in collective agreements.

## *Courts and jurisdiction*

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The labour court has exclusive jurisdiction in collective disputes between trade unions and employers or their associations over whether industrial action (primary and secondary) is lawful and over sanctions for violating the peace obligation. Applications for injunctions to stop industrial action lie within the court's jurisdiction, although not exclusively.

Disputes regarding the legality of boycotting are governed by separate legislation and are therefore adjudicated in the ordinary courts. The same applies to disputes relating to individual employment relationships, such as the dismissal of workers who have taken part in industrial action, *third party* suits and matters covered by criminal law, including alleged criminal law violations while picketing. In such cases, the ordinary courts can only make an assumptive assessment of the legality of industrial action, but cannot formally decide whether or not it is lawful.

## *Access to courts*

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Initially, only the parties to a collective agreement, namely a trade union and an employer or an employers' association, may act as plaintiffs and defendants in labour court cases. In cases relating to the legality of industrial action in a dispute of interests which is not covered by a collective agreement, the parties before the court are the parties to the disputed interests.

In the labour court, the parties (trade unions, employers' associations) appear and act in their own name as well as on behalf of their members (subordinate organisations, individual workers or employers). A case relating to the lawfulness of industrial action must be brought against the relevant organisation, regardless of whether the action was called for or conducted by the organisation or its members. If the suit is confined to the question of lawfulness, the individual members involved may not appear in court as parties.

However, claims may also be filed against members: examples might be a claim to invalidate an employer's decision or against workers for the payment of damages. In such cases, the members concerned also have to be sued as well as the organisation, and they therefore have the right to appear in court as defendants.

Third parties who are injured by industrial action are not allowed to file suits with the labour court, nor may they act as intervenors. In practice, third party actions to recover damages are extremely rare and come under the jurisdiction of the ordinary courts.

The LDA and the PSLDA provide that dispute bargaining on the legal issue has to take place between the (higher) parties before a suit can be filed with the labour court. This requirement also applies to industrial action disputes. The organisations normally meet and bargain very quickly, within one or two days, if industrial action is called or has been taken, in order to avoid any delay in litigation if the dispute is not solved by bargaining.

## *Jurisdiction*

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The jurisdiction of the labour court is confined to collective disputes concerning rights. Disputes concerning interests (economic disputes) are handled through collective bargaining, mediation and possibly arbitration, but are not adjudicated. Legal issues arising out of or in conjunction with economic disputes, such as whether industrial action is lawful, come within the jurisdiction of the courts and are handled in the same way as other cases.

## *Composition of the court*

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The composition of the courts in industrial action cases is no different from other cases. All labour court cases are decided by the full seven-member court (three professional judges and four lay members). This also applies to interlocutory injunctions. In contrast, in the ordinary courts of first instance, applications for injunctions are decided upon by a single professional judge.

## *Interim measures*

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It is a moot point as to whether interlocutory injunctions, such as those to halt industrial action, may be granted in collective labour rights disputes. As yet, interim measures have never in practice been applied in such cases and the issue has not been decided by the labour court.

The LDA and the PSLDA contain no relevant provisions on interim measures. General provisions respecting interlocutory injunctions are set out in the laws on ordinary civil procedure. Applying the latter to collective labour disputes presents a number of problems. In the first place, a request for an injunction should be decided by the court before which the substantive issue is pending. If a suit has not been filed on the substantive issue, the local ordinary court of first instance is responsible for handling an application for an injunction. Appeals then lie with a Court of Appeal and not with the labour court. In effect, this means that the procedure and handling of an injunction wholly departs from the procedure normally applicable in collective labour rights disputes and would therefore, in a sense, encroach on the exclusive jurisdiction of the labour court. In any event, the use of such general provisions would give rise to a series of technically complicated procedural problems that have yet to be resolved, and are best left aside here. The substantive question is no less important: should the courts intervene, and be allowed to intervene, in labour relations law by way of interim measures in view of the effect that this may have on the balance of interests and on the position of those involved in collective disputes?

The legal issue has not yet been resolved. However, judging by recent developments, it seems likely that it will come up for decision by the labour court in the not too distant future.

The fact that the issue has not yet been put to the test, and that interim measures have not been applied, is undoubtedly due to the manner in which industrial action disputes are normally handled. One feature of the handling of these disputes is the time factor and another is the way in which suits are filed. If industrial action is called or embarked upon and the action is alleged to be unlawful, the practice is to immediately file a suit with the labour court for a declaratory judgement. A judgement by the court declaring the action to be unlawful implies an obligation for all those concerned (organisations *and* their members) to refrain from or halt the action forthwith. If so requested by the plaintiff, the court may include a statement to this effect in its judgement. A judgement of this kind is, strictly speaking, not a formal and enforceable order to resume work (or to reinstate workers, as the case may be). In practice, however, such a judgement is almost always complied with and therefore has the desired effect without further ado. The prospect of subsequent liability for damages is of importance in this context.

## *Remedies*

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The remedy that can be applied is damages. Organisations, as well as their individual members, who call for or participate in unlawful industrial action are liable for damages. Organisations may also be liable if they do not take sufficiently active steps to forestall or terminate unlawful action by their members.

Damages can only be awarded for actual financial loss. There is no such remedy as a compensatory fine or general compensation. The labour court also has the power, based on the circumstances of the case and of the parties (LDA, section 5), to reduce the amount of the award below the loss that has been incurred. This is particularly important in the case of individual workers who are held liable for damages. The prevailing practice is to limit the amount paid by each worker to a specified amount, thereby approximating the sanction of damages to a fine. In many cases, this has the effect that the loss that has been incurred is not fully recovered.

### *Time-limits*

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Cases concerning the lawfulness of imminent or ongoing industrial action are handled by the labour court as urgent cases. When receiving the writ, which is normally a claim for a declaratory judgement, the president will immediately contact the plaintiff and the defendant(s). Following consultations with the parties, a date is set for the hearing when the writ is served on the defendant(s), or shortly afterwards. Normally, the hearing is held within five to ten days of receiving the writ, and a full, final decision is handed down on the day of the hearing or within the next one or two days. The total time that elapses has, in certain cases, been only four days.

### *Enforcement of judgements*

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Labour court judgements are final and immediately enforceable in the same manner as those of the Supreme Court. However, no contempt of court remedy is available. Monetary orders may to some extent be directly enforced by the parties (by deduction of wages, etc.), who may also turn to the Enforcement Office.

### *The role of courts*

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The expediency with which suits are handled by the labour courts (and with which they have to be handled in accordance with labour disputes legislation) is undoubtedly an important factor in industrial action cases. The court's influence in this respect may have increased over the past decades. More often than not, the labour court is able to handle a case and give its judgement on the lawfulness of industrial action before the action is actually taken. Moreover, the president of the court can intervene prior to a hearing. There is no formal procedure regarding preliminary meetings in such cases. If, however, a suit is filed concerning industrial action which is due to commence within a short period, it is quite often possible, through consultations with the parties, to reach an agreement at least to postpone the commencement of the action until the case has been heard and a judgement handed down on the lawfulness of the action.

Nor should the indirect influence of the labour court be underestimated. The weight of existing case law as well as the prospect of being sued for damages are both significant when the parties are considering whether to call or take industrial action, and particularly in relation to how organisations respond to industrial action that has been called or taken by members ("wildcat" actions).

Unlawful industrial action only accounts for a small proportion of the total number of cases taken to the labour court each year. They are an intrinsic part of the court's jurisdiction and are not considered a workload problem. As a rule, such cases are no more time-consuming than any other case; indeed, they are often less so and, as indicated, they are handled quickly. The hearing of cases may at times give rise to some practical problems, but these are of minor general importance.

### *Criteria for lawful/unlawful industrial action*

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In Norwegian labour law the peace obligation has a dual basis. It is provided for in the labour disputes acts (LDA, section 6, PSLDA, section 20) and is also considered to derive from a collective agreement, whether explicitly stated in the agreement or not. The scope of the peace obligation is the same on both grounds. It is not possible for the parties to agree on a less extensive peace obligation than that laid down in legislation. However, a stricter or even absolute peace obligation may be agreed upon which is binding on the parties to the collective agreement and on the members of organisations that are covered by the agreement. Clauses to this effect are, however, extremely rare in collective agreements. The exception is clauses relating to sympathy action, which provide for prior negotiations and set out the form and time-limits for giving notice and other matters. Such clauses, although common, do not curtail the general scope of the freedom to take action of this type.

A distinction must be made in relation to the scope of the peace obligation, between *disputes of rights* and *disputes of interests*. In the case of the former, the peace obligation should be characterised as absolute: disputes of rights, such as the interpretation of a collective agreement, its application or claims based on the agreement, and disputes relating to the exercise of managerial prerogative implied in a collective agreement, must be resolved through bargaining and litigation. The use of industrial action is wholly prohibited. With regard to disputes of interests, industrial action may be lawfully taken to pursue matters not settled in a collective agreement.

The scope of the peace obligation is primarily related to the duration of the collective agreement. When the agreement has expired, industrial action may be used as a measure in the renewal process. However, both in this case and where no prior collective agreement was in force, recourse to industrial action is subject to both the statutory cooling-off period and to mediation. If there was no previous collective agreement, a statutory peace obligation of a limited kind applies. Moreover, the contract-based peace obligation is considered, on the basis of these statutory provisions, to extend for the duration of the cooling-off and/or mediation period. Recourse to industrial action during bargaining and mediation is therefore excluded in the same way as during the period of validity of a collective agreement.

Before industrial action can be started, notice must be given to the other party and to the National Mediator. Such notice, as set out in statutory

provisions as well as collective agreements, may be given in the form of notice to terminate the employment relationships involved. Combined with the peace obligation, this to a very large extent excludes the isolated use of go-slows and other forms of limited industrial action from the sphere of measures that may be lawfully employed.

### *Areas determined by the labour court*

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The labour court has mainly been called upon to consider whether industrial action is lawful or unlawful in relation to the peace obligation. As implied in statutory provisions and collective agreements, a dual test is applied. Firstly, the question arises as to whether the objective purpose of an action concerns a matter covered by the peace obligation. In the second place comes the question of subjective intent. However, in practice, there is no sharp distinction between the two and the latter in most cases is subordinate to the former, posing few if any additional problems of evidence and law.

Cases relating to the giving of notice, cooling-off, mediation and other issues, such as the duration of the peace obligation are less frequent. None the less, the case law of the labour court has also been of considerable importance in this respect.

### *The significance of judgements*

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It would be fair to say that the basic concept underlying the statutory provisions on the peace obligation and mediation is to avoid industrial action in so far as possible. It is also fair to say that the labour court has subscribed to this concept in its practice and has applied it as a general approach when interpreting and applying collective agreements in questions related to their scope. The prevailing point of view in case law is that once a collective agreement has been concluded it represents an exhaustive settlement between the parties for the duration of the agreement. In theory, however, the agreement may also be of a limited scope and leave unsettled matters that may be the subject of industrial action during the period covered by the agreement.

The scope of the concept of industrial action is also to some extent a product of case law. The 1915 LDA provisions on the peace obligation explicitly cover only *strikes* and *lockouts*. From the very beginning, however, the labour court interpreted the peace obligation under collective agreements as also including a ban on other forms of action, such as go-slows, and threats of action. The statutory provisions have subsequently been amended, and the inclusion of *other industrial action* was explicitly intended to establish the statutory peace obligation as having the same scope in this respect as the peace obligation deriving from collective agreements.

On the other hand, the labour court has consistently adhered to the principle of the relativity of the peace obligation. This principle is also implied in the relevant statutory provisions. The freedom to undertake sympathy action is not therefore considered to be excluded by a collective agreement, unless the agreement in question provides definite grounds for concluding

otherwise. The same applies to political action such as political demonstrations. The latter is an area in which case law has been quintessential in the shaping of the law.

It should also be noted that the labour court has consistently refused to apply the principles of *ultimo ratio* and *commensurability* as prerequisites for the lawfulness of industrial action. If all the formal requirements have been complied with, it is not for the court to assess whether or not it is reasonable to undertake industrial action in a given situation. That is a matter for the parties to consider, and particularly the initiator of the action.

Generally, since 1915, the case law of labour court has exerted considerable influence on the shaping of the law respecting industrial action through its interpretation and application of the specific provisions and general principles embodied in the labour disputes acts and in collective agreements. The scope of the court's influence should however not be overestimated. Legislation and collective agreements have established the basic framework and also, therefore, the basic limits on the court's inventive freedom. The process of developing the law in this field has been interactive, not only as far as the court is concerned.

# Spain

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Miguel Angel Campos Alonso, President of the  
Central Labour Court

In Spain, recourse to direct action is a right guaranteed by law. Article 28.2 of the 1978 Constitution establishes that "The Constitution recognises the right of workers to strike in defence of their interests. The law which shall govern the exercise of this right shall provide the guarantees necessary to assure the maintenance of services essential to the community". This constitutional precept is enshrined in the section regulating "fundamental rights and public liberties" and is therefore afforded special safeguards, including the possibility of appeal to the Constitutional Tribunal. Lockouts, on the other hand, are covered by the provisions relating to collective disputes, and are established in article 37.2 of the Constitution as a civic right in the sense that "The Constitution recognises the right of workers and employers to take action in collective disputes. The law which shall govern the exercise of this right, without prejudice to any restrictions which may be established therein, shall include the guarantees necessary to assure the maintenance of services essential to the community".

Section I of the Royal Decree Law of 4 March 1977, issued at a time of transition and intended to liberalise industrial relations, contains regulations governing the right to strike. However, the Constitutional Tribunal, in its verdict of 8 April 1981, found that a number of precepts were unconstitutional. The Organic Law of Freedom to Unionise, of 2 August 1985, establishes in section 2 that the exercise of the right to strike is a part of the freedom to unionise, which is in turn recognised as a fundamental right in article 28.1 of the Constitution.

As regards the differences between the various forms of direct action, it should be noted that, as a fundamental right of workers, strikes serve as a counterweight in order to achieve a balance between parties that are bound by an economically unequal relationship. Lockouts constitute even more power for a party which already possesses great power. There is therefore no direct equivalence between strikes and lockout. The two types of action are treated differently and it cannot be argued that a lockout is an *employer's strike*. For this reason, the law only admits defensive lockouts (as opposed to offensive lockouts which are intended to hinder the right to strike), since a civic right may never serve to render a fundamental right inoperable in practice. The right to lock out is therefore limited to situations involving danger to persons or property, and then only for such time as is absolutely essential to ensure the resumption of the firm's activity or the removal of the cause prompting the lockout.

Sympathy strikes, which were declared illegal by the Royal Decree Law of 1977, except where the interests of its proponents were *directly* concerned,

have been widely admitted by jurisprudence since the adverb *directly* was declared unconstitutional in the Constitutional Tribunal's verdict of 8 April 1981. Much jurisprudence upholds the concept of strikes as not being simply *contractual*, that is, an instrument for achieving balance in collective bargaining, but as *industrial*, in the sense that strikes are a means of collective self-defence with respect to all aspects of working relations. Jurisprudence does not, however, go as far as favouring a *multidimensional* approach, whereby strikes are seen as the working class's instrument of direct action in all spheres of social life.

*Informative* pickets are recognised as legal and workers are entitled to make their demands publicly known in a peaceful manner. Intimidatory pickets, on the other hand, are illegal. However, the distinction is not always easy to make. In its verdict of 21 December 1988, the Constitutional Tribunal argued that the right to strike includes the right to try to persuade others to join the action.

Go-slows and work-to-rules are considered to be "unlawful or abusive acts". Although not including them under the heading of *illegal* strikes, the law declares that there is a presumption *iuris tantum* of abuse of the right to strike, while admitting that strikers adopting this type of action may prove that it was not in fact abusive. Where necessary, this point has to be decided by the courts.

The right to strike cannot be waived in individual agreements. Any such agreement would be legally void. The law (section 82.2 of the Workers' Charter) does however lay down that industrial peace may be regulated by agreement. Strikes which are intended to modify the terms of a collective agreement while it is in force are illegal. This clarifies the relationship between strikes and collective agreements and shows that industrial action is considered to be lawful during the negotiating period. The prohibition of strikes during the period of validity of a collective agreement does not apply in cases in which: the aim of the strike is not to modify the terms of the agreement; the employer is in breach of the agreement; or a radical change in circumstances makes it necessary to apply the general principle of *rebus sic stantibus*.

Cases differ as to: whether a strike has to be agreed upon by the workers without any kind of ballot being required; whether the decision has to be made by a representative organisation or a works committee with majority agreement among its members; or whether the strike call should be made by unions with membership in the area affected by the strike. Notification of a strike must be given to the employer and the industrial relations authorities (five days' notice, or ten when a public service is involved), as a surprise strike may be considered abusive. Notice may only be dispensed with in cases of *force majeure* or absolute necessity, which the strikers have to prove.

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## Courts and jurisdiction

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It is a basic principle that, where strikes and lockouts are involved, the courts do not intervene directly to determine whether or not a strike or lockout is legal. Judicial intervention is confined to cases involving claims for payment of wages, dismissal, holiday entitlement, financial assistance and so on. In such cases it is the court's duty to determine whether the events giving rise to the claim occurred in the course of a legal or an illegal strike. The courts do not intervene in collective disputes over wages and conditions of work (article 117

of the Constitution), but they do intervene in collective disputes where points of law or the interpretation or the application of regulations are at issue.

## *Access to the courts*

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According to the Royal Decree Law of 1977, workers are not entitled to strike when they resort to (judicial) procedures to solve the collective dispute. This means that strikes are incompatible with the resolution of collective disputes through the courts. Nevertheless, the Constitutional Court's verdict of 8 April 1981 admits that a strike is lawful when its aim is to seek an interpretation of an agreement (strike in support of a collective dispute to be solved through the courts).

## *Jurisdictional differences according to the type of dispute*

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There is no judicial procedure in Spain for the hearing of a dispute over economic matters or interests. It is not the business of labour courts (now the Labour and Social Affairs Courts) to settle conflicting economic interests and thereby to create case law which falls outside their jurisdiction, as determined in article 117 of the Constitution, or to usurp regulatory powers belonging to the social parties (right of regulatory autonomy of collective bargaining, article 37 of the Constitution).

There is now a debate in Spain over whether to regulate the right to strike by enacting another law under article 28.2 of the Constitution, in order to establish different provisions from those of the pre-Constitution Statute (Royal Decree Law of 1977). In its programmes for the 1982 and 1986 general elections, the governing Socialist Party undertook to regulate the right to strike. Non-interventionists would say that the best strike law is no law at all, but the fact is that there exists a strike law (the Royal Decree Law of 1977, as amended by the Constitutional Tribunal on 8 April 1981).

The legislation that is currently being prepared by the Ministry of Labour, which could hardly contain more restrictive regulations than the existing ones, will regulate the delicate issues surrounding the maintenance of essential services and will set out the procedural rules under which workers and employers can seek from the labour courts (now the Labour and Social Affairs Courts) a general declaration as to the legality of a strike through a summary procedure on a priority basis. This procedure will exclude the requirement for prior conciliation through administrative channels, and the verdict will be an executory order, subject to the right of appeal for a rehearing. It is clear that this represents a basic change from the present situation, in which there can be no separate declaration as to the legality of a strike, and in which the issue of whether the strike or lockout referred to in the lawsuit is legal is considered in the context of an action for unpaid wages, unfair sanctions, or even unfair dismissal. Under the proposed procedure, the final outcome will be determined by the initial declaration. All further claims will be dependent on that declaration.

The legal processes for resolving collective disputes have gained much prestige in Spain, due to the broad effect of their procedural regulations. They provide a civilised and economic means of settling disputes involving wide sectors and categories of workers. The process may be initiated by either workers or employers. However, the former may only take legal action through works committees or shop stewards' committees, subject to majority approval, or through unions that have sufficient members at the workplace in question to warrant their intervention.

The time that elapses between the initiation of collective dispute proceedings with the labour authorities, who then report to the court, and the delivery of the court's judgement does not exceed two months. A similar period is required to process appeals, after which the final judgement is delivered. All in all, the process is rapid and effective.

## Switzerland (Canton of Geneva)

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Claude Wenger, Barrister-at-Law, Clerk of the  
Court of Industrial Arbitration of Geneva

In Switzerland there is no law respecting collective labour disputes, which are governed by common law and, in most cases, by the standards established by the social partners in collective agreements. There is no legal definition of the terms *collective dispute*, *collective dismissal* or *dismissal for economic reasons*. Certain authors distinguish between *conflicts of law*, which bear on the application of existing regulations, and *conflicts of interests*, which arise in relation to questions that have not yet been regulated.

The principal means available to the parties to settle a dispute are principally conciliation and arbitration. In conciliation, one or several persons who are not party to the dispute suggest solutions which the parties are free to accept or reject. In arbitration, the parties submit their dispute to the jurisdiction of common law, entrusting it to persons to whom they give the power to judge. These functions may be entrusted to private persons or to the public cantonal conciliation offices, which the cantons have to establish in accordance with the Labour Act of 13 March 1964. The conciliation offices are auxiliary to the bodies established by the social partners in collective agreements. Nevertheless, they can intervene *ex officio* or at the request of the interested parties. They have the power to summon the parties and to impose sanctions in the event of non-compliance. The proceedings are free of charge. At the request of the parties, the office can take on the functions of an arbitration court and settle the dispute by issuing a binding award.

In Geneva, the cantonal conciliation office is composed of a magistrate delegated by the Cantonal Court, who presides over it, and of two employers and two employees chosen from among the industrial tribunal judges. Their principal tasks are:

- to conciliate, in so far as possible, collective disputes which may arise, either between an employer and his or her workers or workers' associations, or between several employers or employers' associations and workers' associations of the same profession concerning conditions of employment, or the interpretation and implementation of collective agreements or standard employment agreements;
- to bring about the conclusion of collective agreements;
- to draw up standard employment agreements; and,
- at the request of the interested parties, to settle collective disputes by issuing an arbitration award.

The cantonal conciliation office intervenes *ex officio* or at the request of the authorities or of the interested parties. The following are considered to be interested parties: associations of employers and of workers, duly constituted;

associations of employers or of workers of the same profession which, without fulfilling the above conditions, represent or appear to represent a substantial section of their profession; and employers who have a collective dispute with their workers, or conversely, workers with their employer.

## *Peace obligations*

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In accordance with article 357(a), paragraph 2 CO ("Code des obligations"), the parties to a collective agreement must maintain industrial peace and, in particular, abstain from industrial action on matters settled by the agreement.

This legal obligation is considered to be *relative*, since it only forbids recourse to industrial action in respect of matters covered by the agreement. The peace obligation is *unlimited* or *absolute* only if the parties have expressly agreed that this shall be the case. Approximately two-thirds of collective agreements contain an absolute peace obligation.

The peace obligation, whether it is relative or absolute, imposes two principal requirements on the parties to the agreement. On the one hand, they must abstain from hostile acts (especially strikes or lockouts) and, on the other hand, they must bring their influence to bear on their members to ensure that the peace obligation is respected. The question of whether the peace obligation can be imposed individually on an employer or worker who is bound by a collective agreement is much debated.

## *Strikes and individual employment contracts*

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Although neither the Federal Constitution, nor the cantonal Constitutions, with the exception of the Constitution of the Canton of Jura, expressly recognise the right to strike, or any other protest action, jurisprudence largely recognises its existence. The right to strike is considered to be a corollary of freedom of association, which is provided for in article 56 of the Federal Constitution.

To be considered legal, a strike must comply with four concurrent conditions: it must have the support of an organisation able to negotiate a collective agreement; it must pursue an end that can be regulated by a collective agreement; it must not be in breach of a peace obligation; and it must respect the principle of proportionality.

This last condition is deemed to be paramount: a strike is a means to be used only in the last resort, when negotiations have ended in deadlock and no other solution is available. It is the *ultima ratio*. According to recent jurisprudence, the employment relationship is not broken by a legal strike or lockout, but is simply suspended for the duration of the action as regards its principal obligations (for the worker, the obligation to work and, for the employer, to pay the salary).

## United Kingdom

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

For the most part, the issue of strikes or lockouts does not impinge upon the jurisdiction of industrial tribunals. Let me deal quickly with the jurisdiction of industrial tribunals before turning to the High Court. The only real relevance is in connection with the provisions of section 62 of the Employment Protection (Consolidation) Act, 1978. This provides that the jurisdiction of an industrial tribunal is excluded in the case of a lockout by an employer, or industrial action by an employee, unless the employer fails to dismiss all employees concerned, or discriminates by offering re-engagement to some but not to others within a period of three months.

It follows therefore that in England and Wales most of the litigation in connection with strikes and industrial action takes place in the High Court. Injunctions can be obtained *ex parte* or *inter partes*, and, as a result of administrative arrangements made by the judges themselves, they can be obtained at very short notice (in a matter of hours). I shall return to the practical effect of this remedy later in this paper. This is important, since the remedies which are not available in industrial tribunals are the award of damages and, more importantly, the granting of injunctions.

For many years now, the United Kingdom has been the subject of two-party politics, and those parties, rightly or wrongly, in various ways and for various reasons, have been seen to represent either side of industry. This has had a divisive effect upon industrial relations. I personally feel that the industrial tribunals system has done a great deal to heal the rift which has undoubtedly existed in the past. To understand the present position therefore it is essential to examine the development of trade unions and their powers, albeit briefly.

In many countries a positive right to strike is recognised by law, which attaches to that right various restraining conditions or qualifications. In England and Wales the law has taken a different approach. This is for historical reasons.

It is the common law which lays down the basic legal precepts and principles underlying all subsequent evolution of the law. The common law can be modified or indeed its effect can be abrogated by statutes passed in Parliament. The courts themselves also decide cases which develop the common law. For much of the nineteenth century, trade union organisation and activity was mostly at risk from the criminal law, because employees going on strike or threatening to do so, risked criminal prosecution for offences such as intimidation and conspiracy. As a result of this, the Trade Union Act, 1871, was passed to protect trade unions and their members. There was also a Conspiracy and Protection of Property Act, 1875. Since those days the criminal

law has played very little part in industrial relations. Its relevance today is confined almost entirely to picketing, and I do not propose to pursue its development. The remainder of this paper is restricted to the civil law.

However, at the end of the last century, trade unions found their activities increasingly at risk from the provisions of the civil law. The two main torts which were relevant were civil liability for conspiracy, and for inducing a breach of a contract of employment. A tort is a species of civil injury or wrong. A civil wrong gives rise to civil proceedings, which have as their purpose the enforcement of a right claimed by the plaintiff against the defendant. A tort had its roots in criminal procedures, and some are still capable of being made the subject of both civil and criminal proceedings, including assault, theft, and malicious injury to property. Where there is a right there should be a remedy. One of the essentials of a tort is that damages should be at large, and not an action for a liquidated (a specific) sum of money. However, in the context in which we are considering torts, the most important remedy available is that of the injunction.

There was a famous case at the turn of the century (1901) called *Taff Vale Railway Company v. Amalgamated Society of Railway Servants*. This case arose from a strike on the railway in South Wales. It was alleged that a signalman had been victimised by the company, and the trade union organised a strike in his support. The strike was declared to be official. The company sought an injunction against the trade union and also sued for damages. It was successful in both claims.

This decision in the House of Lords brought immediate complaint from the trade unions, and resulted in the passing of the Trades Dispute Act, 1906, which forms the foundation of the modern immunity of trade unions from the law. The trade unions were placed in a different position from other legal entities. By that Act, the individual was protected from tortious liability for acts done "in contemplation or furtherance of a trade dispute" (the *golden formula*). Other sections provided: immunity for a person who, in contemplation or furtherance of a trade dispute, induced another to break a contract of employment; immunity against a possible tort of interference with trade, business or employment of another person; and it also provided that an action in tort could not be brought against a trade union itself for the acts of its members or officials even though they acted on its behalf. Thus it could not be sued for damages. The next relevant statute was the Trade Dispute and Trade Unions Act, 1927, which made it a criminal offence to incite certain strikes, and also removed the protection for acts done in contemplation or furtherance of a strike, which was declared illegal by the 1927 Act. There the matter remained until some years after the Second World War.

Trade union activity increased during the 1950s and 1960s. By various decisions, the courts decided that the Act of 1906 gave no immunity for inducing a breach of a *commercial* contract. It only applied to contracts of employment. The courts also recognised the tort of intimidation in a case called *Rookes v. Barnard* in 1964, where three trade union officials had threatened that there would be a strike at BOAC (British Overseas Airways Corporation) if Mr. Rookes was not removed from employment. The House of Lords decided that this constituted an unlawful conspiracy to commit the tort of intimidation. The *threat* to induce a breach of contract was not protected by the 1906 Act. The Labour Government, newly elected, passed the Trades Dispute Act, 1965, to provide immunity to cover that situation.

In 1968, a report of a Royal Commission under Lord Donovan was published and, as a result, a White Paper called "In Place of Strife" was

published by a Labour Government at the beginning of 1969 to give effect to certain proposals in that report. However, the trade unions took exception to a number of the suggested provisions, and as a result the proposals were not given effect. In 1970, a Conservative Government was elected, and there followed a most important Act in the history of industrial relations, the Industrial Relations Act, 1971. This repealed the Trades Dispute Act, 1906, and set up the National Industrial Relations Court (NIRC) to adjudicate on a new framework of industrial law, which included the creation of a new industrial tort, namely, *unfair industrial practice*. One of the unfair industrial practices was for anyone to induce or threaten to induce a breach of contract, unless they did so in contemplation or furtherance of a trade dispute, and with the authority or on behalf of a registered trade union or employers' association. Official action could only be taken on behalf of or by a union registered under the provisions of the Act. Those provisions laid down requirements for the unions, and also made provisions for clear lines of authority within the trade union with regard in particular to the calling of industrial action. The Act also made strict provisions in connection with actions in support of unfair industrial practices and against extraneous parties, such as secondary picketing. The trade unions would have none of this, and indeed refused to recognise the court, with the result that there followed a period of extremely unhappy industrial relations.

A Labour Government was returned in February 1974 committed to repealing the Industrial Relations Act, which it did by the Trade Union and Labour Relations Act, 1974. It is perhaps interesting to note that it re-enacted almost all those parts of the 1971 Act which related to unfair dismissal and to industrial tribunals. The NIRC became the Employment Appeal Tribunal, which has continued to exist until today. The latter years of the 1970s were taken up in much argument between the Government and the Conservative opposition about the immunities to be granted to trade unions, and whether a total immunity in effect licensed all industrial action, even if directed towards those far removed from the original dispute. This argument has raged until today, and in the event of a Labour Government being returned in the future, I can only think that secondary picketing is likely to be legalised once more. As well as repealing the Industrial Relations Act, 1971, by the Trade Union Law Reform Act, 1974, the Labour Government of 1974 proceeded to strengthen the position of trade unions and their members. By section 13 it redefined what was meant by "acts in furtherance of a trade dispute", and by section 14 provided trade unions with immunity from liability for those acts. By the Employment Protection Act, 1975, the Advisory, Conciliation and Arbitration Service was established, and the seeds of much of what is contained about the rights of employees in the Employment Protection (Consolidation) Act, 1978, were sown. The Labour Government had concluded a social contract with the Trades Union Congress instead of imposing a statutory incomes policy. The agreement was that in return for restraint in wage claims, the Government would pursue policies which were congenial to the trade unions. However, severe inflation undermined that position, and serious strikes broke out with some ugly episodes. This period is sometimes described as the "winter of discontent", and in the following summer of 1979 a Conservative Government was elected.

A new era in the history of industrial relations started with the arrival in 1979 of Mrs. Thatcher as Prime Minister. Her mandate was "to do something about the trade unions". The first Act to be passed was the Employment Act, 1980. Thereafter, successive Acts have been passed and I turn now to examine the present position.

From what I have said already, it is abundantly clear that the law of industrial relations is very much the subject of political argument, and is liable to sudden and radical change. The result is not only difficulty for the courts in the administration of the law, but also disruption in the area of our society upon which industrial relationships impinge. There is some indication in recent discussion papers produced by the Labour Party that, although the view is expressed that the present balance is too heavily weighted in favour of the employer, it is not anticipated that with a return of a Labour Government there would be a complete reversal to the position pre-1979.

However, let us turn to see what has happened since the arrival of the Conservative Government in 1979—the “Thatcher years”. She moved cautiously. The 1980 Act made provision for public funds to be available for secret ballots should trade unions wish to use them, for example for “obtaining a decision or ascertaining the views of members of a trade union as to the calling or ending of a strike or other industrial action”. Secondly, section 16 made secondary picketing illegal by providing that picketing was only lawful if peaceful and “at or near his (the employee’s) place of work”. Thirdly, section 17 also outlawed secondary industrial action (known as “blacking”) at an establishment not directly connected with that in dispute.

The Employment Act, 1982, went a great deal further. The immunity granted by section 14 of the 1974 Act was removed and the trade unions were rendered liable if, but only if, the action was *official*. Various safeguards in this respect were provided, including repudiation by the trade union, but liability was reimposed “if at any time after the union concerned purported to repudiate it the principal Executive Committee or President or General Secretary has behaved in a manner which is inconsistent with the purported repudiation”. A limit was placed upon the amount of damages which could be awarded against a trade union in actions in tort, and certain of its property was *protected*, including its *political fund*. The closed shop was also seriously weakened.

The next Employment Act passed in 1984 is short but most important. For industrial action to be capable of being protected, it has to be supported by a ballot and the ballot is required to comply with the most detailed provisions of the Act.

The Employment Act, 1988, moves yet further in controlling the actions of unions by providing, inter alia, that members of unions have rights to a ballot before industrial action; a right not to be denied access to the courts; and a right not to be unjustifiably disciplined. It also curtails the rights of trade unions to take industrial action to force membership of a closed shop.

Where, therefore, does a trade union stand today when considering industrial action?

The industrial torts for which it could be liable are:

- (a) inducing a person to break a contract;
- (b) interfering with trade or business or a contract by unlawful means;
- (c) intimidation; and
- (d) conspiracy.

In order to assess the situation, three questions need to be asked. The first question is “Is there liability for one or more of these industrial torts?” Secondly, “Does the 1974 Act (TULRA) provide a *prima facie* defence, i.e., was the act done in contemplation or furtherance of a trade dispute?” Thirdly, “Do the provisions of any of the four Employment Acts of 1980 to 1988 remove that defence?”, or in other words, “Do those Acts remove the defence available under the 1974 Act so as to restore common law liability?”

In seeking an answer to the third question, and speaking only in general terms, this would seem to happen first if a union takes official industrial action without first balloting the workers; secondly, where there is secondary action, unless it falls within one of the exceptions; thirdly, where there has been unlawful picketing and in particular picketing away from the employee's own workplace; fourthly, where the purpose of the industrial action is to achieve or give effect to a "union labour clause"; and, lastly, where a trade union is seeking by industrial action to enforce a closed shop, i.e. union membership.

It is the remedies available to an employer should the trade union fail to comply with this maze of statutory provisions, rather than with the provisions themselves, which deter industrial action today. It is the attack upon the finances of the unions that constitutes the main deterrent. As in almost every aspect of industrial relations, it is the maintenance of the balance which is so difficult: the balance between the right of workers to combine and to strike in furtherance of their industrial claims for pay or working conditions, and the protection of the employer, and indeed the public, from gross excesses—the anarchy of the miners' and printers' strikes.

The risk to trade union finances arises in two ways: the first, in a claim for general damages as a civil remedy in tort; the second, and by far the most important, in a fine for contempt of court and sequestration of its assets. This could follow from disobeying an order of the court, which is almost certainly in the form of an injunction. This is by far the most potent remedy for an employer in industrial relations today.

An injunction is a remedy which has its roots in equity, and as a result it has come to be recognised that an injunction would not be granted which has the effect of ordering specific performance of a contract of service. ("Equity will do nothing in vain" and the court could not supervise its order.) However, for the avoidance of doubt, this is now governed by section 16 of the Trade Union and Law Reform Act, 1974, which reads:

No court shall, whether by way of—

- (a) an order for specific performance or specific implementation of a contract of employment, or
  - (b) an injunction or interdict restraining a breach or threatened breach of such a contract,
- compel an employee to do any work or attend at any place for the doing of any work.

It may be pertinent to note that the section applies to an employee and not to any other kind of worker, and that it therefore does not prevent a court from ordering an employer to employ an employee.

The jurisdiction to grant an injunction in the High Court is now given by section 37(1) and (2) of the Supreme Court Act, 1981, which reads as follows:

37(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a Receiver in all cases in which it appears to the court to be just and convenient to do so.

(2) Any such order may be made either unconditionally or on such terms and conditions as the Court thinks just.

The 1974 Act also deals, in section 17, with restrictions on the granting of injunctions. It provides that where a court is hearing an application for an injunction, which concerns an industrial dispute, it must ensure if possible that the defendant has received notice of, and had an opportunity of being heard, at the application. Secondly, it provides that at an application for an interlocutory

injunction, the court in exercising its discretion shall consider the likelihood of a successful defence based upon the *golden formula* being established.

The principles upon which interlocutory injunctions have been granted have altered somewhat over recent years. The object of the order is to provide temporary protection for the plaintiff's interests. The leading case is *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396. Prior to this case, it had been the law that the plaintiff was required to show "a *prime facie* case", but this was denied by their Lordships in *American Cyanamid* in which it was laid down that the plaintiff need only show "an arguable case"—a serious issue to be tried. Naturally, the claim must not be frivolous or vexatious. Thereafter, the court has a discretion, and will in any event take an undertaking in damages from the plaintiff before making any order. If damages are a sufficient remedy, then an injunction is unlikely to be granted unless the defendant is not worth "powder and shot". Alternatively, damages may not be sufficient if the wrong is irreparable, or outside the scope of pecuniary compensation, or very difficult to assess (such as business reputation). A further consideration will be whether more harm will be done by the grant or the refusal of an order. Where the factors in the balancing exercise appear equal or nearly so, it may be preferable to maintain the status quo, if it appears to be wrong to attempt a trial of the action.

However, the difficulty of applying these principles in the law of labour relations is all too obvious. An employer will suffer if the industrial action is not called off—probably, but not only, in monetary terms—and the trade union will suffer if it is called off, in that the impetus of strike action will be lost. Because of section 17(2), when a trade union claims to act within the *golden formula*, *American Cyanamid* may not have made much difference. However, through the Employment Acts, 1980 to 1988, many other technical provisions have now been introduced which greatly increase the likelihood of a trade union not being able to satisfy the court that it has complied with these technical details, which therefore increases the likelihood of an interlocutory injunction being granted. Section 17(1) applies to *ex parte* injunctions and provokes the same comment, with the added problem that the court is hearing only one side of the issue, and although *uberrimae fidei* (and only granted for 24 hours) a successful application can prevent the impetus of strike action.

The result of a breach of a court order is usually an application to commit for contempt of court. The court acts *in personam* except where the legal entity is not human, in which case the penalty is by way of a fine or sequestration of its assets. A person is in contempt if, knowing of the order, she or he aids or abets a defendant in breach of that order; an example might be a bank with knowledge of an order freezing an account, which allows the account to be operated. A trade union will be liable if an officer or a member is in breach of an order, unless it can satisfy the court that it has done all in its power to ensure compliance with the order. This can be difficult. The provisions of section 15 of the Employment Act, 1982, only apply to "actions in tort".

Thus, in recent years, the National Union of Mineworkers was fined a substantial sum together with the sequestration of its property which was held by a Receiver, until all costs and fines had been paid. As steps had apparently been taken to attempt to remove funds from the grasp of the court, the cost was very considerable indeed. Likewise, during the seamen's strike in Dover, the National Union of Seamen was fined and its assets were at stake.

A recent example of the effect of the law as it stands is the dock dispute. The Dock Labour Scheme is a statutory scheme which has been in operation for many years. When it was initiated there was much hardship in the docks due

to the rules relating to casual labour, and there was clearly a need for protection of the workforce. This has now evaporated in the modern world and the Government, after much pressure from the employers, has indicated an intent for it to be repealed.

The latest development in the struggle between trade unions and the employers is represented by *unofficial strikes*. These are not recognised by the trade unions, who pursue a careful path of exhorting their members to behave responsibly and within the law. Where the public is concerned, these *wildcat* strikes can undoubtedly cause great hardship, and it is possible to argue that compulsory arbitration would be fairer for all concerned. The Government has announced that a further White Paper dealing in particular with this problem is to be issued for public discussion, and I have no doubt that some useful guidance is available from studying the ways in which others have handled these problems of labour relations. The major problem in the United Kingdom is that these issues are the very lifeblood of politics, and that the emotions of politics and the reasoned and reasonable development of the law are unhappy bedfellows.

## *Yugoslavia (Slovenia)*

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Janez Novak, Judge, the Associated Labour Court of the SR of Slovenia  
(the Supreme Labour Court)

The right to strike is legally protected. It is the only form of industrial action that is legal, although other forms are also used in practice. This means that industrial action is not precisely regulated. Other forms of industrial action include, for example, extraordinary assemblies of employees, unauthorised meetings, work stoppages and the discontinuance of work.

In legal disputes, the essential question is often the extent to which individual disputes differ from collective disputes. In Yugoslav law, the concepts of lockout, picketing, go-slows, working to rule, sympathy or secondary action, etc., are not recognised. Under the Associated Labour Act, workers have to inform the trade union about disputes which cannot be settled by regular means. They have the right to demand an extraordinary workers' assembly. Industrial action concerns disputes between employees in a specific section of the organisation of associated labour and the employees and bodies of the organisation, and between employees and bodies of socio-political organisations or self-managing enterprises. Strikes and other collective disputes (such as disputes over wages) between a number of employees and the employing organisation are handled by the court of associated labour of the first instance. The Court of Associated Labour of the Republic or of the Autonomous Province hears appeals that are lodged against decisions by the court of first instance.

### *Access to the court*

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The prerequisite for access to the court is for the procedure to have been followed within the organisation of associated labour. This procedure includes a decision by a committee, such as a committee on labour relations or a disciplinary committee, and of the workers' council, which hears the complaint in the second instance within the organisation of associated labour. However, in the past, the labour courts have handled only individual disputes between employees and employing organisations. The main subject of dispute was, with unimportant exceptions, the disciplinary responsibility of employees who did not observe the legal procedures relating to strikes. Article 638 of the repealed Associated Labour Act concerned the disciplinary responsibility of employees in the event of strikes. The new Associated Labour Act covers only the responsibility of the body which manages the enterprise and of workers who are vested with special authority and responsibility.

There are generally only two parties to disputes relating to strikes: the employee and the organisation of associated labour. The parties can be represented by any person who is not a minor and/or by a lawyer. Employees may be represented by trade unions.

The procedures are the same for cases involving rights (legal disputes) and those relating to interests (economic disputes). The composition of the court is the same for all disputes. In the first instance, the court of associated labour is composed of a professional judge and two assessors; in the second instance, the Court of Associated Labour of the Republic or of the Autonomous Province is composed of two professional judges and three assessors.

One interim measure is available under the law in the event of a strike; the interlocutory order. This is regulated by the Associated Labour Court Act (article 30, 1974).

In the past, most strikes and other forms of collective disputes were unlawful. The figures show that, since 1985, 16 cases related to collective disputes have been heard in the Supreme Labour Court.

The speed with which the courts hear and decide a case depends on several circumstances, including the legal and factual complexity of the case, the number of parties and of persons involved, and the attitude of the parties. The majority of judgements are complied with voluntarily. Some cases have to be enforced by the regular courts.

The courts play an important role in deciding disputes. However, their preventive role is equally important. This takes the form of the publication of sentences and contacts with trade unions, the Chamber of Commerce and the Department of Labour, as well as the assistance and suggestions provided by the judges in the legislative process.

There is no long tradition of hearing cases relating to industrial action in Yugoslav courts. The first cases were heard in the courts of associated labour in 1985. However, industrial action first occurred in 1958.

The new Associated Labour Act lays down the following criteria for lawful strikes (articles 620 to 624). The workers have to inform the trade union organisation of the strike and demand an extraordinary assembly of workers. The essential functions of the production process must not be disrupted by the holding of such an extraordinary assembly. The workers set out their claims and put forward their proposals at the extraordinary assembly. If the workers' council is competent to solve the dispute, it has to decide on the workers' claims and inform the workers and the trade union organisation of its decision within seven days. If the workers' council fails to do this, the trade union can institute proceedings against the competent members of the council. If work has been suspended because of the dispute, the trade union immediately has to set up a joint committee to resolve the dispute. The committee is composed of workers' representatives and members of the workers' council and the trade union. The joint committee considers the claims made by the workers, evaluates the reasons for the dispute and makes a proposal for solving the dispute to the workers' council. The proposal has to be made immediately or, if that is not possible, within ten days at the latest. The suspension of work must not disrupt the essential functions of production and the activities of the organisation of associated labour.

*Part II*

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## *Procedural aspects*

# *Comparative overview*

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Werner Blenk and Carl Mischke

## *I. The procedural system*

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In the majority of European labour courts, the procedural system is adversarial rather than investigative, and is often adapted from the civil procedure used in the ordinary courts. However, in keeping with the principles of accessibility and efficiency, labour courts usually have significant discretion to adapt the appropriate rules of civil procedure to their own needs. Nevertheless, in the Federal Republic of Germany, Israel and the United Kingdom, the legislature has established separate procedures that are specific to labour courts.

Although the differences between ordinary civil procedure and labour court procedure vary from country to country, there are certain recurrent themes. Many labour court procedures provide for a pre-trial hearing, which is not frequently found in civil procedures. The purpose of pre-trial hearings is to promote an amicable settlement of the dispute or to settle the facts of the case before the full hearing takes place. Another common feature of labour court procedures is that they often contain special provisions relating to evidence and proof. Their purpose is often to ease the burden on individual and unrepresented litigants. In general, it may be stated that labour court procedures are less strict and restrictive than ordinary civil procedures. Emphasis is also placed on the efficiency and speed of procedures. Moreover, the relationship between ordinary civil procedure and labour court procedure is not, as might be thought, totally one-sided: interestingly enough, in Israel the ordinary courts have adopted procedures relating to evidence that were developed by the labour courts.

The fact that labour court procedures can by and large be characterised as of an adversarial nature has far-reaching implications. In the first place, this means that the parties themselves have extensive control over the course of the proceedings. By selecting and presenting evidence and by initiating steps to advance the proceedings, they play a significant role in determining the pace of litigation. This control, however, must be seen within the context of inequality between the parties; the employer is often more experienced in litigation and has access to greater resources in terms of finance and information. The adoption of an adversarial system also implies that the nature and quality of the representation is of great significance, not only for the outcome of a specific case, but also for the functioning of the system as a whole.

## *II. Representation of the parties*

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The judges noted that, generally speaking, the parties have significant freedom in structuring their representation. In the Federal Republic of Germany, for

example, the parties may conduct a case before the courts of first instance themselves, or they may choose to be represented by legal counsel. However, before the courts of second instance and the Federal Labour Court, they have to be represented by attorneys at law. Representation by officials of trade unions and employers' organisations is also allowed. A similar situation prevails in Spain and in the Canton of Geneva, Switzerland, where a law dealing with these issues is under discussion. In France, the parties are free to choose how they wish to be represented in the first instance, where factual issues have to be resolved. In the higher instances, where issues of a legal as opposed to a factual nature are at stake, representation by legal counsel is obligatory.

Similarly, both attorneys and officials of trade unions and employers' organisations can represent the parties in cases heard by the industrial tribunal in the United Kingdom. The problem in that country is largely one of cost, since the parties in principle have to pay for legal services. Under these circumstances, individual employees often resort to the legal facilities made available under various schemes for the provision of free representation. A wide range of options are permitted in Israel, where the parties can choose a person of confidence, who may be a lawyer, but need not be one. They can also entrust their case to their respective trade union or employers' association. The parties choose legal representation in about 50 per cent of all cases.

In Norway and Sweden, it has become established practice for the parties to be almost exclusively represented by lawyers. Lawyers also tend to play a dominant role in labour court proceedings in Denmark. There, however, as in Finland, the legal representatives are employed by the trade unions and employers' organisations and their main task is to appear in cases before the labour courts.

Lawyers are playing an increasingly important role in a number of countries. The lawyers in question need to be specialised in labour law, which has become very technical and increasingly requires special expertise. The judges felt that the widespread use of legal representation was enhancing an already existing trend towards more legalistic procedures, and that an attempt should be made to ensure that labour courts and tribunals remain easily accessible, informal and expeditious. On the other hand, curtailing the role played by legal experts would not be conducive to the administration of justice. Just like other courts, labour courts have to apply the law, and this task is made considerably easier when the parties are represented by lawyers. Legal representation is particularly important in order to reduce the disadvantage of inexperienced litigants when the other party is experienced in litigation and has access to legal and financial resources, as is the case with large companies with their well-developed human resources administration and in-house legal staff. Measures have been adopted to ensure equality in litigation in, for example, the Federal Republic of Germany and Spain. In Germany, when so requested, the court has to assign a lawyer to a party without representation, provided that the opponent is already represented. In Spain, a party that has legal representation has to inform the other party that this is the case.

Legal representation is becoming more important because of the way in which entitlements are often dependent on rights of a legal nature, the complexity of which is likely to increase in the future. Indeed, labour courts have often been criticised for being unduly *legalistic* in their procedural approaches, but this criticism overlooks the fact that the increasing infusion of law into the employment relationship is a manifestation of the broader trend towards the juridification of labour relations. This process, whereby contrac-

tual arrangements are replaced by laws, and regulations are of general application, can be identified in many countries.

Another important issue is the role played by trade unions and employers' organisations in representing the parties. Although the interests that are brought before the court and the identity of the litigants changes continuously in the ordinary courts, the situation is slightly different in labour courts. Even though the identity of the parties changes, the real confrontation is between employers' and workers' organisations rather than between individual parties. In a broad sense, the same parties are always present in labour court proceedings. This continuous confrontation becomes even more apparent when it is considered that representatives of trade unions and employers' organisations are also often present on the bench as lay judges. It is against this background that the position of employers' and workers' organisations in representing litigants has to be analysed.

In all countries, parties can be represented by officials of trade unions and employers' organisations. In some countries, their participation has to be requested by the parties themselves. This is the case, for example, in Israel and the Federal Republic of Germany. In France, the unions have a right to intervene in the proceedings if a collective interest is potentially affected. In other countries, such as Sweden, these organisations play an even more significant role. Normally, the organisation represents its members in court, whether they are applicants or defendants. However, the organisation may not make any concession to the detriment of a member. Should the union refuse to take an action on behalf of a member, the member may take action in a personal capacity. If a worker does not belong to a trade union (which is, however, an exception in Sweden), the worker would have to take the case to the ordinary courts. Therefore, in a certain sense, the unions *own* the action. It would therefore appear that labour court proceedings have a dual function in countries where employers' and workers' organisations have strong representational rights: not only do they serve to provide justice in individual cases, but this process also takes place within the overall framework of cooperation and confrontation between the labour market organisations.

### *III. The decision, evidence and proof*

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Another implication of the adversarial procedure is that the content of the court's decision is determined and limited by the facts and legal arguments presented by the litigants. Ordinarily, a court cannot take into consideration other factors which are known to the bench, but not to a litigant. To do otherwise would be particularly detrimental to inexperienced individual litigants and is a further reason for the prevalence of legal representation.

The inherent harshness of the adversarial procedure is attenuated in some labour courts by the fact that the court may point out to a litigant a fact or legal provision that has been omitted. In some countries, such as Israel, the court may even use arguments that have not been raised by the parties themselves.

One of the most fundamental aspects of procedure is, of course, evidence. The way that evidence is given has an important effect on the efficiency of the proceedings. However, two conflicting considerations affect the giving of evidence. Firstly, written evidence contributes to the efficiency of the procedure,

since the members of the court are in a position to acquaint themselves with the issues and the facts of the case before the actual hearing. Only legal argument may be needed at the hearing to enable the court to reach a decision. The consideration of written evidence can therefore be an extremely time-saving procedure. However, this kind of evidence is largely based upon legally formulated pleadings and other documents; an inexperienced litigant may not be in a position to present evidence in this form. On the other hand, oral evidence is direct, more informative and less formal, and the court is in a position to clarify any uncertainties which may arise. Nevertheless, oral evidence is time-consuming. What is needed, therefore, is a balance between the advantages of direct oral evidence and the efficiency of written evidence.

In all European labour courts, evidence is at least partly given orally. However, most courts combine the two forms of evidence. In Denmark, for example, affidavits may be used when agreed upon by the parties themselves. In the Federal Republic of Germany, affidavits are only used in interim proceedings, where speed is of the essence. Oral evidence is also used extensively in Finland, Spain, the United Kingdom and Yugoslavia. The only real exception in this regard is Israel, where, especially in individual cases, affidavits are used as a matter of course for direct testimony, whereas cross-examination and redirect testimony are given orally. When the dispute is of a collective nature, however, in order to expedite the proceedings, oral testimony is limited; strike actions, for example, may be resolved without recourse to oral evidence. These measures are seen as an attempt to deal with the time pressure facing the labour court in Israel. In Norway, on the other hand, written statements of fact are in principle not allowed, although if a witness is unable to attend the proceedings, exceptions are made in this regard. In Spain, an affidavit may not be considered as evidence until it has been certified by a notary. Affidavits are not used in the Canton of Geneva (Switzerland), as they have no legal value.

Another important issue is that of proof. The age-old maxim is that "he who alleges must prove". However, in many labour courts, the rules relating to proof are applied less strictly. In Denmark, for example, there are no limitations as to how a party may go about proving the existence of a collective agreement. In several countries, collective agreements are registered, and, as is the case in Israel, general collective agreements are within the judicial knowledge of the labour court. All the employee needs to show is that the employer is a member of the employers' organisation which is party to the collective agreement. In the United Kingdom, the Employment Appeal Tribunal has held that the ultimate decision on rules of evidence (including the admissibility of hearsay evidence) rests with the president of the industrial tribunal. In Germany, legislation relating to the employment relationship in some cases partly shifts the onus of proof. In cases of discrimination on grounds of sex, the applicant need only make out a *prima facie* case; the onus then shifts to the employer, who has to prove that the discrimination is not on the grounds of the employee's sex.

#### *IV. Labour courts and conciliation*

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Some European labour courts attempt to bring about an amicable settlement of the dispute. However, the courts are not arbitration bodies. The proceedings are more a last-minute attempt at conciliation between the parties. If they succeed in this objective, further proceedings are rendered unnecessary and the case load of the court is therefore lightened.

A conciliatory hearing is held before the trial for this purpose in the Federal Republic of Germany. The labour court also has to attempt to settle the dispute amicably between the parties at all stages of the proceedings. This is also the case in Norway. However, the German labour courts are not entitled to act as arbitrators, whereas the Norwegian Labour Court may do so at the request of the parties. Preliminary sessions are held in Denmark, and it is during these sessions that most parties come to an agreement. The pre-trial proceedings in Finland have another purpose: to distinguish all the undisputed and disputed issues and to prepare the case so that the main hearing can take place in one session. The evidence that is accumulated in the pre-trial session is then distributed to the members of the court in advance and the duration of the main hearing is shortened accordingly. In Israel, the parties to an individual dispute can reach a compromise under certain circumstances and can then request the court to affirm that compromise by fixing the sum to be paid by the defendant within a financial range agreed upon by the parties. In the United Kingdom, arbitration and conciliation are, in certain cases, entrusted to the Advisory, Conciliation and Arbitration Service (ACAS), an extra-judicial, government-appointed and -funded body.

### *Concluding remarks: Procedural aspects*

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It is therefore clear that there are certain conflicting considerations involved in labour court procedures. It would appear as if informality and accessibility at times have to give way to procedural efficiency. The increase in the use of legal representation is a related issue. The proceedings have to be conducted in a way that takes account of the circumstances of the litigant, as well as ensuring that the members of the court are in a position to apply the law as efficiently and swiftly as possible. These considerations have become increasingly relevant in the light of the steadily increasing case load. In procedural matters, labour courts therefore attempt to maintain a balance between the interests of efficiency and accessibility, between informality and the increasingly technical legal provisions.

# Denmark

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Johannes Bangert, President, Labour Court, and Niels Waage,  
First Secretary, Labour Court

There is only one labour court in Denmark. This labour court has exclusive competence to deal with the following cases (section 9 of the Labour Court Act, 1973) :

- (a) breaches and interpretations of a general agreement between the Danish Employers' Confederation and the Danish Federation of Trade Unions, and of corresponding general agreements and settlements;
- (b) breaches of collective agreements on wages and working conditions;
- (c) the legality of notified collective industrial action or warnings given of such action, provided that 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 regarding 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 concluding a collective agreement in areas where it does not yet exist.

In recent years there have been no innovations in procedural rules.

In accordance with section 19 of the Labour Court Act, the principles of the Code of Procedure applicable to cases dealt with by the ordinary civil courts apply to the procedures of the labour court with the necessary adjustments. The rules of evidence and procedure in the labour court do not therefore differ from those that are applicable in the general court system. In civil cases in the ordinary Danish civil courts the parties have to be represented by attorneys. There are no restrictions on the right of the parties to be represented by attorneys in the labour court. Organisations are normally represented by their agents in the labour court.

Evidence is normally provided orally under Danish civil court procedure; the same therefore applies in the labour court. With the agreement of the parties, affidavits can normally replace oral evidence, although affidavits are not generally considered to be as effective as oral evidence. In principle, the ordinary courts and the labour court can accept any kind of evidence and are not bound by any statutory regulations in the evaluation of evidence.

It is not possible to make a general statement as to whether a party has to prove that a collective agreement is applicable. The burden of proof depends upon the nature of the case. As noted above, the labour court has exclusive competence to deal with cases concerning the existence of a collective agreement. If this is the only question to be decided, the party which claims the existence of a collective agreement has the burden of proof.

There are no limitations in law as to how a party may prove the existence of a collective agreement. Although cases concerning breaches of collective agreements are dealt with by the labour court, cases respecting the interpretation of collective agreements on wages and working conditions are dealt with by arbitration and, in accordance with section 10 of the Labour Court Act, the labour court may dismiss a case which lies within the scope of arbitration. However, if the parties so agree, the labour court can decide the case. If the case falls partly within the scope of arbitration, the court can postpone the case until the arbitration award is delivered. There are no regulations or laws imposing time-limits within which the labour court has to hand down its decisions.

## *Finland*

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Jorma Pelkonen, President, Labour Court, and Pekka Orasmaa,  
Vice-President, Labour Court

The Finnish labour court, which was established in 1946, is governed by the Labour Court Act, which in its present form dates mainly from the year 1974. The Act contains provisions on the jurisdiction and organisation of the court as well as on the handling of cases. In areas where the Act does not specify the procedure, the labour court applies, where appropriate, the rules of procedure applicable to the ordinary courts of first instance.

However, the provisions governing the procedure for civil cases in ordinary courts of first instance are outdated and are currently being amended. In certain respects, procedures in the labour court differ considerably from the procedure followed in the general courts. The most significant differences relate to pre-trial procedures and to rules of evidence.

There are no pre-trial procedures in civil cases heard by the ordinary courts. The only basis upon which a case is heard by the court is an application for a summons. Even moderately complicated cases therefore have to be handled in several sessions. In the absence of any pre-trial procedure, the attitude of the defendant to the case, as set out in the application for a summons, is not known until the trial begins. The issues that are in dispute do not become clear until the trial. In principle, both written and oral evidence can be introduced at any point in the trial. Even the underlying claims can be set out in more detail after the evidence has been presented. This complicates the conduct of the trial and the evaluation of the evidence. The aim of the procedures of the labour court is to make the handling of the case and the evidence more efficient. The trial is divided into the written and oral pre-trial procedures and the main hearing.

A case is initiated by applying to the labour court for a summons, which the court serves on the defendant or defendants. At the same time, the defendant is requested to submit a written answer within a time-limit set by the court. Depending on the nature of the case, and at the discretion of the chairman of the court, the exchange of briefs may continue. In urgent cases, such as those concerning notice to terminate a contract of employment or ongoing industrial action, the defendant is only requested to answer the summons at the written pre-trial stage. In other cases, the parties retain the right to submit supplementary briefs. Failure to submit a brief to the labour court that has been requested in this way does not entail procedural sanctions; the preparation for the trial continues with the oral pre-trial procedures. Although the oral pre-trial procedures are discretionary under the terms of the law, in practice they are followed in all cases. The oral pre-trial procedures are conducted by the president alone, without the participation of the members of the labour court. A written record of the oral pre-trial phase is distributed to the parties and the members of the court.

The purpose of the pre-trial procedures is to distinguish undisputed questions from those in dispute and to prepare the case so that the main hearing can take place in a single session without having to be postponed. During the pre-trial procedures, the parties have to present all their claims, the grounds upon which they are made and any written evidence that they wish to present in the case. Any statements respecting a matter which could provide grounds for preventing the case from being heard, which the court is not obliged to consider *ex officio*, have to be presented in the initial written reply to the summons. In the pre-trial phases, the parties also have to name the persons they wish to call as witnesses as well as the facts they wish to prove through their testimony. At the conclusion of the oral pre-trial stage, the case is transferred to the main hearing. However, if so warranted by the case, it is possible, and indeed quite common, for the case to be prepared in more than one oral pre-trial session or for the preparation to be continued through an exchange of briefs. As the following statistics show, one oral pre-trial hearing is sufficient in most cases.

| No. of pre-trial sessions | 1   | 2  | 3  | 4  | 5 | 6 | Total |
|---------------------------|-----|----|----|----|---|---|-------|
| No. of cases: 1986        | 96  | 50 | 20 | 10 | — | 1 | 177   |
| 1987                      | 128 | 59 | 14 | 3  | 2 | — | 206   |

The Finnish labour court has scrupulously reserved decisions on material issues for the full court, so that the views of the social partners can be taken into account. Decisions are therefore very limited at the pre-trial stage and are mainly confined to procedural matters.

The main hearing is oral, but the parties do not need to repeat the testimony that has been provided during the pre-trial either in writing or orally, since it is fully recorded and distributed to the members in advance and is therefore taken into account when deciding the case. At the main hearing, the witnesses are heard and the parties present their concluding statements. The main hearing is conducted in one session. It is very unusual to grant a postponement at the main hearing, although it is more common to move the date of the main hearing when a request is made to do so prior to the date fixed for the hearing.

The final decision is made after the main hearing following the presentation by both parties of their positions or, in the majority of cases, at a separate negotiating session on the basis of a draft decision prepared by the legally trained secretary of the labour court, which is distributed in advance to the members. The judgement may be handed down at the hearing, although that happens very seldom. It is usually mailed to the parties.

The president of the labour court plays a central role in the trial. If the presentations of the parties are unclear, it is the role of the president to question the parties in order to ensure that the issues in dispute are clear. The parties have the right to call witnesses, but it is for the president to decide how this right is to be exercised in each individual case. In practice, the president first puts any questions he or she deems necessary to the witnesses, to whom the parties and the other members of the court may then put supplementary questions. However, the questioning of the witnesses may also be left to the parties, with the president and the other members of the court subsequently posing supplementary questions.

The witnesses are present in court only while they are being heard and may not follow the hearing. Witnesses may also be heard together if this is considered necessary due to a discrepancy in their testimonies. Finnish courts apply the principle of the free consideration of evidence. This means that when considering a case, the court is free to consider all the facts that have come up in the case. On the other hand, the court is free to, and is under a duty to weigh all the evidence that is presented.

### *Special rules of evidence for collective labour disputes*

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The Finnish labour court is a special court which has the role of handling: disputes relating to collective agreements in the public and private sectors or related legislation; the interpretation of collective agreements; disputes concerning the compliance of certain procedures with a collective agreement or the relevant legislation; and sanctions for acts that are contrary to the terms of any such legislation. If the issue arises directly out of a dispute relating to an employment contract, the case lies within the jurisdiction of the ordinary courts. The parties to a case that is dealt with by the labour court are the associations or individual employers that are parties to the collective agreements referred to above. Nearly all the disputes involve named parties, so there are no specific rules of procedure for the handling of disputes between associations. The most important provision relating to procedures involving the social partners concerns their duty to negotiate. If, under the terms of a collective agreement covering employees in either the public or private sectors, a dispute has first to be the object of negotiations with the object of its settlement. It cannot be tried by the labour court until such negotiations have taken place.

The parties are free to avail themselves of the services of a lawyer or other legally trained counsel, but are not obliged to do so. Trade unions are normally represented by their own lawyers, but the parties are seldom represented by independent legal counsel.

At the labour court, the trial is held in the name of the parties that have concluded the collective agreement and also on behalf of those that are bound by the agreement. The association, employer or employee against whom a claim is made have to be named in the summons in order to be heard during the trial. If the case concerns wilful or grossly negligent conduct by a party covered by a collective agreement, the employer or employee in question has to answer the allegations in person. Persons who are summoned to be heard have an independent right of expression before the court, as well as the right to submit evidence. In the same way as the parties to the case, they may also be represented by legal counsel.

The parties may produce both written and oral evidence to support their allegations. Written evidence, however, has to be presented at the stage of the pre-trial, and can only be admitted in exceptional circumstances at the main hearing. In terms of its form and content, written evidence may be of almost any kind whatsoever. However, private reports which are prepared specifically for the trial are not admitted as evidence, except under special circumstances.

Complaints that are brought before the labour court are generally based on the collective agreement which has been concluded between the parties. In

most cases, the point at issue concerns the correct interpretation or content of the collective agreement or sanctions for non-compliance with its terms. A party which refers to a collective agreement or one of its provisions submits the agreement to the court.

If the dispute is to determine which collective agreement is applicable, the parties have to present the grounds upon which their views are based. In Finland, employers who are not bound by a collective agreement are under an obligation to apply the minimum terms of the general collective agreement in the field in question. However, a case cannot be brought in the labour court against employers who do not belong to an association; such cases fall under the jurisdiction of the ordinary courts.

The labour court only handles disputes relating to rights. It cannot complete existing collective agreements on behalf of the parties. It does not lie within the jurisdiction of the labour court to decide upon questions which are not covered by a collective agreement, although the parties are bound to find a solution to the question that has been omitted through negotiation. In practice it can be difficult to decide whether a dispute arises out of the interpretation of a collective agreement or whether the question under dispute has been totally omitted from the provisions of the agreement.

The labour court cannot decide disputes which involve purely financial claims. Nevertheless, the labour court can order defendants to make the payments that are claimed in a summons if a decision concerning the claim requires a decision in a matter that lies within the exclusive jurisdiction of the labour court, such as the correct interpretation of a collective agreement. A financial claim can be handled, however, if its amount is not in dispute or if extensive evidence is not required to ascertain the amount. In the case of other financial claims, the party is instructed to bring an action in a lower court of general jurisdiction.

The provisions of a collective agreement may specify that a dispute lying within the jurisdiction of the labour court can be decided by arbitration, except for disputes relating to the amendment of a collective agreement. Indeed, arbitration clauses are included in some collective agreements. The labour court itself cannot act as an arbitration tribunal.

There are no provisions regarding the time-limits within which the labour court has to issue its judgement. Under the law, however, cases involving notice of dismissal to an employee have to be handled as rapidly as possible. According to the procedural rules of the labour court, cases relating to ongoing industrial action also have to be considered on an urgent basis.

The labour court has exclusive primary jurisdiction in matters lying within its jurisdiction over the whole national territory. It does not itself act as an appellate court, nor can appeals be lodged against its judgements. However, a judgement can be removed on the basis of a procedural error in the same way as the decisions of other courts. The Supreme Court is competent in such cases.

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## *Innovations regarding procedure and evidence*

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The Finnish legal system is undergoing extensive reform, which will result in both organisational and procedural changes in the ordinary courts of first instance. Civil case procedure is being changed to bring it closer to the procedure followed in the labour courts. Under the proposed reforms, civil

procedure would be divided into pre-trial procedure and the main hearing, which follows the main procedural principles applied in the labour court. Under certain conditions, however, a case could be decided at the pre-trial stage. The pre-trial would be conducted by a legally trained member of the court. In cases involving labour law, a separate main hearing would be conducted before the full court, which would be composed of three legally trained members. The new rules of procedure for civil cases, which are scheduled to be implemented in 1993, will also require the amendment of the provisions governing the labour court. However, in view of the current differences between the two types of court, no great changes are to be expected in labour court procedures.

# *Federal Republic of Germany*

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Dirk Neumann, Vice-President, Federal Labour Court

## *General procedure and labour court procedure*

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Labour courts have a long history in Germany. An Industrial Courts Act was first enacted in Germany in 1890 and was then replaced by the Labour Courts Act of 1927, which was in turn revised in 1934 and was subsequently replaced after the Second World War by Control Council Law No. 21, of 30 March 1946, which essentially had the effect of restoring the Labour Courts Act of 1927. From 1946 to 1948, individual states enacted laws concerning the jurisdiction of labour courts. A Labour Courts Act (LCA) was enacted in 1953 for the Federal Republic of Germany and was revised on 2 July 1979.

For almost 100 years a separate system of rules of procedure for labour courts has been in existence in Germany. The procedure applicable in the labour courts is similar to the procedure laid down in the Code of Civil Procedure for ordinary courts. Nevertheless, it has special features in areas such as hearings in the courts of first instance and the taking of evidence. Labour court procedures also emphasise the rapidity of proceedings.

In all labour court proceedings, a conciliation hearing is conducted prior to the trial itself. The court hearing follows immediately, or a date for the hearing is determined and announced at the conciliation hearing. At all stages of the proceedings the aim is to reach an amicable settlement of the case. Witnesses are only sworn in for especially important questions. Labour court procedure includes specific provisions relating to conciliation proceedings, the judgement by the presiding judge, the preparations for the court hearing, the taking of evidence, default proceedings and the pronouncement of the judgement and its terms (LCA, sections 54-611). In procedures relating to dismissals there is a special obligation to accelerate the procedure: LCA, section 61a, provides that the time-span set for the conciliation proceedings and the following court hearing should not exceed two weeks. In appeals, it is a rule not to remand the case to the court of first instance, apart from a few exceptional cases (LCA, section 68).

## *Adversarial system*

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The adversarial system is used in both the labour courts and the ordinary courts. The courts therefore only have to take into consideration the evidence presented by the parties. However, in accordance with the rules of the Code of Civil Procedure, the court has to point out the need to plead in certain ways.

The only special features for the informal proceedings of the labour courts relate to disputes concerning the representation and co-determination of employees. Matters relating to the Employees' Representation Act or the Co-determination Act, disputes about the capacity to be a party to a collective agreement or a party's competence to conclude a collective agreement are settled in informal proceedings (LCA, sections 80-97). The principle of *ex officio* investigation is applied in these cases. The LCA explicitly lays down that in these proceedings the court shall make an *ex officio* investigation of the facts of the case within the framework of the claims made by the parties and that the parties to the proceedings contribute to clarifying the facts of the case (LCA, section 83). In order to investigate the facts of the case, these procedural rules allow for the court to make an *ex officio* inspection of documents, to seek information, to examine witnesses, experts and the parties concerned and to carry out inspections. The number of parties to informal proceedings may be very large and may sometimes exceed 100.

## *Collective labour disputes*

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Disputes relating to collective agreements, their legal validity and their interpretation are settled according to the rules of normal procedure that are applicable in the labour courts. This procedure is based on the adversarial system. Following the repeal in 1979 of a provision concerning the composition of the court (a presiding judge and two judges each from the employers and employees) in cases of disputes relating to collective agreements, there are no longer any special rules.

The normal procedure concerning the delivery of a judgement therefore also applies to collective labour disputes, and especially to disputes on industrial conflicts.

## *The role of lawyers*

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In the past, the appearance of lawyers in the labour courts was extremely controversial. The Labour Courts Act of 1927 excluded lawyers from representing the parties in the labour courts of first instance. After 1953, they were only allowed to appear if the financial value of the matter in dispute amounted to at least DM300. In all other cases, they had to be given special permission to appear in the court or in individual cases. There have been no restrictions on the appearance of lawyers in the labour courts since 1979.

If one party is represented by a lawyer, the court has to assign a lawyer to the other party, if it so requests, as counsel or adviser, in order to establish equality in court. Lawyers are therefore allowed to appear in labour courts in the same way as in any other court. Moreover, their admission is not restricted to certain courts; any lawyer who is admitted to a German court may appear in the labour court. In accordance with the provisions of the European Community, this is also true for lawyers from other countries of the European

Community, after they have established the free choice of their residence. However, foreign lawyers have not so far appeared in the labour courts.

### *Representatives of workers and employers*

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The lawyers who are on the staff of employers' associations and trade unions are allowed to appear in the labour courts of first and second instance. Representatives of independent associations of employees that have social, political or professional objectives (ecclesiastical or political associations) are also allowed to appear in the courts of first instance. However, only lawyers, and not the representatives of employers' organisations or trade unions, are allowed to appear before the federal labour court when it acts in its capacity as a court of appeal on questions of law. Representation by lawyers is mandatory in the federal labour court, while representation by either the representatives of associations or by lawyers is mandatory at the court of appeal.

### *Affidavits*

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In accordance with the LCA, evidence is generally given before the full court through the examination of witnesses and experts or by means of inspections. An oral interrogation is required if evidence is taken by a judge alone. Affidavits are only submitted in interim proceedings relating to an interim injunction or an arrest. In accordance with the rules set out in the Code of Civil Procedure, affidavits may also be submitted in interlocutory proceedings, such as actions for reinstatement in the event of failure to follow the necessary procedures to dismiss an employee. Affidavits may not replace oral evidence in proceedings that lead up to the delivery of a judgement or in informal proceedings.

### *Applicability of collective agreements*

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In accordance with the Collective Agreements Act, collective agreements lay down legal rules. In principle, it is the court's duty to inform itself automatically of these legal rules. All collective agreements therefore have to be recorded in a register of collective agreements. The rules set out in collective agreements are considered by the German legal system to be by-laws and only have to be proven if they are unknown to the court. When inquiring into these rules, the court is not restricted to the proofs offered by the parties, and it may therefore use all sources (Code of Civil Procedure, section 293).

The parties have to prove the factual basis for the application of a collective agreement. They therefore have to prove that they are a party to a collective agreement. However, this can be proven by the presentation of a certificate of membership, and there is no need for further evidence in this connection.

## *Jurisdiction*

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The labour courts only have jurisdiction over legal disputes. They are not competent for matters of arbitration or mediation.

## *Arbitration*

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The labour courts are obliged to encourage an amicable settlement at all stages of the proceedings, although they are not entitled to act as arbitrators. The parties are not entitled to invoke the courts as arbitrators. A judge must obtain authorisation from his or her superior authority to be appointed an arbitrator. However, the labour courts have jurisdiction over the legal validity of arbitration awards, offers of mediation and awards handed down by the board of conciliation.

## *Time-limits*

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The labour court procedures provide that the judgement has, in principle, to be pronounced on the basis of the court hearing and the deliberations of the members of the court. In accordance with section 60 of the LCA, the complete judgement has to be delivered to the court within three weeks. If, in exceptional cases, the judgement cannot be completed within this period, it has to be delivered to the court office without the statement of the facts or the grounds for the decision. In such cases, the grounds for the decision have to be stated in writing as soon as possible. If a separate date is set for its delivery, the judgement has to be complete at the moment of delivery.

The courts generally keep to the three-week time-limit, although the statement of the facts and the grounds for the decision are often given much later. Regulations within the judicial districts provide that the president of the court has to be informed if a judgement is not completed within three, or in exceptional cases, within six months. Nevertheless, sometimes the complete judgement is not delivered within one year. In such cases, according to the established case law of the federal labour court, the judgements have to be deemed to be without grounds for the decision, and they therefore have to be reversed *ipso jure* by the court of last resort. These exceptional cases are very unusual and are mostly caused by a sudden illness of the judge.

Section 69 of the LCA is applicable, *mutatis mutandis*, to the proceedings of the appellate court. However, the time-limit of three weeks, within which the statement of facts and the grounds for the judgement have to be given, is extended to four weeks. The judgement has to be signed by all the members of the court chamber. Regulations also provide in this case that the president of the court has to be informed if the statement of the facts and the grounds for the judgement have not been issued within three months. A principle has been established by the federal labour court whereby judgements which have not been completed within six months have to be reported to the president of the court. Despite the absence of legal provisions comparable to sections 60 and 69 of the LCA concerning the proceedings in the court of last resort, the final

judgements are usually served within one or two months after the pronouncement. Only in exceptional cases may this period of time be extended, although it has happened that, because of an illness of the judges or disagreement on certain grounds for the judgement, the period of time has been extended up to one year.

## *Innovations*

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The most recent amendment of the Labour Courts Act, dating from 2 July 1979, was intended to accelerate the proceedings. The limit for an appeal was raised from DM300 to DM800, so that an appeal is only allowable if the cause of complaint exceeds DM800. No appeals are admitted on questions of law in respect of the value in dispute. Appeals may only be made to the federal labour court on questions of law if leave to appeal has been granted. However, leave to appeal is only granted in cases of fundamental importance or in the event of a deviation from legal precedent. If leave to appeal is not granted, the party concerned may appeal against the denial of leave to appeal and the federal labour court may subsequently grant leave to appeal on questions of law. The experience of the past ten years shows that only 1 or 2 per cent of the appeals against denial of leave to appeal have been successful. The amendment was also intended to shorten proceedings. With this objective in mind, the time-limits for filing a brief to support an appeal were standardised and it was laid down that arguments that are advanced after these time-limits have lapsed may be dismissed.

# *Israel*

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Menachem Goldberg, President, National Labour Court

## *Structure of labour courts*

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The jurisdiction of the Israeli labour courts is very broad and covers individual, collective, organisational, social security and criminal labour law.

There are two levels of labour courts: regional and national. The national labour court functions primarily as an appellate court.

Cases are adjudicated by judges and public representatives of the labour courts. The judges are appointed by a statutory committee that appoints all of the country's judiciary. Their mandatory retirement age is 70. The public representatives are appointed jointly by the Ministers of Justice and Labour upon the recommendation of employers' and employees' organisations for a term of three years. The representatives of the public may be reappointed after concluding their term.

In the regional labour court, cases are generally heard by a single judge and two representatives of the public, one representing employers and the other representing the employees. In the national labour court, cases are generally heard by three judges and two representatives of the public; in important matters four representatives of the public sit alongside the three judges.

## *Jurisdiction of the labour courts*

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The jurisdiction of the labour courts includes individual disputes, that is, claims between an employer and an employee arising out of the employment relationship, such as claims relating to wages and conditions of employment at the workplace (leave, recuperation allowance and severance pay). The labour courts have no jurisdiction over tort claims, but they do have jurisdiction over claims for damages arising out of a breach of contract or of statutory obligations. They also cover collective disputes, that is claims between the parties, or potential parties, to both general or specific collective agreements, concerning their conclusion, implementation, interpretation, execution or breaches of their provisions. In addition, organisational disputes, which may be defined as claims between two unions and/or between two employers' organisations in questions of labour relations, claims by an employee against his or her own union in relation to its conduct in matters of labour relations, and social security disputes (that is, all matters relating to national insurance, old-age and survivors' benefits, employment injuries, accidents, invalidity, long-term care,

maternity protection and child-related benefits, unemployment insurance and supplementary income) are also decided by the labour courts, in addition to claims against and by pension and benefit funds, and claims in respect of rights to state pension payments. Finally, criminal offences under labour and occupational safety laws are heard by a judge without the representatives of the public.

## *Procedural rules*

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The procedural rules that are applicable to the labour courts are those that have been laid down under the terms of the Labour Courts Law of 1969. The rules of the general courts are not applicable in the labour courts. In the absence of an applicable procedural rule, the labour court "shall adopt whatever course it deems best for the just handling of the case". Within this framework, the labour court adopts from time to time the rules laid down in the Civil Procedure Regulations of the general courts, especially in respect of interlocutory proceedings.

The Labour Courts Law states that in civil cases the labour courts are not bound by the rules of evidence. This bestows a great deal of freedom upon the judges and permits the introduction of hearsay evidence, copies of documents and much more. Generally, hearsay evidence is given less importance than direct evidence. None the less, the labour courts consider themselves to be bound by the fundamental principles of evidence, such as warning witnesses prior to their testimony and the exclusion of privileged information. The laws of evidence and the Criminal Procedure Regulations, which are applicable in the regular court system, also apply when labour courts hear criminal labour law cases.

Three different forms of Procedural Rules are used in hearings in the labour courts. The first is applicable to all types of claims, with the exception of criminal cases and collective disputes. The second is applicable to collective disputes and the third applies to claims by employers against public service employees who conduct a partial strike.

## *General regulations of civil procedure*

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These regulations, which relate to a broad number of subjects heard by the labour courts, differ from the regulations that are applicable in other courts, even though some of the regulations respecting general civil procedure also apply to the labour courts. The difference between the procedures in the labour courts and in the general courts is that the regulations of the labour courts are less restrictive and easier for persons who are not lawyers to follow. Nevertheless, the regulations that are applicable in the labour courts on a number of elementary subjects are similar to or stricter than those that apply to the general courts. These include the order of hearing evidence at a hearing, the execution of a court order, and the setting of time-limits within which pleadings must be filed, including pleadings for appeals.

Another and perhaps more important difference between the two systems of procedure is the liberal interpretation of the labour court regulations. Many

regulations give the general courts and the labour courts broad discretion. For example, several similar regulations concern the extension of time-limits and decisions to summarily dismiss a claim. Labour court policy aims to prevent dismissals on procedural grounds.

For the benefit of employees who are not represented by legal counsel, special claim forms are provided for the non-payment of wages, severance pay or national insurance. These claim forms can be obtained, free of charge, from local labour councils, and from the labour relations officers at the Labour Ministry and can be filled in prior to being filed with the labour court.

In individual proceedings, if the Court has to interpret a collective agreement, the parties to the agreement (the unions and the employer or employers' organisation) may appear at the hearing and state their case. When a medical question arises, such as in national insurance cases, the labour court appoints an expert medical adviser from a list of experts compiled by the Medical Association. The expense is paid by the State. The expert submits an objective professional opinion. This procedure precludes the need for the hearing of medical testimony from each side and avoids the difficulty of deciding between two conflicting expert opinions. The labour court is aware of the fact that the medical opinion is merely advisory and that the ultimate decision is its own.

The majority of claims brought before the labour court are exempt from court costs. These include all social security claims, collective disputes, claims for severance pay, and wage claims up to an amount which is double the average wage (which today exempts claims up to NIS3,600 (approximately US\$2,000)). The court fee for other claims is nominal and stood in 1989 at a maximum of NIS11 (approximately US\$6).

## *Adversarial system*

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Proceedings in all Israeli courts are based on the adversarial principle, although the system has been adapted in the labour courts. By way of illustration, since the breadth of judicial knowledge is much broader in the labour courts than in the regular courts, general collective agreements need only be referred to rather than proven.

In order to prevent an erroneous judgement due to an omission by a party or a lawyer, the labour court refers them to issues raised in the pleadings which have not been fully litigated. Similarly, when issuing its judgement, the labour court often relies upon a legal argument which has not been raised by the parties; however, this is done only after bringing the point to their attention and giving them the opportunity to state their position. The intervention of the labour court is greatest when one of the parties, or both, are not represented by legal counsel.

Special procedural regulations that are intended to expedite the proceedings apply to collective disputes. The regular procedural rules are not applicable, unless a problem arises which is not covered by the special regulations.

The distinguishing feature of hearings of collective disputes is the exclusion of certain elementary procedural rules (especially the limitation of oral testimony). Evidence is submitted by affidavits in order to expedite the proceedings. Experience shows that this does not cause injustice, since the disputes are generally related to provisions of the collective agreement that can

be interpreted without the need for external testimony. Even trials concerning strikes are resolved without oral testimony.

The principal rule applicable to hearings of collective agreement disputes is that the statement of the claim must include the relevant facts, the legal claims, the relief that is requested, a list of witnesses and their affidavits, and a copy of all relevant documents, including the relevant collective agreements. The statement of the claim must be served upon the opposing side prior to being filed with the court. The defendant's response has to be filed within ten days of the receipt of the statement of the claim and has to be organised in the same format as the statement of the claim. Whether or not a response is filed by the defendant, the parties are summoned to a hearing within two weeks of the date by which the response is due. Once begun, the hearing is continuous, without consideration being given to the court's schedule or that of the parties or their counsel. The labour court decides whether to hear oral testimony, including the cross-examination of witnesses who submitted affidavits. With the court's permission, an individual proceeding may be combined with a collective proceeding. This occurs in particular when an order is requested against a workers' committee and its members.

Interlocutory proceedings, and especially temporary restraining orders, are needed in many collective disputes until a final decision is rendered. This applies in particular to injunctions against strikes or unfair dismissals. Requests for interlocutory orders are generally filed together with the principal claim, and have to be accompanied by an affidavit. In urgent cases, the labour court is authorised to issue a temporary restraining order. An application for a temporary injunction is normally heard on the same day that it is filed, either in the afternoon, the evening or (infrequently) at night. The national labour court has held that both parties must be summoned to hearings concerning temporary injunctions. Experience has shown that a hearing at which both sides are present is more effective and often results in the parties returning to the bargaining table without the need to issue an injunction. Furthermore, an *ex parte* injunction is often not obeyed, since the union has not had an opportunity to be heard. A decision to give interlocutory relief often encourages settlement of the principal claim, since the parties have time to negotiate an agreement between the two hearings.

Claims filed by a public sector employer to reduce wages on grounds of a partial strike are governed by special regulations. There are two stages to the procedure: in the first place comes a collective stage when the labour court decides whether the industrial action is "unprotected". The parties to this proceeding are the employer and the employees' organisation. If the partial strike is declared "unprotected", the employer may deduct one-half of each employee's salary. In the second place comes the individual stage: if an employer desires to deduct more than one-half of the employees' salaries, individual actions may be brought against each employee. Similarly, any employee who believes that the amount deducted from her or his salary was too high may bring an individual action.

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## Attorneys

Attorneys may appear in the labour courts. Due to the adversarial system, the role of the lawyer is important both in terms of the examination of witnesses

and in putting forward arguments. In claims against the National Insurance Institute, legal aid is available to all who request it without regard to economic need. If the claim appears to be unfounded the legal aid lawyer may refuse to represent a claimant. Free legal aid is available for claimants whose income is low.

Representatives of unions and employers' organisations may represent their members in the labour court. Union representatives occasionally represent their members, but employer representatives rarely appear.

## *Affidavits*

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Extensive use is made of affidavits in the labour court. Reference has already been made to their use in cases arising out of collective disputes. For other types of claims it is customary to require each party that is represented by counsel to submit the witnesses' direct evidence in affidavits. The court therefore only needs to hear cross-examination and to redirect the testimony of the witnesses. Affidavits are required in requests for interlocutory relief, such as orders for the attachment of wages or other funds.

## *Proof*

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When a party's case relies on a special collective agreement, the agreement has to be authenticated. The manner in which this is done differs depending upon the circumstances. Extension orders must be published in the *Official Gazette*, but need not be posted in the court house. An employee whose case relies on an extension order has to prove that the provisions of the order apply to the enterprise in which she or he is working (for example, whether an extension order in the shoe industry applies to a factory which produces heels), and that the employee is included in the category of employees to whom the agreement applies (blue-collar workers, technicians, factory workers, etc.).

In order to be considered such, collective agreements have to be registered with the Ministry of Labour. A denial by an employer that an agreement is a collective agreement can be rebutted in one of three ways: by submitting a copy of the agreement bearing the stamp of the Collective Agreements Registry; by obtaining a certificate from the Registry that the agreement has been registered; by submitting a copy of the Labour Ministry's Journal in which the registration of the agreement is announced.

General collective agreements lie within the judicial knowledge of the labour court. To prove that a general collective agreement is applicable, an employee has to show that the employer is a member of an employers' organisation which is a party to the agreement and that she or he is included in the category of employees to which the agreement applies. Special collective agreements have to be submitted to the court and the employee has to prove that she or he is within the category of workers to which the agreement applies. In the few cases in which there is doubt as to whether a special agreement applies to the parties, the demonstration of prima facie proof by the employee places the burden of proof on the employer.

## *Jurisdiction*

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The labour court only has jurisdiction over legal disputes and the resulting rights and obligations, but not over economic disputes.

## *Arbitration*

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The labour court does not have the power to arbitrate in legal disputes, whether they are of an individual or collective nature. Nevertheless, in an individual dispute, the parties are permitted to reach a compromise within given financial limits and to request the court to complete the compromise by fixing the sum to be paid by the defendant within the range fixed by the parties.

## *Time-limits*

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The rules of procedure establish that the court must render its judgement within 30 days of the conclusion of the hearing. However, the courts do not always succeed in meeting this deadline. Nevertheless, in collective disputes, although the time-limit is not established by law, the judgement is generally rendered the day the hearing is concluded or within a few days. There is no regulation setting the time within which an appeal decision must be made. Collective disputes also receive priority at the appeal level. They are generally heard out of turn and judgement is generally rendered at the end of the hearing or within one or two months.

## *Innovations*

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It is difficult to point to radical innovations in the rules of procedure over the past few years. One innovation worthy of note, however, is the national labour court's jurisdiction to dismiss appeals by summary decision, without setting forth its reasons, when it upholds the interpretation of the facts and conditions of the case made by the trial court. It is noteworthy that the regular courts have recently adopted regulations concerning the taking of direct evidence by affidavit which have applied to the labour courts for many years.

# Norway

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Stein Evju, President, Labour Court

At the time when the labour court was established, an old and complex system of courts and civil procedure was still in force in Norway. A general reform was, however, under preparation. The original Labour Disputes Act of 1915, containing the rules governing the labour court and its procedural provisions, was enacted at the same time as a new Courts Act, restructuring the ordinary courts, and a new Act on Civil Procedure. The latter did not, however, enter into force until 1 July 1927 (in some parts not until 1 July 1936). The Labour Disputes Act came into force as of 1 January 1916.

The rules pertaining to the procedure in labour court cases today are contained in the revised Labour Disputes Act, 1927 (LDA; *arbeidstvistloven* of 5 May 1927), as amended. They are, for the most part, identical to those of the 1915 Act, which in turn were modelled along the lines of the fundamental principles of the draft Bill on Civil Procedure.

The procedural provisions of the LDA are neither numerous nor detailed. Nor are the more comprehensive rules of the Act on Civil Procedure and the Courts Act directly applicable at the present time. However, they are applied by the labour court to the extent that they are found to be suitable and compatible with the provisions of the LDA. Although there are a number of differences, for example as regards the status of parties and litigation costs, the essential features of the procedure in labour court cases correspond to the ordinary civil procedure. Nevertheless, the legal situation leaves the labour court a certain freedom in procedural matters, which allows for a high degree of expediency, if needed, and somewhat less formalised proceedings than in the ordinary courts.

The labour court has jurisdiction over legal disputes (disputes of rights) only, and not over disputes of interests (economic disputes). Furthermore, its jurisdiction is confined to collective disputes of rights, that is, to disputes concerning the validity, interpretation and application of collective agreements, breaches of collective agreements and the peace obligation, and claims for damages resulting from such breaches.

## Rules of evidence

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The rules of evidence and procedure which apply to collective labour disputes are therefore those that apply to labour court proceedings. Other forms of legal disputes go to the ordinary courts and are handled according to the Courts Act and the Act on Civil Procedure (with the exception of criminal cases, which are

dealt with by the ordinary courts under the terms of the Act on Criminal Procedure, 1981, the rules of which differ in some respects from the rules of civil procedure).

Moreover, the labour court is generally the court of first *and* last instance in the disputes that come under its jurisdiction.

The labour court system also consists of local labour courts (the ordinary country or city courts) which only have jurisdiction over collective agreements and disputes of a local or regional nature. However, due to the highly centralised collective agreements system in Norway, these courts are very rarely called upon and will not be further dealt with here.<sup>1</sup>

## *Adversarial system*

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The adversarial system fully applies to labour court proceedings. For the factual aspects of a case, the court may only take into consideration and base its decision on the evidence that has been presented to the court during the oral hearing of the case. With regard to the legal aspects of the case, the court is bound by the claims presented by the parties and may not decide the case beyond their confines, such as by awarding the plaintiff more than she or he has claimed or less than the respondent's minimum claim. At the outset, the court is also bound by the pleadings in law, or legal grounds, submitted by the parties in support of their claims. For example, if prescription (or the expiry of the time-limit within which a claim may be made) has not been pleaded, the court may not decide the case on that basis. Within these limits, the court is wholly free to interpret and apply the law. Moot points may of course arise on the distinction between different legal grounds and on giving full effect to the submissions that have been made, but in practice they rarely do. The labour court is under an obligation to see that full information is at hand in a case. The court may require the parties to present further information or evidence on points of fact; this may also be done by the president during the preparation for a hearing. On points of law, the court may raise questions concerning the submissions of the parties for the purpose of clarification or in order to point out the possibility or necessity of pleading in a certain way. As a court of first and last instance a distinct obligation rests with the labour court in this respect in order to prevent mistaken judgements and adhere to the general legal principles that are applicable in this particular field of law. For these reasons, the labour court has plenty of scope to intervene in how the parties argue their case and it makes fairly frequent use of this privilege.

## *Attorneys*

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Attorneys may appear before the labour court. Representation by counsel is not compulsory, but the use of attorneys by the parties on both sides has been

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<sup>1</sup> 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 in (1987), 5 *International Labour Law Reports*, pp. xxxv–xxxix.

the prevailing practice ever since the early 1920s. The role of attorneys is definitely of importance in the preparation and presentation of the case, in its factual aspects, including the examination of the representatives of the parties and witnesses, as well as in putting forward the legal arguments. However, there is no particular bar exam or admission test for lawyers who wish to appear before the labour court. Any lawyer who is qualified to act as an attorney in the ordinary courts may also appear in the labour court.

### *Employee and employer representatives*

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Employee and employer representatives are allowed to appear in the labour court. In many cases the plaintiff and the defendant are the trade union and employers' association which are parties to the collective agreement in dispute and it is therefore common, and in practice it is expected that each party will be represented, in addition to an attorney, by a "representative of the party" who normally makes a statement and is subjected to cross-examination. Under section 17 of the LDA, each party to a dispute is allowed to be represented by "authorised representatives" up to a maximum number of three. The attorney representing a party is considered to be a representative for this purpose. One or two elected or employed officers concerned with the administration of the collective agreement in question also normally appear.

In cases involving individual employees or employers, although they are mainly accompanied by their organisations, the parties are summoned and allowed to appear in person. If represented by an attorney (or some other "authorised representative") their presence is not, however, required for purposes other than the giving of evidence. The same is true for officials of organisations when the parties are a trade union and an employers' association.

### *Affidavits*

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Hearings in the labour court are in all cases oral and the principle of the "direct presentation of evidence" applies. Representatives of the parties, witnesses and experts, as the case may be, also have to make statements and are examined orally in court. The use of affidavits is not normally permitted. Section 19, No. 7, of the LDA, however, allows for the taking of evidence in other courts of law, the records of which may be presented to the labour court. A decision or request by the labour court or its president is required for this procedure to be used. This is intended for cases in which a witness is for some reason prevented from appearing, or is not bound to appear before the labour court. In practice, it is hardly ever used.

### *Proof of the applicability of an agreement*

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Disputes in the labour court normally relate to a specific collective agreement (or set of agreements). Proof of the existence and applicability of the agreement

is not normally required beyond the presentation of the agreement (or relevant excerpts) in the trial documents. In the event of a dispute over whether a party is bound by the agreement, as a party to it or as a member of an organisation that is a party to it, the ordinary rules of evidence apply. Collective agreements, other than the one at issue, are not in principle considered to contain legal rules known to the court and as such applicable. The presentation in writing of their texts is normally sufficient. In the case of general and well-known agreements, such as "basic agreements", pleadings may in practice be accepted without the actual presentation of the texts. In the event of a dispute relating to the interpretation of an agreement, the ordinary rules of evidence apply.

### *Arbitration function*

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The labour court, or its president, are entitled to promote an amicable settlement at all stages of the proceedings. The court is also entitled to act as a court of arbitration in legal disputes if so requested by the parties. This is done occasionally, particularly if a case that has been taken to the court for some reason is dismissed by the court in its capacity as a labour court. In these cases, the three professional judges rather than the full seven-member court sometimes act as arbitrators. In other cases, the court and its members are entitled individually, without needing to obtain consent from any superior body, to act as arbitrators in legal as well as in economic disputes. However, this only occurs rarely, partly for practical reasons and partly due to the problems that might subsequently arise if an arbitration award became the subject of a dispute in the labour court.

### *Time-limits*

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As a general rule, the labour court must hand down its decision in full within one week of the conclusion of the hearing (LDA, section 25, No. 1, paragraph 2). The same rule applies to the local labour courts as well as to the labour court in its capacity as an appellate court, although this occurs rarely in practice. This requirement is complied with in almost all cases. In urgent cases, such as those relating to the lawfulness of ongoing or imminent industrial action, a full decision may be handed down on the day of the hearing or within the next one or two days.

### *Innovations*

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There have been no amendments to the rules of evidence and procedure in recent years. The rules that are currently applied are basically those initially laid down in the 1915 Labour Disputes Act, as supplemented by case law in the early years, without any major changes or innovations over recent years.

# Spain

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Manuel Peris Gómez, Vice-Presidente del  
Consejo General del Poder Judicial

Late last century, in July 1885, a general strike took place in Barcelona. Its fundamental motive was to demand freedom of association, although it also called for the institution of juries of peers through which disputes with employers could be settled without having to go through the slow and ineffective civil courts. Industrial tribunals were introduced in a number of stages, starting in 1908, with a president and six jurors (three employers and three workers), then in 1931 with mixed juries also composed of an equal number of employers and workers, until the labour court was set up in 1938. This coincided with the commencement of a new and totally interventionist phase in labour law, which was highly controlled by the State at the outset, but which allowed a measure of liberalisation later when the laws on collective agreements were adopted in 1958. The right to social self-defence (collective action) is now recognised by the 1978 Constitution. Nevertheless, in practical terms the judiciary continues to exercise a monopoly over industrial affairs, since no provision is made for juries or other means of representing employers and workers.

Trade unions play practically no part in the settlement of individual disputes. This means that pre-trial procedures (in the form of conciliation) are over-bureaucratised and therefore irrelevant. There is still a lack of rapid, effective procedures for the settlement of collective disputes which would give real force to the principles of freedom and autonomy that are essential to trade union action.

Unlike labour courts in many other countries, which are composed of both professional and lay judges, the former labour courts, which since 1989 have been known as the Labour and Social Affairs Courts, are composed of professional judges, with no place for any kind of peer judgement or representation of workers and employers. It is not therefore surprising that litigation should be so common, especially in individual disputes; 266,298 suits were filed with the labour courts of first instance in 1987 and 267,800 in 1988. The higher courts which deal with motions for the rehearing of cases (in reality appeals) and judicial reviews (Division Six of the Supreme Court) lodged against the labour courts, examined a large number of appeals. The central labour court had to deal with 25,832 motions for rehearings/appeals in 1986, 31,413 in 1987, and 39,223 in 1988. The Supreme Court dealt with 5,164 cases in 1986, 6,309 in 1987, and 8,581 in 1988.

Attempts have been made at various levels to extend the scope of negotiations between the social partners. In 1983, the Interconfederal Agreement set the objective of reaching an agreement within the space of one year on voluntary procedures for the settlement of disputes, but did not achieve its goal.

The tripartite Economic and Social Agreement for 1985 and 1986 (concluded between the Government, the employers' associations and the unions) had the same objective. It contained an agreement to introduce a number of voluntary procedures for the settlement of industrial disputes through mediation, conciliation and arbitration. In May 1985, the UGT drew up a "Draft Agreement on Voluntary Procedures for the Settlement of Industrial Disputes", although they did not cover disputes relating to social security or in which the administration was a party. It covered collective disputes relating to the law or its interpretation and individual disputes, and also contained an additional clause calling for technical and financial resources to be made available to set up the proposed bodies. The draft went no farther because the employers' organisations foresaw too many difficulties in setting up the proposed instruments for the settlement of individual disputes.

### *Features of the procedures*

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All types of evidence are admitted in cases relating to labour law. Less restrictions are applied than under civil law procedures where, until the recent reform of 6 August 1984, the testimony of witnesses was only admitted at the initial hearing of evidence and not during the presentation of further evidence. Even now civil law procedure only admits testimony from witnesses whose names are on the case records. The greater flexibility of labour court procedures stems from the various principles of labour law cases, according to which proceedings should be oral, immediate and focused, in contrast with the slow, written proceedings of civil law.

There are some special features of procedures in cases relating to labour law. Cases heard by the Labour and Social Affairs Judge (formerly the Labour Judge until the name was changed in February 1989) are oral and all stages of proceedings take place in the presence of the Judge. The defendant's reply is oral, as is the submission of evidence. There are no lists for examination or cross-examination, nor is there a written interrogatory that has to be answered by the party. There is no challenging of witnesses or balloting of experts. However, in cases of dismissal, the employer cannot oppose the plaintiff's suit on grounds other than those set forth in his letter of dismissal. In social security cases, the administrative proceedings previously initiated by the social security institution have to be taken into account. In cases initiated by the authorities, the labour administration files its official report, which is equivalent to a complaint, to initiate proceedings. Moreover, where appeals are concerned, the procedure only provides for a single instance before the Labour and Social Affairs Court and extraordinary appeals, for rehearing or for review (*review per saltum*) depending on the matter at issue or the sum involved. There is no provision for a two-tiered appeals procedure.

The Act of 12 April 1989 sets out the new principles of industrial procedure, granting a period of one year for the approval of a full text for the Basic Law. The reform fulfils the requirements of the 1978 Constitution, which provides for the creation in each of the 17 autonomous communities of one Higher Court whose judgements are final for all processes of law. Among the divisions of this court, one deals with social affairs, without prejudice to the competence of the Supreme Court (motions of final appeal, and motions for the harmonisation of case law and for review), which has jurisdiction throughout

Spain. The Labour and Social Affairs Division of the Higher Court hears appeals against judgements delivered by the Labour and Social Affairs Courts in the territory of the autonomous community, although the division itself may be empowered to hear a case where the matter at issue affects a territorial area extending beyond the jurisdictional boundaries of a Labour and Social Affairs Court. Final appeals *per saltum* are therefore replaced by a final appeal to harmonise case law. This accords with the objective of final appeals, which is to ensure that the courts are subject to the law and to establish jurisdictional unity.

Labour court procedures include the right of reply. The general rule is that the parties shall speak as often as the judge shall deem necessary. This is a consequence of the oral nature of the proceedings, in which the judge is empowered to request the parties to expand upon or clarify their allegations. The plaintiff is required to respond to counterclaims.

### *Collective disputes*

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Proceedings are instituted by official notification from the labour authority that has been approached by the party which has applied for a judgement in a collective dispute. Only such evidence as the judge deems pertinent may be examined during the hearing.

The courts are only competent to deal with disputes on matters of law, and do not deal with disputes concerning economic matters.

### *Attorneys*

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Representation by attorneys is mandatory in appeals. However, although this is not the case in the courts of first instance, in practice attorneys always act on behalf of the parties. The attorneys' function is to provide guidance for the presentation of the case or the defence and they may also, where appropriate, act as representatives of a party.

### *Representatives of workers' and employers' associations*

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Representatives of workers' and employers' associations are authorised to intervene.

### *Affidavits*

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Affidavits cannot be admitted in lieu of oral statements delivered by witnesses before the court and the defending party.

## ***Applicability of a collective agreement***

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Although not frequent, it may be necessary to prove the applicability of a collective agreement.

## ***Arbitration***

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Some agreements contain clauses providing for the settlement of disputes by means of dispute settlement procedures in which a judicial verdict is given.

## ***Maximum period for delivery of judgement for the main hearing***

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Article 89 of the Labour Court Procedure Act of 30 June 1980 provides that the judge has to deliver judgement within five days. The judgement has to be published immediately and the parties or their representatives have to be notified within the two following days if they reside in the same locality, or through the appropriate official channels if they live elsewhere. Section 19 of the new Basic Law provides that “maximum periods shall be established within which judgement shall be delivered and the parties notified thereof”.

## ***Maximum period for delivery of judgement for appeals***

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A judgement of an appeal has to be delivered within ten days and the records returned within five days thereafter to the original court for the purposes of the notification and execution of the verdict (section 159 of the Labour Court Procedure Act). For reviews, the maximum period is also ten days (section 174 of the same Act).

## Switzerland (Canton of Geneva)

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Claude Wenger, Barrister-at-Law, Clerk of the  
Court of Industrial Arbitration of Geneva

Switzerland is a federal State in which private law, which covers the legal provisions of individual contracts of employment, is uniform, but where the rules of procedure and organisation of the courts lie within the competence of the federated states (cantons). A supreme court, the Federal Court, is responsible for controlling the application of the law by the cantonal courts and for ensuring the uniformity of jurisprudence. There is no division specialised in labour law in the Federal Court, where labour law cases are handled in the same way as other private law cases.

The principal actions that citizens may bring before the Federal Court are *recours en réforme*, which are admissible when the value in dispute is not less than 8,000 Swiss francs, and *recours de droit public* in other cases. The conditions governing admissibility by the Federal Court are currently being revised with a view to making the Court more restrictive and alleviating its workload. In June 1989, Parliament approved a Bill aimed at raising the minimum value in dispute to 30,000 francs in cases of *recours en réforme*, and at introducing a procedure of preliminary examination in cases of *recours de droit public* which would allow cases deemed to be of little importance to be rejected. Cases that are considered to be important would be those which raised a new question of law, where there were grounds for a review or where the cantonal authority had deviated from the jurisprudence of the Federal Court. A referendum has been launched against this Bill. The main support for the referendum comes from workers', tenants' and consumers' organisations. In Switzerland, 50,000 citizens can require a Parliamentary Bill to be put to a public referendum.

### *Rules of procedure laid down by federal law and cantonal rules*

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Even though court procedure falls within the competence of the cantons, certain rules of procedure are to be found in federal laws. This is the case for labour law. Federal law provides that the cantons are obliged to submit to simple and rapid procedures all disputes arising from labour contracts of which the amount in dispute does not exceed 20,000 francs (the sum was 5,000 francs until 31 December 1988), and that in such cases the parties are not to bear either legal fees or legal costs (section 343 of the Swiss Law of Contracts—*Code des Obligations* (CO)).

The cantons have to observe these federal provisions, but retain great latitude in the organisation of the courts and the contents of the rules of procedure. Certain cantons entrust labour law disputes to the lower courts, whereas others have formed special courts composed of industrial arbitration judges and/or of professional magistrates. These courts may comprise one or more instances and may have limitations on their competence as regards the amount in dispute.

Over a century has passed since the Canton of Geneva established a special jurisdiction for disputes arising from contracts of employment, comprising two instances and without limitation of competence as regards the amount in dispute. In Geneva, this jurisdiction hears all disputes relating to individual employment contracts. This institution is governed by a law of procedure, the Act on industrial arbitration of 30 March 1963 (*loi sur la juridiction des prud'hommes*). This Act is currently in the process of being partially revised. The two issues which are delaying the revision relate to the introduction of the possibility for lawyers and other professionally qualified representatives to assist the parties in the first instance and authorisation for professional associations to institute legal proceedings in a declaratory action.

## *Federal and cantonal rules of evidence*

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In Switzerland, the Law of Contracts is based on the principles of freedom to contract and of autonomy (article 19 of the CO). However, there are many exceptions to these principles in areas in which one party to the contract is in need of special protection. This is particularly true of contracts of employment. Nevertheless, this has not prevented the legislature from establishing many provisions that are based on the principle of the equality of the parties, probably in order to respect certain Swiss traditions. Section 361 of the CO gives a list of provisions which cannot be waived, either to the detriment of the employee or the employer. These are known as *absolutely imperative* provisions; there are other provisions, known as *relatively imperative* provisions, which cannot be waived to the detriment of the worker. The employer is therefore also protected against the worker.

Mention should also be made of section 341 of the CO, the aim of which is to protect workers against renunciation of their rights. According to this provision, the worker cannot waive, during the course of the contract or during the month following the end thereof, financial claims arising from imperative provisions of the law or from a collective agreement.

The fundamental rule in private law concerning proof is stated in section 8 of the Swiss Civil Code (CC): "Each party must, unless the law provides otherwise, prove the facts which he/she alleges in order to deduce therefrom his/her rights." This rule is paraphrased in the Geneva law respecting ordinary civil procedure in the following terms: "The party which alleges a fact, whether it be to derive a right or discharge therefrom, must prove it, unless the other party declares that it accepts it or the law allows it to be taken for granted" (section 186 of the LPC).

Therefore, in a claim arising out of a contract, such as a contract of employment, the claimant has to prove the existence and the contents of the agreement, as well as the facts determining its execution, while a defendant who claims that a right has lapsed, bears the burden of proving that it has lapsed.

According to the jurisprudence of the Federal Court, the defendant can be required to contest the allegations of the claimant with concrete facts.

As regards labour law, federal law provides that the court shall establish the facts *ex officio* and freely evaluate the evidence (section 343 of the CO). This is known as the *ex officio* principle, as distinct from the principle of hearings or investigation.

The obligation of the court to establish the facts *ex officio* does not exempt the parties from having to participate actively in the proceedings. It is incumbent upon them to inform the court of the facts of the case and to point out the means of proof. Nevertheless, the court has to satisfy itself, particularly by hearing the parties, that their allegations and their evidence are complete, although it is only bound to do so if there are objective reasons for entertaining doubts in this respect. There are no grounds for obliging the court to conduct a more thorough investigation than those that are undertaken in other proceedings which are governed, at least in certain respects, by the *ex officio* principle, particularly in the fields of divorce, social security or contentious administrative issues. The application of the *ex officio* principle, under which the court makes inquiries as to the facts and establishes the law *ex officio*, does not reverse the burden of proof. If a fact alleged by one party in order to deduce a right cannot be proved, the conditions for the existence of the right are considered not to have been fulfilled. The court might also accept a probable, or the most probable, fact; however, a mere possibility would be insufficient.

The *ex officio* principle does not allow the court to rule *ultra petita*; in other words, the powers of the court are limited by the claims of the parties. The court cannot therefore award more to a party than the party has claimed. However, the arbitration court is not deemed to have ruled *ultra petita* if a claim comprises several counts and it awards more than is claimed on one of these, provided that the total amount awarded does not exceed the total amount that has been claimed.

New federal provisions respecting dismissal came into force on 1 January 1989. These establish the concept of *abusive dismissal* and provide for the reversal of the burden of proof when the worker is a member of an enterprise committee. In such cases, an employer who wishes to dismiss the worker has to prove that there is good cause for dismissal. In all other cases in which abusive dismissal is claimed, there is no reversal of the burden of proof. The main remedy is a penalty equivalent to a maximum of six months' salary, rather than reintegration in the enterprise.

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## Summary of the Geneva Law on Arbitration

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### Competence

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All disputes between employers and employees on all matters concerning their relations under a contract of employment are settled by arbitration (*jurisdiction des prud'hommes*). The competence of this jurisdiction is limited in respect of both its purpose and the parties. It is limited to disputes arising out of an individual contract of employment and brings together the parties to the individual contract (although certain exceptions to these principles are provided for by the law). The competence of the *prud'hommes* is public policy and cannot be set aside by an arbitration clause.

### *Organisation*

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The 12 groups of industrial arbitration judges, subdivided according to their profession, are composed of lay judges, who are elected every six years. The candidates are proposed by employers' and workers' organisations. Each group is comprised of 21 employers and 21 workers, with a total of 504 judges for all the groups. Each group contains conciliation boards composed of one employer and one employee arbitration judge, courts composed of two employer and two employee arbitration judges and of a president who is alternately an employer and a worker. There are therefore no professional magistrates at the level of the first instance. Each group also contains appeal chambers, which are composed in the same way as the court, except for the president, who is a professional magistrate delegated by the cantonal court to exercise this function in addition to his or her usual duties.

### *Rules of procedure*

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In accordance with the law, the parties are summoned to appear at short notice. However, there is no rule of procedure concerning the time-limit within which decisions have to be delivered. In 1986, 70.5 per cent of the cases that were handled were settled in less than four months; of these, 75 per cent of the cases which were settled before conciliation boards were handled within one month; two-thirds of the cases which were settled before the courts were handled within four months and two-thirds of the cases that were settled before appeal chambers were handled within one year.

In all instances, both parties are heard in the proceedings. The hearings of the conciliation boards take place in camera. Other hearings are open to the public. The proceedings of the conciliation boards and the courts are oral and the parties have to appear in person without the assistance of third parties. There is an exchange of briefs in actions that are heard by the appeal chambers and the parties may be assisted or, exceptionally, represented by a lawyer or another professionally qualified person, who is normally a representative of a union or an employers' association. In no case does a written statement made outside the court, whether or not it was made under oath, have the value of testimony. At the most, it may be considered as evidence.

For a collective agreement to be applicable, the parties to the dispute must be bound by it, that is to say, the parties must be members of the associations which have signed the collective agreement. Under certain conditions, which are related mainly to the degree to which the signatory organisations are representative, the state authorities may declare an agreement to be generally applicable. The agreement therefore becomes applicable to all employers and employees in the particular economic sector.

Appeals are admissible when the value in dispute is in excess of 1,000 Swiss francs. The time-limit for appeals is ten days from the receipt of the court's decision. The appeal chambers may recommence the inquiry of the case *ab initio* and may hear witnesses that have already been heard by the court of first instance.

# *United Kingdom*

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

Before seeking to analyse and comment upon procedures in industrial tribunals in Great Britain (the only jurisdiction of which I am aware which stretches across the border into Scotland but does not include Northern Ireland), it is important to stand back and look at the general structure of the courts and their jurisdictions in so far as each is relevant to industrial relations, the likely identity of the parties involved in such litigation, and those entitled to appear before those courts. It is also vitally important to remember that whereas in many countries in Europe the procedure is investigative, procedures in the United Kingdom are adversarial. It is no part of my function in these papers to argue the advantages and disadvantages of each.

## *The courts*

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There are three jurisdictions to be considered. First, the ordinary courts which consist of the county courts, and the Supreme Court; this latter has two levels, the High Court (first instance) and the Court of Appeal which takes appeals both from the High Court and the county courts. The Judicial Committee of the House of Lords is the highest court in the land, but for historical and constitutional reasons the judges (known colloquially as "Law Lords") sit in a committee room in the House of Lords, and sit unrobed. When in open court (as opposed to sitting in chambers) all judges of the Supreme Court and county courts sit in robes. Save in the Court of Appeal, which sits in six divisions of three Lord Justices, the judges sit alone.

Secondly, the industrial tribunal system is part of our administrative law structure. There are two levels: the Industrial Tribunal (first instance) and the Employment Appeal Tribunal (EAT). There are approximately 70 industrial tribunals; the EAT is the sole tribunal of appeal. It has the status of the High Court. Thereafter, there is an appeal to the Court of Appeal and the House of Lords. All appeals from industrial tribunals to the EAT must be based on points of law. Unless the findings of fact are perverse, in other words, if the tribunal has reached a decision on the facts which no reasonable tribunal could have reached, the industrial tribunals are the sole judges of fact. They have sometimes been referred to as "Industrial Juries". The president of tribunals, who is a senior county court or circuit judge, is responsible for the overall administration of industrial tribunals. The system is divided into 11 regions,

each of which is administered by a regional chairman. Overall there are some 60 full-time chairmen and some 120 part-time chairmen. The qualification for each is to be a barrister or solicitor of not less than seven years' standing. Scotland is regarded separately for administrative purposes and a Scots judge sits from time to time to hear appeals in Edinburgh in a division of the EAT. I try to visit Edinburgh each year to sit for a few days myself.

Both in the industrial tribunals and EAT the legal member sits with two lay members. All such members are selected by the Department of Employment and appointed by the Lord Chancellor's Department. Until recently they were selected from lists supplied by the Trades Union Congress (TUC) and the Confederation of British Industry (CBI), but recently the Department of Employment has announced that it will select from wider fields, provided each member can properly be said to be representative of either side of industry and with experience in the field of industrial relations. There are some 1,800 members in all on the lists of industrial tribunals. They are appointed for three years at a time. The EAT has a separate list of 40 members, some of whom are or have been members of industrial tribunals.

All lay members of industrial tribunals and the EAT are equal members with the legal member or myself. This again is an important point to remember. It is also important when considering procedures. The members participate in the hearing, the decision-making, and the preparation of the judgements (known as "reasons").

Thirdly, there is a government-funded and appointed body, the Advisory, Conciliation and Arbitration Service (ACAS), which has a small but important jurisdiction in connection with internal trades union matters, but for our present purposes is also important in procedural terms.

The functions of ACAS are wide and complex, and would merit a paper on their own, but it is sufficient for our present discussions to note that it has branches throughout the country and is responsible in every originating application brought before an industrial tribunal for mediation in an attempt at reconciliation of the parties. The statistics are interesting: for the year 1987-88 (31 March) the total number of cases registered was 34,233, of which 10,107 were withdrawn by the parties, and in 13,018 of which a settlement was achieved with the help of ACAS.

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## *The extent of jurisdictions*

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The history of the development of our law of industrial relations stretches back to the last century. I propose to summarise the jurisdictions as they exist today; changes have been made as recently as the Employment Act, 1988.

I shall examine the jurisdictions in the reverse order. I do not propose to consider the ACAS position in detail, although a bare list of the jurisdiction of industrial tribunals is attached as an Annex. On reading the Annex the wide extent of its jurisdiction will be clear. For the most part, however, it deals with aspects of industrial relations that lie outside the sphere of strikes and lockouts.

By far the greatest number of cases coming before tribunals are claims under the provisions of the Employment Protection (Amendment) Act, 1978. It is under this Act that industrial tribunals and the EAT have their statutory being, although the origins of both tribunals can be found as early as 1969 and in the 1975 Act.

The 1978 Act and its predecessors from about 1969 introduced a new concept in English law. It was the concept of the right not to be unfairly dismissed. This concept must be contrasted with actions for wrongful dismissal in breach of the contract of service. In order for a dismissal to be fair it must be brought within the provisions of the Act and those provisions are for the most part contained in section 57. It is for the employer to establish that the dismissal was for a reason falling within that section and then, thereafter, the tribunal must decide whether the dismissal was in all the circumstances a fair one. On this latter issue the burden of proof does not lie on one side or the other. It is neutral.

The primary remedy is a power to order reinstatement or re-engagement, and the secondary to award compensation. This is limited under the present law to £8,500. The tribunals have no power to enforce awards, which must be enforced through a county court. A tribunal cannot award damages for breach of contract nor give injunctive relief. That is for the ordinary courts. Nor indeed can the tribunal award interest on the sums awarded from the date of their decision. It is not a Court of Record. This has been regarded by many lawyers as a serious lacuna, since the power to award interest is available in other courts and has a very salutary effect upon delay in payment and delays generally. I was recently asked by the members of the EAT to write to the Secretary of State and have received a reply that Regulations dealing with this matter are at present in draft. This is just as well since delays in appeals and the utilisation of appeal procedure in order to avoid payments of awards was becoming a scandalous manoeuvre. It is to the High Court (in smaller monetary claims to the county court) that parties will turn for claims in damages, such as for wrongful dismissal, and for injunctive relief. The latter is a vitally important remedy in connection with industrial actions and strikes.

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## *The parties*

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Before the High Court the parties are likely to be employers (usually but not always substantial companies or bodies) and trade unions. Individuals may be involved in the more complex and substantial wrongful dismissal claims, and in particular where there are applications for injunctions to restrain disclosure of confidential information and matters of that nature. It is also likely, where a service contract has been entered into in connection with a takeover or sale of a business, that breaches of certain warranties and allegations of fraud will involve very substantial matters and difficult issues of evidence, with evidence being given by merchant bankers and accountants. That type of case is far more suitable to the courts than it is to tribunals, even though some of the issues might be relevant in deciding whether or not a dismissal would have been unfair. The principle of "estoppel" applies (this precludes someone from asserting something contrary to what was implied by a previous action or statement of that person or by a previous pertinent judicial determination).

Before industrial tribunals the vast majority of the applicants are individuals, but occasionally a trade union may be an applicant if it is alleged, for instance, that it has not been sufficiently consulted over redundancies or under the Transfer Regulations. A trade union can only make such an application if it is recognised as the negotiating body by the employer involved.

## Procedure

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It was initially contemplated that the vast majority of applicants would appear in person and industrial tribunals would be looked upon as “peoples’ courts”, where total informality would be desirable. Regulations were made to this end. There was no legal aid available for legal representation, nor is there now. Rule 8(1) reads—

The Tribunal shall conduct a hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings; it shall, so far as appears to it appropriate, seek to avoid formality in its proceedings and it shall not be bound by any enactment or rule of law relating to the admissibility of evidence in proceedings before the courts of law.

However, over the years it has been noticeable that there has been a growth in representation and today any of the following may appear before a tribunal, and indeed before the EAT: the applicant in person; a member of his or her family as a representative; a member of a Citizens’ Advice Bureau; an industrial consultant; a representative from the trade union concerned; solicitors, whether from a law centre, in private practice or an “in-house solicitor”; Counsel; or Queen’s Counsel.

The object of the industrial tribunal, as indeed of any court, is to achieve a fair, just and reasonable result between the parties before it, in accordance with the existing law. Although there can be politically sensitive situations, it is essential for every member to remember that he or she is in the position of a judge bringing their own expertise to bear upon the problems, and each member must regard the problems and facts objectively in accordance with the law.

I think it is right to say that gradually, and with experience, it has been found that the procedures which have been developed over centuries in seeking to achieve fairness in the hearing of an issue have been found to be the most satisfactory. The tribunal is the master of its own procedure, but gradually certain guidelines have come to the fore. They were recently examined by the EAT in a case called *Aberdeen Steak House Group v. Ibrahim* [1988], ICR 550. The EAT found that—

Rule 8 of schedule 1 to the industrial tribunals (Rules of Procedure) Regulations, 1985, is identical in form to its predecessor in the Regulations of 1980 which came into operation on 1 October 1980. In substance it reduced into writing the situation as it had in fact existed formerly.

The tribunals have always had a discretion in their procedures and admission of evidence, which, as we have said, must be exercised judicially. The stress on justice is made by the use of the word “just” in rule 8. Over the years a number of cases have given guidance on the appropriate procedures and on rules of evidence. Examples of these are to be found as follows:

- (a) Decisions bearing upon the party who should present his case first: *Gill v. Harold Andrews Sheepbridge Ltd.* [1974] ICR 294 and *Oxford v. Department of Health and Social Security* [1977] ICR 884.
- (b) It is for the party and not the tribunal to decide the order in which the witnesses are called: *Barnes v. BPC (Business Forms) Ltd.* [1975] ICR 390.
- (c) It is the duty of the parties to ensure that all relevant evidence is put before the tribunal and it is not for the tribunal themselves to do this: *Craig v. British Railways (Scottish Region)* [1973] 8 ITR 636 and *Derby City Council v. Marshall* [1979] ICR 731.

- (d) A tribunal should not allow a party to be taken by surprise by an allegation of dishonesty made at the last minute, but should adjourn and give directions: *Hotson v. Wisbech Conservative Club* [1984] ICR 859.
- (e) Where a party specifically states that he or she will not be calling evidence, he or she will normally be bound by his or her statement: *Stokes v. Hampstead Wine Co. Ltd.* [1979] IRLR 298.
- (f) Tribunals cannot refuse to admit evidence which is admissible and probative of one or more issues: *Rosedale Mouldings Ltd. v. Sibley* [1980] ICR 816.

It is also clearly recognised that tribunals on occasions can and should admit hearsay evidence, as is done sometimes in other courts. However, whilst recognising that tribunals have a wide discretion in these matters of procedure and evidence, it must be remembered that the rules of procedure and evidence have been built up over many years in order to guide courts and tribunals in the fairest and simplest way of dealing with and deciding issues. Prolivity is to be avoided.

It is possible for informality to go too far and it is important for parties appearing before any judicial body, and for their legal advisers in preparing for trial, to know the rules normally to be applied during that hearing. It is important that there should be consistency. It is also important that any sudden change from that norm should not present a party with an embarrassing situation from which a feeling of unfairness can arise.

Whilst leaving the ultimate decision of the procedures and rules of evidence to the discretion of the chairman, it seems to us that under normal circumstances the party opening a case should call his or her evidence, by which we mean all his or her relevant evidence, and should then close his or her case. When in cross-examination questions go to credit only, the party cross-examining should be bound by the answers of the witness. Total informality and absence of generally recognised rules of procedure and evidence can be counter-productive in that parties may not feel that their cases have been fairly and appropriately dealt with. Thus it seems to us important that a tribunal should be astute to prevent the tactical presentation of evidence in a way which would not normally be permitted and which can cause embarrassment or prejudice to a party.

There are still certain gaps in the powers of the tribunal; for example, it cannot subpoena a witness except at the request of a party. It has, however, a power to award costs and to strike out. The tribunals hear evidence on oath and they can admit hearsay; they could doubtless admit affidavit evidence, but as a matter of practice this is not usually done. However, they can admit written statements if they so wish.

Tribunals can give short-form reasons, which they give at the close of the hearing, but it is the custom to give a reasoned decision some days later. If requested by a party, the tribunal must do so, and indeed most advocates appearing before a tribunal so request as a matter of practice.

The procedures which I have described so far are in the main those that are most commonly applicable to unfair dismissal claims and to other claims made under the 1978 Act. However, the introduction of the Sex Discrimination Act, 1975, and the Race Relations Act, 1976 (it was expressly stated that the latter was based upon the former), and also the Equal Pay Act, 1975, have introduced a number of problems.

Discrimination can be direct or indirect, or can be what is described as "victimisation", which is constituted by direct discrimination based upon an act

such as the reporting of a case of discrimination to the body responsible for encouraging its elimination; the Equal Opportunities Commission (EOC) for sexual discrimination and the Commission for Racial Equality (CRE) for racial discrimination. Direct discrimination needs no definition. However, indirect discrimination does not appear to be discrimination, but in fact has that effect because fewer women than men, or Blacks or Asians than Whites, can comply with the condition that has been imposed. To take a simple example; a requirement for all applicants for a job to be not less than six foot (1.83 metres) in height would discriminate against women.

It can readily be understood that indirect discrimination in particular can be difficult to prove. I do not know to what extent the burden of proof is relevant to the inquisitorial system of jurisprudence, but it can be and is important in borderline cases within the adversarial system. This was recognised by the legislature, which incorporated into each of the discrimination Acts an expressed power to make rules for the delivery of wide-ranging questionnaires. These can be delivered before the issue of proceedings or within three months of such a date, or later if leave is given. The answers are admissible and by sections 64 and 74(2) of the 1976 Act and section 65(2) of the 1975 Act, which are in identical terms:

Where the person agrees to question the respondents (whether in accordance with an order under subsection (1) or not) then—

- (a) the question of any reply by the respondent (whether in accordance with such an order or not) shall, subject to the following provisions of this section, be admissible as evidence in the proceedings;
- (b) if it appears to the court or tribunal that the respondent deliberately, and without reasonable excuse, omitted to reply within a reasonable period or that his reply is evasive or equivocal, the court or tribunal may draw any inference from that fact that it considers it just and equitable to draw, including an inference that he committed an unlawful act.

These time-limits are, to my mind, important because discrimination should be dealt with quickly and rooted out. A case for the applicant should not be allowed to fester and grow. The CRE and EOC have powers to support claims and do so, as do the trade unions. They are able to sift cases and I feel that this process is to be encouraged. Any abuse of the process can be controlled by orders for costs.

This area of the law, as in cases of equal pay to which I shall refer later in this paper, can be and often are of a technical nature, in the sense that in order to do justice it is necessary to go through a careful process of somewhat detailed analysis. These are not cases where the "broad swipe" of a general allegation of discrimination is desirable nor to be encouraged. A recent example in the Court of Appeal was the case of *James v. Eastleigh B.C.* (CA 26 April 1989). It has been found that a far more careful pleading of the case and of the defence is not only desirable, but necessary in order to avoid either party being taken by surprise at the hearing, with the consequent necessity for adjournment and increased costs. I have stressed the appreciation that in some instances it may be difficult to prove indirect discrimination, so on the other hand it must not be forgotten that it is easy to make broad allegations of discrimination, which may be extremely expensive to defend, and unless particularised may lead to expensive and fruitless investigations. In this area the parties are more often than not represented, and the EAT is encouraging industrial tribunals to maintain a greater control over the pleading stages, which are those in which the parties state their cases in detail.

## *The equal value provisions of the EEC*

Article 119 of the Treaty of Rome, and Council Directive 75/117, which has an interpretative effect, concern equality between men and women. The notion of equal value is wholly foreign to our jurisprudence. "Like work" we understood; we also understood "job evaluation". Parliament tackled it and Regulations were introduced to seek to deal with the procedural problems. These procedures have, I believe, proved to be unsatisfactory. Let me say why.

After the issue of the initial proceedings in an equal value claim, the industrial tribunal is obliged to hold a Preliminary Hearing. At that hearing it may decide that the application has no reasonable prospect of success and dismiss it. At the Preliminary Hearing it may also hear evidence on a defence under section 1(3) of the Equal Pay Act, 1970. That is the "genuine material factor" defence, which is the equivalent of the phrase in European law "objectively justified". That hearing may therefore last some days, at the end of which the defence may or may not have succeeded.

If no progress is made at the Preliminary Hearing, the industrial tribunal is bound to refer the case to an independent expert for the evaluation of the job of the complainant and that of the chosen comparator. In some cases there are many comparators. It is almost certain that each side will seek assistance from job evaluators. At the substantive hearing the tribunal is governed by a complex set of rules which enable it, in some circumstances, to look at findings of fact lying behind opinion, and enable it to accept or reject the views and the report of the independent expert. Those rules are so complicated that it would not benefit this debate if I were to refer to them in detail. They were described by Lord Denning in a debate in the House of Lords as "beyond compare". He said that no ordinary lawyer would be able to understand them, and that the industrial tribunal would have the greatest difficulty and the Court of Appeal would probably be divided in opinion. This has all come true. The complexity and ambiguity in the drafting has caused endless problems.

The major problem however is the delay which this type of procedure has engendered. "Job evaluation" is a phrase which has recently been described as "a term of art describing the highly sophisticated technique adopted by the English legislation to give an effect to community law by measuring what, apart from like work, as defined by section 1(4), is to qualify as equal work under Article 119 of the EEC Treaty". Many solutions have been put forward in attempts to resolve the present highly unsatisfactory situation of procedure in equal value cases and this will no doubt remain the subject of much discussion in the months or possibly years ahead. However, the art of job evaluation has developed over the past years and I am assured by the lay members of the EAT, and indeed from my own knowledge of the cases that have come before us, that these days the members feel themselves, for the most part, well able to deal with job evaluation on the evidence which is adduced before them. I see no reason why this should not also be true of lay members in cases before industrial tribunals, and it is now quite apparent that a number of chairmen of tribunals have wide experience in job evaluation. It is not right to consider it still to be esoteric.

In summary, therefore, my inclination is to think that the procedure before tribunals is tending to get less uninhibited than it was in the early days and to my mind this is desirable. Secondly, there are certain areas in which the procedure is as yet unsatisfactory and in particular in the area of equal value. My own solution would be to alter the rules radically, and to allow each side to

call its own expert in job evaluation and thereafter for the tribunal to listen to the opinions and make up its own mind. A possible variant would be to allow a tribunal to appoint its own expert to sit as an assessor and to advise on any technical point upon which the tribunal sought assistance. Some broad procedural structures are valuable and assist the administration of justice, but rigid and technical procedures offer opportunities to obstruct the flow of justice. Maintaining a balance is one of the skills of a good judge.

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## *Annex*

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1. Industrial Training Act, 1964.  
Section 12: appeals against assessment of industrial training levies.
2. Docks and Harbours Act, 1966.  
Section 51: reference of disputes about meaning of "dockworker".
3. Equal Pay Act, 1970.  
Section 2: complaints regarding breach of equality clauses.
4. Health and Safety at Work, etc., Act, 1974.  
Section 24: appeals against improvement or prohibition notices;  
Section 80: regulations provide for complaints by safety representatives regarding time off with pay.
5. Social Security Pensions Act, 1975.  
Regulations concerning occupational pension schemes and the right to be consulted.
6. Employment Protection Act, 1975.  
Section 101(1): complaints by trade unions relating to failure of consultation on redundancies;  
Section 10(1): claims for remuneration under protective awards.
7. Sex Discrimination Act, 1975.  
Section 63: complaints of unlawful discrimination on the grounds of sex or marital status;  
Section 68: appeals against non-discrimination notices;  
Section 72(3) (a) : applications by Equal Opportunities Commission (EOC) to enforce provisions relating to discriminatory advertisements, etc.;
- Section 73: complaints by EOC relating to preliminary action before application to county court.
8. Race Relations Act, 1976: The same as under SDA, 1975.
9. Employment Protection (Consolidation) Act, 1978.  
Section 11(1)–(3): reference of questions relating to written statements of terms of employment and to itemised pay statements;  
Section 17(1): complaints relating to guarantee payments;  
Section 22(1): complaints relating to remuneration for suspension on medical grounds;  
Section 24(1): complaints by employees relating to trade union membership and activities;  
Section 27(7): complaints by trade union officials relating to time off for trade union duties;  
Section 28(4): complaints by trade union membership relating to time off for trade union activities;  
Section 29(6): complaints by employees in relation to time off for public duties;

Section 31 (6): complaints by employees in relation to time off to look for work or make arrangements for training;

Section 31A (6): complaints relating to time off for antenatal care (inserted by EA, section 13);

Section 36(1): complaints relating to maternity pay;

Section 43 (1), (3): complaints and appeals relating to maternity pay rebates;

Section 53 (4): complaints relating to written statements of reasons for dismissal;

Section 67 (1): complaints relating to unfair dismissal;

Section 77 (1): applications relating to interim relief;

Section 91 (1): references of questions relating to redundancy payments;

Section 108 (1), (3): references and appeals relating to redundancy rebates;

Section 112: references relating to payments equivalent to redundancy rebates in respect of civil servants, etc.;

Section 124 (1): complaints relating to employee's rights on insolvency of the employer;

Section 124 (2): complaints relating to payment of unpaid contributions to occupational pension schemes;

Section 130: references of questions formerly determined by referees or boards of referees under 23 specified statutory provisions as set out in Schedule 10.

10. Employment Act, 1980.

Section 2 (4): complaints by trade unions relating to secret ballots on employers' premises;

Section 4 (4): complaints relating to unreasonable exclusion or expulsion from trade union (application for compensation is made under section 5 (1), (2)).

11. Transfer of undertakings (Protection of Employment) Regulations, 1981, SI 1981/1794.

Regulation 11 (1): complaints by trade unions relating to failure to inform or consult them about transfers of undertakings;

Regulation 11 (5): complaints by employees relating to failure to pay compensation.

12. Wages Act, 1986.

Section 5: complaints relating to unauthorised deductions from wages.

13. Employment Act, 1988.

Section 4: complaints by trade union members relating to infringement of rights not to be unjustifiably disciplined.

## *Yugoslavia (Slovenia)*

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Janez Novak, Judge, the Associated Labour Court of  
the SR of Slovenia (the Supreme Labour Court)

Generally speaking, the competence of the Associated Labour Courts covers disputes and industrial action (strikes) arising out of the employment relationship. This relationship is of a legal nature for "associated labour" (as well as for both physical and civil persons). The system is composed of Associated Labour Courts (courts of first instance) and the Associated Labour Court of the Republic or of the Autonomous Province (the Supreme Labour Court).

Access to the court is conditional upon a decision to that effect by the organisation concerned (a labour organisation or a basic organisation of associated labour; in the future, under new laws the organisation concerned may also be an enterprise). A final decision by the organisation is necessary for litigation to commence in the labour court.

The competence of the Associated Labour Courts and their procedures are governed by two Associated Labour Courts Acts (1974 and 1984). These Acts lay down that Chapters 1 to 25 of the Civil Procedure Act (1977 to 1987) may be applied in Associated Labour Courts if they correspond to the nature of disputes arising out of self-management employment relationships. The Associated Labour Courts Act differs in some manners from the Civil Procedure Act.

The parties in proceedings before an Associated Labour Court are known as *partners*. The bench is composed of professional judges and of members of the community (citizens). Proceedings in an Associated Labour Court are initiated by the bringing of a petition and are conducted by the court *ex officio*. The petition has to contain a description of the matter under dispute, the facts that impinge upon the case and other evidence. The petition may include the claim that is made by the party concerned. Proceedings can also be instituted by minors. The court is empowered to issue interlocutory orders *ex officio* or upon application by a labour attorney. The court may reach its decision without an oral hearing on the basis of documents and the petitions of the parties if it holds that oral proceedings are not necessary. The Associated Labour Courts are not obliged to consider the claims made by the *partners*.

The professional judges of the Associated Labour Court of the SR of Slovenia are elected by the Parliament of the SR of Slovenia for a term of office of eight years; non-professional judges are elected for four years. The judges of the Associated Labour Courts (the courts of first instance) are elected by the Communal Assembly of the seat of the court. The term of office is the same as for the judges of the Associated Labour Court of the SR of Slovenia.

### *The rules of procedure*

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The Civil Procedure Act governs the proceedings of the Associated Labour Courts. The adversarial system is used in the same way as in civil proceedings.

Under Yugoslav law, the rules of evidence and procedure are the same in the Associated Labour Courts as in civil proceedings, with the exceptions set out above.

As in other proceedings, attorneys are allowed to appear in the labour courts. They represent the interests and rights of the parties. Affidavits are not recognised under Yugoslav law as a separate form of evidence. In civil proceedings the following forms of evidence are admitted: inspections, documents, witnesses, experts and the hearing of the parties.

The court bases its decision on the law and on other legal rules, including: social contracts, self-management agreements and other self-management enactments, such as by-laws, statutes, rules, decisions and rules of procedure. Self-management agreements are legal provisions and it is not therefore necessary to prove whether they are applicable. However, collective agreements are different.

The labour courts have jurisdiction over rights (legal) and interest (economic) disputes. As with other courts in the legal system, labour courts are not empowered to perform the functions of arbitration. No time-limits are set out under the Associated Labour Courts Act within which the trial court has to hand down its decision. Under the Civil Procedure Act, a time-limit is specified within which courts have to hand down their written decisions. This time-limit also applies to the labour courts.

During the 1980s, the Associated Labour Court of the SR of Slovenia (as the second instance or Supreme Court) handled about 20 disputes a year. These often concerned questions of remuneration and of innovative practices. It is frequently necessary to hear experts in these kinds of disputes. A procedural prerequisite for initiating procedures before the labour court, as in other disputes, is a positive decision to this effect by the labour organisation. The worker first has to make the claim before a committee or another first instance body and the workers' council. Fifteen days after the delivery of the decision of the workers' council, the worker may bring an action against the organisation.

## List of participants

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*Meeting of European Labour Court Judges*  
(Paris, 12 September 1989)

|                                                   |                                                                                                                                                                                                                                                                                                               |
|---------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Denmark</i>                                    | Mr. Johannes BANGERT, President, and Mr. Nils WAAGE, First Secretary, Arbejdsretten (Labour Court), St. Annae Plads 5, DK-1250 Copenhagen K.                                                                                                                                                                  |
| <i>Finland</i>                                    | Mr. Pekka ORASMAA, Vice-President, Työtuomioistuin (Labour Court), PL 165, SF-00141 Helsinki.                                                                                                                                                                                                                 |
| <i>France</i>                                     | M. I. ZAKINE, Conseiller à la Cour de cassation (Chambre sociale), Palais de Justice, Boulevard du Palais, F-75001 Paris.                                                                                                                                                                                     |
| <i>Germany</i><br>( <i>Fed. Rep. of</i> )         | Dr. Dirk NEUMANN, Vice-President, Prof. Dr. Wolfgang LEINEMANN, Dr. Friedrich HEITHER, and Ms. Gisela MICHELS-HOLL, Bundesarbeitsgericht (Federal Labour Court), Postfach 410 280, D-3500 Kassel.                                                                                                             |
| <i>Israel</i>                                     | Mr. Menachem GOLDBERG, President, and Mr. Stephen ADLER, Judge, National Labour Court, PO Box 1328, Jerusalem 91013.                                                                                                                                                                                          |
| <i>Norway</i>                                     | Mr. Stein EVJU, President, and Mr. Odd FRIBERG, Member, Arbejdsretten (Labour Court), Postboks 8015 Dep., N-0030 Oslo 1.                                                                                                                                                                                      |
| <i>Spain</i>                                      | Sr. D. Manuel PERIS GOMEZ, Vicepresidente del Consejo General del Poder Judicial, Paseo de la Habana No. 140, E-28036 Madrid, Sr. D. Antonio LINARES LORENTE, Vocal del Consejo General del Poder Judicial Y Magistrado de Trabajo, Madrid, and Sr. D. Bartolomé RIOS, Presidente, Sala de lo Social, Murcia. |
| <i>Sweden</i>                                     | Mr. Olof BERGQVIST, President, Arbetsdomstolen (Labour Court), Box 2018, S-103 11 Stockholm.                                                                                                                                                                                                                  |
| <i>Switzerland</i><br>( <i>Canton of Geneva</i> ) | M. Claude WENGER, Greffier, Tribunal des prud'hommes, rue des Chaudronniers 7, 1204 Genève.                                                                                                                                                                                                                   |
| <i>United Kingdom</i>                             | The Hon. Mr. Justice WOOD, President, Employment Appeal Tribunal, 4 St. James's Square, London SW1Y 4JB.                                                                                                                                                                                                      |
| <i>Yugoslavia</i>                                 | Dr. Janez NOVAK, Judge, Supreme Labour Court SR Slovenije, Miklosiceva 28, YU-6100 Ljubljana.                                                                                                                                                                                                                 |
| <i>ILO</i>                                        | Mr. Alan GLADSTONE, Director, Mr. Werner BLENK, Industrial Relations and Labour Administration Department, CH-1211 Geneva 22.                                                                                                                                                                                 |