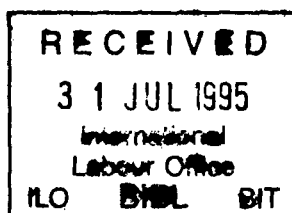


**EUROPEAN LABOUR COURTS:
REMEDIES AND SANCTIONS IN INDUSTRIAL ACTION;
PRELIMINARY RELIEF**



40410



LABOUR-MANAGEMENT RELATIONS SERIES

**EUROPEAN LABOUR COURTS
REMEDIES
AND SANCTIONS
IN INDUSTRIAL ACTION;
PRELIMINARY RELIEF**

**Proceedings of the Fourth Meeting of European Labour Court Judges
(Athens, September 1991)**

Edited by Anne Trebilcock

INTERNATIONAL LABOUR OFFICE GENEVA

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Foreword

This volume encapsulates labour court judges' experiences in confronting difficult issues brought to them by parties to a conflict over labour rights. It reproduces the edited version of contributions that were prepared for a meeting of labour court judges from European countries and Israel held in Athens in September 1991. The initiative for the meeting came from the judges themselves, with the ILO acting as a facilitator. This gathering continued a tradition begun in 1984, in which periodic meetings¹ of labour court judges from Europe and Israel have enabled an exchange of experiences by people who no doubt welcome the opportunity to step back from day-to-day decision-making to reflect upon the approaches taken by colleagues from other legal systems.

In line with a decision taken by the organizers of the meeting (Judges Stein Evju of Norway, Menachem Goldberg of Israel and Gisela Michels-Hohl of Germany), labour court judges from 14 countries were asked to prepare papers on two topics. Judge Ove Sköllerholm prepared the outline for the first topic, remedies and sanctions in case of industrial action (Part I) and Judge Goldberg did so for the second topic, preliminary relief in individual labour disputes (Part II). Part I addresses a core issue of collective labour relations: the eruption of industrial action (mainly strikes) and the remedies and sanctions that may or may not be applied to it. Under what conditions, if any, may a labour court enjoin industrial action? If industrial action continues anyway, what remedies may be applied? Part II explores how the labour courts deal with pleas from individuals for temporary relief in cases that often threaten those individuals' very employment status. When can a labour court enjoin an individual dismissal or order other immediate relief before the merits of the case have been determined?

In preparation for a discussion of these and related issues, the participants provided papers on aspects relevant to their own national labour courts. Some labour courts have jurisdiction only over collective labour disputes (such as Norway), which explains why contributions appear for these countries only in relation to Part I and not Part II. Similarly, not all the labour courts represented can act on individuals' claims (such as that of Denmark), and thus could not make a contribution to Part II. This explains why there is not entirely the same representation of countries under Parts I and II.

The exchange of views in Athens was rich indeed. While coming from often divergent legal cultures and court systems, the judges often found common ground in the problems they face and the solutions they reach. This reinforcement of earlier positive interactions

¹ See the edited reports of previous meetings: B. Essenberg (ed.), *Labour courts in Europe, Proceedings of a meeting organised in Szeged, Hungary, 1984* (Geneva, ILS, 1986); W. Blenk, ed.: *European labour courts: Current issues* (Geneva, ILO, Labour-Management Relations Series No. 70, 1989); and W. Blenk, ed.: *European labour courts: Industrial action and procedural aspects* (Geneva, ILO, Labour-Management Relations Series No. 77, 1993).

led them to decide to meet again in Brussels in 1993, where they addressed the topics of labour court jurisprudence on sex discrimination and the role and use of international and European labour standards in labour court judgements. It is also planned to publish those proceedings in the Labour-Management Relations Series.

The logistical arrangements for the meeting were made by the Industrial Relations and Labour Administration Department of the ILO, with the kind assistance of the Greek chapter of the International Society for Labour Law and Social Security. Alan Gladstone, then the Department head, welcomed participants on behalf of the Director-General of the ILO. This volume was edited by Anne Trebilcock, Principal Legal Officer, Office of the Legal Adviser, who was at the time an official of the Labour Law and Labour Relations Branch.

It is our hope that the dissemination of this information will help shed light on the practice of labour courts in resolving both collective and individual disputes.

August 1994

Edward Yemin,
Chief, Labour Law and Labour
Relations Branch,
Industrial Relations and Labour
Administration Department,
International Labour Office.

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*Remedies and sanctions in industrial
disputes*

Comparative overview

Anne Trebilcock*

In examining remedies and sanctions, a primary distinction to be made is whether the industrial action is lawful or unlawful under national legislation and jurisprudence.¹ In a number of the countries considered in the reports, the court may not exercise jurisdiction at all if a lawful strike or lockout is involved (Finland, France, Germany, Norway, Spain, Sweden). Even lawful strikes may be entertained by courts, however, if violence erupts, for example (e.g. France). The report on the United Kingdom notes that it is difficult for a trade union to take strike action which is lawful.

Definitions of when a strike is lawful vary, of course; there is particular divergence around the issue of advance notice to the other party and the authorities. Failure to give advance notice will render a strike unlawful in Norway, for instance, but not in Sweden. A requirement of prior notification of industrial action characterizes the labour relations system in Denmark, Finland, the public sector in France, Hungary under legislation in force in 1991, Israel, Norway, Spain and Sweden. The effects of this differ, however: in Spain the courts in any event have no power to order a strike to cease or be postponed, whereas in Norway a strike is prohibited for four days following the notification.

The notification of industrial action in Scandinavian countries is often accompanied by mechanisms for the resolution of disputes. Various types of mediation procedures must be pursued in Denmark, Finland, Norway and Sweden; this was also the case under the 1989 Hungarian legislation. In Ireland settlement efforts are pursued by consensus in the Labour Court, which is a court of appeal from the conciliation services of the Labour Relations Commission and all parties resort to it on a voluntary basis, whereas in the United Kingdom the parties may voluntarily seek the services of the Advisory Conciliation and Arbitration Service.

Where industrial action is threatened or already under way, there is a variety of approaches with regard to interim relief. In Spain this is unknown in the context of industrial action, and in several countries interim relief is available in the civil courts rather than specialized labour tribunals (e.g. Finland, Ireland, the United Kingdom). Some countries combine orders to postpone or suspend a strike and to use dispute settlement mechanisms (e.g. Norway); although this combination is not possible in the United Kingdom, the court may postpone the effective date of its order to promote conciliation efforts. Most temporary

* Office of the Legal Adviser, International Labour Office. The author relied on information in a table prepared by Judge Ove Sköllerholm as well as the country studies.

¹ For an examination of the law governing industrial action, see e.g. W. Blenk (ed.): *European labour courts: Industrial action and procedural aspects* (Geneva, ILO, Labour-Management Relations Series No. 77, 1993).

injunctions in Israel are granted against “unprotected” strikes in the public sector. The Labour Court in that country will often ask the parties if they are willing to suspend action and negotiate. The Labour Court in Ireland has no jurisdiction to grant temporary relief. A party to a dispute who seeks relief by way of injunction must apply to the civil courts. The public sector in France has also been subject to orders to suspend a strike notice. No such injunctive action is possible in Norway, but the Labour Court may order attachment to secure a claim for compensation. Injunctive relief in labour cases is rare in Germany.

Hearings on a request for interim relief in an industrial dispute can be held on very short notice, i.e. a matter of hours in the case of the United Kingdom. In Israel, to permit hearings to take place as quickly as possible, they are often held outside normal court hours. In Norway a matter can be heard on the same or the following day as the petition is filed, but since the main suit would be heard within a matter of days, there is normally no call for interim relief. Courts in many of the countries may hold *ex parte* hearings in urgent cases if necessary, but they hesitate to do so. Interim relief can be granted only at the behest of a party in all the countries except Sweden, where this may be done *ex officio* by the court.

In case of unlawful industrial action, various remedies may be granted to parties in the dispute and different sanctions may be ordered by the courts. In some countries, jurisdiction for these may be split between the labour court and the ordinary courts. In others, such as Israel, the labour court can provide the same relief as the ordinary courts.

A declaratory judgement is often sought by the party wishing to have the industrial action deemed unlawful. This may accompany a claim for interim relief, as is usually the case in Israel and Sweden. A declaratory judgement will serve as the basis for granting an injunction as well as for subsequent claims for damages. The injunction is of course the remedy sought by the party wishing to prevent or stop industrial action (examples in the country studies are Germany and the United Kingdom, and for wildcat strikes, Israel).

In Denmark, Finland and Sweden, the sanction applied for unlawful industrial action is the compensatory fine in lieu of damages (*Bot*). This notion combines actual loss with a type of general damages. Maximum amounts are fixed in Finland, but parties to a collective agreement can agree to lower maxima which the court will take into account along with factors such as the size of the association and enterprise. In Sweden no limit is set in relation to associations or companies, but the law puts a cap on the amount an individual worker may be fined (the sum was raised in 1992). In addition, in these countries, there may be an additional fine imposed for failure to observe statutory notification procedures. In a few recent cases, trade unions in Norway which have launched industrial action before the expiry of the notice period have found this to be rather costly in terms of fines.

Other countries, such as Norway and Spain, provide only for compensation of the actual damages the other party has proved. In Germany such a damage award may be in addition to a court-imposed disciplinary fine if a party fails to respect an order to cease industrial action. The remedies in Israel in case of unlawful industrial action are specific performance and rescission in relation to a collective agreement and, if specified in the agreement, damages. A similar approach is taken in Switzerland, but with more leeway in regard to awarding damages. In addition to remedies a court may grant to the other party, fines may be imposed in case of contempt of a court order (e.g. Israel, United Kingdom).

The United Kingdom takes a unique approach consistent with the particular historical development of the law in relation to industrial action. The main remedies sought are those for industrial torts: injunctions, and, in case of contempt of court for failing to observe them, fines and sequestration of assets. Statutory limits link the amount of a possible award for damages caused by an industrial tort to the size of union membership. Damage claims are made but rarely pursued, since the contempt procedure provides the occasion to go after the capital assets of a trade union in an unlimited way. As the report on this country notes, "it is the remedies available to an employer should the trade union fail to comply with (this) maze of statutory provisions, rather than the provisions themselves, which deter industrial action today".

Finally, penal sanctions may be available under certain circumstances, especially if acts of violence have occurred. In countries where workers have occupied premises of the employer, such as in France, the legal system provides specifically for expulsion orders.

Remedies have been discussed so far in relation to employers and trade unions. In some countries, they are the sole parties who may appear before the labour courts (e.g. Denmark, Finland). The standard of conduct to which a trade union is held for purposes of determining liability varies. In France, the union must have clearly incited unlawful acts to be held liable. Sweden, Switzerland and the United Kingdom, however, require trade unions to ask their members to cease unlawful action; in the latter case, unions must do all in their power to ensure compliance with a court order and must meet specific statutory requirements in relation to repudiation of the unlawful action.

Some of the countries foresee liability in certain cases for individuals in their capacity as trade union officials (France, United Kingdom), whereas this is not possible in other labour courts (e.g. Denmark). Individuals may also incur liability if they acted in excess of limits agreed by their organizations, as in Germany and Hungary. Claims by individual workers seeking payment of wages in case of illegal lockouts are entertained in the labour courts of Germany and Spain.

Employers may also seek a remedy against individual workers engaging in an unlawful strike. In Norway, for instance, damage claims must be filed against all individuals concerned (in addition to claims against the organization representing them), although the amount that may be assessed against each worker is limited. Individual service of process is required in that country, whereas in Israel large numbers of striking employees may be notified by notices posted at the workplace or announced in the media. Various arrangements for group representation are foreseen for large numbers of workers in Norway, Spain, Sweden and the United Kingdom.

The most common remedy sought by employers against individual employees is not damages, however, but termination of employment. Engaging in unlawful industrial action constitutes a breach of the contract of employment in a number of countries (e.g. Denmark, Finland, Hungary, Norway, Sweden). In Sweden, the imposition of disciplinary sanctions such as fines or suspensions is also practised in the non-state sector, if authorized by statute or collective agreement. In France, on the other hand, it is not permissible to dismiss an employee for having exercised the constitutional right to strike; nor is it possible to dismiss strikers in the private sector in Israel. Spanish law permits dismissal for misconduct in connection with a strike only if the employee took an active part in an unlawful strike, and only if such a sanction is applied uniformly across the employer's workforce. In Switzerland and the United Kingdom, participation in an unlawful strike would constitute just cause for

dismissal. Under certain circumstances, engaging in unlawful industrial action in Germany would also justify notice of termination.

It must be borne in mind, however, that even in countries where participation in an unlawful strike may lead to dismissal, this does not necessarily occur and in some instances is rare. In some instances, employers impose only disciplinary sanctions and, in others, workers undergo only a loss of pay for the period in which they engaged in an unlawful work stoppage. An employer seeking to re-establish a positive working atmosphere may decide that it would be counterproductive to make use of the available legal possibilities following unlawful industrial action.

In cases involving unlawful industrial action, rules governing court costs and litigation expenses vary. The losing party bears court costs in Denmark (in the form of a fee) and Germany, for instance. General rules applicable to court costs are used in such cases in Hungary, Israel and Spain. Labour courts in Finland, Norway and Sweden may order the losing party to pay the other party's litigation costs, although these are often modest in amount in those countries. This will also be done in Spain if the party acts in bad faith or recklessly. Litigation costs are not awarded in Denmark, Israel or in the first instance of the labour courts in Germany.

Although an interim decision will often resolve many of the issues involved in challenges to industrial action, questions of the lawfulness of the action and any damages which may be owed in case of unlawful action may continue on the courts' dockets. The time needed for a final decision to be pronounced in such a case may be as little as a few days, as in Norway, or as much as 27 months, as in Switzerland where an appeal is pursued. In most of the countries, the case will be finally resolved in under a year. The time required of course largely depends upon the system of appeal, if any, for first instance labour court judgements.

To sum up, there is a basic divide between countries in which the labour courts have a role to play in connection with lawful industrial action, and those in which they have nothing to say about it. There is also a difference in approach between countries which compel the parties to engage in a type of mediation before resorting to industrial action and those which give the parties a free hand in resolving their differences. The greater space accorded to lawful industrial action will often obviate the perceived need to engage in unlawful activity.

When unlawful industrial action does occur, the legal systems close ranks in mustering the power of the courts to have it stopped. The law offers various remedies to be sought by the party opposing such action — declaratory judgements, injunctions, compensatory damages, actual damages. In addition, the court may impose fines for contempt of court or for failure to observe statutory notice requirements. Where relief is rapid and/or has a significant financial bite, it is effective in stopping unlawful industrial activity.

Liability may be imposed on entities only, or in some systems on individuals as well, subject to limitations. The law of many of the countries permits termination of employment for employees who engaged in an unlawful strike, but this is certainly not a routine result. Individual employees or their unions can pursue claims for unpaid wages in case of an unlawful lockout.

The possibilities of legal action and their use in practice will not necessarily coincide. This is seen most clearly in relation to claims against individual workers. The remedies a

court will award, the sanctions it will apply and the rulings it may make on litigation costs in cases of unlawful industrial action, all reflect the country's basic philosophy of labour relations. Remedies and sanctions in relation to unlawful industrial action must be viewed in the context of the extent to which a society places a high premium on labour peace and the means it uses to achieve industrial harmony.

Denmark

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

Introduction

Under the Danish Conciliation Act a State Conciliation Authority has been established to assist the labour market parties in reaching collective agreements and avoiding industrial action. The Conciliation Authority consists of three official conciliators assisted by a number of assistance mediators. The parties are under obligation to transmit to the Conciliation Authority a copy of every notice of a lawful stoppage of work.

The Conciliation Authority is entitled to convene the parties to the dispute for negotiations, and they are bound to appear when so summoned. Mediation is carried out by one of the three conciliators. A single conciliator has the power to postpone lawful industrial action for two weeks. The three conciliators together can require the postponement of a lawful industrial action for an additional two weeks.

The conciliators can submit a mediation proposal (for a [renewed] collective agreement), fix the time-limit for the communication of the parties, acceptance or rejection of the mediation proposal and can postpone industrial action until their replies. A mediation proposal is to be voted upon within any organization. Every vote on a mediation proposal has to be taken by written secret ballot. A mediation proposal is only regarded as having been rejected by the workers' side if a majority of the voters (comprising at least 35 per cent of the members entitled to vote) cast their vote against the mediation proposal. On the employers' side the outcome of the ballot is determined by simple majority. The conciliator is entitled to decide that a number of mediation proposals are to be considered as forming a whole. It has happened that the Parliament has converted a mediation proposal into law if it has not been accepted by one or both parties.

Any question regarding the competence of the Conciliation Authority may be referred to the Labour Court for decision.¹ Recently the Labour Court ruled that the conciliator had not been entitled to join a union and an employer to a mediation proposal submitted to settle a dispute between other parties, because negotiations between that union and employer had not yet been initiated.

¹ For a description of the jurisdiction of the Danish Labour Court and the legal status of industrial action, see J. Bangert and N. Waage, country papers: "Denmark", in W. Blenk (ed.): *European labour courts: Industrial action and procedural aspects* (Geneva, ILO, Labour-Management Relations Series No. 77, 1993), pp. 15-17 and 69-75.

Remedies for unlawful industrial action

If unlawful industrial action is threatened or has already been started, the parties to the collective agreement in question are normally under an obligation to participate in a joint meeting to discuss the matter, pursuant to the general agreement between the Danish Employers' Confederation and the Danish Federation of Trade Unions or similar agreements. In most cases a precondition for imposing a fine for the breach of an agreement is that a joint meeting has been held before the case is brought before the Labour Court. If a party does not fulfil its obligation to participate in seeking a solution to the problem, the Labour Court may impose a fine.

If the court cannot deal with all the issues in the case immediately, it can deliver interlocutory orders declaring the industrial action to be in contravention of the collective agreement. A Labour Court case can be limited to the question of declaring an industrial action unlawful, but the Labour Court cannot *ex officio* issue an interim decision in order to stop or avoid unlawful action. The court has no power to order the parties involved to enter into discussions to explore the underlying causes of the unlawful action. The opposing party must be heard before an interim decision is given. In cases of emergency a hearing can be fixed within a week or two. Oral hearing is mandatory. When delivering an interlocutory order the court is composed in the same way as when finally hearing and deciding a case concerning unlawful industrial action.

If an interim decision is not complied with, the party in question is liable to a high fine. An interim decision normally meets with compliance.

Only organizations or individual employers can be parties before the Danish Labour Court. Therefore only the workers' organization and not the individual worker is summoned to labour court sessions, and the workers cannot choose to be represented other than collectively.

The principal (and only) sanction for unlawful industrial action is the compensatory fine¹ which may be imposed upon both organizations and individuals. If the organization has ordered its members to participate in an unlawful action, fines are normally not imposed on the members. The organization will be liable to a fine if it has made no effort to get the members to stop the unlawful action. Whether the organization can avoid sanctions depends on the circumstances and cannot be set out in general terms.

There is no limitation to the fines set by law. But the fines imposed on individual employers have in practice been fixed to special rates. A party's non-compliance with an interim order to stop an unlawful action will normally be considered an aggravating circumstance. The Labour Court Act does not set any time-limit for bringing the question of sanctions to court.

According to Danish law an employer normally can choose whether to apply ordinary contract law sanctions in case of an employee's breach of contract of employment or the special collective law procedure including a claim for a compensatory fine. Therefore, if proceedings have not been initiated before the Labour Court an employer normally has the option of dismissing workers in response to the breach of contract constituted by the

¹ For a discussion of the compensatory fine (*Bot*) used in Denmark, see T. Sigeman, "Damages and *Bot*: Remedies for breaches of collective agreements in Nordic law", in *Comparative Labor Law Journal* (Philadelphia), Vol. 8, No. 2 (Winter 1987), pp. 155-181.

unlawful industrial action, if such a response is not considered out of proportion to the breach of contract.

Unlike the practice in ordinary civil courts in Denmark, in labour law cases the winning party is not awarded litigation costs. However, the losing party is ordered to pay a fee to the Labour Court, at present DKK 2,000.¹

The normal time needed for handling and deciding a dispute over sanctions for unlawful industrial action depends on whether the unlawful industrial action has terminated when the court fixes the date for the oral hearing. If the action is still ongoing, and an interim decision is requested, the case is considered on an emergency basis and the oral hearing is fixed within a few weeks as a maximum. The decision will be rendered very soon after. If the action has terminated, the oral hearing will take place from five to eight months after the filing of the case, depending on the number of preliminary sessions held.

¹ In 1990, DKK 6.19 equalled approximately US\$1. OECD: *Historical statistics* (Paris, 1992), p. 23.

Finland

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

Introduction

Under the Mediation of Labour Disputes Act there are two public offices of the National Conciliator in Finland for the mediation in disputes between employers and workers as well as civil servants. One of these offices may be left vacant. The National Conciliator is appointed by the President of the Republic for a renewable term of four years. For local labour dispute mediation, the country is divided into six districts, each with a part-time conciliator appointed by the Council of State for a renewable term of three years. The Ministry of Labour may also appoint a temporary conciliator or conciliation board to undertake a specific individual mediation task although so far there has been no need for this. The duties of the National Conciliator include, inter alia, promoting, in cooperation with the labour market organizations, relations between employers and workers and civil servants as well as those between their organizations and mediating labour disputes in the entire country and especially when mediation is needed because of a labour dispute affecting an area covered by more than one district conciliator.

Any work stoppage, i.e. a strike, a lockout, or any extension thereof, has to be notified to both the conciliator concerned and the other party no later than two weeks prior to initiation. The notification has to be given to the National Conciliator but it may also be given to a district conciliator if it concerns industrial action affecting only that area.

The provision requiring the party undertaking the industrial action to give advance notice aims at reserving sufficient time for mediation and also at allowing the other party time to prepare for the action. The advance notice has to state the reasons for the work stoppage, its scope and the date and time of its commencement. The parties to a labour dispute may agree to postpone an industrial action beyond the scheduled date and time. This is done, for example, if either party wants to have the result of a mediation addressed by the membership of the organization.

The parties to the dispute have to be informed of the decision prohibiting the work stoppage no later than three days prior to the date and time on which it was scheduled to commence or three days before the end of the previous period of prohibition.

Failure to give advance notice of commencement of a work stoppage under the prohibition is punishable by a fine. Breaches like this are subject to official prosecution and cases are tried in general courts of law.

If a work stoppage can, due to its scope or nature, be considered to be directed against vital functions of society (essential services) or considerably to endanger public interests, the Ministry of Labour may, in order to reserve sufficient time for mediation, prohibit the intended work stoppage for a maximum period of 14 days from the announced date. The prohibition may take place only upon the suggestion of the conciliator or conciliation board in question.

In addition to this two-week period, a work stoppage over the terms of employment of civil servants may be prohibited for another seven days for special reasons.

With regard to civil servants, specific provisions exist for cases in which the industrial action may result in a serious disturbance of vital functions of society (essential services). In this case the mediation authorities or civil servant organizations may, within five days after receipt of the advance notice referred to above, refer the matter to the State Civil Servants Disputes Board. The Board, which consists of eight members representing the various parties and appointed for a period of three years may, in case the industrial action endangers society, by its decision recommend that the parties renounce all or part of the intended action. Industrial action referred to the Board may not be started until after two weeks from the initially scheduled date and time it was initially to be commenced or extended.

From time to time and also recently, discussion has arisen in Finland regarding the use of legislation to limit the right of so-called "key groups" to strike. However, no legislative measures have as yet been taken, nor have legislative means been used to resolve labour disputes in other respects.

The mediation system may perhaps be characterized by saying that Finland has compulsory mediation, but that no compulsory agreement can be imposed: it is entirely up to the parties to agree or not to agree. The conciliator may issue a proposal for an agreement, but it is up to the parties to decide freely whether to accept the proposal or not.

Jurisdiction

The jurisdiction of the Labour Court in Finland consists in handling and deciding disputes concerning collective labour agreements under the Mediation of Labour Disputes Act and other agreements of a like nature which nevertheless fall outside the scope of that Act. A matter concerning *lawful* industrial action (i.e. action not directed against a collective agreement as a whole or any of its terms) can thus not be tried before the Labour Court. The Labour Court of Finland may not impose provisional or interim orders to stop or avoid industrial action.

Collective agreements and other corresponding agreements generally include provisions for the resolution of disputes arising out of these agreements. These provisions do not, however, concern situations of unlawful industrial action, which thus fall outside the scope of the duty to negotiate. Legislation does not include such provisions either. If a party wants to bring a labour dispute underlying unlawful industrial action before the Labour Court separately or by filing a counter-claim in a matter involving a breach of the obligation to maintain labour peace, the provisions on the duty to negotiate contained in the collective agreement in question have to be respected. In some fields, however, there is a provision under which the duty to negotiate is not applicable in such a situation.

The parties to an action concerning breach of the obligation to maintain labour peace are the associations that are parties to the collective agreement or collective civil servant agreement in question or the respective state or municipal negotiating authorities. The local or district unions and individual employers involved are summoned to be heard in the case if claims have been brought against them.

Remedies

An association or employer, party to a collective agreement or otherwise bound thereby, who fails to observe the obligation to maintain labour peace or to supervise work based on the collective agreement may, unless otherwise provided in the collective agreement in question, be ordered to pay a compensatory fine in lieu of damages.¹ The maximum amounts of the compensatory fine are provided by law and are reviewed every three years to adjust for changes in the value of money. At present, the maximum fine that can be imposed upon an association or an individual employer that is either party to or bound by a collective agreement is 121,000 marks, while the corresponding amount for those that are parties to or bound by the State or municipal collective agreements covering civil servants is 67,000 marks and that for private institutions subsidized by the State, 13,000 marks.²

The possibility of reducing, by agreement, the amount of the compensatory fine stipulated by the law has been used in the agreements concluded by the central employers' organization representing the business sector. The central organizations in question have agreed that the maximum fine that may be imposed upon individual employers and enterprise-level trade unions is 13,400 marks.

When imposing the compensatory fine, the court pays attention to all the factors present, such as the extent of damage done, the degree of responsibility and any contributory cause of the other party, as well as the size of the association or enterprise in question. For special reasons, the court may decide not to impose a fine. In general, the compensatory fine is payable to the party having brought the case. Normally, the amounts imposed in labour dispute cases vary between 10,000 and 20,000 marks. Only in rare cases has the Court not imposed the fine. If the industrial action continues in spite of the decision of the Labour Court, a new fine may be imposed, in which case the amount is normally considerably higher than that of the previous fine.

A compensatory fine is the only remedy that may be imposed for breach of the obligation to maintain labour peace. As mentioned above, a collective agreement may provide for smaller compensatory fines than those provided by the law. This possibility has been used in the business sector by individual employers and enterprise-level trade unions. No other restrictions exist with regard to the sanctions that may be imposed.

Within the scope of collective agreements, the labour peace obligation concerns organizations and individual employers only. An individual worker cannot be subjected to

¹ For a fuller description of this remedy (*hyvityssakko* or *Bot*), see T. Sigeman: "Damages and *Bot*: Remedies for breaches of collective agreements in Nordic law", in *Comparative Labour Law Journal* (Philadelphia), Vol. 8, No. 2 (Winter 1987), pp. 155-181.

² In 1990, 3.82 Finnish marks equalled approximately US\$1. OECD: *Historical statistics, 1960-90* (Paris, 1992), p. 23.

a compensatory fine for breach of the labour peace obligation. With regard to civil servants, the labour peace obligation concerns also individual civil servants, but even their breach of the obligation is not sanctioned.

Under the Employment Contracts Act, an employer may cancel a contract of employment on the basis of an employee's participation in unlawful industrial action if other special grounds exist. The law does not differentiate between industrial action undertaken by an association or, for example, by the workers of one enterprise only. In practice, however, termination of contracts of employment because of industrial action undertaken by an organization is usually out of the question. Collective action by workers may justify the termination of an employment relationship if the action is deemed so serious a breach of contract that the employer cannot, with reason, be considered under a duty to continue the contractual relationship. In considering what is reasonable, attention has to be paid, *inter alia*, to the effect of the breach of contract upon the operations of the employer, any extraordinary arrangements that have been necessary at the worksite, the way the industrial action has been carried out as well as its duration and any possible repetition.

Special provisions exist regarding civil servants, who may not be dismissed for participation in industrial action undertaken upon the decision of a civil servants' association.

Procedural aspects

Finnish legislation contains no provisions on time-limits concerning action brought on the basis of industrial action. Collective agreements or collective civil servant agreements may contain provisions on time-limits concerning matters subject to the duty to negotiate, but they are not very common either. As the compensatory fine resembles damages, it should be subject to the general ten-year period of limitation, but this matter has not come up before the Labour Court.

The party who has lost the case before the Labour Court may be ordered to reimburse the other party for the latter's litigation costs. This is also the case with regard to actions brought for breach of the obligation to maintain labour peace. The law contains no special provisions regarding the award of litigation costs. In practice, the awarding of litigation costs is fairly standard and their amount in ordinary industrial action cases is approximately 2,000 to 3,000 marks.

In an action over the obligation to maintain labour peace, the average time between the date when the application for a summons was filed to the final decision of the Court is about three months. The Finnish Labour Court does not issue interim orders.

France¹

J. P. Cochard, President, Labour and Social Affairs Division, Supreme Court of Appeal (Court of Cassation)*

The right to strike in France

In France, the right to strike was recognized in the preamble to the Constitution on 27 October 1946, to which the Constitution of 4 October 1958 explicitly refers: "The right to strike shall be exercised within the framework of the laws governing it." As a constitutional right, no hindrance may be imposed so as to keep it from being exercised.

In the absence of a legal definition a strike has been defined in case-law as a collective, concerted work stoppage undertaken in support of occupational demands. The Labour and Social Affairs Division of the Supreme Court of Appeal (Court of Cassation) has stated that a strike may not be conditioned upon the employer having first rejected the underlying demands.

In French law, there is no legal regulation of the right to strike in the private sector. Thus exercising the right to strike is not subject to any requirements linked to timing (a strike is possible at any time), place (the strike can affect a workshop, an establishment, an enterprise or, in the case of a national strike, sectors of the economy) or subject-matter of the demands, as long as they are occupational in nature (which excludes purely political strikes).

Collective agreements can govern the means by which the right to strike is exercised (organization of a referendum, respect for a prior conciliation requirement, or a cooling-off period); the Court of Cassation none the less holds the view that the right to strike may not be hindered by vague provisions in a collective agreement that would act as a prohibition on a collective, concerted work stoppage. Waiting clauses that restrict the exercise of the right to strike until the exhaustion of open-ended conciliation procedures may be declared null and void. Although there are legal and institutional procedures governing collective labour disputes, they do not have the effect of delaying or preventing a strike from being called.

* For a description of the organization of labour courts in France, see P. Veillieux in B. Essenberg (ed.): *Labour courts in Europe* (Geneva, ILO, ILS, 1986), pp. 19-21.

¹ Translation by the editor.

In contrast to the situation in the private sector, the right to strike is regulated in the public service (where it is sometimes even prohibited, as for the police and prison service staff). The legal requirements are as follows:

- the strike notice must be issued by the most representative trade unions (thus preventing wildcat strikes);
- this notice must specify the reasons for the strike, where it will take place, the date and time on which it will begin and its duration, whether limited or not;
- the notice must be served five days before the strike is to begin, which prohibits surprise strikes;
- the notice must be addressed either to the responsible authority or the management of the establishment, enterprise or body concerned. During the notice period, the responsible authority must negotiate, but the fact that negotiations are under way does not suspend the notice period;
- finally, intermittent strikes (one hour of work stoppage alternated with one hour of work, differing by the service affected; rolling strikes) are prohibited.

In both the private and the public sectors, there is no legal way to deny the right to strike.

Role of the judicial authorities

Since the right to strike is protected by the Constitution, a judge cannot enjoin the calling of a strike before it begins. The judicial authorities do not have a mandate to arbitrate or to decide a collective labour dispute.

Judicial action to prevent a strike may be envisaged only in enterprises that engage in a public service, where respect for the notice period is mandatory, and in enterprises that fall under a collective agreement containing a notice clause. In the public sector, and air transport in particular (where the strikers' demands were considered "unreasonable"), the power of the magistrate sitting in emergency session to suspend the strike notice was the subject of heated controversy. Legal doctrine and some courts were of the view that the judge, as part of the judiciary, "having received from neither the law nor the parties a mandate to arbitrate or to decide a collective labour dispute, did not have the status or the competence to evaluate the basis for or, consequently, the legitimacy of the occupational demands submitted by a party to the dispute".

In other enterprises where a strike may be called lawfully without notice, the employer can seek judicial relief only to stop a strike after it has begun, and only if the employer can make a showing of the unlawful nature of the work interruption or of unlawful activities on the part of the employees during the collective action. The judge can, it is true, order the unlawful activities to cease; the judge cannot, on the other hand, order a return to work so as to bring the strike to an end.

Unlawful collective work stoppages are thus those in which the instigators have not based their action on any occupational demand (political action or a solidarity strike aimed only at supporting an employee who has been penalized for personal misconduct), those in which the means of implementation go exorbitantly beyond the right to strike (for

example, repeated disruptions leading to disorganization of the enterprise, and not merely of production). Moreover, some acts accompanying a strike movement are illegal (acts which involve attacks on persons or property, acts interfering with the freedom to work, etc.); this is also the case in the public sector when the legal rules have not been followed.

Unlawful collective work stoppages and unlawful acts committed during a strike

When an employer believes that a work stoppage is unlawful or that unlawful acts are being committed during a strike, his or her recourse is to apply for an order seeking preliminary measures to bring the action to an end. This claim is brought before a judge, usually sitting in emergency session owing to the plea of urgency made in support of the intervention being sought. To justify the exercise of jurisdiction by the magistrate sitting in emergency session, it must also be shown that the contested acts are manifestly unlawful or that harm is imminent.

Jurisdiction over collective action is vested in the magistrate sitting in emergency session at common law (the High Court). The first instance labour courts, i.e. the individual disputes boards (*Conseil de prud'hommes*), have competence only to decide on individual disputes arising under contracts of employment (and therefore would have jurisdiction to decide on the dismissal of a striking employee).

The jurisdiction enjoyed by a magistrate sitting in emergency session lies with the presiding judge of the Division. It is therefore exercised by a single magistrate, unless he or she opts to refer the case on an emergency basis to a panel of judges at a hearing on a date he or she sets.

The emergency procedure is one which is rapid but still adversarial. Although the magistrate sitting in emergency session should ensure that the respondents have enough time to prepare their defence, the complainant may be authorized by the judge to summon the opposing parties at a specified time (in a procedure called "hour-to-hour emergency hearing"), even on holidays or days of rest, whether at a hearing or at his or her home.

Even though in practice the magistrate sitting in emergency session usually refers the grounds of the main suit to a panel, this is not mandatory. The magistrate sitting in emergency session has the power to take action before any proceedings have begun on the main suit, and even once the main suit has begun, as long as the prosecuting magistrate, who has the power to take preliminary measures, has not yet taken jurisdiction over it. For this reason it has been said that a magistrate sitting in emergency session can enjoin strikers to cease engaging in unlawful acts, but cannot in any event order an end to the strike. The magistrate sitting in emergency session may, in addition, order an investigation and designate a mediator.

Where collective action is accompanied by unlawful means of its implementation, such as a strike involving on-site occupation when this occupation goes hand in hand with impeding the freedom to work, an expulsion order may be sought from a magistrate sitting in emergency session. A question arises as to whom the order is directed, given the practical difficulties of bringing all the occupiers into the case. In a judgement issued in 1977, the Labour and Social Affairs Division of the Supreme Court of Appeal suggested a solution

designed to facilitate the enforcement of expulsion orders: the naming of a few of the employees who appear to be the leaders of the movement, a procedure that permits a common defence for all staff, and the concomitant presentation of a plea for expulsion of all other occupants, whether identified or not (the order given on the plea is a temporary decision issued *ex parte* in cases where the applicant has grounds for not calling the opposing party). This solution has not since been affirmed by the Supreme Court of Appeal and has given rise to sharp criticism from the point of view of legal doctrine.

Sanctions for unlawful collective work stoppages and unlawful acts committed during a strike

Disciplinary penalties

The Labour Code provides that:

a strike shall not constitute a breach of the contract of employment unless there is serious misconduct attributable to the employee. Engaging in a strike shall not give rise to discriminatory measures in connection with remuneration or social benefits.

Any dismissal taken in violation of the preceding paragraph of this section shall be null and void.

On this basis, the Labour and Social Affairs Division of the Supreme Court of Appeal has ruled that an employee who has been dismissed for having gone on strike could bring a suit for reinstatement in the enterprise. As a matter of principle, if the strike is lawful the contract of employment is merely suspended while the worker is on strike: thus an employer who is seeking to dismiss the employee by claiming that the contract was breached bears the burden of proving that the employee engaged in serious misconduct. The employer must also respect the procedures applicable in case of dismissal. Facts that can give rise to disciplinary penalties are subject to a two-month period of limitation.

Serious misconduct, which the Labour and Social Affairs Division of the Supreme Court of Appeal has defined as being conduct that displays the intent to cause harm, must be directly imputable to the employee; the employer must prove personal misconduct of a particularly serious nature. Examples of serious misconduct are acts personally committed by employees that constitute an attack on the physical safety of persons, acts that hinder freedom of movement (i.e. sequestration), acts involving reduction in the value of materials or merchandise, acts that infringe the freedom to work, etc. Serious misconduct can also be characterized by knowing participation in an unlawful collective work stoppage. Serious misconduct justifying dismissal *a fortiori* justifies less severe disciplinary penalties.

Civil liability

Civil liability on the part of trade unions and employees who have participated in an unlawful collective work stoppage can come into play under the general principles governing the law of civil liability. These require the existence of a misdeed, personally

committed by the defendant; prejudice caused; and a cause-and-effect relationship between the misdeed and the harm suffered.

Trade union liability. As indicated, provisions of a collective agreement may regulate the exercise of the right to strike. If these provisions are not followed, the liability of the signatory trade unions may be invoked. A signatory trade union may not be held liable for a wildcat strike that was declared without its instigation. It should also be noted that trade unions are only under a duty to refrain from taking action that would compromise the faithful implementation of the collective agreement. Moreover, there is often an issue of the level at which the strike broke out and the level at which the collective agreement was signed.

Civil liability on the part of the trade union can also be invoked if the union directly called for participation in an unlawful work stoppage begun by instigators of the action, or if the union participated in unlawful acts committed during a strike. The mere fact of having called the strike would not imply liability for unlawful acts committed during the strike; by the same token, the mere presence of a trade union representative whose attitude remained passive cannot give rise to liability for the trade union. To be held liable, the trade union must have clearly incited the strikers to commit unlawful acts.

Trade union leaders. The individual responsibility of trade union leaders can come into play only if they wittingly participated in illegal collective action which they did not lead. They can be liable only for acts that they committed personally, in their individual capacity. They cannot incur liability on behalf of their trade unions.

Employees. In the case of failure to follow the provisions of a collective agreement regulating resort to the right to strike, holding employees individually liable presupposes first of all proof of knowledge of the agreement on the part of each of them, and then serious misconduct. If individual participation in unlawful acts were to be proved, these employees could be held liable.

Once the requirements for showing liability have been met, trade unions, trade union leaders and employees will be called upon to make good the losses the dispute has caused to the enterprise and to compensate non-strikers for having deprived them of their wages as a result of the strike. The duty to rectify the harm caused is limited only by the amount of the damage, subject to the cause and effect relationship between the misdeed committed and the harm caused. Trade unions, trade union leaders and employees may each be held jointly and severally liable to pay the compensation awarded.

Germany¹

Friedrich Heither, Federal Labour Court

There are no official and therefore no judicial measures against imminent or initiated actions in a lawful industrial dispute.² The applicable German collective bargaining law, the essential features of which are protected by the Constitution (article 9, paragraph 3), permits lawful industrial action without restrictions or remedial measures by the Government or the courts. There is no official compulsory mediation in case of conflict between collective bargaining partners. Nor is there any possibility to suspend industrial action temporarily by official or judicial means.

Since there is no legal regulation of industrial action, jurisprudence has established criteria which must be met for industrial action to be lawful. Strikes must be carried out only: (a) by trade unions (unions, on the one hand, and single employers or employers' associations on the other); (b) only to achieve an objective that can be collectively bargained; (c) after the expiration of a possible peace obligation under an applicable collective agreement; and (d) once all negotiation possibilities have been exhausted (*ultima ratio* principle). Of course, at the beginning of an industrial dispute the courts will not in fact examine whether all negotiation possibilities between the employers and trade unions have been exhausted. The initiation of industrial action rather represents the free and non-verifiable decision of a party that it considers the negotiation possibilities as exhausted unless accompanying industrial action is taken. Defensive lockouts by employers are permissible if in accordance with the principle of proportionality.

There is no obligation on the parties involved in the conflict to report imminent or initiated industrial action to any official or private authority. Nor is there any legal remedy or relief in case of lawful industrial action. Only if a party claims that industrial action is unlawful or requests an injunction or compensation for damages will the labour courts examine whether the industrial action is lawful or unlawful.

When a strike or particular industrial action by the trade union is unlawful, then employers' associations as well as the single employers affected by the industrial dispute may request an injunction against the commenced and continuing actions. The plea for an injunction may also be put forward by means of a preliminary request for a prohibitory injunction if an unlawful industrial dispute or unlawful industrial action is impending. If a

¹ Translation revised by the editor.

² For a discussion of the legal status of industrial action see also D. Neumann, "Country paper: Germany", in W. Blenk (ed.): *European labour courts: Industrial action and procedural aspects* (Geneva, ILO, Labour-Management Relations Series No. 77, 1993), pp. 25-30.

lockout is unlawful, the union may request an injunction and individual employees may file suits for wages withheld.

There is no legal obligation for the parties to engage in discussions over impending industrial action. The only time it is prohibited for parties to a collective agreement to carry out industrial action on matters which have already been or are still regulated in the collective agreement (so-called "peace obligation" (*Friedenspflicht*)) to refrain from strikes and lockouts is during the period the collective agreement is in force. After expiration of this peace obligation it is basically possible to initiate industrial action at any time. Although in practice negotiations by the parties take place throughout, no party can press a claim to initiate or carry on negotiations for a collective agreement. However, the parties to collective agreements often contractually agree to go through a conciliation procedure under the collective agreement prior to the initiation of industrial action. However, there is no compulsory conciliation by the Government.

Imminent or already initiated unlawful industrial action (strikes and lockouts) can be prohibited by labour courts by means of preliminary injunctions. The respective jurisdiction is with the first instance of the Labour Court. A decision of that court may be appealed to the state level of the Labour Court (*Landesarbeitsgericht*). However, there is no review by the Federal Labour Court (*Bundesarbeitsgericht*) in the temporary order proceedings.

According to prevailing opinion, extreme caution is recommended in relation to the issue of temporary orders in industrial disputes. A prohibition has considerable effects on the continuation of an industrial dispute. Therefore, restrictions should only be implemented in very rare cases (e.g. where there would be disproportionately great economic damage). A decision as to the lawfulness or unlawfulness of industrial action (strike or lockout), is thus normally reached only upon damage claims of the employer or wage claims of the employees after the industrial dispute is over. Therefore both sides face large risks which will discourage them from taking imprudent measures.

A claim in the proceedings on the main issue for the imposition of sanctions need *not* be raised prior to the making of an application for a preliminary injunction. Even if a claim in the proceedings on the main issue were raised, it is only possible to grant a temporary order upon application of a party.

In especially *urgent* cases, where there is a special need for expedition, a decision may be reached without a hearing, i.e. without hearing the opposing party. Even prior to the transmittal of the preliminary ruling, a hearing of the adverse party need not take place. Also, the preliminary ruling will not be officially served to the adverse party. It is rather up to the prevailing party in the suit to serve the opposing party. Normally, however, in such significant summary proceedings a decision is not taken without hearing the adversary. The period of notice for entering an appearance in this oral hearing may be shortened to a few hours.

The composition of the panel that rules on a temporary order is normally the same as when a decision is taken in the proceedings on the main issue. In *urgent* cases, the chairperson of the panel alone can even take a preliminary decision without the participation of other judges, who would otherwise be involved.

An interim decision to stop unlawful industrial action may not be combined with an order to take up discussions to avoid further industrial action. While the court may prohibit unlawful industrial dispute actions, it cannot prescribe the further attitude taken by the parties.

A preliminary injunction can be enforced upon application of the party in whose favour it was granted (the successful party). If the losing party does not discontinue the unlawful industrial action the court has prohibited, then, upon application of the successful party, a disciplinary fine up to DM500,000¹ or, as a substitute, disciplinary detention up to a total of two years can be imposed in respect of each violation. Temporary decisions are normally observed, at least after utilization of all legal remedies.

Apart from an injunction against industrial action (see above), the main remedy for unlawful industrial action is an order requiring the party to make up for all damages resulting from such action.

An unlawful strike is grounds for a claim for indemnification of the employer concerned if liability could be attributed to the striking union or employees participating in the strike. If, on the occasion of a lawful strike, actions occur which do not fall under the right to strike (so-called "strike excesses", e.g. prevention of the ingress and egress of goods and customers) this does not make the strike unlawful as such. However, these actions create liability to make up for those damages which are not covered by actions involving the right to strike (Federal Labour Court Judgment of 21 June 1988).

Should an employee engage in an *unlawful strike*, this may under certain circumstances justify notice of termination of the contract of employment by the employer.

An *unlawful lockout* is a violation of the contract of employment. The unlawfully locked out employees, although not working, nevertheless are entitled to receive their wages for this time.

Apart from these main civil law consequences of an unlawful industrial dispute, sanctions (in the sense of punishment) are only taken into consideration if criminally punishable actions (e.g. duress, bodily injury) occur within the scope of an industrial dispute. In Germany, there is no special criminal offence for engaging in unlawful industrial disputes.

The sanctions according to the civil law can be directed against both organizations that are parties to the industrial dispute and individuals engaged in it. Criminal penalties come into consideration only against individuals. All sanctions presuppose actions incurring liability. Where unlawful industrial dispute action has been decided upon and carried out by organizations, the individuals participating in the industrial action will not be found liable because they are allowed to rely in principle on their organizations acting within the law. Sanctions against individuals are only taken into consideration if they act in an unlawful manner beyond the limits agreed by the organizations.

Sanctions may not be applied against organizations if they did not themselves participate in unlawful industrial action. There is no general obligation for organizations to prevent others from engaging in unlawful industrial action. There are no special restrictions in respect to sanctions which may be imposed on organizations, individual employees or individual employers.

Whether a party observes a temporary injunction of unlawful industrial action or not is of no special significance for the decision on the main issue in the case. Nor is there any obligation to raise the question of sanctions before the court within a fixed time-limit. However, claims for indemnification as a result of industrial action are time-barred after

¹ In 1990, DM1.65 equalled approximately US\$1. OECD: *Historical statistics, 1960-90* (Paris, 1992), p. 23.

three years from the date of the party's knowledge of the damage, so that a claimant seeking indemnification will need to bring an action within this period.

An employee who is engaged in unlawful industrial action commits a breach of the contract of employment and engages in an unjustifiable refusal to perform the service owed. The employer may dismiss such employees (without notice) if they do not resume their work in spite of a request to do so. However, if an unlawful strike has been led and organized by the trade union and the employee therefore considers the strike to be lawful, then the employee is not normally held responsible. In such cases dismissal does not occur.

According to German procedural law, the losing party must also bear the cost of the proceedings, that is, court costs and trial costs of the successful party. However, under the law governing the Labour Court, in the court of first instance the cost incurred by the successful party to consult an attorney will not be awarded.

In case of disputes over the prohibition of unlawful industrial action the parties are mainly organizations. Indemnification proceedings are normally conducted between the employer affected by the unlawful industrial action and the striking union.

If the complaint is filed against a large number of individuals, then each individual is a party to the proceedings. The court is then required to serve a summons on each individual. In addition, each individual is entitled to appear at the hearing and file petitions.

A temporary order for the prohibition of unlawful industrial action can be issued within a few hours. It is not possible to state the time period within which a final decision will be made and served on the parties. This depends on the working methods and workload of the various courts. At present, all cases heard or reviewed by the Federal Labour Court can be ruled on within one year.

Hungary

József Radnay, Presiding Justice of the Supreme Court of Hungary

Introduction

The new Hungarian Act on the right to strike was passed in the last session of the last non-democratically elected Parliament in March 1989.¹ Therefore the Act is very reserved and is limited strictly to the basics. In response to a government request for advice, the ILO had proposed the adoption of a short regulation on the subject.

According to the Act the parties have to negotiate with each other when lawful industrial action is contemplated. In this case the parties have to establish a conciliation committee within five days. The conciliation committee has to mediate between the parties. The committee can take a decision only when the parties agree to it in advance.

The conciliation committee is authorized to postpone or stop industrial action by binding decision only when the parties have given the committee such power; otherwise there is no direct remedy to avoid industrial action. A party can at any time ask the Labour Court for a declaration of the legality or illegality of the strike; this acts as an indirect means of controlling industrial action.

A judgment of the Labour Court declaring the strike as legal or illegal may be appealed to the Supreme Court of the Hungarian Republic.

Under the 1989 Act, the strike will be illegal if it was initiated before seven days from when the conciliation committee began to function.

The Labour Court may decide only the lawfulness or unlawfulness of the industrial action. The explicit jurisdiction of the courts does not include the power to take provisional or interim decisions. Because of the reasons mentioned at the outset, the Act says nothing on this question, and a specific provision would be needed for the court to have this jurisdiction.

Sanctions for unlawful industrial action are laid down in civil law (governing criminal law) and labour law (governing termination or disciplinary penalties). Legal action to stop or avoid unlawful industrial action or threatening industrial action is not regulated in the new Act concerning strikes, and practice has not yet developed on this point. But Hungarian

¹ The text of the Act (No. VII of 1989) appears in translation in *Labour Law Documents* (Geneva, ILO), 1990/1, under the code 1989-HUN 1. The Labour Code, Act No. 22 of 1992, which appears in translation in *Labour Law Documents*, (Geneva, ILO), 1993/1, under the code 1992-HUN 1, now governs collective labour disputes.

jurisprudence in the years prior to the Second World War certainly permitted such legal action.

Under section 260 of the Criminal Code anyone who considerably disturbs the functioning of works of interest to the general public (public utilities, etc.) so as to cause damage to the components or otherwise, may be subject to a criminal penalty of five years' imprisonment. The expression "or otherwise" can mean illegal industrial action too. An order to pay damages can be imposed upon both organizations and individuals. According to the 1989 Act strikes can be organized by trade unions or workers acting without the trade unions. In civil law, no limitation is placed on sanctions.

Although no practice has yet emerged, it can be considered as a starting-point that sanctions cannot be imposed upon individuals if the action has been decided by their organization, unless the individual went beyond mere participation. For an organization to avoid having sanctions imposed upon it under Hungarian law, it would have to show that it did what could be expected from it, with regard to the circumstances, in order to prevent the unlawful industrial action.

There is no specific time-limit on legal action for sanctions but there is a binding three-year period of statutory limitation.

Under the general rules governing disciplinary sanctions and termination of employment it would be possible for an employee to be sanctioned for engaging in unlawful industrial action but this is not used in practice.

A party may be held responsible for litigation costs; there are no special rules on this as regards industrial action. The parties before the court may be the employer and the trade union and/or the employees. If a large number of individual employees were before the court, each would have to be served with a writ individually and could appear if they had not chosen to be represented collectively. In general, cases involving sanctions for unlawful industrial action are decided within six months to one year.

Israel

Stephen J. Adler, Deputy President, National Labour Court of Israel

The lawful strike

The primary means of settling collective disputes is by negotiations between the parties involved. The National Labour Court has suggested that the duty to perform a contract in good faith, which is obligatory according to sections 12 and 39 of the Contracts Law (General Part), 5733-1973, obligates the parties to a collective bargaining agreement to negotiate in good faith concerning any disagreement over implementation of the agreement. A party to such negotiation may not conceal important facts from the other party or set a "non-negotiable" position prior to negotiations. Moreover, the National Labour Court has held that an employer should negotiate prior to making unilateral changes of contractually set working conditions.

In lieu of industrial action, the parties may submit to the Labour Court a dispute over the interpretation of a collective bargaining agreement. Often, such adjudication prevents industrial action.

Remedies and legal doctrines common to lawful and unlawful strikes

The personal employment contract is suspended during a strike. The employer is therefore not obligated to pay wages to striking employees. When a partial strike occurs employees are only entitled to partial wages. In addition, the employer may refuse to accept the different work which is being offered by the striking employees. In such an event the employees are not entitled to any wages.

In Israel employers generally do not continue production or provide services during a strike. The reasons for this custom are as follows: (1) the high percentage of organized workers (about 70 to 75 per cent of the workforce is organized). Most organized workers are represented by the Histadrut (the General Federation of Employees), but there are a few independent unions, notably those representing doctors, journalists and high-school teachers; (2) all employees in most companies are organized, except a handful of top managers; (3) management of organized companies is, in general, not "anti-union"; (4) about 15 per cent of the workforce is employed by Histadrut-owned or controlled companies, and about 50 per cent of the workforce are government or municipal employees

or employed by government-owned or controlled companies. Management in the public sector consider it politically unacceptable to “fight” the union. It must however be noted that there is a growing number of non-union companies, especially in high-tech industry.

Section 44 of the Employment Service Law, 5719-1959, prevents the Government Employment Service from interfering in strikes by either finding jobs for striking employees or sending job applicants to fill the jobs of striking employees.

Pre-strike notice — cooling-off period

Israeli law places few restrictions on the freedom to strike.¹ However, when a union or employer intends to take lawful or unlawful industrial action, section 5A of the Settlement of Labour Disputes Law, 5717-1957, obligates the authorized organ of the trade union or the employer to notify the other party and the Chief Labour Relations Officer in the Ministry of Labour, at least 15 days prior to such action. This requirement also applies to partial strikes. The notice may not be given by local works committees, which are not authorized by the Histadrut constitution to conduct a strike.

The Chief Labour Relations Officer decides whether to conduct conciliatory procedures during the 15-day “cooling-off period”. Conciliation procedures include mediation, negotiation and fact-finding. The parties are obligated to participate in conciliation proceedings, submit reasoned answers to arguments of the other party, and provide certain economic information to the conciliator. The law empowers the conciliator to hear testimony, subpoena people or information and fine persons who refuse to comply. However, in practice all conciliatory procedures have been on a voluntary basis. If agreement is not reached by conciliatory procedures, the parties may agree to submit the dispute to arbitration, which may be conducted according to the Settlement of Labour Disputes Law or the Arbitration Law, 5728-1968.

Fifteen days after giving notice under section 5A of the Settlement of Labour Disputes Law, the union may strike or the employer may lock out. The Chief Labour Relations Officer has no power to postpone or cancel industrial action. Furthermore, the law provides no penalties for failure to give this pre-strike notice. However, the Labour Court may take the failure to give notice into account when deciding whether to grant a temporary injunction against a strike which is otherwise illegal. The Labour Court has no role in the conciliation procedure.

Dismissal during industrial disputes

Section 19 of the Collective Agreements Law, which declares that participation in a strike is not a violation of the individual labour contract, makes it a violation of contract to dismiss an employee for participating in a strike. However, section 19 does not protect strikers in the public sector, when the strikes are “unprotected strikes” (see below).

¹ For a discussion of the legal aspects of strikes and other industrial action, see S. Adler, “Country paper: Israel”, in W. Blenk (ed.): *European labour courts: Industrial action and procedural aspects* (Geneva, ILO, Labour-Management Relations Series No. 77, 1993), pp. 31-36.

Parties to collective suits

In general the parties to collective labour relations are also the parties to collective suits. This includes the individual employer or the employers' organization and the trade union. Persons who are not a party to the collective bargaining agreement (members of the works committee or Histadrut officials) may be added as respondents to a collective suit, especially when they are involved in a strike called in non-conformity with the procedures established in the Histadrut constitution or without approval of the authorized Histadrut organ.

When a large number of employees are added as respondents to a collective dispute, they are summoned by posting notices in the workplace or by announcements in the media. In such instance each individual employee has the right to be present at the hearing and represented by an attorney. However, employees may decide not to appear at the hearing; if so, they will be represented by their union. In any event, an injunction not to strike a particular workplace is *in rem* (based on the subject-matter at issue) and binds individual employees even when they were not respondents.

In collective suits the parties are generally represented by attorneys but works committees are sometimes represented by their officers. Even when parties are represented by attorneys, union and management officials are usually present. Some judges require the presence of senior union and management officials at hearings, so as to better enable the court to explore the possibility of reaching agreement to suspend the industrial action and negotiate.

Jurisdiction over collective suits

Under section 24(a)(2) of the Labour Courts Law, 5729-1969, the Regional Labour Courts have original and exclusive jurisdiction over collective labour suits. This is the trial court of the labour courts system. Such jurisdiction includes interpretation, application and implementation of collective bargaining agreements. Appeal of regional court decisions is to the National Labour Court.

Section 25(1) of the Labour Courts Law grants the National Labour Court original and exclusive jurisdiction over collective suits involving parties to a general collective bargaining agreement (i.e. an employer organization and trade union). Such cases are rare and sometimes involve nationwide strikes. This is one of the rare instances in Israeli law where there is no appeal from decisions of the court of first instance. The reason is the importance of speed and finality in settling this type of case.

The Labour Courts have jurisdiction to hear cases involving enforcement of existing legal rights ("rights disputes"), and not "economic" cases involving the creation of new economic rights ("interest disputes"). The Labour Courts are empowered to grant the same remedies which may be granted by the general courts. Tort suits involving civil claims, in which a third party injured by a strike requests damages against a union or individual strikers, are not under the jurisdiction of the Labour Courts. Such cases are adjudicated in the regular courts.

Hearings of collective disputes are only 1 per cent of the workload of the Labour Courts, which in 1990 handled about 34,000 cases. However, such disputes are very time-consuming and place a burden on the courts' work.

Procedure

There are special procedural rules relating to collective disputes. Evidence is generally limited to affidavits and documents necessarily including the collective bargaining agreement submitted when the suit is filed. The parties are entitled to an oral hearing, but may waive it and submit briefs.

The composition of the court hearing a collective dispute includes representatives of the public. Since the hearing concerning temporary relief is considered a separate proceeding, the panel hearing the request for temporary relief may have different judges and public representatives than that hearing the main case.

Decisions regarding temporary relief are given priority and are handed down on the day of the hearing or a few days thereafter. The National Labour Court has established a general rule that court costs are not awarded in collective suits.

The National Labour Court has held that a party requesting temporary relief in a collective dispute must file the main suit. A party filing for temporary relief against industrial action is not required to initiate negotiations or discussion. However, the Labour Court generally discusses with the parties their readiness to suspend industrial action and negotiate. Furthermore, when temporary relief is granted the Court usually requests a report of compliance. Such reports may be given orally, thereby enabling the court to oversee the progress of negotiations.

Unlawful industrial action — breach of contract

"Unlawful" industrial action violates a contractual obligation voluntarily established in a collective bargaining agreement. The Contracts (Remedies for Breach of Contract) Law, 5731-1970, provides for the following remedies for a breach of any type of contractual obligation: specific performance, rescission and damages.

The parties to collective bargaining agreements may agree to restrictions on the right to strike or lockout. Most collective bargaining agreements have no strike/no lockout clauses. Furthermore, the Labour Court has ruled that even in absence of such a clause, there is an implied no-strike/no lockout clause in collective bargaining agreements.

However, section 19 of the Collective Agreements Law, 5717-1957, states that "participation in a strike shall not be regarded as breach of a personal obligation". This section does not grant such protection to public service employees participating in "unprotected strikes". Section 24 of the same Law states that a union or employers' organization "shall not be liable for damages for an infringement of its obligations under a collective agreement ...". This means that damages cannot be awarded against a union which conducts a strike in violation of its contractual obligations. However, if a collective agreement expressly states that a union will be liable for damages if it strikes in violation

of the agreement, the court may award damages. No collective bargaining agreement known to the author contains such a clause.

Termination of a collective bargaining agreement is limited by law. Sections 13 and 14 of the Collective Agreements Law state that, in the absence of a termination clause: (1) a collective agreement for a specific period may only be terminated two months prior to its express expiration date; (2) a collective agreement for an indefinite period may only be terminated by two months' prior notice.

Specific performance, in the form of an injunction, is the main remedy available to the employer against a strike in violation of a union's contractual undertaking. Specific performance can also be a remedy against employers to prevent collective dismissal. The National Labour Court's policy is to use the labour injunction sparingly, mainly as a remedy against wildcat (unauthorized) strikes, and to avoid granting temporary injunctions *ex parte*. The injunction is an equitable remedy and therefore the conduct of the party requesting the injunction is a factor considered by the courts when deciding whether to grant the request. Courts have, for example, refused to grant a temporary injunction against an unlawful strike when the employer has not paid wages.

A party may be summoned to a hearing on short notice, even notice of one hour. Summonses to such a hearing are generally in writing, but may also be by telephone, facsimile, or announcement by way of newspaper, radio or television. Hearings for temporary relief against a strike or lockout are held immediately, usually the same day they are filed or the next day. Such hearings are frequently held after regular court hours. Temporary relief is granted only at a party's request, and not at the court's initiative.

Compliance with court orders

Labour Court injunctions against strikes generally meet with compliance. Often, non-compliance occurs when the relations between the parties have deteriorated or become abnormal. A party not complying with a court order is considered in contempt of court. The other party may institute a contempt of court suit, which is a separate trial held before a judge or judges (without public representatives in the court panel). The only penalty for contempt of court is a monetary fine. The fine is based on any future refusal to comply, thereby encouraging compliance with the injunction. A 1972 amendment to the Settlement of Disputes Law prohibits imprisonment for participation in a strike.

Declaratory judgements

Another type of relief, usually temporary in nature, is the declaratory judgement. For example, the court may declare a strike unlawful or in violation of a collective bargaining agreement without issuing an injunction against the strike. The importance of such a declaration is tactical, especially to influence public opinion in public sector strikes. It may also be the basis for a later suit for damages or an injunction.

Unlawful industrial action — tort remedies

Jurisdiction over cases involving the tort of nuisance lies with the general courts. However, when the parties are a union or works committee officials and an employer, the labour courts have jurisdiction over torts arising out of section 62(b) of the Civil Wrongs Ordinance (New Version), 5728-1968, which states that a strike or lockout shall not be considered the tort of inducing breach of contract. When a third party brings suit against a union, jurisdiction is in the general courts. These courts have held that a strike or lockout is not a tort against the other party to the collective relationship.

The tort of nuisance was the basis for a recent controversial Supreme Court decision which held union officials liable for tort damages in a lawful strike that had caused economic harm to a third party (who was not a party to the collective bargaining agreement). The strike was by members of a ship's crew who moved a ship to a dock and thereby prevented unloading of the plaintiff's cargo from another ship. The court found tort liability because the unions' strike action obstructed a public thoroughfare.

Unlawful industrial action — strike in violation of internal union constitution

The constitution of the Histadrut, the principal labour federation, grants certain union organs the power to declare and conduct a strike. It also establishes procedures for declaring a strike. If the strike is declared and conducted by an organ not authorized to do so, or the procedures are not followed, the strike is "illegal" or "unprotected".

Unauthorized strikes in the public sector

Sections 37A to 37E of the Settlement of Labour Disputes Law attempt to limit strikes in the public sector. Under this law, a strike that is not authorized by the proper trade union organ or violates a collective bargaining agreement is an "unprotected strike". Since such strikes are not protected by legal provisions like section 19 of the Collective Agreements Law or section 62(b) of the Civil Wrongs Ordinance, most temporary injunctions are granted against "unprotected strikes" in the public sector.

Norway

Stein Evju, President, Labour Court

Introduction

The statutory provisions in this field are chiefly embodied in the two Acts forming the pillars of the legal framework of collective bargaining and dispute resolution in Norway: the Labour Disputes Act of 5 May 1927 (LDA, as amended; originally adopted in 1915) and the Public Service Labour Disputes Act of 18 July 1958 (PSLDA, as amended). The 1958 PSLDA covers the state part of the public sector; the 1927 LDA covers the rest of the labour market, including the municipal part of the public sector. Both Acts are based on the same basic principles and contain, to a large extent, parallel provisions. There are, however, some differences on technical points, as will be noted where appropriate.

Lawful industrial action¹

In order to undertake lawful industrial action (including sympathy strikes and lockouts) in a dispute of interests, written notice by one party to the other is required. A strike or lockout notice (hereafter "action notice") must be given in conformity with certain rules; the notice period is in most cases 14 days.

When an "action notice" is given, the party giving notice is also required to notify the National Mediator's Office immediately, giving particulars concerning the subject of the dispute, the scope of the possible industrial action, and so forth, pursuant to detailed provisions in the LDA (section 28(2)). If bargaining is in progress that party is further required to notify the National Mediator immediately if and when bargaining subsequently is terminated without a settlement between the parties.

Upon such notification of "action notice" or of subsequent termination of bargaining, as the case may be, a strike or lockout in the dispute at hand is in all cases prohibited for the period of four days following the notification to the National Mediator. This is to allow for the National Mediator to assess the dispute and to decide whether to order a temporary

¹ The concept of "industrial action" has been the subject of previous discussions; the matters discussed in this section are treated more extensively in *Methods of settlement of collective interest disputes*, National Report (Norway) to the XIIIth World Congress of the International Society of Labour Law and Social Security (Athens, 1991). See S. Evju, "Country paper: Norway", in W. Blenk (ed.): *European labour courts: Industrial action and procedural aspects* (Geneva, ILO, Labour-Management Relations Series No. 77, 1993), pp. 37-44.

suspension of the right to start industrial action pending completion of the mediation procedure.

The National Mediator may issue a ban to that effect within two days of having received a relevant notification from a party. Whether to do so is in principle left largely to the discretion of the National Mediator: pursuant to the LDA (section 29(2)), the National Mediator has the competence to ban industrial action — and is presupposed to do so — if he or she considers that the dispute appears likely to threaten the general interest either because of its scale or because of the type of enterprise concerned. In practice, suspension orders are issued in all national and other major collective agreement relationships, but more rarely in smaller disputes involving only one or a few employers with a limited workforce.

If suspension is ordered, the National Mediator is in principle required to institute mediation in that dispute “without delay”. Mediation may also be conducted if industrial action is not banned, and that is the prevalent practice in smaller disputes that are handled, for the most part, by district mediators in their respective districts. In either case mediation is compulsory: once it has been decided to institute mediation, the parties are obliged to convene and participate in good faith — for a limited period of time.

The LDA stipulates rather brief deadlines for the completion of the mediation procedure: ten days or more after the ban on industrial action, either party may require the mediation to be terminated within four days. Thus at the outset, a suspension order is effective and mediation may be carried out for a minimum of 14 days. The usual practice is, however, to apply deadlines in a highly flexible manner in order to give the mediation process every chance of success. It rests with the parties to decide when they wish to have mediation procedure terminate; they are not compelled to do so after ten days and may freely prolong the mediation procedure by waiting. Doing so is the prevalent practice.

The procedure pursuant to the PSLDA differs somewhat in its details from that under the LDA. Under the PSLDA if bargaining is unsuccessful, the National Mediator must be notified immediately of the end of the bargaining process. Mediation is compulsory in all cases and should be initiated within 14 days following notification. Subsequently, 14 days after the initiation of the mediation process either party may require it to be terminated within seven days. The minimum deadline is thus 21 days, as opposed to 14 under the LDA. No suspension order by the National Mediator is required; industrial action is expressly forbidden by the PSLDA itself pending the completion of the mediation procedure.

The purpose and aim of mediation is to have the parties reach a “reasonable” voluntary settlement without resorting to industrial action. During mediation, mediators have access to all documents of the parties and have fairly unlimited powers of investigation. In practice, however, their work is predominantly based not on documentary evidence but on talks with the parties, mostly conducted separately but in plenary meetings at the beginning and at the end of the procedure. Formal requirements are few and the procedure is sufficiently flexible to permit practical approaches suited to the individual dispute.

Apart from what has been mentioned above, mediators have no formal competence to dictate to the parties and cannot compel them to conclude an agreement or to accept a proposal. The mediator may, in the concluding stages of the procedure, elect to present a formal proposal for a settlement. Normally, this is done only when it is considered likely by the mediator that the parties’ representatives will agree to submit a proposal to a subsequent vote within their respective organizations in accordance with their own internal

rules. The submission of a proposal for subsequent decision is not a statutory requirement. Nor can it be imposed on the parties by the mediator, as far as the LDA is concerned; the PSLDA does, however, authorize the National Mediator to require a referendum. Industrial action is in neither case banned beyond the formal completion of the mediation procedure by virtue of statutory provisions. Thus in principle, a strike and lockout may be undertaken during the interim period. It has, however, been established by case-law that if representatives consent to submit a mediator's proposal for subsequent decision, this also implies an agreed postponement of any industrial action pending the expiry of the deadline fixed — by the mediator and the parties jointly — for submitting final replies on whether the proposal has been accepted or rejected.

The present legislation on labour disputes makes no general provision for compulsory arbitration if mediation is unsuccessful. If no settlement has been reached by way of mediation, the parties to the dispute may at the outset have recourse to industrial action in accordance with notices previously given.

Occasionally applied in pre-Second World War years, compulsory arbitration was introduced as a general instrument in 1945 and then gradually scaled down until final abolition in 1952. Instead, by an Act of 19 December 1952, the National Wages Board was set up. The Board is a permanent body available, at the outset, for voluntary arbitration of disputes of interests. It is composed of five permanent members: three neutrals and two representatives of the major confederations of employers and trade unions. The representatives of the federations are members in their capacity as experts on industrial relations and do not formally hold voting rights. In addition, each party to a dispute designates a representative to the Board for that particular case; these representatives do have voting rights.

The Board is empowered to deal with any dispute arising in the process of negotiating collective agreements, provided that both parties request it to do so. Requests for voluntary arbitration by the National Wages Board have been rather rare, however. On the average, they number scarcely more than one per year. The Board has actually been used more frequently for compulsory arbitration.

Since 1952, compulsory arbitration has been imposed rather frequently by special legislation to settle specific disputes. A special Act of Parliament — or, between sessions, a special Cabinet Decree in accordance with powers conferred by the Constitution — is required. In practice, the authorities have acted on an ad hoc basis to prohibit industrial action in a large number of cases. By the end of 1990, the number of special Acts and Decrees totalled 81. The individual Act or Decree has in some cases covered more than one labour dispute. Thus, the actual number of disputes submitted to compulsory arbitration totals in excess of 120, approximately three per year on the average. In practice, such cases have not been limited to essential services, whether in the strictest or a somewhat wider sense. Recognized more or less tacitly as a factual reality, the use of compulsory arbitration is none the less a matter of consistent controversy and frequent criticism, as well as of occasional conflict, at times involving illegal industrial action.

The Labour Court has no role to play in the ordinary case of lawful industrial action. Interest disputes are not adjudicated. However, in the course of a dispute procedure, issues may arise concerning notifications, time-limits, orders issued by the National Mediator, and so forth, which may be of consequence as to whether and when industrial action in that interest dispute is lawful. Disputes of this kind are adjudicated by the Labour Court, although in practice they are infrequent.

Unlawful industrial action

Interim measures

If unlawful industrial action is threatened or is ongoing there is no specific legal obligation for the parties to meet and discuss, or to bargain on, the underlying substantive issues. On the contrary, the prevailing practice — particularly on the part of employers insisting that the peace obligation be respected — is in such cases to refuse discussions or bargaining on the substantive issues involved while a threat is pending or action is ongoing.

On the other hand, a prerequisite for bringing a case to the Labour Court is that the dispute has been subject to “dispute bargaining” between the parties to the collective agreement (or, that the plaintiff has endeavoured, in vain, to initiate such bargaining; LDA, section 18(2)). In cases of unlawful industrial action the relevant bargaining issue in this respect is that of the lawfulness of the action concerned. And, in keeping with what has been noted above, dispute bargaining in such cases will ordinarily be confined to that issue, possibly including demands by the prospective plaintiff that the opposing party actively engage itself in relation to its members with a view to terminating the industrial action.

The position taken by a party in dispute bargaining in such cases — or a possible refusal to participate in dispute bargaining — is quintessential for the question of liability for unlawful action taken by members and is also accordingly of consequence if and when an assessment is done of compensation to be paid (see below).

Whether interlocutory injunctions may be granted in collective labour rights disputes, e.g. to stop industrial action, is a moot point. The legislation on labour disputes itself does not contain provisions for interlocutory proceedings or interim measures — with one exception: pursuant to section 7(6) of the LDA, an order of attachment may be granted to secure a claim for compensation in a dispute to be decided by the Labour Court.¹ From this it is arguable that, as there are no stipulations on other forms of interim measures in the Acts covering labour disputes, such measures may also not be applied in cases that are adjudicated pursuant to this particular legislation. In addition, the possible application of the general rules of ordinary civil procedure on temporary measures would imply a number of problems, technical as well as substantive and, in part, of a fundamental character.

This legal issue is, as yet, unresolved; it has not been ruled on by the Labour Court. The matter was discussed by the Ministry of Labour’s tripartite consultative committee on collective labour law in a 1987 “White Paper” on remedies and sanctions in unlawful industrial action cases.² The committee noted that the legal issue is “an open one”, but did not recommend that legislative action be taken. In a Bill on a revised Enforced Execution Act presented to the Storting (Parliament) on 7 June 1991, no changes of significance to the issue were proposed.

To the extent that the use of interim measures is considered to be possible, the general rules of the 1915 Enforced Execution Act (EEA) would have to be applied, that being the

¹ Or a local labour court, as the case may be. This provision applies in PSLDA cases as well pursuant to the PSLDA section 23.

² *Arbeidsrettsrader: Om reaksjonsmidler ved ulovlig arbeidskamp, Innstilling 1/87* (Oslo, 1987), pp. 8-10 and 21.

sole Act containing relevant provisions in this respect.¹ Accordingly, interlocutory orders might be granted prior to the filing of the main suit. Interim orders can in no case be granted *ex officio*. However, in urgent cases, petitions for temporary measures may be decided *ex parte*, prior to serving the petition on the defendant and without summoning either party to an oral hearing.

If the Labour Court were to decide on a request for an interim order, the Court would have to be composed in the same way as when it hears the relevant main case. Pursuant to section 15 of the LDA, the Labour Court as a general rule cannot hear or decide any case or issue unless all seven members are present. No exceptions apply to issues of temporary relief.

If an interim order concerning unlawful industrial action were to be granted, it is hardly conceivable that the court would also order the parties to discuss or bargain on the underlying substantive issues. Notwithstanding the considerable discretion allotted to the courts in fashioning a suitable temporary measure in the individual case pursuant to section 265 of the EEA, an order to this effect would seem rather problematic in relation to the otherwise basic principle that it is not within the jurisdiction of the courts to deal with interest disputes. In the event of an interim order, the means available to secure compliance by the parties would be those applicable according to the general rules of the EEA.

Sanctions

The applicable final relief is the sanction of liability in damages, pursuant to sections 4 and 5 of the LDA and the fully parallel section 23 of the PSLDA. In contrast to the other Nordic countries, under Norwegian law compensation is available for actual financial loss only; there is no remedy in the form of a compensatory fine or "general damages" (*Bot*).²

Generally, organizations as well as individual members calling or participating in unlawful industrial action are subject to liability. An organization is also liable if it is not sufficiently active to forestall and/or to terminate unlawful action by its members. The activity required by the organization in this respect is a matter to be considered in the individual case but some general principles have developed, mainly in case-law. A party which, in dispute bargaining or otherwise, sides with its members and supports the industrial action concerned, or refuses to participate in dispute bargaining or, when requested by the adversary party to act refrains from activity to forestall or terminate, is certain to be held liable.

Individual members may conceivably be held liable even if the industrial action is called and decided by their organization. In principle, pursuant to section 4 of the LDA, participation in unlawful industrial action is in itself grounds for the liability of individual members. It may however be argued that if a member is merely acting in accordance with an order by the organization, the member cannot be seen to be "at fault" in the sense foreseen

¹ As regards the rules of the Enforced Execution Act, see, generally, the country paper on Norway, *infra*. As for attachment cases pursuant to the LDA (section 7(6)) and the PSLDA (section 23), it is presumed that the relevant EEA provisions are to be applied to supplement the LDA/PSLDA rules.

² For a general and comparative analysis of these remedies, see T. Sigeman: "Damages and *Bot*: Remedies for breach of collective agreements in Nordic law", in *Scandinavian Studies in Law* 29 (1985), pp. 187-212, reprinted in *Comparative Labor Law Journal* (Philadelphia), 1987, Vol. 8, No. 2 (Winter 1987), pp. 155-181.

in section 4. This issue is a topical one and not yet definitively resolved. (An old Labour Court decision, ARD 1920-21, page 85, may be cited in support of the position that mere compliance is exculpating.)

When liability is incurred, compensation is, at the outset and in principle, to be paid in the amount of the full economic loss suffered. All those responsible are in principle jointly and severally liable for the full amount. There is no specific limit on the amount that anyone, whether an organization or an individual, may be held liable to pay. However, compensation is to be assessed pursuant to section 5 of the LDA. There, it is provided that regard is to be had to the extent of the loss suffered, the blameworthiness and economic capacity of the one(s) at fault, the circumstances of the one(s) suffering the loss, and any other relevant circumstances. Where there are especially mitigating circumstances, liability may be dispensed with altogether.

This rule is important in practice, and primarily so with regard to the assessment of the liability of individual members. In Norwegian law there is no strict notion, or any formal stipulation, holding that there should be a normal remedy for breach of the peace obligation by individual workers. On the other hand, the Labour Court, in essentially a rule-creating manner, has consistently applied the practice of fixing a maximum for the individual's liability. From a practical point of view, this is in effect a form of deviation from the principle of fully joint and several liability, even if maximum amounts are not fixed on a strict pro rata basis. The maxima actually fixed may vary with the individual case, taking into consideration section 5 and the economic loss in question. In recent years, each individual worker's liability has been limited to amounts ranging from NOK800 to 1,200.¹ Recent cases are however very few. Significantly higher amounts may be, and have been, awarded against workers who have been considered to bear particular responsibility for a breach of the peace obligation, e.g. shop stewards or union representatives.

There is no specific time-limit for filing a suit, whether on the issue of the lawfulness of industrial action as such or for damages. Claims in damages are however subject to the ordinary civil law rules on limitation.

An employer may, in the event of unlawful industrial action, apply sanctions in the form of remedies under the contract of employment. Participation by a worker in unlawful industrial action is considered a breach of the employment contract and may, if considered to be sufficiently serious, warrant instant dismissal under the general rules of the existing employment protection legislation.² From case-law on this legislation it also follows that settlement of the issue of unlawfulness of the industrial action by the Labour Court (see e.g. the Supreme Court decision in Rt. 1977, page 902) is not a precondition for dismissal. Further, if a worker does not resume work subsequent to a decision finding the industrial action to be unlawful, according to case-law the employer may, depending on the circumstances, be entitled to refuse reinstatement, considering the worker as having terminated the employment relationship. (See, in particular, the Supreme Court decision in Rt. 1962, page 766, in conjunction with the Labour Court decisions in ARD 1958, page 111 and ARD 1960, page 139.)

¹ In August 1991 this equalled approximately £70 to 105 or ECU100 to 150.

² On these, see S. Evju: "Disputes concerning termination of employment: Norway", in W. Blenk (ed.): *European labour courts: Current issues*, Labour-Management Relations Series No. 70 (Geneva, ILO, 1989), pp. 67-71.

From the rules of the relevant employment protection legislation it follows, implicitly but well established in law, that sanctions in the form of disciplinary fines or suspension cannot be implemented. Penal sanctions, in the true sense, no longer exist in Norwegian law as a remedy for breach of a collective agreement or of statutory rules on the peace obligation.

Litigation costs may be awarded pursuant to a general provision in the LDA (section 45(2)). As opposed to other cases, the prevailing practice in unlawful industrial action cases is for the plaintiff to file for indemnification of litigation costs. Barring exceptional circumstances, the Court in such cases will award costs against a party held to be responsible for the action at issue. Although there is no specific limitation on this responsibility, in practice the amounts claimed are fairly modest.¹

More often than not, responsibility for litigation costs is the only "sanction" actually implemented in practice. If industrial action, threatened or ongoing, is alleged to be unlawful the action most commonly taken is immediately to file suit with the Labour Court for a declaratory judgement on that issue. A judgement of this kind is almost always complied with, and if so, a subsequent suit for damages very often is not filed.

Parties and procedure

As a general rule pursuant to section 8 of the LDA, only the organizations that are the higher-level parties to the collective agreement concerned may be plaintiff and defendant at the outset of a case brought before the Labour Court. It is a prerequisite in all cases that the relevant organizations be parties to the litigation. Again at the outset, they appear and act in their own name as well as on behalf of their members (subordinate organizations, individual workers or employers). Consequently, a suit regarding allegedly unlawful industrial action must be brought against the relevant higher-level organization, regardless of whether the action concerned was called or conducted by that organization or by its members.

Adding to this, a distinction must none the less be made. If the suit is for a declaratory judgement it is not necessary to file against more than the relevant organization. A decision by the Labour Court holding the industrial action unlawful implies an obligation on all those concerned (organizations *and* members) to refrain from or stop the action forthwith. If so requested by the plaintiff the Court may include in its judgement a statement to this effect. Strictly speaking, a judgement of this kind is not a formal and enforceable order to resume work (or to reinstate workers, as the case may be). Thus, it is needless in cases of this kind to file against the individual members concerned. If, regardless of this, the individuals are listed in a complaint as purported "defendants" they none the less have no formal standing as parties to the litigation. An exception applies if a claim for litigation costs is made against members. That is, however, unusual as far as individual members are concerned. If, in a suit for declaratory relief, the higher-level organization is not adduced to be responsible, the common practice is to include as a defendant, and claim for litigation costs against, the relevant union branch to which the individual members belong. On the

¹ Ranging in recent years from NOK2,000 to 35,000 (approximately ECU250 to 4,400 in Sep. 1991).

other hand, a claim for damages must be brought against all those asserted to be liable, i.e. all (individual) members against whom a claim is made must be sued, alongside their higher-level organization (LDA, section 8, third subsection). In this case, members have full standing as parties to the litigation.

It is a basic rule, regardless of the number of defendants, that a writ must be served on each and everyone having formal standing as parties to the suit in question. When a suit is filed also against members, in practice they are not — except in the very odd case — represented by an attorney at the outset. Thus, the initiating complaint must be served on each member individually. When, as is the usual practice, the members are subsequently represented by an attorney, the further preparation of the case and all exchange of trial documents takes place in communication between the Court and the parties' attorneys.

Whether represented by an attorney or not, all those who have standing as parties in the litigation have a right to appear and, if so required, to make a personal statement at the oral hearing of the case. If, as may well be the case, a large number of individual defendants are involved this may give rise to some problems — partly to the Court, as concerns the practical aspects of conducting the hearing, and partly to the employer(s), as concerns the possible absence from work of the workers involved.¹ However, in practice this has rarely been seen to entail problems of real significance. Legislative reform on this account has been considered unnecessary.²

When suit is filed for a declaratory judgement on the lawfulness of called or ongoing industrial action, it is handled by the Labour Court as an "urgent case". Upon receipt of the writ the President of the Court will immediately get in touch with the plaintiff and the defendant(s). Subsequent to consultations with the parties a date for the hearing will be fixed when serving — the same day or the next — the writ upon 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 elapsed has in many cases been merely four days. The fact that the issue of whether interlocutory orders may be granted in industrial action cases has not been put to a test in practice is, undoubtedly, due to main suits being handled in this way.³

Concerning a suit for damages, the time needed to handle and decide the case will depend to a very large extent on the thoroughness and efficiency of the parties in the preparatory process prior to a hearing. Once the hearing has been concluded, a decision normally will be handed down within six to ten days. In practice, the total time period involved in cases of this kind varies from three to nine months.

¹ The highest number of individual defendants in a single case so far was slightly in excess of 800. That was, however, quite exceptional. From 200 to 400 defendants may be seen in some cases; more commonly the number will be anywhere from ten to 50 or 60 individuals.

² Possible reform measures were discussed but rejected by the previously mentioned tripartite expert committee (see p. 38, note 2 above) in a 1985 "White Paper" (*Arbeidsrettsradet: Partenes moterett ved erstatningssoksmål for Arbeidsretten, Innstilling 1/85* (Oslo 1985)).

³ See S. Evju in *European labour courts: Current issues*, op. cit. (p. 40, note 2). It may, as an illustration, be pointed to the case in ARD 1989, page 47, being one of the extremely rare cases in which a request for an interlocutory order to prohibit industrial action from starting was filed. The request was filed with the Labour Court along with the main suit. As the full Court would have to be convened, a full hearing and decision in the latter was considered preferable by *both* parties and thus they willingly cooperated with the Court to achieve this in a minimum number of days. The request for an interlocutory order was accordingly withdrawn.

Spain

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Preliminary considerations

Royal Legislative Decree No. 17/1977 of 4 March 1977 on industrial relations, which predates the Constitution of 1978, includes rules governing the right to strike (and to engage in a lockout). In a major decision of 8 April 1981, the Constitutional Court subjected these rules to a thoroughgoing analysis and declared many of their provisions to be constitutional. These remain applicable pending the promulgation of a new law on strikes, on which Government, employers and unions are now at odds.

Strike action may be dealt with by three divisions of Spanish courts: criminal, administrative and social and labour affairs. Cases where strike action constitutes a criminal offence are dealt with by the criminal courts, which can order the appropriate precautionary measures but in fact do so very rarely. On the other hand, the administrative and labour and social courts do intervene frequently, but as a rule only after the fact, which means that their decisions do not as a rule affect strikes at the moment of occurrence.

The administrative courts deal with questions of skeleton services, which the civil authorities are empowered to impose where a strike affects an essential public service. Such official decisions are frequently challenged by strikers when they are felt to be excessive, but the court will not order interim measures. For example, a rail strike was called for 24, 25, 26, 27 and 28 May 1989 and the Ministry of Transport issued an Order, dated 19 May 1989, establishing skeleton services. This was contested by the Works Committee before an administrative court in Madrid on 31 May 1989, and the court's decision was delivered on 7 December 1989.

Similarly, industrial courts deal with strikes after the event, for the purpose of determining sanctions or compensation. For example, on 18 December 1989, the railway drivers' union SEMAF called a strike for 1, 2 and 3 January 1990; the employer filed a complaint in January 1990 petitioning the judge exercising labour jurisdiction to declare the strike illegal and abusive and to require compensation of 50 million pesetas¹ from the union. On 22 May 1990, the court found in favour of the employer (although this was subsequently set aside by a higher court on 3 April 1991). Here again, no order was issued to suspend the strike.

¹ In September 1991 about 100 pesetas equalled US\$1.

In the case of legal strikes, five days' prior notice must be given to the employer or employers concerned and to the labour authorities (Ministry of Labour). Jurisprudence establishes that in case of "*force majeure*" or "state of necessity" such prior notice may be curtailed or dispensed with; however, in the event of litigation the striking party must prove the existence of such circumstances. Neither the administrative authority nor the industrial courts have power to postpone or cancel a strike.

The administration normally offers to mediate. Compulsory arbitration may only be imposed in exceptional cases where considerations such as serious harm to the national economy are involved. In any case, the Constitutional Court has determined that the impartiality of the arbitrator must be guaranteed.

In the case of lockouts, the industrial authorities must be notified within 12 hours of commencement.

The industrial court has no specific role in legal strikes or lockouts.¹ It intervenes only in subsequent litigation for the purpose of pronouncing on points remaining at issue; payment of wages, social security contributions and so on.

In the case of illegal strikes (or lockouts), neither the administration nor the industrial courts can force the parties to negotiate. Nor is refusal by any party to negotiate taken into account for the purpose of sanctions.

The industrial court cannot order provisional measures for the prevention of a strike which is impending or has already commenced. The same is true of a lockout. Nor are such measures allowable in connection with main proceedings on the legality or otherwise of a strike and on its consequences. The composition of the industrial court is always the same, irrespective of the matter at issue.

The consequences of unlawful strikes (or lockouts) are manifold. The most usual sanctions are: (a) for the worker, dismissal for misconduct; (b) for the union, payment of compensation; (c) for the employer, payment of wages and possibly an administrative fine (see below).

Possible sanctions for the employee are: dismissal as ordered by the employer or, very occasionally, a lighter sanction such as suspension without pay for a given period. In any case, the employee must have taken an "active" part in the strike. For the union: sanctions may take the form of compensation to pay for damages, provided that the union called the strike.

Strictly speaking, there are no specific limits as to sanctions, but the following considerations should be noted. Organizations, generally of workers, may be required to pay compensation for damages, which is limited to the actual extent of the harm caused. Individual employees may be dismissed if they took an active part in the strike. The limitation here is on discriminatory sanctions; in other words, the courts generally rule that the employer must impose a like sanction for like conduct.

An individual employer who has engaged in an illegal lockout may be sanctioned by having to pay wages. Failure to obey an official order to reopen may constitute a serious administrative industrial offence punishable by fine ranging from 500,000 to 15,000,000 pesetas (the employer may contest such a sanction before the administrative courts).

Since the industrial court cannot order the cessation of a strike, and hence there is no possibility of disobedience to such an order, there can be no question of sanctions therefor.

¹ For a discussion of the legal status of lockouts, see M. Campos Alonso, "Country paper: Spain", in W. Blenk (ed.): *European labour courts: Industrial action and procedural aspects* (Geneva, ILO, Labour-Management Relations Series No. 77, 1993), pp. 45-48.

As to time-limits, the sanctions arising in connection with an illegal strike (or lockout) are subject to the generally applicable rules; there are no special time-limits. This means that the dismissal of a striking employee (as of any employee charged with serious misconduct) must be ordered by the employer within a maximum of 60 days; the employee has 20 days in which to contest such dismissal before an industrial court. A claim for damages from a trade union constitutes something of an extra-contractual liability and is subject to the time-limits established in civil law, that is, one year. In industrial law, the period of limitations on actions is also generally one year. In the case of unlawful lockout, the claim for payment of employees' wages is subject to the general limit of one year, and the administrative sanction may not be imposed after three years have elapsed.

The private sanction open to the employer is typically dismissal of an employee who has taken part in an illegal strike. It must be stressed, however, that the employee must have taken an "active" part in the strike (whether by instigating or inducing others to initiate or continue the strike, or by engaging in violent picketing or the like). Industrial courts generally disallow discriminatory practices by an employer in the imposition of such sanctions.

The costs of litigation involving a strike or its consequences (and likewise a lockout) are subject to the general rules. A court exercising labour jurisdiction may impose a fine of up to 100,000 pesetas on a party having "acted in bad faith or in a clearly reckless manner", in which case such party must also pay attorney fees if there were any, since in the first instance of proceedings the presence of counsel is not compulsory.

In proceedings involving sanctions, the parties are the following persons or entities:

- dismissal: the plaintiff is the employee (and may also be his or her union); the defendant is the employer;
- compensation for damages: the plaintiff is the employer; the defendant is the union;
- wages for illegal lockout: the plaintiff is the employee concerned (and may also be his or her union); the defendant is the employer;
- fines for illegal lockout: tried by an administrative court. The plaintiff is the employer who is challenging having been fined; the defendant is the administration which imposed the fine.

Where a large number of employees are involved in proceedings arising from an illegal strike (which will normally mean that many employees have been subject to sanctions), the rules of general procedure again apply. It should be recalled that dismissal is the decision taken by the employer, and that it is the employees who will institute proceedings against this. They may act individually or jointly; in the latter event, if they number more than ten, the court exercising labour jurisdiction may require them to appoint a common representative to act on their behalf throughout the proceedings. In the trial, any of the employees concerned may be questioned, but for this purpose they must be summoned directly.

The normal duration of proceedings concerning sanctions arising from an illegal strike (or lockout) is the same as that of any other trial. Once the complaint has been filed, the court exercising labour jurisdiction summons the parties to appear on a date not less than four days nor more than eight days hence. Following the hearing, the judge has five days in which to deliver a decision. As the courts are overloaded, these time-limits are not observed in practice.

Sweden

Ove Sköllerholm, Chairman, Labour Court

Introduction

The statutory provisions in this field are to be found in the Act on Joint Regulation of Working Life (JRW) of 1976,¹ which forms the legal framework of collective bargaining and out-of-court labour dispute resolution in Sweden. A few special provisions, concerning the public sector, are contained in the Public Employment Act (PEA) of 1976.

Lawful industrial action

The most important remedy when lawful industrial action is threatened or has already been started is mediation, which may be initiated by the State Mediation Office (JRW paragraph 46), and by the Government in disputes of greater significance (JRW paragraph 52). In both cases the authorities may act *ex officio* or at the request of one or more of the parties to the dispute.

A party who wants to take industrial action is obliged to give written notice thereof at least seven days in advance, both to the other party in the dispute (JRW paragraph 45) and to the State Mediation Office (JRW paragraph 47). Failure to give such notice does not, however, make the action unlawful.

If the State Mediation Office gains knowledge, through a notice or otherwise, of a labour dispute which threatens to lead to industrial action or has already led to such action, it appoints a mediator if this is deemed appropriate to resolving the dispute (JRW paragraph 46). The State Mediation Office very rarely decides to appoint a mediator in a dispute unless both parties agree thereto. Swedish legislation makes no provision for compulsory arbitration in industrial labour disputes. The mediator calls upon the parties to meet for negotiations in his or her presence, or takes other appropriate steps. He or she works for a peaceful solution of the dispute and appeals to the parties to postpone or revoke industrial action (JRW paragraph 46), but has no authority to ban such action for any time. However, in almost all cases the parties respond positively to such an appeal.

¹ The Act respecting codetermination at work, as this legislation is also known, was published in translation in the *Legislative Series* under the code LS 1976-Swe.1.

When the parties negotiate in the presence of the mediator, the mediator works towards an agreement, primarily on the basis of proposals coming from the parties themselves. The mediator may, of course, propose modifications with the aim of reaching an agreement (JRW paragraph 48). If agreement is not reached this way, in most cases the mediator will finally choose to present a formal proposal for a settlement. If this proposal is not accepted, the mediation will normally end, at least until the parties request further efforts by the mediator.

In disputes of greater importance the Government may appoint a mediator or a commission of two or more mediators. The work of such a mediator or commission follows the same lines as the work of a mediator appointed by the State Mediation Office. Like such a mediator, a mediator or a commission of mediators appointed by the Government has no authority to compel the parties to postpone or cancel industrial action, but in practice the parties always respond positively to such an appeal.

Industrial action was ended once by means of legislation in recent decades, in the beginning of the 1970s. During serious conflict in the public sector, Parliament passed an Act declaring that the normally applicable collective agreement should come into force again, and thereby bind the parties to the peace obligation (no-strike clause).

Since interest disputes are not adjudicated, the Labour Court has no significant role to play concerning remedies in ordinary lawful industrial action. If a party refuses to fulfil the obligation to appear at negotiations conducted before a mediator (or a commission of mediators), the mediator or commission may, at the request of the other party, report this to the Labour Court. The Court may then order the party to fulfil the obligation to negotiate and combine such order with the penalty of a fine, which then may be enforced by the Court if the party still refuses (JRW paragraph 49). Such cases are very rare.

A party who fails to give the other party written notice, in due time, of the intent to take industrial action and has no valid excuse for such failure, will be liable in damages to the other party (JRW paragraph 54). Such a dispute is adjudicated by the Labour Court, but since this failure does not make the industrial action unlawful, such cases are mostly handled some time after the action has already ended. Cases of this type are rare. (A party who does not give written notice to the State Mediation Office may be fined; JRW paragraph 47. Such cases, which are handled by the general courts, are in practice unheard of.)

Unlawful industrial action

If employees who are bound by a collective agreement have undertaken unlawful industrial action, the employer and the employee organization are obliged under the JRW to meet for discussions (not negotiations) as soon as possible in order to make joint efforts to stop the action. On the employee side, this obligation rests with the local union, if there is one (JRW paragraph 43). The purpose of the discussion is to try to elucidate the underlying causes for the unlawful action and thereby try to find ways to stop the action. In principle, this obligation is intended to be of help in cases where the unlawful action may have causes such as an unsatisfactory working environment, etc. The discussions are not, of course, a forum for putting forward claims for increased wages or similar demands that would be contrary to a binding collective agreement. However, even if the underlying causes are of

such a nature (which they often are), the obligatory discussions have in many cases proved to be helpful in bringing a quick end to unlawful action.

Employees who have taken part in unlawful industrial action are normally not subject to any sanctions, provided they have put a definite stop to the action by the time of the first discussion meeting. Sanctions may in such a case be imposed only if there are special reasons (JRW paragraph 60).

The Labour Court may issue interim orders to stop ongoing unlawful industrial action or to avoid threatened unlawful industrial action. A main suit must be filed prior to a petition for such an interim decision. The main suit need not call for sanctions; it suffices to request a declaratory judgement that the action is unlawful. The petition for an interim decision is in most cases contained in the main suit. On the other hand, if a main suit calling for damages because of ongoing unlawful industrial action by employees is filed and the Court finds the action unlawful, it must *ex officio* issue an interim decision (JRW paragraph 60). This rule was introduced by an amendment to the JRW on 1 January 1985, but up to now it has never been applied; the employer in such cases has always filed a petition for an interim decision.

It is not obligatory for the Labour Court to hear the opposing party or parties before issuing an interim decision. If there is danger in delay, an interim decision may be heard *ex parte*, although by tradition this possibility is almost never used. It is assumed that interim decisions in such cases would gain less respect and compliance if they were imposed without giving the party or parties concerned an opportunity to state their views. For the same reason, there is almost always an oral hearing before the Court prior to an interim decision being issued.

The Labour Court may be composed of three members (chairperson, one employer representative and one employee representative) when hearing a case in which an interim decision has been requested. By tradition, however, the Court is almost always composed of all seven members at such hearings. This is because the Court has traditionally handled cases concerning unlawful industrial action with a degree of solemnity in form.

Normally, a case in which an interim decision is sought is heard within four or five days of the filing of a petition for such a ruling. In cases where speed is of great importance, the hearing may take place two or three days after the filing of the petition.

If unlawful industrial action has been carried out by employees bound by a collective agreement, the Labour Court may combine an interim decision with an order that the employer and the employees' organization concerned meet for new discussions, presided by a mediator, to try to avoid further unlawful action (JRW paragraph 60). This rule, introduced by an amendment of 1 January 1985, has been applied only in one case, concerning prolonged unlawful action in a very polarized situation. The subsequent discussions did not lead to a resolution of the conflict.

In practice, there are no means (except liability in damages) to make parties comply with interim decisions to stop or avoid unlawful industrial action. This liability flows from the engagement in unlawful action, not from the refusal to comply with the interim decision *per se*. However, failure to comply with an interim decision will normally be considered as an aggravating circumstance. In very serious cases, parties may also apply contractual sanctions such as dismissal. (According to law, an interim decision may be combined with a penalty of a fine for non-compliance, but that possibility is almost never used in such cases.) Interim decisions concerning unlawful industrial action are normally met with compliance.

Thus the principal sanction for unlawful industrial action is liability in damages (JRW paragraphs 54-62). The damages include compensation for actual financial loss and so-called general damages, which compensate for the infringement of the other party's rights.¹ Parties usually ask for general damages, since they may be determined by estimation and do not require evidence of financial loss.

If an employer or an employees' organization that is bound by a collective agreement commits a gross breach of that agreement or of the JRW, and that breach has a major impact on the contractual relationship as a whole, the other party can petition the Labour Court to declare the collective agreement no longer binding between them (JRW paragraph 31). This possibility has not been used in modern times, however.

In general, both organizations and individuals calling or taking part in unlawful industrial action may be found liable (JRW paragraph 54). However, if unlawful industrial action has been called or provoked by an organization that is bound by a collective agreement or has been called or provoked by a higher level organization, individual employers or employees may not be held liable in damages for participating in the action (JRW paragraph 59).

Organizations may also be liable if they in any way support or condone unlawful industrial action. An organization that is bound by a collective agreement may also be liable if it does not try to avoid or stop an unlawful industrial action undertaken by members of the organization (JRW paragraph 42). The activity required by the organization may vary according to the circumstances in the individual case. In principle, one can say that the organization must not side with the participants and has to take appropriate active steps to avoid or stop the action. The Court will, however, take into consideration the ways and means that can be deemed to have been appropriate and effective in the individual situation. This is not necessarily, for instance, immediate action directed against several hundred strikers. There is no specific monetary limitation on the sanctions that may be imposed upon organizations or individual employers in case of unlawful industrial action.

An individual employee may not normally be held liable in damages (compensation for financial loss or general damages) for an amount exceeding SEK200 (about \$US35) for participating in unlawful industrial action. However, this limitation does not apply if there has been a refusal to comply with an interim decision by the Labour Court to stop the action, and if the action is regarded as especially serious (JRW paragraph 60). In such cases, non-compliance is normally considered to be an aggravating circumstance and the sum might be increased to perhaps SEK300 to 600. It should be mentioned that the SEK200 limit was introduced in 1928, when it corresponded roughly to one month's pay for a blue-collar worker. Later it became a sort of political symbol to the Swedish trade unions and the Social Democratic Party. It was abandoned by a non-Socialist majority in Parliament in 1976 but reinstated by a Socialist majority on 1 January 1985. Recently, a committee appointed by the Social Democratic Government has proposed that the sum should be increased to SEK2,000 (about \$US350).² The question was deferred until after the general elections scheduled for 15 September 1991.

¹ See T. Sigeman: "Damages and *Bot*: Remedies for breaches of collective agreements in Nordic law", in *Comparative Labour Law Journal* (Philadelphia), Vol. 8, No. 2 (Winter, 1987), pp. 155-181.

² Ed. note: This was done with effect from 1 July 1992. *European Industrial Relations Review* (London), No. 224, Sep. 1992, pp. 12-13.

An action for damages because of unlawful industrial action must be brought to court no later than three months after the action ended (JRW paragraph 67).

An employer may, in case of unlawful industrial action, apply contractual sanctions such as dismissal. Participating in unlawful industrial action is a breach of contract. Whether there are grounds for dismissal will be judged according to the general rules of the Act on Employment Protection. Regard must be had to all circumstances in the individual case, such as the underlying cause of the unlawful action, the general character of the action and the greater or lesser extent of involvement by the individual employee. In general, it can be said that dismissal is warranted only in exceptional cases, such as when unlawful action becomes very prolonged and is meant to support demands that are clearly in violation of a collective agreement. Another case may be when an employee initiates unlawful industrial action with the mere intent of sabotaging normal labour relations in the workplace. From case-law it may be noted that the Labour Court has emphasized that (unlawful) industrial action is generally meant to be of a temporary character and that all parties therefore normally should act with the intention of restoring normal conditions in the workplace as soon as possible. Dismissal must be regarded only as a last resort, when other means to resolve the situation have been exhausted. In practice, dismissals are very rare as a sanction for participating in unlawful industrial action.

Sanctions in the form of disciplinary warnings or disciplinary fines or suspensions may be applied by an employer who is bound by a collective agreement, as long as these measures are authorized by provisions of the agreement or by statute (JRW paragraph 62). If the employer is not bound by a collective agreement, he or she may apply such disciplinary sanctions only if specifically authorized by the individual contract of employment or by statute. State employees who participate in unlawful industrial action may not be subject to disciplinary sanctions of the kind just mentioned (PEA paragraph 1, Chapter 10).

Litigation costs may be awarded under the general provisions of the Act on Litigation in Labour Disputes (LLD) and the General Act on Litigation. In principle, the losing party or parties must fully compensate the winning party or parties for the litigation costs, without any specific limitations. According to the General Act on Litigation, responsibility for litigation costs is joint and several in cases where there are two or more parties on the losing side. According to LLD, however, such responsibility is divided between the losing parties. In cases concerning unlawful industrial action by a certain number of employees, the responsibility for litigation costs is always divided between them on a per capita basis. In more complicated cases where only a few employees have participated in an unlawful industrial action, it may happen that the sum each one of them has to pay as compensation for litigation costs will exceed the normal maximum on general damages (SEK200).

In disputes concerning sanctions for unlawful action, only an organization or an employer that is party to a collective agreement can be a plaintiff in the Labour Court. Organizations on both the employer side and the employee side are entitled to bring and pursue actions as plaintiffs on behalf of their members, who are then not regarded as formal parties on the plaintiff's side. Action is brought against individuals as defendants, but if the defendant is a member of an organization, the organization must also be brought before the Labour Court, even if no petition has been directed against the organization. The organization is entitled to answer on behalf of its members in so far as the member is not filing a separate answer. Accordingly, in most cases concerning unlawful industrial action

the plaintiff is an employer's organization, while the defendants are a number of individual employees and their organization(s). It is very common that a great many employees appear in person before the Labour Court in these cases, but they are normally represented by one or more attorneys from the organization(s). In a quite exceptional case in 1990, there were around 900 employees who wanted to be present in Court. That trial had to be divided over two days, with the case in principle being repeated on the second day.

When suit is filed seeking sanctions or a remedy in case of unlawful industrial action, a writ must be served on each and every one of the defendants, individuals as well as organizations. At this stage, individuals are almost never represented by an attorney, so the writ must be served on each individually. Sometimes this leads to a lot of work and some problems, but in general it functions surprisingly well. The Labour Court is obliged to call each and every one of the parties, individuals and organizations, to the oral hearings in a case. Each one is entitled to appear in person and to make a personal statement if required. But, in general, individual employees are represented by attorneys at this stage, or by one or more spokespersons among them.

Given this background, the Labour Court usually serves the summons to oral hearings in the case to each defendant, together with the writ, that is to say, already at the initial stage of the case. Accordingly, when unlawful industrial action is going on, all days for oral hearings are fixed from the beginning. There is normally an oral hearing of a petition for an interim decision within four or five days, an oral pre-trial hearing two or three weeks later and the main hearing another two or three weeks later. Usually, individuals attend only the main hearing.

Since the Labour Court has jurisdiction over the whole country, these cases do, if a significant number of employees want to be present in Court as defendants, of course give rise to some problems to the employer(s) concerned. In general, the Court refuses to leave Stockholm for hearings. However, the problems do not seem to be too difficult, since no legislative amendment addressing these questions has been considered.

The usual time schedule for handling and deciding a dispute over sanctions for unlawful industrial action depends on whether the action is going on at the time the suit is filed. If unlawful action is continuing, an interim decision will normally be pronounced by the Court within five or six days. In special cases, it may be pronounced within two or three days. The final decision is then usually handed down about three months later.

In cases where it is alleged that industrial action, which has already started or is about to be started by an organization, is unlawful, the Court often chooses to proceed to the main hearing and give its final decision very quickly. In such cases, the final decision may be handed down within a few days of the suit having been filed. If an unlawful industrial action has already ended when the suit for sanctions is filed, the case will normally be handled so that the final decision is handed down six to eight months later.

Switzerland (Canton of Geneva)¹

Lisa Sercomanens, Registrar, Labour Court, Canton of Geneva*

There is no obligation for any party to a labour dispute to report to any public or private body that lawful industrial action is threatened or under way. If the parties cannot reach an agreement, there are no remedies that may be applied to avoid industrial action. However, the court has a role to play concerning indirect sanctions. Under section 337 of the Code of Obligations, the court must indicate whether the industrial action constitutes valid grounds for summary dismissal.

In cases involving unlawful industrial action, the most important remedy is attempted conciliation. The parties to the dispute are legally required to meet for discussion if there is a collective agreement (Code of Obligations, sections 356 et seq.) or if it is otherwise stipulated by written law. In practice, the parties always try to discuss before there is resort to unlawful industrial action.

The Labour Court of the Canton of Geneva has never issued a provisional or interim decision, and it is aware of only one such case which was handled by the Labour Court of Bern (Order of the President of Judicial Chamber III, Bern, 30 March 1977). It is not at all sure that the Labour Court in Geneva would take that kind of decision in case of an unlawful industrial action. If it did, it would be governed by the procedural civil law of Geneva.

In Switzerland there are 26 procedural civil laws, one for each canton. A main suit must be filed prior to the petition for an interim action. The Labour Court cannot issue an ex officio order to stop or avoid unlawful industrial action. The opposing party need not be heard before a preprovisional decision. But it is necessary that the opposing party be heard before a provisional decision is taken.

The composition of the court need not be the same for an interim and a final decision. In Switzerland, labour judges are elected by the people and are divided into 12 different categories (watchmaking, construction, etc.). Half of the judges in the same category must be employees and the others employers. Each employee or employer elected in a category can take the place of another on the same board.

In theory it is possible for an interim decision ordering a stop to industrial action to be combined with an order to engage in discussions. As for means to comply with an interim

* With thanks to the interim "S.A."

¹ For a description of the overall system in Switzerland, see C. Wenger: "Country paper: Switzerland", in W. Blenk (ed.): *European labour courts: Industrial actions and procedural aspects* (Geneva, ILO, Labour-Management Relations Series No. 77, 1993), pp. 49-50 and 97-100, and A. Berenstein: "Labour courts in Switzerland", in B. Essenverg (ed.): *Labour courts in Europe* (Geneva, ILO, 1986), pp. 57-59.

decision, according to the labour tribunal of Bern, it would be possible to apply article 292 of the Swiss Penal Code.

The principal sanctions for unlawful industrial action are: resiliation of the collective agreement; execution of the collective agreement; a claim for damages or disciplinary sanctions. Such sanctions can be imposed upon both organizations and individuals as parties to the action. However, they will not be imposed upon individuals if the action has been decided by their organization. Sanctions may also be imposed on an organization which has not actively condoned such action by some of its members. In such a case, the organization should write to these members in order to ask them to stop the unlawful action. There is no specific limitation on the sanctions that may be imposed upon organizations, individual employees or individual employers. In fact, the sanctions are disciplinary ones; recovery of damages is not allowed because of a concern to avoid prolonging the conflict, since the length of the procedure begins to determine the amount of the damages. A party's compliance or non-compliance with an interim order would not influence sanctions imposed for the unlawful industrial action. There are no specific limitations on responsibility. A party could be held to pay litigation costs.

Under section 337 of the Swiss Code of Obligations, an employer can dismiss a worker for engaging in unlawful industrial action, because this can constitute a just ground to terminate a contract.

Although there has been no case in Geneva of unlawful industrial action by a very large number of individuals, in such circumstances the labour court would be obliged to serve a writ upon each and every one of those individuals personally. The court would also be obliged to call each of them for oral hearings in the case, if they had chosen not to be represented collectively by an attorney.

The period of limitation is one year from when the damage occurred. The period from the filing of a suit and a decision being taken by the tribunal is normally six to eight months. From initiation of a suit and until a decision is taken by the Court of Appeal and the Supreme Court, 18-20 months and 24-27 months can elapse respectively.

United Kingdom

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

1. Background

Before seeking to analyse and comment upon procedures in industrial tribunals in the United Kingdom (with jurisdiction stretching across the border into Scotland but not including 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, the UK procedures are adversarial. It must be stressed that civil not criminal jurisdictions are being discussed.

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 system¹ 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 on points of law to the Court of Appeal and the House of Lords.

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, and 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 to note that it has branches throughout the country and is responsible in every originating

¹ For further details, see Wood: "Country paper: United Kingdom", in W. Blenk (ed.): *European labour courts: Industrial action and procedural aspects* (Geneva, ILO, Labour-Management Relations No. 77, 1993), pp. 51-57 and 101-109.

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. The comparable figures for 1988-89 were 29,317, 10,636 and 8,791 — and for 1989-90 — 31,913, 10,772 and 10,242. It follows that the cases heard before the industrial tribunals in those three years were 11,108, 9,890 and 10,899.

Most of the litigation in connection with strikes and industrial action takes place in the High Court. From July 1991 there will also be jurisdiction in the County Court to grant injunctions. However, it is anticipated that these issues are likely to remain within the High Court, at least for the most part.

2. *Lawful industrial action*

As has been shown in an earlier paper,¹ there is much statute law which makes it difficult for a trade union lawfully to take industrial action. In many countries a positive right to strike is recognized by law, which attaches to that right various restraining conditions or qualifications. For historical reasons, in England and Wales the law has taken a different approach. When considering industrial action a trade union may be liable for the industrial torts of inducing a person to break a contract, interfering with trade or business or a contract by unlawful means, intimidation and conspiracy. In order to assess the situation three questions need to be asked and in the sequence in which they are posed. 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 1980 to 1990 remove that defence? Those Acts remove the defence available under the 1974 Act so as to restore common law liability.²

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 the one exception and in particular where there has been unlawful picketing and in particular picketing away from the employee's own workplace; thirdly, where the purpose of the industrial action is to achieve or give effect to a "union labour clause"; fourthly, where a trade union is seeking by industrial action to enforce a closed shop, i.e. union membership; and lastly where there has been unofficial action which has not been repudiated.

It is the remedies available to an employer, should the trade union fail to comply with this maze of statutory provisions, which deter industrial action today; it is the attack upon the finances of the unions (by a fine or sequestration of assets for contempt of an injunction) that constitutes the main deterrent.

¹ *ibid.*

² Ed. note: A considerable number of provisions governing industrial action have been consolidated in the Trade Union and Labour Relations (Consolidation) Act 1992 (Chapter 52) of 16 July 1992, published in *Labour Law Documents* (Geneva, ILO), 1993/1 and 1993/2.

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, he or she aids or abets a defendant in breach of that order, e.g. a bank with knowledge of an order freezing an account, allowing it 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".

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. At its initiation there was much hardship in the docks due to the rules about 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 that it should be repealed.

The latest development in the struggle between trade unions and the employers is represented by "unofficial strikes". These are not recognized by the trade unions, which pursue a careful path of exhorting their members to behave responsibly and within the law. Where the public is concerned these "wildcat" strikes undoubtedly can cause great hardship, and it is possible to argue that compulsory arbitration would be fairer for all concerned. After publication of a White Paper for public discussion the Government provided its solution by the requirements of the Employment Act 1990.

But if industrial action is lawful then there is nothing to prevent it taking place. It may, of course, amount to a breach of contract by an individual, but this would depend upon the facts of the particular case. A ban on "voluntary overtime" may not be a breach of contract.

There is no obligation for a party to a dispute to report the threat of the initiation of industrial action to any public or private body. The parties are of course free to seek the assistance of ACAS. Although ACAS may help by seeking to mediate a dispute, it has no powers to make any orders. It is not a court or judicial body and the parties are not "before it" in litigation terms. However, the experience and skills of the officials of ACAS are of the greatest value in seeking to avoid industrial action. There is some current discussion which indicates that future legislation may contain provisions requiring a trade union to give seven days' notice of industrial action. The major problem in England is that these issues concerning industrial action are the very life blood of politics, and that the emotions of politics and the reasoned and reasonable development of the law are unhappy bedfellows.

3. Unlawful industrial action

The most important legal remedy when unlawful industrial action is threatening or has already been started is the grant of an injunction, together with the sanctions that may be imposed for contempt of court for failing to obey an order. Provisional or interim decisions in order to stop (or avoid) unlawful industrial action form part of injunctive relief. Procedurally, the main suit and the request for interim relief are part of the one action.

The court acts only on the application of a party to the proceedings, and not *ex officio*. A judge hearing a request for interim relief involving industrial action may reserve later hearings in the case to himself or herself. Although this is not obligatory, it is probably desirable.

An interim decision by the court in order to stop (or avoid) unlawful industrial action may not be combined with an order to the parties involved or concerned to enter into discussions to elucidate the underlying causes and avoid further unlawful action. However, encouragement can well be given to this end and sometimes the making of an order can be delayed or its effect postponed.

The means to make parties comply with an order to stop or avoid unlawful industrial action are proceedings for contempt of court, initiated for breach of the order or orders made. This sanction has proved most efficacious. In recent years the National Union of Miners was fined a substantial sum together with sequestration of its property which was held by a receiver, until all costs and fines had been paid. As steps had apparently been made in an attempt to remove funds from the grasp of the Court, the cost of following these 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.

The principal sanctions for unlawful industrial action are injunctions and contempt proceedings. Very rarely are claims for damages pursued. If the circumstances are appropriate, sanctions may be imposed upon both organizations and individuals. For the main part the importance of the action where a trade union itself is involved is to obtain an injunction against the trade union and then through the contempt proceedings to attack the capital assets of the trade union. An individual may also be subject to sanctions for being in breach of contract.

Under provisions of the Employment Act 1990 which deem a trade union to have endorsed industrial action unless repudiated, sanctions may be imposed on an organization when it has not ordered nor condoned such action. To avoid sanctions on itself, the organization has to meet the requirements of that Act, which are complicated. In general terms the repudiation must be by the principal executive committee or the president or the general secretary of the trade union as soon as reasonably practicable after coming to the knowledge of any of them. The action required involves three things: (a) to give written notice of repudiation to those involved without delay; (b) to do its best to give individual written notice of the fact and date of repudiation to every trade union member which it has reason to believe is or might be taking part in the industrial action; and (c) to give similar written notice to the employer of every such union member.

In addition the notice to the union members must contain certain statements, thereafter the principal executive committee and the president and the general secretary must behave consistently with that repudiation and they must, if necessary, confirm the repudiation on request from a party to a commercial contract. Unofficial industrial action which is supported by a trade union cannot be rendered official and legal by the use of a ballot.

The question of specific financial limitation on the sanctions that may be imposed on organizations depends upon the nature of the claim. By the provisions of the Employment Act 1982, section 16, unlimited damages may be awarded against a trade union where the action is for personal injuries arising out of negligence, nuisance or breach of duty or where the tort is connected with the use or ownership of property, whether real or personal. In any other case including "industrial torts" there is a limit upon the amount which can be awarded against a trade union in tort. The limit varies with the total membership as follows:

Membership	Limit
Less than 5,000	£10,000
Less than 25,000	£50,000
Less than 100,000	£125,000
100,000 or more	£250,000 ¹

Two points need emphasis. The limit is on damages only and interest on the award can be added to it. Secondly, there is no limit on the amount of a fine which may be imposed on a trade union for breach of a court order, i.e. for contempt of court.

A party's compliance or non-compliance with an interim order to cease unlawful industrial action is of specific importance when the court is finally deciding upon sanctions for that action. A party may also be held responsible for litigation costs in a dispute involving unlawful industrial action.

Although there is no time-limit for seeking sanctions after an unlawful industrial action has come to an end, delay will count against the party seeking to have them imposed.

It is also possible for an employer to use "private" sanctions, such as dismissal, in case of unlawful industrial action. The relevant provisions are those 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. Thus, the employer may dismiss all the employees on strike but must not offer re-engagement to any within the three-month period. An employee on unofficial strike loses his or her rights under this Act.

The parties before the court in disputes concerning sanctions for unlawful industrial action can be either organizations or individuals or both. For instance if individuals (shop stewards) urge a group of employees to take industrial action which is unlawful those shop stewards can be made defendants.

If unlawful industrial action is undertaken by a great many individuals and their employer files a suit, there is no need for a writ to be served upon each and every one of them, or for them to be called for oral hearing in the case. The procedure which is relevant is called a representative action and is covered by rules of the Supreme Court (Order 15, rule 12). This is a complicated provision and there is a great deal of law surrounding it. So far as industrial relations are concerned it enables an injunction to be issued against a class or group of people who are not themselves individually identifiable but who belong to the same society or club or organization and are linked together with some common interest. One or more of the defendants may be named on behalf of the whole group or class in the representative action. If the court at any time feels that there may be some conflict of interest within the class then orders will not be made against the class as a whole and there may have to be an identification of sub-classes or individuals or groups. If there is a possibility of different defences from different individuals then it would no longer be possible to continue as a representative case. If, for example, a group of unofficial pickets were sued then a representative action might very well be brought.

¹ In 1990, £0.56 equalled approximately US\$1. OECD: *Historical statistics, 1960-90* (Paris, 1992), p. 23.

Interim orders for injunctions can be obtained at only a few hours' notice as a result of administrative arrangements made by the judges. Interim orders are likely to be for a very short duration and may be made *ex parte*. In many cases no final decision will be pronounced by the court because the issues would have been solved by the interim orders. The sanctions that may be imposed for contempt come into play for breach of orders whether interim or final.

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 relations 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.

*Temporary relief in individual labour
disputes*

Comparative overview

Menachem Goldberg,* President, National Labour Court

The questionnaire on this topic that was distributed to the participants sought to explore the jurisdiction of labour courts to grant temporary relief, the circumstances in which a court has authority to grant it, any special procedures applicable to such proceedings and procedures for, and standards on, appeal. It elicited comments on any lessons learnt based on experiences with granting temporary relief. The findings are summarized in this overview.

The capacity of a court to grant temporary relief corresponds to the subject-matter the court is competent to address. Therefore, in Norway for example, the Labour Court has no jurisdiction to hear individual disputes, this being in the purview of the ordinary courts. The Norwegian ordinary courts deal regularly with wrongful dismissal cases, so many of the types of temporary relief that these courts can grant are consonant with this subject-matter. Secondly, the frequency with which a labour court will dispense temporary relief is a direct function of the speed with which the general court system will grant temporary relief. Thus, in Israel, where such relief is a routine matter, the Labour Court will have no qualms about granting it, as opposed to a country such as Norway where temporary relief orders are rarely used. This diversity of practice also has a bearing on the courts' willingness to hear a motion *ex parte*.

Almost every type of relief is available in the form of temporary relief. This includes declaratory powers and enforcement orders (France,¹ Sweden). Examples from Germany include attachment in financial disputes, mandamus, disclosure and non-competition orders. The power to reinstate an employee seems to be based on the attitude the legal system has towards forcing re-establishment of a troubled relationship. Reinstatement may be ordered in Slovenia and Sweden, for instance.

The common thread of logic behind granting temporary relief seems to be a concern to maintain the status quo and avoid change until such time as the court can rule on the merits of the case. It may also be awarded in the interests of preserving evidence or property.

* Ed. note: This overview has been prepared on the basis of a questionnaire, summary of findings and information in tabular form prepared by Judge Goldberg.

¹ For a description of the organization of labour courts in France, see P. Veillieux in B. Essenberg (ed.): *Labour courts in Europe* (Geneva, ILO, ILS, 1986) pp. 19-21, and M. Despax and Jo. Rojot in R. Blanpain (ed.): *International encyclopaedia of labour law and industrial relations*, Vol. 5, "France" (The Netherlands, Kluwer, 1987), pp. 146-149.

Prerequisites for granting temporary relief appear to fall into two categories. The first is whether a statement of claim has to be filed, with the practice in most countries being that the claims in the main suit and the petition for temporary relief are the same. The second is whether a guarantee has to be posted upon such filing (as in Israel but not in Norway).

The major considerations of the court when it rules on a motion for temporary relief seem to be the following: a likelihood that the defendant will make financial or personal changes that would be detrimental to the hearing of evidence or the ability to reach a judgement, a need to avoid violence or irreparable harm (Norway, Slovenia), the balance or convenience in the case, and considerations of equity such as full disclosure and clean hands (as in Israel), and the court's view that an employee should be allowed to work until a final judgement has been rendered in the matter.

The procedure for seeking temporary relief varies from country to country. The major issues seem to be as follows: whether the request for temporary relief is deemed a separate action and therefore heard by a different judge (Germany) or is usually part of the main action (Norway), whether such motion must be made in writing (Israel) or may be made orally (France, Sweden), and whether there is a need for an oral hearing (Germany) or not (Slovenia, Sweden). Posting of security may be required, as in Norway.

One common feature is that motions for temporary relief are heard quickly (within days) and are ruled on rapidly. Some systems do not allow *ex parte* hearings (e.g. the Conciliation Bureau in France), but others such as Israel allow them under certain conditions. The consideration seems to be the weighing of the fairness of the hearing against the urgency of the relief. All the systems require at least one professional judge, with the exception of the French Conciliation Bureau (in which one is required in case of a split decision among the lay judges). In Sweden the composition of the labour court varies.

Enforcement procedures for temporary relief in most systems make use of the regular legal means of execution of judgements. Some interesting features are the power of the Israeli court to levy fines and to imprison (rarely) under contempt of court provisions, the French referee's inability to enforce his or her decisions, and the inability of the Norwegian court to enforce reinstatement or back-to-work orders.

The stance concerning the right of appeal seems to be split, with countries such as France disallowing unless the court exceeded its jurisdiction, while others permit it (Hungary, Israel, Norway). In this group of countries, the only case of a motion to grant permission to appeal is Israel. No appeal from a labour court judgement concerning a collective agreement may be lodged in Sweden.

The time-limits for filing, hearing and ruling on appeal are uniformly short. The courts in Slovenia and Spain, however, do not always follow the deadlines indicated for judgements. The amount of discretion granted to the appeal court varies. The Israeli appellate court (the National Labour Court) is limited basically to points of law, whereas the Swedish industrial court may use the same degree of discretion as a lower court.

There are several lessons which may be drawn from the information contained in the country reports. This first is that apart from a country in the throes of transition — Hungary — there seems to be no movement afoot to make major changes. This would appear to be because these types of relief are parallel to those in the general legal system, rather than being unique to a labour court system.

On the negative end of the spectrum, widespread resort to plead for temporary relief can be upsetting and place pressure on the legal system. They impede the ability to make timely final decisions. In France, the procedure permits a large number of claims.

On the other hand, when the relief is dispensed wisely it can bring the parties to reach a compromise. This is especially so in countries such as Sweden where the temporary relief gives a very strong indication as to how the court will rule in its final disposition. Where funds are tied up in the proceedings, as in Israel, the parties feel under pressure to settle their differences.

Finally, where attachment is permitted as part of temporary relief, this method has proven to be a very efficient method of assuring speedy execution of judgements.

Germany¹

Friedrich Heither, Federal Labour Court

1. Introduction

In Germany, the Labour Courts have jurisdiction to provide temporary relief in labour law disputes.² The rules of procedure recognize two means of a preliminary securing of interests: attachment and injunction. The attachment secures the satisfaction of a monetary claim (such as for wages), and an injunction ensures the later implementation of a non-monetary claim. A legal status is thus determined on a preliminary basis.

Both of these summary proceedings may concern issues in dispute arising prior to the beginning of an employment relationship (submission of application credentials), during the employment relationship (actual employment), and at the end of the employment relationship (surrender of work documents).

Both types of procedure stand independently of the main trial in the case. They may proceed pending the main suit or during the course of proceedings on the main issue. Proceedings for temporary relief cannot be automatically carried over into a hearing on the main case; they must be pending separately.

2. Special procedural features

The court dealing with a claim for temporary relief is principally the court addressing the main issue; in labour matters, this is the Labour Court. In attachment procedures, the creditor has the option of calling on the District Court (Court of General Jurisdiction in Civil Matters) instead of the Labour Court. In a procedure for the issue of an injunction the District Court can be seized only in cases of special urgency, i.e. where resorting to the Labour Court would lead to a delay that would cause harm to the creditor.

A plea for an attachment order can be decided upon without a hearing. It is up to the court to exercise its discretion as to whether it wants to hold a hearing or not. On an application seeking an injunction, on the other hand, only in urgent cases can a decision be

¹ Translation revised by the editor.

² For a general description of the jurisdiction and procedure of the labour courts see D. Neumann: "Country paper: Germany", in W. Blenk (ed.): *European labour courts: Industrial action and procedural aspects* (Geneva, ILO, Labour-Management Relations Series, No. 77, 1993), pp. 25-30.

made without a hearing. The urgent case in this instance requires a showing of an additional necessity for expedition beyond the normally required showing of urgency within the framework of such a rationale.

If the court issues a decision without a hearing, the presiding judge may rule alone. In this case, he must consider the legal arguments of the opposing party. This can be disregarded only if the urgency of the situation necessitates an immediate decision without hearing the opponent.

3. Prerequisites to preliminary relief

Attachment is only of minor significance in Labour Court proceedings. It is permissible only if there is a reason for resorting to attachment. For example, there could be a reason for an attachment order if the debtor were unlawfully to sell important assets through the black market or waste them, or if he or she were to announce an intent to take such action, or if he or she were intentionally to damage the creditor's property. A reason for attachment may also be present if the debtor wanted to leave the country, thus making seizure considerably more difficult, such as by giving up his or her residence without a forwarding address, generally having no permanent residence, or excessively imposing charges on property. The attachment does not serve to give the creditor priority over other creditors of the debtor in enforcement proceedings. Attachment cannot be ordered if the procedure is only being delayed thereby or if adequate security has already been given to the creditor.

In a personal attachment it is additionally required that the person of this individual debtor is required in order to guarantee the claim. This may be the case if the debtor wants to leave German territory with the assets, or if he or she wants to evade making an affidavit about his or her assets. In any case, concrete indications of such behaviour on the part of the debtor must be shown; a mere abstract possibility is not adequate. In particular, the fact that the debtor is a foreigner can never be a sufficient showing.

An injunction can serve two different purposes: securing a claim for specific performance (a preventive order) and regulation of a temporary status in reference to a disputed legal relationship (regulatory order).

In individual cases, these summary proceedings may also serve to satisfy the creditor on a preliminary basis. For example, this is the case, if by an injunction the date for annual leave is determined or if an employee is ordered to stop engaging in competition with a firm. In such cases in which a final ruling results in practice if it is later found out that the creditor's claim was groundless, only a claim for compensation remains for the opposing party. For this reason, special circumstances must exist to justify such a claim. Such an order is permissible only where other measures are not possible. In these cases, the examination of the rationale for the order is subject to an especially strict standard. As a rule, this is not to be presumed in view of possible social security coverage by means of unemployment compensation, unemployment benefits or social assistance.

The question of justification of a temporary order can be reviewed only in the proceedings on the main issue or in proceedings on indemnification upon the enforcement of an unjustified order.

Frequent cases in practice

As examples, an employee can achieve the following results by means of injunction: granting of vacation leave; preliminary remuneration payments in order to secure his or her livelihood; a right to be employed, including the right to continuing in employment for the duration of court proceedings on protection against unfair dismissal; surrender of work documents, and so forth.

As examples an employer can by means of an injunction: be granted an exemption from the obligation to continue to employ an employee during the pendency of court proceedings on unfair dismissal and obtain a prohibition on competition by the former employee.

Hungary

József Radnay, Presiding Justice, Supreme Court of Hungary

Hungarian labour law rests on the Labour Code, which was elaborated and promulgated in 1967.¹ The guiding premise of this Code is a society and economy governed primarily by the State. Therefore instruments traditionally available to the parties in a case were pushed into the background. In the future, it appears that mediation will play an increasing role in disputes resolution.

As regards temporary relief, the general rule under section 64(2) of the Hungarian Labour Code is that the request may have no delaying effect upon a measure to be taken in labour matters, unless otherwise provided by a provision of law. There are three important exceptions to this rule, however. Firstly, disciplinary measures may not be enforced before a final decision has been reached on the merits of the application submitted to challenge such measures (Ministerial Decree of 1 December 1979, section 78(3)). Secondly, complaints challenging decisions imposing damages on the employee act to stay payment of the damages (*ibid.*, section 82(4)). Thirdly, if the measure taken by the employer violates the rules relating to employment or the interests of the employees, the trade union has the right to raise objection to this measure so as to block it. The measure thus objected to may not be carried out before the court has reached a decision on its validity (Labour Code, section 14(3)).

Thus, in Hungarian labour law temporary relief is based on the veto power of the trade union, and not on judicial action. Consequently the courts have only exceptional jurisdiction when it comes to temporary relief in a case.

In a suit seeking recurrent payments, where the facts indicate that it is likely that the defendant is under a duty to perform, the Labour Court can, upon the request of the plaintiff or on the court's own initiative *ex officio*, require the defendant to perform the presumably adjudicable act (Code of Civil Procedure, section 156(1)). Under the applicable procedural rules, the court has to immediately issue its judgement concerning the request for temporary relief. This judgement is enforceable and remains in force until the court supersedes it or fails to reach a decision on the same question (Code of Civil Procedure, section 156(5)).

The request for temporary relief can be filed in the course of the suit on the main issue. The request must be heard by the judge, who must render a decision immediately.

¹ The text of the original Code and amendments adopted in 1979 appear in the *Legislative Series* under the codes LS 1967-Hun. 1 and LS 1979-Hun. 1. Hungary has since adopted a new Labour Code, Act No. 22 of 1992, published in *Labour Law Documents* (Geneva, ILO), 1993/1 under the code 1992-Hun. 1.

The judgement regarding temporary relief may be enforced in line with the enforcement procedures applicable in the general court system. There is an appeal by right of the trial court's judgement regarding temporary relief.

In a draft Labour Code now under consideration, the institution of the trade union veto remains untouched. In the author's view the veto system does not correspond to the principle of equality of rights of the parties. The veto was introduced at a time when, for political reasons, the strike could not be recognized. Since then, with the adoption of Act No. VII of 1989 on the right to strike, this right has been recognized by the law. So the veto cannot be upheld and there is a need to return to the use of traditional instruments, which makes a change in ideas all the more important for the country.

Furthermore, the Labour Court has the power to declare a judgement calling for recurrent payments to be enforceable in advance (Code of Civil Procedure, section 231) and to suspend execution of a decision during the course of a labour case (*ibid.*, section 353(3)).

Israel

Menachem Goldberg, President, National Labour Court

Introduction

Israel's Labour Courts are authorized to grant temporary relief in all matters within their jurisdiction. The Regional Labour Court is empowered to grant any relief which the District Court of the general court system may grant; the National Labour Court is authorized to grant any relief which the Supreme Court of the general court system may grant.

The Labour Courts have exclusive jurisdiction to hear individual suits between an employee and employer, suits concerning collective agreements, disputes between trade unions, disputes between employers' organizations, suits against pension funds and suits concerning social welfare legislation.¹ In terms of temporary relief in individual labour cases, suits are based on the employer-employee relationship and arise out of the contract of employment. They include: (1) suits arising out of the relationship in the period between the signing of the contract of employment and the commencement of work, such as claims relating to negotiating in bad faith, external tenders, discriminatory hiring practices and the breach of a contract before the employer-employee relationship begins; (2) suits arising during the employer-employee relationship; and (3) suits arising out of the contract of employment that relate to events occurring after the work has in fact been completed, i.e. mainly wrongful dismissal cases and employer claims regarding non-competition clauses.

The temporary types of relief which all Israeli courts, including Labour Courts, are competent to grant are temporary injunctions, attachments, orders prohibiting departure from the country and, in rare cases, temporary specific performance.

Temporary orders are meant to maintain the existing situation (*status quo*) when the applicant has an alleged right to have the requested relief granted and a change in the existing situation could cause irreparable harm. On this basis, a court will deny an application for a temporary order to pay wages when the employer-employee relationship no longer exists.

The court's main consideration when deciding whether to grant a temporary order is the "balance of convenience" between the applicant and the party affected by the order. For example, if a public body states that it will reinstate the plaintiff employee if he or she prevails in the main action for a reinstatement order, then this is sufficient grounds for denying a temporary reinstatement order.

¹ See Z. Bar-Niv: "The labour courts in Israel", in B. Essenberg (ed.): *Labour courts in Europe*, 1986, and M. Goldberg: "Country paper: Israel", in W. Blenk (ed.): *European labour courts: Industrial action and procedural aspects* (Geneva, ILO, Labour-Management Relations Series No. 77, 1993) pp. 83-88.

Other factors which must be considered include whether the applicant delayed in filing his or her request and whether he or she has come to court with "clean hands", i.e. by including all relevant facts or concealing them.

Temporary attachment is granted to ensure that the defendant will not attempt to remove assets which would bar the plaintiff from executing the judgement should he or she be successful in the action. The financial ability of the defendant to pay is not at issue, and it is sufficient to make a *prima facie* showing of the existence of a debt. The defendant may offer to post a bond to pay the debt, and if the security is found reasonable, and most importantly "liquid", the court will allow the posting of security in lieu of an attachment. Temporary attachment to secure funds allegedly owing the plaintiff will not be granted against state or local authorities, banks or insurance companies. This is based on court policy to accept a bank guarantee or a guarantee of an insurance company as ample security in lieu of an attachment of funds or assets.

The purpose of an order to prevent a defendant from leaving the country is to guarantee that a successful plaintiff will have a party against whom to execute the judgement. Such an order will not be granted unless the applicant shows that the affected party plans to leave the country on an extended or permanent basis and that this will hamper the holding of a trial or the execution of the judgement. If the respondent deposits ample security with the court to secure the payment of a judgement should the plaintiff be successful, an order will not be granted or, if granted, will be annulled upon deposit of such security.

When examining an application for temporary relief in wrongful dismissal cases, the court will consider first if an employer-employee relationship can be found between the parties. This is an important consideration because Israeli law allows reinstatement for wrongful dismissal only in the public sector, not in the private sector.¹

Procedure

In general, the request for a temporary order is filed with the main action and is granted only after the filing of a statement of claim. The reason for this rule is that the court must weigh the likelihood of the applicant to prevail in the main action. However, this rule has a number of exceptions regarding matters of utmost urgency: (1) an order to block a wrongful dismissal which will go into effect within a few hours; and (2) an order to prevent a party from leaving the country when the applicant can prove that the affected party plans to depart within the next several hours, and the applicant does not have sufficient time to file the claim. Orders granted under such circumstances will require the filing of the main claim within several days.

Sometimes temporary orders are requested during a hearing, or after both parties have filed their papers, e.g. when one party wishes to leave the country after institution of court proceedings or it becomes apparent to the plaintiff that the defendant's financial situation has deteriorated. A defendant may apply for relief in such a case where a former employee has claimed damages for wrongful dismissal, but continues to come to his or her former place of employment and hampers the normal conduct of business.

¹ M. Goldberg: "Disputes concerning termination of employment: Israel", in W. Blenk (ed.): *European labour courts: Current issues* (Geneva, ILO, Labour-Management Relations Series No. 70, 1989), pp. 62-66.

In general, a condition of receiving temporary relief is for the applicant to post a guarantee, in an amount set by the court, to compensate the respondent if the claim is found to be without foundation and harm has been caused by the temporary relief. However, if the temporary relief is to prevent wrongful dismissal, the court does not usually require the posting of security. In cases of temporary attachment to secure the payment of the alleged sum (usually payment to the employee by the employer or an order to enforce a non-competition clause), the applicant must post security. The court usually requires a personal guarantee to cover potential damages to the respondent. This guarantee is usually in writing and does not require a cash deposit or a bank guarantee. Sometimes a third party guarantee is required. When an order is given to prevent a party from leaving the country, the court usually requires a cash deposit from the applicant, in addition to a guarantee to cover damages that may be caused to the respondent because of such relief.

A claim for temporary relief must be supported by an affidavit setting out all relevant facts. The claim and affidavit must assess the likelihood of success in the main suit and the necessity of granting temporary relief. All relevant documents supporting the claim must be attached to it.

The composition of the bench which hears requests for temporary injunctions is a justice of the Labour Court and two public representatives. However, a party may request that the application be heard by the judge only. A temporary attachment and an order preventing a party from leaving the country can be granted by a judge alone or by the court registrar.

Usually, requests for temporary relief are heard in the presence of the parties. The court has wide discretion to disregard the general rule and grant the relief after hearing one party only. By law the court and registrar are empowered to grant temporary orders *ex parte*, although use of this power is dependent on the relief requested and the circumstances of the case. A request for a temporary injunction to bar a wrongful dismissal will be heard in the presence of both parties, unless the dismissal notice has been given to the applicant only a very short time before the filing of the application and the dismissal is to come into effect immediately. If the relief is granted in front of one party without hearing the opposing party, he or she can ask to have the order struck, and a hearing on this motion will be held shortly after the motion is filed.

Applications for temporary attachments and orders to prevent a party from leaving the country are usually heard *ex parte*, both for reason of their urgency and for fear of the concealment of assets or of the defendant's departure prior to the hearing. The affected party may apply to have the order struck and a date is then set as soon as possible to hear his or her motion with both parties present. The respondent must then supply the court with an affidavit with supporting documentation to substantiate his or her position. If requested, the court will allow brief questioning of the people who submitted affidavits, but oral evidence is not generally allowed.

Applications for temporary relief are heard as closely as possible to their filing date. Applications for temporary attachment and an order to prevent a party from leaving the country are usually heard *ex parte* on the date of application, or at the latest on the following day. Such decisions are usually given on the spot, as are decisions on *ex parte* temporary injunctions. If an especially difficult legal issue is raised and it is clear that delay will cause no harm, the decision is delayed. If delay will cause harm, it is customary to grant an order for a few days until a reasoned decision can be given.

Temporary orders granted by the Labour Courts are enforced in the same way as temporary orders granted by the regular court system. A party not complying with a temporary injunction is in contempt of court. In such instance, courts, including the Labour Courts, are empowered to enforce their decision by way of a fine. Imprisonment is also possible but rarely used. The fine or imprisonment are not given as punishment for disregarding the order, but rather as instruments to enforce the court's will, and thus they are prospective. When the court hears a contempt-of-court application, the alleged offender is summoned to court (in case of non-appearance, a warrant is issued for the police to bring him or her to court), and if the court finds that the order has not been upheld, the court may impose a fine for every day the order is not observed, from the date set by court. The fine increases, growing daily, weekly or monthly as the court wishes, until the order is adhered to. On rare occasions the court will order the offender imprisoned until the order has been obeyed.

Attachment orders regarding the debtor's funds or outstanding claims are enforced by way of notice to the holders of the funds (banks, third parties, etc.) that are subject to attachment, and henceforth they are barred from using the funds or transferring them to their owner. If the holders of the funds defy the order, they may be sued following a final judgement for the amount of funds in their possession when they received the attachment order.

An attachment on real estate is registered at the Land Registry and an attachment on chattels is done by registering them with the Clerk of the Execution Office, and in some cases removing them from the defendant's possession and storing them with the Execution Office pending final judgement. An order to prevent a party from leaving the country is enforced by giving notice to the border police, whose role it is to check all people leaving the country (by air, sea and land to Egypt).

Appeal

All temporary orders can be appealed by either party, whether by right or after receiving permission of the appeal court (the National Labour Court).

Decisions of a Regional Court's Registrar are appealable by right to the Regional Court where the Registrar sits. A Regional Labour Court decision regarding appeal of a Registrar's decision is appealable to the National Labour Court, if permission is granted by the President of the Court, his or her deputy, or a justice appointed for this matter by the President. Permission is granted only in cases where the applicant can identify an apparent error in the judgement being appealed.

Appeals are generally based on points of law, as where a Regional Court decision contradicts previous decisions of the National Labour Court. Generally, the National Labour Court does not overrule the factual findings of the court that heard the witnesses and was in a position to assess their reliability. When dealing with interlocutory proceedings, the appellate court does not review the lower court's assessment of the evidence.

Time periods for filing an appeal are short, varying between seven and 30 days. In unusual cases the appellant may request an extension of the time for filing the appeal. The appellate court will rule on the appeal with the speed suitable to the nature of the case.

Priority in setting hearing dates for appeals is given to cases in which the lower court has denied an application for temporary relief and delay may cause irreparable harm; as opposed to instances when the temporary relief has been granted and the appeal is to have it lifted. In any event, in all appeals upon lower court decisions for temporary relief, or requests for leave to appeal, the case is heard within days. The appellate court does not hear evidence, but decides on the basis of the evidence which was before the lower court and the oral or written arguments of the parties.

The appeal will usually be held with both parties present. On rare occasions it is justified to hear the appeal *ex parte*, as where an application for an order would be heard in this way. Applications for leave to appeal filed with the National Labour Court are ruled upon the basis of the records in the case, without the presence of the applicant. The justice ruling on the application can deny it or ask the other party to respond. Upon receiving such response the justice rules without the parties being present. The President or a justice of the National Labour Court has the power to summon the parties to an oral hearing, but rarely does so.

The lessons of experience

The experience of Israeli Labour Courts has been that temporary relief is an efficient method to guarantee execution of final judgements. Such procedure, adopted from procedure used by the general courts, has not changed significantly since the foundation of the Labour Courts in 1969, since it has proved satisfactory.

The temporary attachment, if granted, saves the plaintiff the extra procedure of later requesting the Execution Office to execute the judgement. Temporary attachment has an additional benefit, perhaps its major one, in that the defendant (usually the employer) will attempt to settle with the plaintiff (usually the employee) before a hearing is held on the case. This is because an attachment of funds limits the employer's ability to operate and it is not in his or her interest to prolong the hearing. The plaintiff, on the other hand, is encouraged by the temporary attachment. The same result is achieved by orders preventing a defendant from leaving the country.

It thus appears that temporary injunctions help in achieving an out-of-court compromise. It is in any event clear that they are effective for rapid execution of a judgement.

Norway

Stein Evju, President, Labour Court

Jurisdiction and legal rights

In Norway the Labour Court — and the specialized system of labour courts — does not have jurisdiction in individual labour disputes. Individual labour disputes come within the jurisdiction of the basically uniform judicial system of the ordinary courts.¹ So do matters concerning temporary relief in disputes of this kind.

Statutory provisions on interlocutory proceedings and temporary measures are embodied in the Enforcement Execution Act, 1915, as amended (hereinafter: EEA), Chapters 14 and 15. These provisions are general, applying in principle to any kind of claim without specific exception. The EEA, however, is supplemented by specialized legislation, notably in the field of individual labour disputes by provisions contained in the Worker Protection and Working Environment Act, 1977 (hereinafter: WPA).

Generally, temporary measures may be granted in order to secure a claim or the subsequent execution of a judgement, or to establish and enforce an interim arrangement safeguarding the position of a party to a matter in dispute.

Pursuant to the EEA a distinction is made on the basis of the claim at issue. If the main claim is one for money, the proper temporary measure is that of *attachment* (seizure, arrest). For any other kind of claim “other temporary measures” are available. The applicable procedural rules are largely the same.

Temporary measures *may* be requested and granted prior to the filing of the main suit. The court having jurisdiction to grant temporary relief will, however, depend on whether the main suit has been filed (see below).

Likewise, the petitioner is not required to furnish security prior to or when requesting a temporary measure. The general rule is, on the other hand, that if granting an interlocutory order the court *may* make the order conditional on the petitioner’s putting up security, in the amount and form considered appropriate by the court, for a possible claim of damages and compensation by the defendant. Furthermore, the court is required to include such a condition when granting an order even if the probability of the main claim has not been demonstrated. An interim order may be granted in such circumstances if danger is involved in case of a delay. The common principal rule, however, is that the petitioner must show

¹ See the Prefatory Note on “Competent courts in labour matters”, for Norway, in *International Labour Law Reports*, Vol. 5 (Geneva, ILO, 1987), pp. xxxv-xxxix.

probability with respect to the main claim as well as to the grounds warranting an interlocutory order.

The principal rule implies that, when considering a request for a temporary measure, the court on the basis of evidence and law must take a provisional stand on the main claim. Since this is done on the basis of the facts available during interlocutory proceedings, as a rule less is required to show probability at this stage than would be required for the granting of the main claim in a full judgement. Should the court consider it improbable that the main claim will stand up in full, but probable that it will stand up in part, a temporary measure may still be granted if the further prerequisites are satisfied in relation to the more limited claim.

Attachment is a temporary measure to secure the enforcement of execution of a claim for money. Attachment may be in two principal forms: arrest of property, or arrest of person. Arrest of person may be ordered when a debtor is in the process of leaving the country in circumstances rendering it uncertain whether he or she intends to return, and an arrest is considered necessary to secure the execution of a claim for which the debtor may be sued in Norway. The measure to be imposed will be some form of curtailment of the personal freedom of the alleged debtor. Detention is possible; an order of prohibition on travelling abroad probably is the more practical alternative. However, arrest of person is extremely rare. As far as is known, this measure has not been used in labour law cases.

Arrest of property may be ordered when a debtor's conduct gives cause for fear that execution will be forfeited or significantly complicated, or that a judgement will have to be enforced abroad. An arrest of property implies a ban on transactions, factual and legal, that would be to the detriment of the petitioner. Actual seizure of the property arrested, such as the freezing of a bank account, may be ordered. If actual seizure is not carried out registration is made in the relevant property register, to protect the right established by the arrest in case of a transfer of the property involved to a third party. Arrest of property is used to some extent in practice, but again, as far as is known, this measure is very rarely seen in labour law cases.

If the main claim is for anything other than money, the only relevant form of temporary relief is that of some form of *other temporary measure*. The court may grant an interim order on the basis of one of two sets of conditions (EEA, section 262): (a) when the conduct of the defendant gives cause for fear that pursuing or enforcing the claim may otherwise be forfeited or significantly complicated, in particular if by alteration of the status quo; or (b) when in a disputed matter an interim arrangement is considered necessary to avert considerable damage or inconvenience or to avoid violence of which the defendant's conduct gives cause for fear.

As noted above, the petitioner as a main rule is required to demonstrate probability with respect to the main claim as well as grounds warranting a temporary measure according to one of these two alternatives. It is, however, not required to show probability of the relevant difficulty or inconvenience actually occurring. Cause for fear, which is to be understood as a less strict requirement, is sufficient. The second alternative comprises not merely economic consequences but damage or inconvenience of any kind.

It rests with the court to assess whether the basic prerequisites are at hand for granting an interlocutory order according to one or the other alternative. Furthermore, the wording of section 262 expressly states that an interim measure "may" be granted. It is thus left to the discretion of the court whether to issue an order even if the requirements are met at the outset. Pursuant to the second alternative an interim measure should be considered

"necessary". This in particular requires the court to make a total appraisal, taking into account considerations such as the inconvenience that a possible measure might entail for the defendant.

With the exception that detention and curtailment of personal freedom cannot be ordered, there are no specific restrictions as to the contents of a temporary measure. Pursuant to section 265 the court "stipulates those measures that are considered necessary". Thus, it is left wholly to the discretion of the court to fashion a remedy suitable to the situation and the dispute at hand, in view of all relevant considerations. Section 265 expressly points out, as examples, that an order to undertake, to abstain from or to submit to certain action, factual or legal, may be granted. *Specific performance* thus may be decreed, as may *specific restraint*. Both are applied in labour law disputes. Case-law offers a wide variety of measures that have been imposed by interlocutory order in individual labour cases. In particular, specific restraint in a variety of forms has been decreed in disputes involving restrictive covenants or the possible misuse of business secrets or competition in breach of loyalty obligations. It should be added, however, that all told the number of such cases in which temporary measures are requested and granted is rather small.

Whereas an interim order of attachment may always be prevented or lifted by the defendant's putting up security to an amount fixed at the court's discretion, this is not the case where other temporary measures are concerned. Here, it is a matter for the court to decide, on the basis of considerations of the individual case, whether an order should be avertable by the furnishing of security, as well as the duration of an order.

In older case-law it was held that, in principle, an interlocutory order to suspend a dismissal might be granted (Halogaland Court of Appeal, 24 October 1962, RG 1963, page 338). This will no longer be a relevant issue in practice, due to the now applicable provisions on dismissal protection, primarily those of the WEA.¹

In cases of ordinary dismissal with notice the employee has an absolute right to remain on the job — meaning that the effects of a dismissal are suspended — for the duration of the period of notice and beyond for as long as negotiations with the employer are ongoing. Subsequent to the termination of negotiations the employee still has the same right to remain on the job, provided that certain formal requirements are complied with, pending a final decision by the courts on a suit to annul the dismissal. The employment relationship is thus continued. The employer may however request the court to be released from this obligation by way of an interim decision, which may be labelled a particular form of interlocutory order. An interim order to this effect should be granted only if the court considers it unreasonable for the employment relationship to remain in force during the relevant time period (WEA, section 61(4)). Case-law abounds with decisions on requests of this kind. Generally, the courts may be said to have adopted a fairly liberal attitude when appraising "unreasonableness" in cases concerning workforce reductions and a stricter attitude when disciplinary dismissals are involved.

In cases of dismissal without notice no such right to remain on the job applies, either during negotiations or following their conclusion. Pursuant to section 66(3) of the WEA, the employee is, however, entitled to request an interim decision granting the continuation

¹ Similar or in this respect somewhat more favourable protection applies in fields exempted from the WEA according to special legislation for the relevant categories of employees. See S. Evju: "Disputes concerning termination of employment: Norway", in W. Blenk (ed.): *European labour courts: Current issues* (Geneva, ILO Labour-Management Relations Series, No. 70, 1989).

of the employment relationship pending a final decision on a suit for annulment of the dismissal. This is, in essence, a particular form of interlocutory order of specific performance. The purpose of the remedy primarily is to counteract any evasion of the law — i.e. the employee's right under section 61(4) — in cases where there is reason to consider it unwarranted by the employer to have resorted to summary dismissal. The predominant impression of case-law here is one of reserve; interim orders of reinstatement in summary dismissal cases are rarely granted.

To the extent that a party to a dismissal dispute may invoke the provisions of the WEA, temporary measures under Chapter 15 of the EEA are not available. This does, however, not rule out the possibility of, and the possible need for, applying other temporary measures in dismissal disputes. In ordinary dismissal cases it frequently occurs that the employer — for various reasons — refuses the employee the right to continue in employment, e.g. by demanding that he or she leave, by terminating payment of wages, or by denying access to the workplace. Jurisprudence is now well established that the provisions of Chapter 15 of the EEA may be relied on in such cases. The employee's right under the WEA to continue in employment then is conceived as the "main claim". An interlocutory order upholding this right may accordingly be granted. When deciding on a request for an order to this effect the court must take a provisional stand on whether the main suit for annulment is a "dismissal case" in a legal sense according to the WEA. Furthermore, the court must weigh whether the formal requirements of section 61(4) of the WEA have been satisfied and consider the criterion of "unreasonableness". If it is then found that the employee should have a right to remain on the job, the conditions for granting an interim order will be fulfilled. The assessment of "unreasonableness" in practice will include, and be exhaustive in relation to, the relevant considerations pursuant to the second alternative under section 262 of the EEA.

An interlocutory order in these cases ordinarily will state that the employee is entitled to continue in employment pending a final decision of the annulment suit, or that the employee has a right to reassume his or her position or to be reinstated. In any case, in a legal sense the order is one for specific performance. Under case-law, the fact that enforced execution of such an order is barred is no legal hindrance to the granting of interim orders of this kind.¹

From the information available from reported cases and elsewhere, it seems that in current practice requests for and decisions on interlocutory orders pursuant to the EEA are relatively frequent in dismissal cases. Also, they probably represent the far greater number of all cases on temporary measures pursuant to the EEA in individual labour disputes. None the less, the total number of such cases still is not great.

Procedure

A request for temporary relief must be filed in writing. The request must state the main claim as well as the grounds asserted to warrant an interlocutory order. When filing for temporary relief under Chapter 15 of the EEA, normally it is appropriate to indicate the

¹ See, in particular, the explicit ruling on this point by the Supreme Court Appeals Committee, 9 Mar. 1989, Rt. 1989, p. 361.

kind of interim order requested. This is, however, not required, nor is it necessary, strictly speaking, in view of the court's discretionary authority pursuant to section 265 of the EEA.

If action on the main claim has already been initiated, or a suit is filed simultaneously, the request for a temporary measure is to be filed with the court in which the case on the main claim is pending. Otherwise, the request for a temporary measure must be filed with the local court of execution. This is in most cases the ordinary city or county court, merely acting in a special capacity as a court of execution. (Separate courts of execution alongside the city court in question exist in the jurisdictional areas of the country's four largest cities only.) In either case the request is heard and decided upon by one professional judge, sitting alone in matters of this kind. With the exception that if a request is filed at the appeal stage of a case, which is fully possible, it will be heard and decided upon by three professional judges in accordance with the rules on the composition of the Court of Appeal then hearing the case.

As a main rule, a request for a temporary measure pursuant to Chapter 15 of the EEA should be served on the defendant and the parties should be summoned to an oral hearing. A hearing will ordinarily be in full, with the parties introducing evidence and pleading their case. The hearing is, however, not in public. In *urgent cases*, i.e. if there is no time to wait until a hearing can be held, the court may decide on an *ex parte* request, without summoning either party to an oral hearing and prior to serving the request on the defendant. When this procedure is applied both parties have a right, within a time-limit fixed by the court, to demand that an oral hearing be held by the same court to review and, as the case may be, alter its initial decision. In ruling *ex parte*, the court is required to inform the parties of their right in this respect. On requests for *attachment* the court has a more extensive right to decide *ex parte*. An oral hearing is required only if so demanded by the petitioner or if considered necessary by the court. The rules on a hearing subsequent to a decision *ex parte* apply here as well.

The time needed for a decision in the first instance on a request for temporary relief certainly will vary. In the case of a decision *ex parte*, a decision normally will be made within the day or one or two days subsequent to the filing of the request. If an oral hearing is held the time lapse will depend on the urgency of the matter and the time needed for summons and the preparation of the hearing. In practice, the time lapse may range from a day or two up to a month or maybe two. It might be added that decisions on interim orders pursuant to sections 61(4) and 66(3) of the WEA *cannot* be made *ex parte*. More recent practice indicates that the time lapse in such cases still varies among the different courts, currently ranging from three to six weeks and up to the same number of months (see also Evju, op. cit. (p. 81 above, note 1), page 70).

Generally the enforcement of interlocutory orders on temporary relief are subject to the ordinary rules of the EEA applying to all forms of enforcement of judicial decisions. An interlocutory order — interim orders pursuant to the WEA not included — is to be referred by the court, automatically and immediately, to the local enforcement officer with whom it rests to take the steps necessary to implement the order. In the case of a main non-monetary claim, an order for a measure that requires the cooperation of the defendant may, at the outset, be enforced by imposing a *coercive fine*,¹ thus attempting to compel the

¹ i.e. a fixed amount stipulated, normally, to accrue on each day of non-compliance, payable to the Treasury and enforceable according to the rules on enforcement of monetary claims.

defendant to comply. The court may stipulate a coercive fine in its initial order, or in a subsequent order at the request of the petitioner.

Pursuant to a particular provision in section 239, second paragraph, of the EEA, use of a coercive fine is however restricted in so far as orders of specific performance are concerned. A coercive fine cannot be imposed to compel an employee to perform work, nor to compel an employer to accept or reinstate a worker into actual employment. Thus, there are in effect no measures available for the actual enforcement of orders of this kind. Yet, as noted above, orders of specific performance are not precluded on account of this.

Orders on other forms of specific performance, as well as orders of specific restraint, may on the other hand be enforced by the use of a coercive fine. For example, an interim order may be to the effect that a contract of employment should not be maintained, or in the form of restraining the right to enter into an employment relationship or to perform certain work. In either case, a coercive fine may be applied.

Whether a coercive fine may be imposed in the case of a restrictive covenant containing a clause on an agreed penalty or damages in the event of a breach — recently at issue in Sweden¹ — does not appear to have been ruled on in Norwegian case-law. In relation to the provisions of the EEA, the matter seemingly would have to be decided on the basis of an interpretation of the covenant in question, the issue being whether its stipulations on a monetary remedy exhaust the possible sanctions that may be pleaded for by the party concerned.

Appeal

Decisions in matters of temporary relief are subject to appeal in accordance with the ordinary rules of civil procedure. An appeal on a decision by a court of first instance lies to the District Court of Appeal, which has full jurisdiction over all legal and factual aspects of the case. Further appeal to the Supreme Court Appeals Committee is then possible, but only on points of law and not on the interpretation of the factual aspects of the case. If a request for temporary relief is decided upon by a Court of Appeal in the first instance, the Supreme Court Appeals Committee on appeal has full jurisdiction.

The time lapse involved also varies. Ordinarily, there is no oral hearing in an appeal case of this kind; appeals are decided on the basis of the parties' written submissions and documentary evidence. Obtaining a decision by a Court of Appeal normally takes from two weeks to three or four months; on further appeal a similar time span must be added.

An appeal does not stay the decision being appealed, unless the court of first instance or the higher court, upon receiving the appeal, so specifies. In addition, a defendant has a right to request an interlocutory order to be lifted on the grounds of "altered circumstances". In particular, the defendant may do so following a decision concerning the main claim at issue, even if the decision is not yet final, in the event that the petitioner/plaintiff does not win the case. Furthermore, either party may at any time request a decision to alter the duration of an interim order. Prolongation of an order is of practical importance if the initial order fixed the duration at a time prior to the rendering of a final decision on the main claim.

¹ See the Swedish Labour Court's decision AD 1990 No. 44, and Adlercreutz, "Personexekution eller skadestånd/avtalat vite i mål om konkurrensklausuler", in *Svensk Juristidning* (1990), pp. 445-454.

Concluding remarks

As already indicated, cases concerning temporary relief in individual labour disputes do not abound in the actual practice of Norwegian courts. As a whole, temporary relief pursuant to the EEA in itself seemingly plays quite a modest role. As far as can be judged on the basis of currently available information, the use of attachment is virtually non-existent. Other forms of temporary measures are applied in a very limited number of cases, almost to the point where each case is a notable incident in itself.

Apparently, there is no quest for reform in this area. A Bill on a new, revised Enforced Execution Act has been put forward rather recently.¹ It does not contain any changes of actual significance as concerns the provisions being discussed here — with, however, one possible exception: the repeal of the second paragraph of section 239 of the EEA is proposed. If enacted, this would imply the introduction of a wholly new principle with regard to the use of the coercive fine in matters concerning specific performance of work. There is, however, reason to believe that no such change is intended, the Bill on this point being the result of an oversight that can be expected to be redressed prior to the adoption of a new Act.

The “interim provisions” of the WEA, on the other hand, do play an important role. This is particularly true of section 61(4). The employee’s right to continue in employment under this provision is of considerable significance in practice. Its purpose is to relieve the employee of the disadvantages of a break in the employment relationship and to counteract any unwillingness on the part of courts to order annulment, thus reinforcing the right to maintain the contract of employment in cases of unjustified dismissal. It has also proved important in practice that the employee invoking a right of continuation in employment tends to encourage out-of-court settlements in dismissal disputes. This works for the employee in terms of obtaining a favourable settlement.

¹ Ot. prp. No. 65 (1990-91), formally presented to Stortinget (the Parliament) on 7 June 1991.

Spain

Bartolomé Ríos Salmerón, President, Labour Appeals Division, High Court, Murcia

Preliminary considerations

Civilian court jurisdiction in Spain is structured in four areas: civil, criminal, administrative and labour and social matters. There are two special features:

- The various courts, including the industrial courts, fall within ordinary jurisdiction (as opposed, for example, to France and Germany, where the industrial courts are excluded from this category).
- All courts, again including industrial courts, enjoy a constitutional mandate “to judge and to ensure enforcement of the decision” without having to go through other separate organizations. Where a township has several labour court judges, however, one of these may assume all executory functions.

This means that precautionary, preliminary or prior measures are executed directly by the industrial court and not through any other organization or agency.

In matters of appeal, the organization and functioning of Spanish industrial courts follows a two-stage principle. A decision or other order issued by labour courts [*Juzgados de lo social*] — normally, with only some exceptions, in the first instance under an exercise of original jurisdiction — may be brought for review before the labour appeals division [*Salas de lo social*] of the High Court of Justice having jurisdiction (normally in the second instance, with some exceptions) in the various autonomous regions into which Spain is divided, by means of an appeal [termed “*recurso de suplicación*”] that is not an appeal for re-hearing but rather similar in nature to the Spanish appeal for annulments [“*casación*”]. The Supreme Court is not in fact a third stage, but rather — again, with some exceptions — serves to impose uniformity on decisions delivered by the High Court labour divisions where these adopt conflicting criteria.

For the purposes of precautionary or temporary measures, this means that there is strictly speaking no appeal to a higher court from the decisions of an industrial court; nor indeed any other kind of remedy.

Spanish industrial proceedings have always been conceived as a very simplified version of civil proceedings. Hence, although we do in fact have a Labour Procedure Act [*Ley de procedimiento laboral*] whose current provisions date from 27 April 1990, this is supplemented by the Civil Procedure Act [*Ley de enjuiciamiento civil*] of 1881, to which industrial courts have daily recourse.

This could in principle have important effects as regards precautionary measures, for whereas the Labour Procedure Act provides almost exclusively for the traditional seizure for security [*embargo preventivo*], the Law on Civil Procedure makes provision for indeterminate measures, which the court may order to be given in the particular circumstances of the case. However, industrial courts do not normally apply this aspect of civil procedure law.

Spanish industrial courts never act as “emergency courts” in the manner of the French “*référé*”. Provisional or precautionary measures are always ordered as part of the main proceedings, for the purpose of ensuring effective execution of the final judgement in the event that the plaintiff (as a rule the employee) prevails.

The injunction, as a general remedy affording protection in any situation, does not exist in Spanish law (with the exception of the “indeterminate measures” provided in civil law and available to industrial courts, discussed further below). More specifically, there is no possibility of provisionally reinstating a dismissed employee or enjoining a person to remain within the court’s jurisdiction.

The Labour Procedure Act 1990 provides essentially two possible precautionary measures:

- seizure for security (sequestration), applicable in principle to all kinds of proceedings;
- suspension of an act in violation of freedom of association or other fundamental right, applicable in a new kind of special proceedings introduced for this type of case.

The Civil Procedure Act provides for so-called “indeterminate measures”, which could in theory encompass any precautionary measure for protection, but which in practice are not applied by the industrial courts.

Seizure for security

This remedy consists in the attachment of certain of the defendant’s (normally the employer’s) goods in order to ensure effective execution in the event of a judgement requiring payment of a sum of money. Movable goods are placed in the keeping of a receiver (trustee). Immovable goods (and certain movable goods such as vehicles) are attached by recording the seizure in a public register.

Seizure is ordered where the defendant takes any action which invites presumption of the intention to become insolvent or to thwart effective execution of the final judgement.

For a petition for seizure to be admitted, main proceedings must have already been initiated; the plaintiff may request seizure upon filing the complaint or at any subsequent time prior to the delivery of the court’s decision.

The law makes no provision for the deposit of a bond or guarantees by the person requesting seizure, and in fact such a requirement is extremely rare.

The law gives the court discretion to require the plaintiff and party requesting seizure to provide *prima facie* evidence as to the suspicious demeanour of the defendant on which the request is based. In practice, however, such evidence (documents, witnesses, etc.) is hardly ever required. The court normally deduces the need for seizure from the circumstances of the case, such as dismissal of all or part of the workforce, non-payment of wages, etc.

By law, the court may order seizure on its own initiative where it deems this to be desirable in order to safeguard the rights of the plaintiff. It is not, however, a common occurrence.

There is no special or complicated procedure; a complaint by the employee suffices. If the court requires *prima facie* evidence (documents, witnesses) regarding the employer's situation, this must be submitted on the following day. Normally, no such evidence is required. The judge then gives an immediate decision, with no further formalities and without hearing the defendant whose goods may be seized (seizure is ordered *ex parte*).

In practical terms, seizure is effected by officers of the industrial court (the "Court Commission" [*Comisión del Juzgado*], comprised essentially by the judicial officer and the clerk). There is therefore no need to go through any other court. In the event that police assistance is required (to enter locked premises or overcome resistance by the defendant), the consent of the industrial court judge suffices.

As there is no "appeal" as such in the system of Spanish industrial proceedings, there can be no appeal to a higher court from a seizure order issued by an industrial court.

The utility of seizure for security is clear. Without it, employees would receive practically nothing. Movable goods not in the keeping of a depository could disappear. Immovable goods (or such movable goods as vehicles) not publicly registered as attached could be freely sold. In addition, such registration is essential where there is a lien on property and the employee wishes to ensure that he or she will be awarded preference over the mortgage creditor (normally a credit institution) for the last 30 days' pay.

Suspension of acts in violation of freedom of association

Under the measures introduced recently by the Labour Procedure Act anyone filing a complaint against an act which violates freedom of association or any other fundamental right may, in the same complaint, petition the industrial court to "suspend the effects of the contested act". This applies only, however, where such act prevents:

- a candidate's participation in the electoral process;
- the exercise of representative or trade union functions in connection with collective bargaining, workforce reorganization or other matters of vital importance to the general interests of workers, and may cause irreparable harm.

The law establishes no requirement of security or guarantee from the person requesting suspension.

As soon as suspension is requested, the court summons the parties and the public prosecutor to attend a hearing, which must take place within the following 48 hours; at the end of the hearing, the judge will verbally issue the ruling. There is no appeal.

Naturally, the acts subject to suspension may vary widely in nature. The judge will seek to ensure effective execution of the judgement through the court officers. However, the law does not establish consequences (sanctions) in the event of failure by the defendant to comply with the court's order. The Labour Procedure Act introduces a fine of up to 100,000 pesetas per day¹ for failure by a convicted defendant to comply with a final

¹ In September 1991, around 100 pesetas equalled US\$1.

judgement (analogous to the German *Zwangsgeld*, as such monies are paid into the public treasury). However, for the purposes of precautionary measures, there is no provision for a hypothetical conviction. Since the statute is very recent, it is too early to define the criteria normally applied by industrial courts under it or the means of enforcement applied.

“Indeterminate measures” in the Civil Procedure Act

Civil law is based on the principle of proving the existence of *prima facie* written evidence clearly indicating an obligation to do, not to do or to deliver certain or specified things.

In such a case, the plaintiff may petition the judge exercising labour jurisdiction (who applies civil procedure by reference) to order “such measures as may be necessary in the circumstances to ensure effective execution of the judgement” finally delivered in the main proceedings.

Such a measure may be requested on filing the complaint or subsequent thereto; it may also be requested prior to the complaint, provided that the complaint is then filed within eight days.

The law provides that the party requesting such an order must deposit “sufficient advance security” in order to meet possible damages.

These measures are ordered by the judge following petition by the plaintiff and without hearing the defendant (*ex parte*). A defendant subject to such measures may, however, challenge them after the fact, in which event the court will decide as it deems appropriate. As before, the measure ordered is executed by officers of the court. There is no appeal.

Lessons derived from experience in regard to temporary relief in individual disputes

There are few, if any. In practice, judges exercising labour jurisdiction do not apply this kind of “indeterminate measure” authorized by the Civil Procedure Act, owing to the two express requirements involved: clear written evidence of the defendant’s obligation; and the provision of security or guarantee by the plaintiff, who is, as a rule, an employee.

Sweden

Ove Sköllerholm, Chairman, Labour Court

Introduction

The Labour Court is the court of first (and last) instance in disputes over collective agreements or other labour disputes referred to in the Act on the joint regulation of working life, provided that action is brought by an employer organization, by a trade union or by an employer who is a signatory to a collective agreement. The Labour Court also has the authority, as a tribunal of first and last instance and on the same conditions, to decide other labour disputes when there is a collective agreement between the parties or when the individual employee who is affected by the dispute is employed in work which is covered by a collective agreement that is binding upon the employer. The situation arising when a collective agreement is *temporarily* inapplicable — for example after termination in connection with a new round of wage negotiations — does not restrict this authority of the Labour Court.

Other labour disputes are decided by the ordinary (assize) courts in the first instance, and can then be appealed to the Labour Court as the tribunal of second and last instance. Broadly, this encompasses all labour disputes concerning unorganized labour or organized labour when a labour market organization (social partner) is not willing to bring an action on behalf of its member.

The Labour Court of Sweden has jurisdiction to grant temporary relief of different kinds in a range of situations. With regard to individual labour disputes, the form of temporary relief most frequently applied is an interim decision in disputes seeking annulment of an employee's dismissal. For a more complete picture, however, the following considerations should be borne in mind. To the extent that the Act on litigation in labour disputes does not provide for special judicial proceedings in labour disputes, the appropriate parts of the general code of procedure (RB) for discretionary civil actions applies. This means that the Labour Court has jurisdiction to grant orders for the sequestration of property and injunctive relief. In both cases the claim must have already been raised or be expected to be raised in an action before the Labour Court (RB 15:1, 2 and 3). Sequestration of property may be ordered if and to the extent such measure is deemed necessary to secure the future collection or execution of a claim against a party for money or property.

In cases where sequestration does not apply, the Labour Court can issue various types of injunctions so as to secure the value for a party of an anticipated final judgement. In individual labour disputes such injunctions have been used, for instance, to stop certain activities by a party that may be detrimental to the alleged rights of the opposing party, to

declare that an employee is obliged under his or her contract of employment to perform certain work and to declare that an employer in particular circumstances is not entitled to reassign an employee from one type of work to another. Such injunctions may thus be used to temporarily regulate the relations between the parties in accordance with the main petition of a plaintiff in a dispute. Interim relief in individual disputes is available regardless of the prior right of interpretation enjoyed by trade unions under certain statutes.¹

There is no jurisdictional basis for the Labour Court or other courts to grant orders in civil actions preventing or limiting a person from leaving the area of court jurisdiction or country. The possibility of imposing such orders was abolished in 1982.

In addition to these rules governing civil actions, the Labour Court has jurisdiction to impose some particular interim decisions under the Security of Employment Act in a number of instances. The first of these is in disputes over the annulment of a dismissal with notice. The Security of Employment Act stipulates that the employment relationship does not expire, because of the given notice, until there is a final decision on the dispute. Furthermore, the Act provides that the employer is not entitled to prevent an employee from working unless the employer can present particular reasons for doing so, for instance where the employee represents a danger in the workplace. Linked to these provisions in the Security of Employment Act, the Labour Court has been given authority to impose:

- on petition by the employer, an interim decision that the employment relationship shall expire when the period of notice ends or at a later date decided by the court (Security of Employment Act, section 34, third paragraph); and
- on petition by the employee, an interim decision that an employer's refusal to let the employee return to work shall be terminated and the employee reinstated (*ibid.*).

These provisions also apply to public employers and employees, except judges on permanent service (Public Employment Act, Chapter 7, sections 1 and 2).

The Labour Court may also grant temporary relief in disputes about annulment of a summary dismissal (discharge) without notice (which to be lawful requires a gross breach of contract by the employee). The Security of Employment Act provides that the employment relationship terminates notwithstanding a dispute challenging summary dismissal. However, the Labour Court has been given authority to impose, on petition by the employee, an interim decision that the employment relationship shall continue in force, in spite of the dismissal, until there is a final decision on the dispute (Security of Employment Act, section 35, second paragraph). This provision is not applicable for employees in the service of the State or employees whose terms of employment are regulated by the Public Employment Act. In disputes over the annulment of a summary dismissal (discharge) of such an employee, the dismissal has no effect on the employment relationship until there is a final decision of the dispute. If the summary dismissal is combined with the employer's refusal to permit the employee to perform work pending the dispute, the employee can challenge that refusal; the Labour Court has jurisdiction to issue an interim decision ordering reintegration (Public Employment Act, Chapter 17, section 3

¹ Under some Acts, such as the Act on the joint regulation of working life, the Act on the status of trade union representatives at the workplace and the Act on the right to time off for studies, a trade union that is or usually is bound by collective agreement with the employer has the so-called priority right of interpretation in certain legal disputes. This means, in principle, that the trade union's opinion in the dispute prevails until the dispute has been finally decided by the Labour Court. However, these Acts contain provisions pointing out that the priority right of interpretation is no bar to interim decisions by the Labour Court.

(third paragraph)). In many cases, the interim decision hints strongly at the probability of a final decision in favour of one party or the other.

In disputes about the lawfulness of temporary employment (employment for a fixed term in contrast to a permanent position) the Labour Court may, on petition by the employee, decide that the employment shall constitute a permanent position. On petition by the employee, the Labour Court is authorized to impose an interim decision that the employment relationship shall persist, in spite of the time limitation, until there is final resolution of the dispute (Security of Employment Act, section 36, second paragraph). This provision also applies to public employers and employees.

Under the Public Employment Act the Labour Court has additional jurisdiction to impose some particular interim decisions.

In disputes about the obligation imposed on a public employee (in the service of the State or whose terms of employment are regulated by the State) to leave service at the agreed pension age, the Labour Court may, on petition by the employer, issue an interim order that the employment relationship shall expire when the employee has reached that age (Public Employment Act, Chapter 17, section 2).

In disputes over the lawfulness of a decision by the State as employer that the director of an administrative authority, employed for a fixed period of time, shall be transferred to another employment in the service of the State or be forced to leave employment before the expiration of the period, the Labour Court is authorized to impose an interim decision that the transfer or order to leave shall be stayed until there is a final decision of the dispute (Public Employment Act, Chapter 17, section 3).

Furthermore, there are some special legislative Acts that explicitly forbid dismissal of an employee on certain grounds, such as the Act on the right to parental leave, the Act on the right to time off for studies and the Act on the right of immigrants to time off to learn Swedish. In disputes challenging dismissals that are alleged to violate any of these Acts, the provisions mentioned above in regard to staying dismissals with and without notice are applicable.

Procedural aspects

Petitions for sequestration of property are very seldom made. The general experience in Sweden is that the collection of sums owed to employees does not pose a big problem. In situations of the employer's bankruptcy, the State guarantees to quite a broad extent the payment of salaries and other claims arising from employment. As for procedure, the main suit is normally filed prior to or together with a request for sequestration of property. This is, however, not absolutely necessary under the law. If sequestration of property has been granted prior to filing the main suit, the main suit must be filed within one month from the date of granting the sequestration of property. If that is not done, the order automatically expires.

The petitioner must give security (someone's personal guarantee or a bond) covering losses that the sequestration of property may cause and for which the opposing party may claim compensation. The security must be approved of by the court. An exemption from having to provide security may be granted by the court if the petitioner has presented a very strong case and is not able to provide it.

In individual labour disputes it is very rare in practice that the main suit is not filed prior to or together with the request for a temporary injunction. Furthermore, in individual labour disputes the giving of a security is in practice almost never required. Mostly it is regarded as unnecessary, either because the party who files the request for an injunction (often a labour market organization such as a trade union) is known as well capable of covering possible losses or because the injunction that is requested is not likely to cause any loss that would call for compensation.

The main suit must be filed prior to, or at the latest at the same time as, the request for an interim decision, since the interim decision in almost all cases is based on one or more of the claims in the main suit. However, in a case brought by an employee over dismissal, the defendant employer may also request an interim decision to have the employment relationship expire with the term of notice or at a later date determined by the court.

The petitioner seeking sequestration of the defendant's property must present facts and reasons that make it probable that he or she has a valid claim for monetary relief against the opposing party (PB 15:1), or a better claim to certain property than that of the opposing party (RB 15:2). In other words, the Labour Court will consider whether it seems probable that the petitioner will win his or her claim or prove his or her preferential right to particular property.

The petitioner's claim against the opposing party must be presented or be expected to be presented before the dispute is finally decided. It is, of course, for the Labour Court to examine and try these questions.

The petitioner must present facts and reasons that give cause to fear that the opposing party will try to avoid paying the alleged debt by absconding, hiding assets, and so forth, or will manage disputed property in such a way that it may harm the petitioner's alleged right to it. The Labour Court will consider whether there is cause to fear such "sabotage" of enforcement of a future judgement.

A petitioner seeking injunctive relief must present facts and reasons that show probability that he or she has some kind of legal claim (other than those mentioned above, and with the word "claim" taken in a broad sense) against the opposing party. In other words, the Labour Court will consider whether the petitioner has a likelihood of success in pressing the claim. The petitioner must also present facts and reasons that give cause to fear that the defendant, by action, inaction or in some other way, will stop or obstruct the petitioner in exercising his or her rights or will seriously depreciate the value of the petitioner's claim. The Labour Court will consider whether the requested injunction seems adequate in relation to the purpose of securing the value of an anticipated judgement in the petitioner's favour.

In individual labour disputes, injunctions of this kind can mean that the plaintiff gets vindication of his or her alleged rights at once. In other words, the petitioner may be granted a temporary arrangement of the relationship between the parties that is in accordance with a claim in the main suit. The petitioner will have to present very good reasons to be granted such an injunction, and the Labour Court will carefully weigh the petitioner's interest in obtaining the requested injunction against the defendant's interest in having the injunction refused.

In almost all these situations the main consideration will be whether it seems very likely that the final decision will correspond to the interim decision. If that is not the case,

the request for an interim decision will not be granted. (An exception is a claim over barring an employee from work, where the court will try the reasons invoked by the employer.)

In the legislative history of some Acts, there are indications as to the degree of probability that should be required for granting an interim order. For illustration, mention should be made of the situations that are most frequent in practice. In a dispute to overturn a dismissal with notice, an employer who requests an interim order to have the employment expire before the final decision on the dispute must present facts and reasons that make it *quite apparent* that the dismissal was justified. In a challenge to a summary dismissal, an employee who requests an interim order that the employment relationship shall continue despite the dismissal, until there is a final decision of the dispute, must present facts and reasons that make it *decidedly more likely* that the dismissal was unjustified than that it was justified.

Where a trade union has exercised its so-called priority right of interpretation, an employer who requests an interim decision in line with his or her position in the dispute must present facts and reasons that make it *quite apparent* that the trade union's opinion is *unfounded*.

There is no special procedure for filing requests for temporary relief. The request can be made orally at a hearing concerning the main suit, or in writing which is by far the most common. If, exceptionally, a main suit has not yet been filed, the request must of course be made in writing. Where a main suit has not yet been filed, there are also some special provisions regulating the competence of courts and questions concerning costs.

A request for temporary relief can always be denied after a hearing *ex parte* in which the opposing party did not have an opportunity to respond. In some cases a request for temporary relief cannot be granted unless the opposing party has been given the chance to reply. This is the case when a trade union has exercised its so-called priority right of interpretation under the Act on the status of trade union representatives at the workplace or the Act on the right to time off for studies, and the employer has requested an interim order.

In all other cases the normal procedure is for the respondent to be given the opportunity to give a reply to the request for temporary relief before it is granted. Even in these cases, however, such a request may be granted immediately after an *ex parte* procedure, if the petitioner presents facts and reasons showing that there is "danger in delay". When the respondent subsequently gives an answer, such a temporary order is reviewed and might be changed. In labour disputes it is very unusual in practice for a request for temporary relief to be granted immediately after an *ex parte* procedure. Normally it would be done only in rare cases where the request concerns sequestration of property.

With regard to procedure, it should be mentioned that requests for temporary relief in individual labour disputes are, in the overwhelming majority of cases, decided upon without an oral hearing before the court. Thus, the decision is normally founded only on the written material presented by the parties.

When the Labour Court is sitting as a court of first (and last) instance, a request for sequestration of property is normally heard by the chairperson (the judge) to which the case has been assigned. Other requests for temporary relief cannot be heard by the chairperson alone. They are normally heard by the Labour Court composed of three members (chairperson, one representative of the employers and one representative of the employees). In rare individual cases of great importance, such requests are sometimes heard by the Labour Court comprising seven members (chairperson, vice-chairperson, one member who

is not a representative of any side, two representatives of the employers and two representatives of the employees).

Normally a request for temporary relief is heard and decided upon within one week of the filing of the petition. The time is extended only if absolutely necessary or upon consent of the parties. Depending on the need for a quick decision, the request may sometimes be heard and decided upon within less than a week. For instance a request for sequestration of property can sometimes be granted temporarily the same day it was filed. In other cases, hearing and deciding a request for temporary relief within less than one week normally requires, for practical reasons, summoning the parties to an oral hearing.

The time that elapses between a ruling on temporary relief and final disposition of the case varies widely, depending on the circumstances. It should be mentioned that where it is appropriate and the parties consent, the Labour Court sometimes hears a case very quickly to reach a final judgement instead of rendering an interim decision.

Enforcement

Decisions regarding sequestration of property are enforced by the executive authority in accordance with general rules for the execution of court judgements. Unauthorized disposition of property that is under sequestration constitutes a criminal offence. Various injunctions may be combined with a fine imposed to penalize non-compliance. This method is, however, very seldom used in individual labour disputes. By tradition, due in part to the position and strength of the Swedish labour market organizations (social partners) and the position of the Labour Court in labour relations, orders and interim decisions are normally complied with even in the absence of "threats" as to enforcement measures.

In many cases, injunctions, orders or interim decisions issued by the Labour Court cannot be enforced *ex officio*. But in such cases non-compliance with the court's decision will often mean that the party is also acting contrary to substantive provisions in an Act or a collective agreement, which leads to an obligation to pay damages to the opposing party or to other sanctions of a private law nature. In such cases the Labour Court generally regards non-compliance with an interim decision as an aggravating circumstance. It should be noted, however, that when determining the amount of damages to be paid, the court cannot fix an amount higher than that requested by the party entitled to receive them.

Appeal

There is an appeal of right on decisions regarding temporary relief issued by ordinary courts. The appeal must be filed within a short time after the decision. The opposing party's position is normally heard in writing in the appeal. The decision of the ordinary court cannot be altered without hearing an opposing party whose right would be affected thereby. However, if the ordinary court has denied a request for temporary relief, the Labour Court may grant it immediately on a provisional basis. The same applies, *mutatis mutandis*, if the ordinary court has granted a request for temporary relief. In practice, such provisional decisions are extremely rare.

Appeals are almost always heard by the Labour Court without an oral hearing. The Labour Court will normally be composed of the chairperson sitting with one representative from the employer side and one representative from the employee side. An appeal cannot be heard by the chairperson alone. The Labour Court normally decides on the appeal within seven to ten days from the day it was filed in the Labour Court.

In principle, on appeal the considerations are the same as when the Labour Court is sitting as a court of first instance, since the right of appeal is not limited to certain questions or aspects of the case. Normally requests for temporary relief are brought forward at an early stage of the proceedings in the ordinary court, so the state of oral evidence is usually not better for the ordinary court than for the Labour Court sitting as the appellate court.

Experiences with temporary relief

One important experience is that requests for temporary relief in more complicated cases, since these requests must be heard very quickly, can have a very disturbing effect on the court's normal work flow. The Swedish Labour Court has found that it is often better to try getting the consent of the parties to have an early full hearing of the case so that a final decision may be reached.

The court has esteemed it important to exercise great restraint when parties wish to submit oral evidence to support a request for an interim decision. The hearing of such a request must not, even if it is heard in an oral hearing, turn into something like a final hearing of the case unless the parties have so agreed.

It cannot be said that there has been any misuse of different kinds of temporary relief in Sweden. It is, however, a problem that there are so many appeals from interim rulings made by the ordinary courts in cases concerning dismissal. One explanation for this could be that the Labour Court, unlike the ordinary courts, is a specialized court. It is, of course, not always desirable for the Labour Court to have altered an interim decision by an ordinary court before the ordinary court has had a chance to hear the case and reach its final decision.

Yugoslavia (Slovenia)

Janez Novak, Judge, Supreme Labour Court of Slovenia (Yugoslavia)*

1. Introduction

The following legal rules are relevant to the granting of temporary relief under the law in force for the Republic of Slovenia: the Associated Labour Courts Act (*Official Gazette of the SFRY*, No. 24/74, 38/84, hereafter "ALCA"), the Civil Procedure Act (*Official Gazette of the SFRY*, No. 4/77 to 27/90, hereafter "CPA") and the Execution Procedure Act (*Official Gazette of the SFRY*, No. 20/78 to 27/90, hereafter "EPA").

Temporary relief is referred to in the ALCA as "temporary measure" or "interim measures" and in the CPA and the EPA as "temporary decrees". For temporary relief, section 30 of the ALCA applies in the first instance. The CPA and EPA may be applied if they correspond to the nature of the labour relations (disputes). The CPA regulates procedure relating to temporary relief (under sections 278 and 312 prior to and during the main hearing; under section 435 in labour disputes; and under section 442 in disputes over possession). The EPA regulates temporary relief in relation to reinstatement of the employee in the labour relationship (sections 229 to 232), temporary decrees to guarantee monetary and non-monetary claims (sections 262 to 274) and security (sections 269 to 274).

Section 30 of the ALCA lays down:

- the conditions for granting temporary relief at the time of filing a motion or thereafter upon the request of the participants or at the initiative of the court (paragraph 1);
- the right of the social attorney of self-management to propose, before the labour dispute occurs, one or more types of temporary relief to prevent or to divert arbitrary action (paragraph 2);
- the deadline fixed by the court in which the social attorney of self-management must file the motion (paragraph 3);
- the revocation of temporary relief if the social attorney of self-management does not file the motion within the period fixed (paragraph 4);

* This manuscript was completed on 21 June 1991. For a general description of Labour Court jurisdiction, see J. Novak: "Country paper: Yugoslavia (Slovenia)", in W. Blenk (ed.): *European labour courts: Industrial action and procedural aspects* (Geneva, ILO, Labour-Management Relations Series No. 77, 1993), Part I, pp. 59-60.

- the principle that an appeal against the decision ordering temporary relief does not stay execution of the decision (paragraph 5).

The Labour Court grants temporary relief by issuing orders (as opposed to judgements). Disputes connected with the temporary relief are handled on an expedited basis.

2. Jurisdiction and legal rights

Labour courts are competent to grant temporary relief. The legislation regulates the following types of temporary relief (temporary measures, temporary decrees):

- reinstatement of the employee in the employment relationship pending final resolution of the dispute;
- the payment of the employee's remuneration pending the final resolution of the dispute (EPA, section 268);
- bail (EPA, section 269 et seq.) instead of temporary relief;
- the penalty imposed on the organization (enterprise) or employer if the employee is not reinstated to his or her job or to the previous workplace (EPA, section 229 et seq.).

The Labour Court can grant temporary relief if the general conditions applicable to labour dispute cases and the special conditions for special group claims are met. The conditions concern both substantive and procedural aspects of law.

The general substantive law conditions are that temporary relief is necessary to:

- prevent or to divert arbitrary action with the intention of preventing serious violations of employees' rights (ALCA, section 30(1) and (2)); or
- prevent a violent act or irreparable harm (CPA, section 435).

In monetary claims the creditor (i.e. an employee as well as an employer) must furnish satisfactory proof of the existence of the claim and of the risk that recovery of the claim could be prevented or considerably hindered by the debtor (EPA, section 265(1)).

If the employee demands temporary relief in the form of payment of remuneration it must be established that the compensation is necessary for the survival of the employee and of his or her legal dependants. The court must hear both parties and weigh the documentary evidence before determining whether the circumstances laid down by law have been met.

3. Procedure

The special features of the procedural rules connected with temporary relief are the following:

- the motion for temporary relief must be filed at the same time as the main matter or within a period fixed by the court (ACLA, section 30(1) and (3));
- the court is empowered to decide on temporary relief on its own initiative;

- the court must take a decision immediately;
- before rendering a decision the court must, as a matter of principle, hear the parties;
- the court of first instance may decide that an appeal against the decision granting temporary relief will not stay its execution;
- the court sits in a panel of three judges (the court of first instance) or five judges (the court of second instance).

In the main dispute the Labour Court may decide without an oral hearing (i.e. without the parties being present and on the basis of the documents and claims they have presented) if it supposes that an oral hearing is not possible or if the participants have waived an oral hearing. Otherwise, an oral hearing of parties is mandatory, since a trial *ex parte* is not permitted.

The panel taking the decision is comprised of the chairperson of the panel, who is a professional judge, and two lay judges. The court takes its decision at the first hearing fixed for deciding on temporary relief. Matters connected with temporary relief are handled on an urgent basis. Final judgements of the Labour Courts, including any decisions on temporary relief, are executed by the ordinary courts pursuant to regulations issued under the EPA.

4. Appeal

A special appeal against the decision of the temporary relief may be heard by the court of second instance. Immediately after an appeal is filed, the court of first instance must produce the file for delivery to the court of second instance. The court of second instance, sitting in a five-judge panel, must take its decision as soon as possible. The appellate court assesses whether the procedural conditions for a temporary relief exist and whether the party has satisfactorily proved the existence of circumstances required by law.

Yugoslav legislation does not make a distinction between disputes of a legal nature (rights disputes) and disputes of an economic nature (interest disputes). This applies to temporary relief too. In civil law the plaintiff can plead that he or she has a certain right or that he or she entered into a certain legal relationship. This is the so-called dispute about the grounds of the claim, in essence a dispute about the underlying right. The decision of the court in such a case is declaratory. The plaintiff can also file an executory action, which is a dispute about the extent of the right. The court delivers an executory judgement in such cases.

5. Experience and lessons concerning temporary relief

In practice, claimants do not apply for temporary relief very frequently. The courts of first instance often do not take into consideration that the decision on temporary relief is an urgent matter and that it must be taken prior to decision on the main dispute. There have been no recent changes in the legislation, regulations, court decisions or practice on this

question. The essential effect of temporary relief against dismissal is that while relief is granted the employee's livelihood is guaranteed. Temporary relief does not affect out-of-court settlement of a case. The EPA does not provide for an order attachment on an employer's funds or property, but it does permit the following orders:

- prohibition of the debtor's disposal of movable and real property;
- encumbrance or alienation of movable or real property;
- prohibition of changes in things that are the objects of the claim (EPA, sections 266 to 268).

Through such measures the court forces the debtor to pay the main claim.

If an employer does not carry out the decision of the court (e.g. to reinstate the employee in the employment relationship), the court may, acting on a motion by the employee, impose a fine to force the employer to execute the final and binding decision.

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