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NATIONAL REPORTS

Topic 2

Collective Agreements in Case of Transfer of Undertaking

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and

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Belgium

National reporter: Judge Koen Mestdagh, member of the Labour Chamber of the Court of Cassation, Belgium

I. PRELIMINARY QUESTIONS

1. What degree of organisation (unions and employers' associations resp) do you have nationwide?

Trade unions in Belgium (cfr. Questionnaire 1, XXth meeting in Copenhagen)

There are three main trade unions in Belgium: ACV/CSC, ABVV/FGTB and ACLVB. These organizations defend the employee interests at the national inter-professional level. They treat the issues of general interest. These main unions have different ideological backgrounds. The first is akin to Christian social doctrine, the second to democratic socialism and the third to political liberalism.

The ACV/CSC and ABVV/FGTB reportedly both have more than 1.500.000 members. The ACLVB has about 275.000 members.

The ACV/CSC and ABVV/FGTB both have a two pillar structure. They are so called supra-organizations to which on the one hand sectional unions and on the other hand regional unions adhere.

The sectional unions are nationwide organized and group workers per sector of economic activity. Belgium has no tradition of professional unions. There are for instance no unions for cleaning personnel, ... Cleaning personnel in a bakery is member of a different union than cleaning personnel in the car industry. The sectional unions have a separate organisational structure, and they exclusively defend the employee interests within their sector of economic activity.

The regional unions group all the workers of a certain geographic entity. They assure the inter-professional activity at the regional level. They are to a large extent administrative bodies that take care of union membership, legal assistance, promotion, *etc.*

The organisation of ACLVB is more centralised. Workers become directly member of the ACLVB itself.

Legal representativeness and Belgian trade unions

The Belgian Constitution recognises the freedom of association. Thus anyone can form new labour unions exercising their freedom of association at any time.

However, the Belgian legislator has given some legal privileges to the employee organisations that are declared legally representative.

In the past, the criteria of legal representativeness gave rise to some legal issues, because in the end it was the government that determined which unions were representative, since the 29 May 1952 Statute instituting the National Labour Council (NLC) did not indicate the legal criteria to become member of the NLC, whereas other Acts referred *inter alia* to membership of the NLC as a criterion for legal representativeness.

However, since 1 January 2010, criteria for legal representativeness have been written down in the 1952 Statute instituting the National Labour Council. For the application of the 1952 Statute instituting the National Labour Council, the unions that meet the following criteria are deemed to be most representative (art. 2, § 4):

- operate nationwide and at the inter-professional level;
- represent the absolute majority of sectors of activity and worker categories in the public and the private sector, on condition that the majority of employees is represented;
- have on average at least 125.000 paying members in the four years preceding nomination for the NLC, including the members of associated organizations;
- aim at the defence of the interests of employees.

Following the modification of the 1952 Statute instituting the National Labour Council, other legal acts that determine criteria for legal representativeness of unions have also been modified. They currently provide that the following unions are representative:

- the unions that exist nationwide and are represented in the NLC and the Central Economic Council (CEC);
- the unions that are associated to or are a member of these unions.

Only the three aforementioned trade unions, and the unions that adhere to them, are declared legally representative. This is a stabilising factor in the collective labour relations between employers and employees.

Legal representativeness entails, *inter alia*, the following privileges:

- the collective agreements the representative unions conclude, have binding force in accordance with the provisions of the CLA-Statute;
- membership of joint industrial committees;
- the right to start court proceedings to safeguard the rights that workers derive from collective agreements (art. 4 of the aforementioned 5 December 1968 Act), or from certain statutes (e.g. discrimination law, art. 35, 2°, of the 10 May 2007 Act on the combating of discrimination between man and women, art. 32, 2° of the 10 May 2007 Act on fighting some forms of discrimination);
- the right to register candidates for the elections of the enterprise council and the committee on the prevention and protection at work;
- the right to represent workers in court proceedings.

Employers' associations

There are 6 employers' associations that are recognised as "representative" and represent the employers in the NLC:

- the Federation of enterprises in Belgium (FEB);
- Union des Classes Moyennes (UCM);
- Association of Independent Entrepreneurs (Unizo);
- Association of social-profit undertakings (Unisoc);
- the Farmers Association (Boerenbond);
- Fédération Wallonne de l'Agriculture (FWA).

FEB is the only multi-sector organisation, representing companies in Belgium's three regions. It represents more than 50.000 companies, accounting for 75 % of employment in the private sector.

Unizo represents mainly small and middle large companies in Flanders and Brussels (N). Including independent entrepreneurs and the liberal professions, it has about 85.000 members. UCM does the same in Wallonie and Brussels (F).

Unisoc is the nationwide representative employer's association of all social-profit sectors such as hospitals, child care services, geriatric care services, etc..

Boerenbond represents employers in the agricultural sector in Flanders and the German speaking region and FWA does the same in Wallonie, but their members are mainly independent farmers.

2. How do you define „collective agreement“ in your system? When and how does it work?

According to article 5 of the 5 December 1968 Statute on Collective Labour Agreements and Joint Industrial Committees, hereafter CLA-Statute, a collective labour agreement (CLA) is an agreement concluded between one or more employee organisations and one or more

employers' organisations or employers, that establishes the individual and collective relations between employers and employees in undertakings or economic sectors, and that establishes the rights and obligations of the contracting parties.

Thus in principle any representative employee organisation, be it a main organisation or a sectional organisation, can conclude collective labour agreements with employers or employer organisations.

However, the Belgian legislator has also instituted the National Labour Council (NLC) and joint industrial committees or sub-committees (JIC), and developed a certain hierarchy between collective labour agreements concluded within those committees and outside the committees.

To understand this, one needs to comprehend the functioning of the NLC and the JIC's on the one hand, and the binding force of a CLA on the other hand.

- ♦ The functioning of the NLC and the JIC – Only the main trade unions, not the sectional member organisations are a member of the NLC. The NLC has various competences. It can give the legislator advice on general social matters, it is competent to settle disputes on the competence of the JIC's, it can function as a mediator in collective labour disputes, and it is competent to conclude CLA's.

The JIC's are instituted by Royal Decree. They are competent for certain sectors of economic activity or for certain enterprises (article 35 CLA-Statute). Their competence includes concluding collective labour agreements, prevent or solve disputes between employers and employees, give advice to the Government, the NLC, the CEC on matters belonging to their competence and any other task the law assigns to them (article 38 CLA-Statute).

It is thereby important to realize that the binding force that is attached to collective labour agreements concluded within the JIC's, only holds if all organisations that are member of the JIC have signed the agreement (article 24 CLA-Statute). The same used to be the case for collective labour agreements concluded within the NLC. However, since 1 January 2010, there has been an exception to the traditional rule of unanimity: it is sufficient that 90% of the members that represent the employees have signed the agreement (article 24 CLA-Statute, as amended, *juncto* article 5bis NLC-Statute). This exception to the unanimity rule was written down in the NLC-Statute at the time when employers organisations that represent non-commercial employers (Unisoc) became full member of the NLC (before 1 January 2010 those organisations were associated members with limited rights). The modification of the unanimity rule was motivated by the necessity to prevent a potential blocking of the regulatory power of the NLC by a small minority, since this would seriously undermine the socio-economic development of the country.

- ♦ The binding force of collective labour agreements – It follows from the aforementioned legal definition of the CLA that there are two types of provisions in CLA's. First there are the so called *obligatory provisions*, *i.e.* the provisions that determine the rights and obligations of the contracting parties to the CLA. These can be express

provisions (such as the obligation to cooperate in the creation of a specific social institution), or implied terms. It is generally accepted in Belgium that there are at least two types of implied obligations for the contracting parties: a relative peacekeeping duty, and a duty to exercise influence. The relative peacekeeping duty essentially means that the parties can not undertake actions to modify the content of the CLA during the validity of the CLA. The duty to exercise influence obliges the contracting parties to use the influence they have vis-à-vis their members to convince them to respect the provisions of the CLA.

Aside from obligatory provisions, there are the normative provisions, *i.e.* the provisions that establish the individual and collective relations between employers and employees in undertakings or economic sectors. Within the normative provisions, a distinction is made between the individual normative provisions and collective normative provisions. The first are the provisions that regard the individual relation between the employer and the employee, such as the wages, function classification, working time, ... The latter are provisions that have to do with the collective labour relations at the level of the undertaking or at the sectional level, such as provisions regarding the trade union representatives at the firm level.

The normative provisions of any CLA in the sense of the CLA-Statute apply to employers bound by the CLA and all their employees, regardless of whether or not they are member of a trade union.

Employers bound by the CLA, are the employers who are either party to the agreement or have acceded to it, or are member of an employer organisation that has signed the agreement or has acceded to it (article 19 CLA-Statute). Moreover, the individual normative provisions of a CLA that has been concluded within the NLC or a JIC, are supplementary applicable to all employers that are within the jurisdiction of the NLC or the JIC (article 26 CLA-Statute). The binding force can be extended by Royal Decree, in which case all – *i.e.* the individual and the collective – normative provisions of the CLA imperatively apply to all employers within the jurisdiction of the NLC or the JIC, and all of their employees (article 31 CLA-Statute). Thus, the CLA-Statute conceives the CLA as a contract with regulatory effects.

Given this concise overview, one should be able to comprehend the meaning of the hierarchy between various CLA's embodied in article 51 of the CLA-Statute. This provision holds that the following hierarchy of norms exists between the normative provisions of various CLA's:

The CLA's that are declared universally applicable by Royal Decree, in the following order: - CLA's closed in the NLC; - CLA's closed in the JIC
CLA's that are not declared universally applicable, provided that the employer has signed the CLA, or is affiliated to an organisation that has signed it, in the following order: - CLA closed in NLC; - CLA closed in JIC; - CLA closed outside a joint body (typically at level of the undertaking)

The CLA closed in a joint body that is not declared universally applicable, when the employer, although he has not signed the CLA or is not affiliated to an organisation that has signed it, falls within the jurisdiction of the joint body in which the CLA is closed

The vast majority of CLA's are closed in a joint body, most in the JIC's. The CLA's closed in the NLC usually regard matters of general concern. For example Directive 77/187/EEC (and now Directive 2001/23) was implemented in Belgium by the CLA n° 32*bis* concluded in the NLC.

Since the NLC and the JIC's meet on a regular basis, there is a constant flow of CLA's being concluded. CLA's that are declared universally applicable by Royal Decree have to be published in the State Gazette. Thus, nearly every day several CLA's are published in the State Gazette.

CLA's closed outside a joint body, at the level of the undertaking, mainly are concluded when the employer is planning a restructuring, which usually means collective dismissal. Sometimes an employer needs to conclude a CLA to be able to benefit from a measure decided by the government, e.g. a reduction of social security contributions.

3. Who concludes collective agreements?

CLA's are on every level concluded by representative trade unions. Employees' representatives – other than unions – can't conclude CLA's (they can negotiate a CLA, but to be valid it has to be signed by the secretary of their regional or sectional union).

On the side of the employers, on a national, regional or sectional level, CLA's are concluded by employers' associations and, on a company or plant level, by an individual employer.

4. Is the state involved in the process of collective bargaining?

- by mandatory regulations as to the contents of collective agreements

The CLA-Statute contains a set of rules concerning the formal content of CLA's :

- a CLA is mandatory concluded in writing (on pain of nullity -article 13), in principle both in Dutch and in French;
- it has to be signed by the persons who conclude the CLA on behalf of the unions/employer's associations (article 14);
- a CLA is concluded for a fixed time, an indefinite period or for a certain time with renewal clause; unless agreed otherwise, each party can unilaterally end the CLA for an indefinite period or for a certain time with renewal clause; partial withdrawal is only possible if expressly stipulated in the CLA; termination shall be made, on pain of nullity, in writing; (article 15)
- the CLA has to mention (article 16):
the name of the concluding associations;

the name of the joint body in which the agreement is concluded;
the identity of the persons who conclude it on behalf of the associations;
unless valid for every employer and employee within the competence of a JIC, the persons, the branch or the undertakings and the region the agreement is valid for;
the period of validity of a CLA concluded for a fixed time or the modalities of termination of a CLA for an indefinite period or for a certain time with renewal clause;
the date of conclusion and the date when the CLA comes into force;
the signature of the persons who according to article 14 are competent to conclude the CLA;
the registration number of the undertaking if the CLA is concluded by an individual employer.

- by mandatory registration and/or concession of unions or associations

The state is first of all involved by limiting the actors involved in collective bargaining through the notion of legal representativeness (see preliminary question 1).

According to article 18 of the CLA-Statute, CLA's must be deposited at the registry of the Ministry of Work. Deposition is refused if the aforementioned requirements of the articles 13 to 16 of the CLA-Statute are not fulfilled. Need also to be deposited at the registry: the declaration of acceding to a CLA by an organisation or an individual employer and the notification of the termination of a CLA concluded for an indefinite period or for a certain time with renewal clause.

- by initiating collective agreements

No

- by providing a system of or body for collective conciliation

The state has created joint bodies, the NLC and the JIC's, to facilitate collective bargaining (see preliminary question 2).

- by having the authority to declare a collective agreement universally applicable?

Yes, on demand of a joint body or the associations represented in it, a CLA concluded within the NLC or the JIC's can be declared universally applicable by Royal Decree (article 28 CLA-Statue). If the Minister of Work esteems that he can't propose to declare a CLA universally applicable, he announces his motifs for it to the joint body (article 29 CLA-Statute).

By declaring a CLA universally applicable, the binding force of a CLA is extended to all employers within the jurisdiction of the NLC or the JIC, and all of their employees, so that all individual and collective normative provisions imperatively apply to them (article 31 CLA-Statute). Moreover, an employer who doesn't comply with the normative provisions of a CLA declared universally applicable commits a criminal offense.

5. What is the relationship between collective agreement and individual employment contract?

According to article 11 of the CLA-Statute, the provisions of an individual employment contract are null and void if they are contrary to the provisions of a CLA that has binding force for the concerned employers and employees. On basis of a rule of Civil Law (article 1135 Civil Code), the individual normative provisions of a CLA that is binding for the employer, are automatically incorporated in the individual employment contract of his employees.

However, provisions of an individual employment contract that are more beneficial to the employee are rarely contrary to the provisions of a CLA since CLA's mostly set minimum standards and not fixed norms or maximum standards. E.g. remuneration rates usually are minimum standards. Thus the remuneration agreed in the contract of employment will not be substituted by the less beneficial rate agreed in the CLA.

The CLA-Statute doesn't regulate how to determine whether an individual employment contract is more beneficial to the employee than a CLA. Since the issues covered by an individual agreement usually are covered by several CLA's, it is practically impossible to compare the contract as a whole with the whole of the individual normative provisions of the CLA's the employer is bound by.

In my experience the employee will try to limit the comparison to a single issue, e.g. the remuneration rate, while the employer will claim that other benefits also should be taken into account. Unless the issues are quite similar, e.g. remuneration rate and benefits that are considered to be a form of remuneration, the judge will refuse to extend the comparison to other issues than the one at hand.

6. Can (or must) in your system a collective agreement (or a part thereof) be made applicable in an employment relationship by a clause of reference in the contract of employment?

No, the individual normative provisions of a CLA are automatically incorporated in the employment relationship. A clause of reference is completely superfluous. I never came across to such a clause.

II. TRANSFER OF UNDERTAKING

1. In case of a transfer: Do conditions of work as ruled by a collective agreement transfer?

Yes.

2. How do conditions of work as ruled by a collective agreement transfer?

Automatically. According to article 20 CLA-Statute, in case of a transfer of an undertaking or a part of an undertaking, the transferee has to honour the collective agreement the transferor was bound by, until the validity of that agreement ends.

If an employer leaves an employers' association, he will stay bound by the CLA's that were signed by the association he left until they are changed in such a way that the resulting obligations have substantially changed (article 21 CLA-Statute). Also, if an employers' association is dissolved, the individual normative provisions of a CLA signed by that association remain applicable to its members until the CLA is changed in such a way that the resulting obligations have substantially changed (article 22 CLA-Statute).

Unless stipulated otherwise in a collective agreement, the terms of an individual employment contract that were implicitly changed (substituted) by the terms of this CLA, stay further unchanged when the validity of a collective agreement ends (article 23 CLA-Statute).

- Does it make any difference whether or not the collective agreement applicable with the transferor has normative effect? Does it retain normative effect if transferee is not bound by (the same or any other) collective agreement?

A distinction between applicable CLA's with and applicable CLA's without normative effect does not exist in Belgium. If the transferor is bound by a CLA, the transferee will stay bound by that CLA in his relation with the transferred employees, even if in the relation with his own employees he is bound by another CLA.

- How does a collective agreement transfer if the basis of validity is the contract of employment?

Not applicable (see preliminary question 6)

- How does a collective agreement transfer – statically (i.e. as it stands at the time of the transfer) or dynamically (i.e. in the current version)?

As it stands at the time of the transfer.

- How – if at all - can the transferee change the terms of a collective agreement for the transferred employee?
 - Can he enter an employers' association and then apply the terms of that collective agreement?

Unless the new CLA would be more beneficial to the transferred employees, no.

- Does it depend on whether or not the employee is a member of the union which concluded that collective agreement?

No

- Can the terms of the transferred collective agreement be lawfully altered by amending the contract of employment? Immediately after the transfer or after a certain period of time?

Not as long as the validity of the transferred collective agreement hasn't expired. After that, when the terms of the CLA stay incorporated in the contract of employment according to article 23 CLA-Statute, it seems that nothing prevents to alter these terms by amending the contract of employment (to my knowledge there is no case law on this particular topic).

3. How would you solve this case:

Alemo (A) works as a kitchen helper in the restaurant of a department store. He is a member of the Trade & Services Union (TSU), the employer is a member of the association of commercial employers (ACE). The contract of employment provides, "During your employment with [the store], your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the [TSU and ACE] ...".

By virtue of the current version of the collective agreement A receives 2,500 € monthly wages. On January 1st 2014 the kitchen is transferred to Parkwood Caterers (P), a catering sector undertaking. Parkwood is member of the Caterers' association (CAT). Their collective agreement, concluded with the Union of Food and Restaurant Employees (UFO), provides monthly wages of 1,300 € for kitchen helpers.

a) P pays A 1,300 €, A demands 2,500 €. Who is right?

A

b) On April 1st 2014 the collective agreement for the trade and service employees is amended. The monthly wages for kitchen helpers is increased to 2,600 €. The caterers' collective agreement remains unchanged. Can A demand to be paid 2,600 € henceforth by virtue of the clause of reference in the contract of employment)?

No, he will continue to have to be paid 2,500 €.

c) Does it make any difference to this case if the department store is not a member ACE but applies the collective agreements for the trade and service employees because it has concluded a "Collective Agreement of Acknowledgement" with TSU stating that the employer will apply the terms of the collective agreements for the trade and service employees in its current version?

No

4. Has the ECJ's ruling re Alemo Herron any relevance in your country? Will you have to change your jurisdiction?

No

National reporter: Jytte Scharling

I. PRELIMINARY QUESTIONS

1. How do you define „collective agreement“ in your system? When and how does it work?

A collective agreement is an agreement on the terms of employment and/or the workplace conditions formed by a union or a plurality of employees on the one side and an employer's association or an individual employer on the other side.

An employer which is (1) a party to the collective agreement, or (2) a member of the employers' association which is a party to the collective agreement, is bound by its terms. An employer's withdrawal from the employers' association will not release the employer from the applicability of the collective agreement in force at the time of the withdrawal.

The scope of a collective agreement is generally determined by the type of work performed, e.g. plastering and painting work. If the employer is subject to a collective agreement, the terms of the agreement will almost always apply to all employees undertaking this type of work, irrespective of whether they are members of the union that is a party to the collective agreement.

2. What degree of organisation (unions and employers' associations resp) do you have nationwide?

Unions: Close to 80 % of the Danish employees are members of a union.

Employers' associations: 70 % of the Danish employees (privately or publicly employed) are employed by a member of an employers' association. Because some employers form or accede to collective agreements on an individual basis, the percentage of employers employed by an employer that is subject to a collective agreement exceeds 80 %.

3. Who concludes collective agreements? Is it

- Unions and employers' associations
 - on a national level?
 - on a regional level?
 - on a company level?
 - on a plant level?
 -
- Unions and individual employers
 - on a national level?
 - on a regional level?
 - on a company level?
 - on a plant level?
- Employees' representatives – other than unions – (e.g. works councils) and individual employer?

Please summarise national peculiarities if necessary to understand the system in a European context.

The majority of collective agreements are concluded between unions and employers' associations on a national level.

Individual employers which are not members of an employers' association may accede to a collective agreement formed between a union and an employers' association, or form a separate collective agreement with a union or a plurality of its employees.

4. Is the state involved in the process of collective bargaining?
- by mandatory regulations as to the contents of collective agreements
 - by mandatory registration and/or concession of unions or associations
 - by initiating collective agreements
 - by providing a system of or body for collective conciliation
 - if so, please summarise how it works, whether it is mandatory and if its recommendations are in any way binding
 - by having the authority to declare a collective agreement universally applicable?

There is no mandatory regulation as to the contents of collective agreements. Such agreements are, however, secondary to mandatory law which cannot be derogated by collective agreement unless this is specifically stipulated in the act.

Unions and associations are not required to register for the purpose of having authority to negotiate a collective agreement.

The unions and associations themselves initiate collective agreements, and the state intervenes only if the unions and associations are unable to agree on collective agreements. In this event, the intervention will often have the form of declaring a collective agreement previously suggested to the parties by a mediator applicable between the parties.

The Danish Labour Court is regulated by law. It is primarily funded by the state. Only a fraction of the Labour Court's budget is covered by costs ordered in its decisions (the losing party is generally ordered to pay a symbolic sum of approximately EUR 270 to the Labour Court).

5. What is the relationship between collective agreement and individual employment contract?

- Do collective regulations derogate/substitute individual agreements
 - always, without exception?
 - never? Do individual agreements always take precedence over c.a.?
 - in principle, unless the individual agreement is more beneficial to the employee? If so, how do you define "more beneficial"? Do you compare the whole contract or just that part of the contract that deals with the issue at hand (e.g. remuneration on the one hand, employment protection on the other hand)?

Collective agreements do not substitute individual agreements. Employees are entitled to a separate written statement of his/her employment terms. However, if the employee is covered by a collective agreement, it is mandatory to include a reference to the collective agreement in the written statement of employment terms. The individual employment terms will (on an “issue at hand” / “term by term” basis) take precedence over the collective agreement if the individual term in question is more beneficial to the employee, e.g. if the individual term provide for higher salary or more vacation days.

6. Can (or must) in your system a collective agreement (or a part thereof) be made applicable in an employment relationship by a clause of reference in the contract of employment?

If a collective agreement is applicable, then it is mandatory to include a reference to the collective agreement in the written statement of employment terms (which is often in the form of an employment contract).

- If such a clause of reference is not conditional but permissible: How often are collective agreements applied by virtue of congruent membership alone and how often by virtue of a clause of reference in the contract of employment?

N/A.

- If collective agreements have normative effect in your system: What is the legal situation if both parties of a contract of employment are members of the respective collective partners – which renders the c.a. normatively applicable – and refer to the same c.a. in the contract of employment?

The collective agreement will then apply to employment, subject to terms more favourable to the employee that may be agreed in the individual written statement of employment terms, ref. the answer to question 5 above.

II. TRANSFER OF UNDERTAKING

1. In case of a transfer: Do conditions of work as ruled by a collective agreement transfer? (non-EU-members)

Denmark is a member of EU and has implemented Council Directive 2001/23/EC with the Danish Transfer of Undertakings Act.

2. How do conditions of work as ruled by a collective agreement transfer?

- Does it make any difference whether or not the collective agreement applicable with the transferor has normative effect? Does it retain normative effect if transferee is not bound by (the same or any other) collective agreement?

A Danish collective agreement has normative effect. It retains its normative effect for the duration of its applicability also if the transferee is not bound by (the same or any other)

collective agreement. This is because the individual employees continue to enjoy the entitlements awarded by the collective agreement.

- How does a collective agreement transfer if the basis of validity is the contract of employment?

As described above.

- How does a collective agreement transfer – statically (i.e. as it stands at the time of the transfer) or dynamically (i.e. in the current version)?

As a starting point, the collective agreement will transfer statically because the transfer is a transfer of the employees' individual rights according to the collective agreement at the time of transfer.

However, if the transferee do not within 3 weeks after the transfer inform the union that the transferee do not wish to accede to the collective agreement, the transferee will be become a party to the collective agreement. In most cases, continuity clauses applicable in or to the collective agreement will then result in the transferee becoming bound by the current version of the collective agreement at any point in time.

- How – if at all - can the transferee change the terms of a collective agreement for the transferred employee?
 - Can he enter an employers' association and then apply the terms of that collective agreement?
 - No, not unless this is agreed between the transferee and the transferred employees that the terms of that other collective agreement will apply.
 - Does it depend on whether or not the employee is a member of the union which concluded that collective agreement?
No.
 - Can the terms of the transferred collective agreement be lawfully altered by amending the contract of employment? Immediately after the transfer or after a certain period of time?
Yes, provided that the transferee has not become a party to the collective agreement and provided that both the transferee and the employee(s) agree.

3. How would you solve this case:

Alemo (A) works as a kitchen helper in the restaurant of a department store. He is a member of the Trade & Services Union (TSU), the employer is a member of the association of commercial employers (ACE). The contract of employment provides, "During your employment with [the store], your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the [TSU and ACE] ...".

By virtue of the current version of the collective agreement A receives 2,500 € monthly wages. On January 1st 2014 the kitchen is transferred to Parkwood Caterers (P), a catering sector undertaking. Parkwood is member of the Caterers' association (CAT). Their collective

agreement, concluded with the Union of Food and Restaurant Employees (UFO), provides monthly wages of 1,300 € for kitchen helpers.

a) P pays A 1,300 €, A demands 2,500 €. Who is right?

A is right.

b) On April 1st 2014 the collective agreement for the trade and service employees is amended. The monthly wages for kitchen helpers is increased to 2,600 €. The caterers's collective agreement remains unchanged. Can A demand to be paid 2,600 € henceforth by virtue of the clause of reference in the contract of employment)?

No, provided that P in due time has informed TSU that P does not wish to become a party to the TSU/ACE collective agreement.

c) Does it make any difference to this case if the department store is not a member ACE but applies the collective agreements for the trade and service employees because it has concluded a "Collective Agreement of Acknowledgement" with TSU stating that the employer will apply the terms of the collective agreements for the trade and service employees in its current version?

No.

4. Has the ECJ's ruling re Alema Herron any relevance in your country? Will you have to change your jurisdiction?

The ruling in Alema Herron does not have any immediate relevance for the Danish regulatory framework and is not expected to result in any changes.

Finland

National reporter: Judge Jorma Saloheimo, President of the Labour Court

1. PRELIMINARY

1. How do you define „collective agreement“ in your system? When and how does it work?

The legal definition of a collective agreement is in Sec. 1 of the Collective Agreements Act (1946). Under the provision, a collective agreement is an agreement regulating conditions to be observed in employment contracts or otherwise in employment relations, concluded by one or more employers or employers' associations on one side, and one or more trade unions on the other side.

There are three levels of collective bargaining in Finland: the level of central agreements, the level of agreements concluded by nationwide industrial federations, and the level of company agreements. The most important is the level of nationwide collective agreements. There are ca. 200 such agreements in force. They are normally concluded for a term of 1 to 3 years.

2. What degree of organisation (unions and employers' associations resp) do you have nationwide?

According to the latest statistics, the union density is about 67 per cent of all wage earners. On the employer side the degree of organisation is at the same level. In the private sector some 85 per cent of the work force is covered by normally binding collective agreements or agreements declared as generally binding.

3. Who concludes collective agreements? Is it

- Unions and employers' associations
 - on a national level? x
 - on a regional level?
 - on a company level? x
 - on a plant level?
- Unions and individual employers
 - on a national level?
 - on a regional level?
 - on a company level? x
 - on a plant level?
- Employees' representatives – other than unions – (e.g. works councils) and individual employer?

Local agreements of a collective nature can be concluded by the shop steward on the employee side and an individual employer, if so authorized in a collective agreement made at a higher level. In this case the local agreement becomes legally part of the authorizing agreement.

Please summarise national peculiarities if necessary to understand the system in a European context.

The role of collective agreements represents what can be called the Nordic model for industrial relations. The model is based on a unified trade union movement and a high rate of unionization with a long tradition of labour regulation through collective bargaining. The governmental regulation takes place in close cooperation with trade unions and employer organizations.

4. Is the state involved in the process of collective bargaining?

- by mandatory regulations as to the contents of collective agreements - No
- by mandatory registration and/or concession of unions or associations - No
- by initiating collective agreements – No, except in the role of employer in the public sector, where the state appears as party to collective agreements.
- by providing a system of or body for collective conciliation

Yes, we have a system of Mediation in labour Disputes in place. It is in operation at a time when there is no collective agreement in force and negotiations for a new agreement are underway. A party intending to commence a strike or lock-out in this situation has to give notice to the opposite party and also to the National Conciliator Officer at least 14 days

beforehand. The conciliator shall then take measures to settle the dispute. The parties are obliged to attend the negotiations convened by the conciliator, but the system does not include a possibility to impose a binding solution on the parties. Instead, the conciliator may present a draft settlement to the parties. The Ministry of Employment and the Economy may under certain conditions defer the intended work stoppage for a fortnight, but not prohibit it.

- by having the authority to declare a collective agreement universally applicable?

Nationwide collective agreements, which are considered to be representative in the field in question, can be declared as generally binding. Such agreements must then be observed also by employers who are not organized but operate within the field of application of the agreement.

The power to make such declarations belongs to a special board. Appeals against its decisions can be made to the Labour Court. Currently there are some 160 generally binding collective agreements in force.

5. What is the relationship between collective agreement and individual employment contract?

- Do collective regulations derogate/substitute individual agreements

Yes in principle, unless the individual agreement is more beneficial to the employee. In the comparison just that part of the contract that deals with the issue at hand (e.g. remuneration on the one hand, employment protection on the other hand) is taken into account.

6. Can (or must) in your system a collective agreement (or a part thereof) be made applicable in an employment relationship by a clause of reference in the contract of employment?

- If such a clause of reference is not conditional but permissible: How often are collective agreements applied by virtue of congruent membership alone and how often by virtue of a clause of reference in the contract of employment?

Such a clause of reference seldom has independent significance. In the vast majority of cases (nearly 90 per cent) the parties are organized and are already on this basis bound by the collective agreement, or the agreement is declared as generally binding.

- If collective agreements have normative effect in your system: What is the legal situation if both parties of a contract of employment are members of the respective collective partners – which renders the c.a. normatively applicable – and refer to the same c.a. in the contract of employment?

In such a case a reference to the collective agreement applicable serves merely an informative function. On the other hand, such references are quite common in employment contracts. An incentive (albeit no obligation) to this is in Directive 91/533/EEC (Art. 2(2)i).

II. TRANSFER OF UNDERTAKING

1. In case of a transfer: Do conditions of work as ruled by a collective agreement transfer? (non-EU-members)
2. How do conditions of work as ruled by a collective agreement transfer?
 - Does it make any difference whether or not the collective agreement applicable with the transferor has normative effect? Does it retain normative effect if transferee is not bound by (the same or any other) collective agreement?

As a rule, the transferor is normatively bound by a collective agreement on one basis or the other. We can, however, imagine a case where the employer is a) not organized and b) not a party to a company-level agreement either, and c) the collective agreement concluded for the sector in question is not generally binding. In such a case the question of transferring any rights under a collective agreement would not arise – unless there is a reference to a collective agreement in the contract of employment, which is discussed below.

According to Finnish law, rights and duties under a collective agreement, binding upon the transferor, are transferred to the new employer regardless of whether he is bound by another collective agreement or any collective agreement. This effect continues until the term of the agreement comes to an end. In other words, the transferee attains the position of the old employer with the same rights and duties following from collective agreement and the Collective Agreements Act as long as the agreement is in force (Section 5 of the Act).

It is important to note that Finland has not used the option, provided for in Art. 3(3.2) of the Directive 23/2001/EC, to limit the period for observing a transferred collective agreement to one year.

- How does a collective agreement transfer if the basis of validity is the contract of employment?

The individual rights and duties of the contract parties are transferred in the same way as if the parties were bound by the collective agreement. Also the period of this effect is the same. The difference is that legal effects, which have a collective labour law nature (special remedies according to the Collective Agreements Act etc.) play no role in this kind of transfer.

- How does a collective agreement transfer – statically (i.e. as it stands at the time of the transfer) or dynamically (i.e. in the current version)?

There is no case law on the subject, but I would say that the general approach of Finnish law favours a static transfer. This does not, however, exclude changes, mainly rises of wages, which have been determined on the occasion of concluding the agreement but which are scheduled to take effect at a later stage, which may occur after a transfer of undertaking.

Otherwise it is not common for the parties to a collective agreement to amend the agreement while the agreement is currently in force. This is all the more so, if we think of the time between a transfer and the expiry of the agreement. Yet another thing is that any significant amendment would easily be interpreted as discontinuing the whole agreement and concluding a new one.

- How – if at all - can the transferee change the terms of a collective agreement for the transferred employee?
 - Can he enter an employers' association and then apply the terms of that collective agreement?
 - The transferee can, of course, enter an employers' association, but this would have no influence on his duty to observe the former collective agreement as long as it is still in effect.
 - Does it depend on whether or not the employee is a member of the union which concluded that collective agreement? – No.
 - Can the terms of the transferred collective agreement be lawfully altered by amending the contract of employment? Immediately after the transfer or after a certain period of time?

No. The duty to follow the transferred collective agreement is mandatory as long as the agreement is in effect.

3. How would you solve this case:

Alemo (A) works as a kitchen helper in the restaurant of a department store. He is a member of the Trade & Services Union (TSU), the employer is a member of the association of commercial employers (ACE). The contract of employment provides, "During your employment with [the store], your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the [TSU and ACE] ...".

By virtue of the current version of the collective agreement A receives 2,500 € monthly wages. On January 1st 2014 the kitchen is transferred to Parkwood Caterers (P), a catering sector undertaking. Parkwood is member of the Caterers' association (CAT). Their collective agreement, concluded with the Union of Food and Restaurant Employees (UFO), provides monthly wages of 1,300 € for kitchen helpers.

- a) P pays A 1,300 €, A demands 2,500 €. Who is right?

Assuming that the agreement between TSU and ACE is still in force, A is right.

- b) On April 1st 2014 the collective agreement for the trade and service employees is amended. The monthly wages for kitchen helpers is increased to 2,600 €. The caterers' collective agreement remains unchanged. Can A demand to be paid 2,600 € henceforth by virtue of the clause of reference in the contract of employment)?

First of all we would have to interpret the purpose of the clause of reference. Since both parties have been bound by the transferred collective agreement, the natural starting point is that the clause is intended to have an informative purpose only. It would be unlikely to argue that the clause was specifically designed with a view to a transfer situation, so that the clause would constitute rights which go beyond those which ensue from the ordinary rules concerning collective agreements and their application in a transfer situation. This speaks for the denial of A's demand.

Secondly, the background information given in the questionnaire on the amendment of the collective agreement is not quite clear. Are we really speaking of an amendment of an existing agreement in the middle of the agreement period? At least in the Finnish labour market it would be exceptional for the parties to agree on an extra pay rise at this stage (and in the current economic situation). But even if this were the case, A's claim would probably be rejected. Even though there is no established case law concerning such a case, the ruling of the ECJ in *Alemo-Herron* has clarified the situation so that the clause in A's contract would be given a static effect only.

The end result would be the same if the amendment made on April 1st is considered to signify, not just an amendment, but in effect the expiry of the old agreement and the conclusion of a new one (see also the circumstances in the ECJ's ruling in *Werhof* C-499/04, paragraph 11).

A's claim could be successful in only one situation. The increase in wages may have been determined in advance, already when the collective agreement was concluded. This is the normal way of scheduling increases which are meant to take effect during the course of an agreement period which lasts e.g. for two or three years (see also the case in the decision of Bundesarbeitsgericht 19.9.2007 – 4 AZR 712/06). If this is the case, also A is entitled to the increase. This would, however, not follow from the clause in his employment contract, but the regular rules concerning the transfer of a collective agreement.

- c) Does it make any difference to this case if the department store is not a member ACE but applies the collective agreements for the trade and service employees because it has concluded a "Collective Agreement of Acknowledgement" with TSU stating that the employer will apply the terms of the collective agreements for the trade and service employees in its current version?

No. Besides, such an "Agreement of Acknowledgement" would probably be regarded as a company-level collective agreement in law.

- 7. Has the ECJ's ruling re Alemo Herron any relevance in your country? Will you have to change your jurisdiction?

The ruling will be followed in Finland undoubtedly and without any particular difficulty. Its relevance may, however, be limited. Although employment contracts in Finland frequently make references to the applicable collective agreement, there is no pre-existing case law on the issue at hand. This suggests that such references are understood as having only an informative, not a constitutive meaning, and it has not occurred to anybody to present a claim such as the one in Alemo-Herron.

Although the ruling in Alemo-Herron has been criticized in European legal writing, one should keep in mind the other side of the coin, which is the equal treatment aspect. If employees, transferred to a new undertaking, are allowed to keep their better terms and conditions of work for longer than what can be considered an acceptable transition period, the other workers, performing the same work but receiving lower pay, are not treated fairly. The rule

laid down in Alemo-Herron may help even out such unjustified differences in working conditions.

Hungary

National reporters: Dr. Tünde Handó, dr. Éva Simon, Dr. Zoltán Németh, Dr. Anna Csorba, Hungary

I. PRELIMINARY QUESTIONS

1. *How do you define „collective agreement“ in your system? When and how does it work?*

Collective agreement is an agreement, which are concluded between the employees and the trade unions. These agreements regulate the network of the parties and the work contract of the employment who are situated within the scope of the collective agreement/covered by the collective agreement.

Act I of 2012 on the Labour Code (Labour Code) according to section 276. § subsection (1) collective agreement may be concluded by employers, and by employers interest groups by authorization of their members and trade unions.

Collective agreement is traditionally divided into two parts. One of them is the obligation part, which regulates the network between the parties and it regulatest the attitude of the parties in connection with the concluding of the agreement, fulfillment of the agreement, the termination of the agreement, excercising of rights, performancing of the obligations.

Normative part of the collective agreement regulates the rights and obligations arising from employment or rights related with it.

Collective agreement may be concluded by the trade union, several trade unions, federation of trade union and employer(s) or employers interest groups by authorization of their members.

2. *What degree of organisation (unions and employers' associations resp) do you have nationwide?*

The number and the members of trade unions have been decresed for the past 10 years. The ability of the representation of the trade unions has been decreasing as well. Trade unions exist, their operation is regulated by tha Labour Code, but their effect has been reduced.

The rights of the trade unions are the following:

- right to conclude collective agreement,
- information rights (e.g. request information from employers on all issues related to the
- economic interests and social welfare of employees in connection with their employment),
- right to initiate consultation,
- right to represent their members – under authorization – before the court, the relevant authority and other organs,
- right to display information connected to its activities at the employer,
- right to use the employer's premises for the purposes of interest representation activities.

- A person acting on behalf of a trade union who is not employed by the employer shall be admitted go into the employer's premises if any member of the trade union in question is employed by the employer. The person admitted to visiting the employer's premises shall abide by the provisions of the employer's internal policies.
- The employers have to withholding and transferring membership dues to the trade union.
- Right to working time reduction.
- Workers and employer may pursue their claims arising from the employment relationship or out of this Act, and trade unions and work councils may pursue their claims arising from this Act or a collective agreement or from works agreement by judicial process.
- Special protection for the elected trade union official.

Among the most significant unions we can mention the unions in the railway sector, in trade sector, in the health care sector, in the policing sector, and in education. In some sectors the right to strike is excluded (e.g. in the sector of police). In the sector of police a lot of law suites were indicated by the trade unions (e.g. claiming wage supplement), but after these suites nothing could be heard about their activity. The Supreme Court of Hungary has not decided in their case.

3. *Who concludes collective agreements?*

Trade unions and employers interest groups can conclude collective agreements on national, company level and plant level as well.

Concluding collective agreements on a regional level cannot translate in Hungary, because it is a centralist country.

Collective agreements may be concluded on national level in Hungary, but it is not dominant.

Collective agreement can be covered in a sector, sub-sector. It means, that the effect of a collective agreement shall apply to all employees who working in the same sector (collective agreement with extended scope). Such collective agreement exists in the building industry sector, in the bakery sector, in catering industry, in the turism sector, and in the electricity industry.

Collective agreements concluded by one employer or more employers are more frequent. Trade union cannot conclude collective agreement with the employers on national and regional level. This can be interpreted only on company and on plant level. According to the Labour Code 1992 work agreements could not contain issues in connection with the individual employment relationship. Because these issues could be regulated only by the collective agreements. According to the previous Labour Code (1992) the work agreement was not considered as employment regulations. The new Labour Code 2012 allows that the work agreements may contain provisions related to the collective agreements. Nevertheless such agreements may be concluded on condition that the employer is not covered by the collective agreement it has been concluded, or there is no trade union at the employer with entitlement to conclude a collective agreement. Work agreement is also divided into to parts: an obligation part and a normative part. The obligation part of the agreement regulates the network between the employer and the works council. The normative part of the works agreement may contain rights and

obligations arising out of or in connection with employment relationships with the exception of remuneration for work.

Bilaterally dispositive rules have been codified by the new Labour Code. This means, that the collective agreement may contain derogation from the Labour Code to the disadvantage of workers. The goal of this rule is to encourage the parties to conclude collective agreement. The concept behind this rule, that the trade union in bargaining position could stipulate beneficial terms and conditions for the employees in exchange for some disadvantages terms. According to the new Labour Code the main rule is the totally dispositive rules. This means that collective agreements derogations are allowed from the provisions of Part Two (Employment Relationship) and Part Three (Industrial Relations) of the Labour Code unless otherwise provided for in the Labour Code. So the collective agreement may contain derogations from the provisions of the Labour Code to the detrimental terms (disadvantage) to the workers and to the benefit of workers. Each unit of the Labour Code define which provisions are cogent provisions and relative dispositive rules.

4. Is the state involved in the process of collective bargaining?

Collective partners have to notify together the concluded collective agreement to the National Labour Office. The notification does not have constitutive force, the collective agreement comes into force without notification. The failure of notification does not any sanction. The aim of the notification is only the registration of the collective agreements (register of the collective agreement).

Since 2002 bilateral conciliation forums works, which are regulated by the law (Act number LXXIV. of 2009.). In these conciliation forums social partners consult on issues affecting the whole sector. Conciliation forums are entitled to conclude collective agreements and these forums are entitled to demand the extension of the collective agreement for the whole sector. An independent council in an administrative proceedings is entitled to decide who is entitled to participate in the conciliation forum. Against the decision of this council may be appealed to the Labour Court of Budapest.

The extension of the collective agreement is an administrative proceeding, so in this process the state is involved.

Collective agreement with extended scope and the revocation of this collective agreement shall be made public in the official Hungarian Gazette. The collective agreement entered into force after the 30. day from the publication.

5. What is the relationship between collective agreement and individual employment contract?

Employment contract may derogate from the provisions of the collective agreement regulations only to the benefit of workers. Collective agreement should not contain cogent provisions. To decide which provisions are more beneficial for the employees, we have to compare the employment contract and the collective agreement. We have to compare only that part of the contract that deals with deals with the issue at hand.

Just for the individual legal institutions as a whole rules comparable to each other. It is essential that the comparison should be performed objectively.

The connection between the c.a. with a limited and the c.a. with a broader scope:

An employer may enter into one collective agreement. A collective agreement of limited effect may derogate from one with a broader scope (on a sector or sub-sector level) –

unless otherwise provided therein – insofar as it contains more favorable regulations for the employees. It means, that a collective agreement with a broader scope is entitled to allow the derogation in the collective agreement with a limited effect. Derogations for the benefit of employees shall be adjudged by a comparative assessment of related regulations.

6. *Can (or must) in your system a collective agreement (or a part thereof) be made applicable in an employment relationship by a clause of reference in the contract of employment?*

In our country the collective agreement has got an erga omnes effect. In our system a clause of reference is not conditional but it is permissible of course.

According to the Labour Code Section 46. § subsection (1) point g): the employer shall inform the employee in writing within fifteen days from the date of commencement of the employment relationship concerning: whether a collective agreement applies to the employer.

This issue will be decided whether there is collective agreement, because the content of the collective agreement impact on relations between the parties. Therefore no membership is required in any association to be covered by the given provision. According to the Labour Code section 279. § subsection (1)-(3):

the effect of a collective agreement shall apply to any employer who:

a) is a party to the collective agreement; or

b) is a member of the employers interest group that concluded the collective agreement.

The effect of the provisions of the collective agreement governing the means of communication of the parties shall apply to the undersigning parties of the collective agreement.

The effect of the provisions of the collective agreement governing employment relationships shall apply to all the workers employed by the employer.

II. TRANSFER OF UNDERTAKING

1. *In case of a transfer: Do conditions of work as ruled by a collective agreement transfer? (non-EU-members)*

Of course.

2. *How do conditions of work as ruled by a collective agreement transfer?*

Yes, the collective agreement retains normative effect. According to the Labour Code Section 282. § subsection (1)-(2) in the case of transfer of employment upon the transfer of enterprise the receiving employer is required to maintain the working conditions specified in the collective agreement covering the employment relationship – apart from working time and rest periods –

existing at the time of transfer for a period of one year after the date of transfer. The obligation referred to in Subsection (1) shall not apply to the employer if the collective agreement expires within one year after the date of transfer, or if the employment relationship is covered by a collective agreement after the date of transfer.

According to the Act of Public Servant: if the transferor is a public employer and the transferee is a private employer, after the transfer the wage must reach the total of the allowance of salary due under the collective agreement before the transfer.

The collective agreement transfer is statically, not dynamically. So the provisions of the collective agreement are not modify after the time of the transfer.

3. How would you solve this case:

Alemo (A) works as a kitchen helper in the restaurant of a department store. He is a member of the Trade & Services Union (TSU), the employer is a member of the association of commercial employers (ACE). The contract of employment provides, "During your employment with [the store], your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the [TSU and ACE] ...".

By virtue of the current version of the collective agreement A receives 2,500 € monthly wages. On January 1st 2014 the kitchen is transferred to Parkwood Caterers (P), a catering sector undertaking. Parkwood is member of the Caterers' association (CAT). Their collective agreement, concluded with the Union of Food and Restaurant Employees (UFO), provides monthly wages of 1,300 € for kitchen helpers.

a) P pays A 1,300 €, A demands 2,500 €. Who is right?

The case is alien, strange in terms of Hungarian law, as the parties agree to a specific wage amount in the individual employment contract. Based on Section 45 of the Labour Code wages are a mandatory element of the employment contract. Accordingly, in this case as well, wages are not considered a working condition set out in a collective agreement. Instead, the question is treated as an agreement of the parties (employee and employer) set out in the individual employment contract. The Labour Code contains separate provisions in the case of a change of the employer's person for maintaining rights and obligations, and contains a separate regulation regarding the fate of the working conditions ensured in the collective agreement in the case of legal succession, as follows. According to Section 36 subsection (1) Rights and obligations arising from employment relationships, existing at the time of transfer of an economic entity (organized grouping of material or other resources) by way of a legal transaction are transferred to the transferee employer. Section 282 subsection (1) says that in the case of transfer of employment upon the transfer of enterprise the receiving employer is required to maintain the working conditions specified in the collective agreement covering the employment relationship existing at the time of transfer for a period of one year after the date of transfer. According to subsection (2) The obligation referred to in Subsection (1) shall not apply to the employer if the collective agreement expires within one year after the date of transfer, or if the employment relationship is covered by a collective agreement after the date of transfer.

Based on Hungarian law, the above case may be judged, according to Section 36 of the Labour Code, that the rights and obligations are transferred without any time limit to the receiving employer. The wage amount in this scope is to be considered a right established in the employment contract to which the employee is entitled. Thus, based on Section 36 of the Labour Code, it is to be applied without any time limit to the receiving employer. Based on this, the employee is entitled to wages in the amount of EUR 2,500.

If, instead of wages, the case would cover some working condition set out in the collective agreement, judgement should be reached based on Section 282, and the receiving employer would be required to maintain the working conditions specified in the collective agreement covering the employment relationship existing at the time of transfer for a period of one year after the date of transfer, except if the collective agreement expires within one year after the date of transfer, or if the employment relationship is covered by a collective agreement after the date of transfer.

b) On April 1st 2014 the collective agreement for the trade and service employees is amended. The monthly wages for kitchen helpers is increased to 2,600 €. The caterers's collective agreement remains unchanged. Can A demand to be paid 2,600 € henceforth by virtue of the clause of reference in the contract of employment)?

According to Section 36. Rights and obligations arising from employment relationships, existing at the time of transfer of an economic entity (organized grouping of material or other resources) by way of a legal transaction are transferred to the transferee employer. This includes all the points of the employment contract comprehensively such as the agreement on wages.

c) Does it make any difference to this case if the department store is not a member ACE but applies the collective agreements for the trade and service employees because it has concluded a "Collective Agreement of Acknowledgement" with TSU stating that the employer will apply the terms of the collective agreements for the trade and service employees in its current version?

No.

4. Has the ECJ's ruling re *Alemo Herron* any relevance in your country? Will you have to change your jurisdiction?

The Hungarian regulation complies with the principle of the *Alemo* case, because according to the rules of the above mentioned Section 282 in the event of a transfer of an undertaking, no such situation can occur in which the receiving employer should apply rules negotiated and adopted after the date of transfer.

Ireland

National reporter: Kevin Duffy, Chairman, Labour Court of Ireland

I. PRELIMINARY QUESTIONS

1. How do you define „collective agreement“ in your system? When and how does it work?

Answer

The term 'collective agreement' is not defined in Irish law. However, the term is understood as referring to an agreement concluded between a trade union or an association of workers on the one hand and an employer or an association of employers on the other covering the rates of pay and conditions of employment of a group or body of workers.

In law a collective agreement is not generally legally binding on the parties although it can be made legally enforceable if the parties expressly provide that the agreement is intended to be binding in law. The vast majority of collective agreements are not legally enforceable and are intended to be binding in honour only. In practically all cases the parties who conclude collective agreements accept that they are bound by what they have agreed.

Where a dispute arises concerning the interpretation of a collective agreement or its application the matter can be referred to the Labour Court for determination. The Court can give its interpretation of the agreement which the parties generally accept. There is no provision for the imposition of any sanction for the contravention of a term in a collective agreement.

Collective agreements are only concluded in employment in which collective bargaining takes place. There is a very high incidence of collective bargaining in the public sector while in the private sector it is estimated that less than 30% of workers are covered by collective bargaining. Currently the Government are committed to bringing forward legislation to deal with situations in which collective bargaining does not take place and in consequence of which rates of pay and conditions of employment are out of line with acceptable standards.

Collective agreements can be concluded at national level, sectorial level or at the level of the individual employment. The majority of collective agreements in the private sector apply at the level of the individual employment. In the public sector they tend to apply nationally. Sector agreements apply in some industries, notably construction and electrical contracting.

Heretofore the practice in Ireland was for the social partners (Employers organisation, the Congress of Trade Unions and Government) to conclude a national framework agreement covering all workers and their employers and the terms of that agreement were applied locally through individual collective agreement. However, that practice was discontinued in or about 2008. There are no plans to reintroduce that form of arrangement.

2. What degree of organisation (unions and employers' associations resp) do you have nationwide?

Answer

There is a single trade union centre (Irish Congress of Trade Union –ICTU) to which practically all trade unions are affiliated. There are 48 individual trade union affiliated to ICTU representing 780,000 workers. ICTU represents trade unions in both the Republic of Ireland and in Northern Ireland. 569,000 of those workers are in the Republic of Ireland and 211 in Northern Ireland.

ICTU coordinates the activities of its affiliates and ensures that there is a common approach to negotiations where more than one trade union represents workers in a sector or employment.

The principal employer's organisation is the Irish Business and Employers' Confederation (IBEC). IBEC represents the majority of employers in the private sector. There is also a

separate organisation representing employers in the construction and related industries (Construction Industry Federation –CIF). Both IBEC and CIF engage in collective bargaining on behalf of their members. There are a number of smaller organisations representing the interests of particular sectors, some of which are affiliated to IBEC. Most of these smaller organisations promote the business interests of the sectors to which they relate but do not provide an industrial relations service for their members nor do they engage in collective bargaining.

In the non-commercial public sector a dedicated Government Department (the Department of Public Expenditure and Reform) coordinates the industrial relations activities of individual public employers’ particularly in respect to public sector pay and cost related conditions of employment. There is a high degree of standardisation of pay and conditions of employment in this sector.

3. Who concludes collective agreements? Is it

Answer

See the response to question 1 above.

Collective bargaining can take place at national level in certain industries (for example construction and electrical contracting and in relation to public sector employments). It more generally occurs at the level of the individual employment. Agreements are rarely concluded at regional level.

Collective agreements are concluded between unions and individual employers. Often, employers are represented in negotiations by employers’ associations but the associations are acting on behalf of the individual employers and the resulting agreement is with the employer rather than the employer’s association.

Collecting bargaining rarely taken place with employee representatives who are not trade unions although there is provision in Irish law for certain workers associations (which are not trade union) to negotiate with and conclude collective agreements with employers. In some instances work councils conclude agreements but these agreements would not be classified as collective agreements as that term is understood.

- Unions and employers’ associations
 - on a national level?
 - on a regional level?
 - on a company level?
 - on a plant level?
 -
- Unions and individual employers
 - on a national level?
 - on a regional level?
 - on a company level?
 - on a plant level?

- Employees’ representatives – other than unions – (e.g. works councils) and individual employer?

Please summarise national peculiarities if necessary to understand the system in a European context.

4. Is the state involved in the process of collective bargaining?
 - by mandatory regulations as to the contents of collective agreements
 - by mandatory registration and/or concession of unions or associations
 - by initiating collective agreements
 - by providing a system of or body for collective conciliation
 - if so, please summarise how it works, whether it is mandatory and if its recommendations are in any way binding
 - by having the authority to declare a collective agreement universally applicable?

Answer

The state is only involved in the process of collective bargaining in the non-commercial public sector where its involvement is more in its role as an employer.

The state does not regulate or control the content of collective agreements.

The state regulates who can engage in collective bargaining in the sense that only bodies that hold a negotiation licence issued by the state can engage in negotiation of the fixing of rates of pay and conditions of employment. There are exceptions to this requirement. An individual employer can negotiate in respect of its own employees. A house association, all the members of which are employed by the same employer, can negotiate in respect of its own members but no others. These bodies, known as ‘excepted bodies’ do not require a negotiation licence. In practice all trade unions are licenced to negotiate as are employer associations.

The state provides extensive support to collective bargaining through a system of conciliation and third party adjudication by the Labour Court. This system is voluntary and the outcome is not binding on the parties. In the case of conciliation, this service is provided by a state agency known as the Labour Relations Commission. The purpose of conciliation is to assist parties to reach agreement.

If agreement is not reached in conciliation the dispute can be referred to the Labour Court. The Labour Court issues recommendations to the parties setting out the basis upon which the dispute should be resolved. The parties are not bound to accept the recommendations of the Court although in practice the recommendations are accepted in over 80% of cases. This system operates only in respect to disputes concerning issues of interest (where legal rights are not in issue).

Parties are not legally obliged to use the services of the Labour Relations Commission or the Labour Court (in industrial relations cases). However most collective agreements provide that where a dispute arises between the parties to the agreement the matters in dispute will be referred to those bodies.

The Industrial Relations Act 1946 made provision for the registration of collective agreements with the Labour Court. The effect of registration under this Act was that the

agreement was made legally enforceable and universally applicable. However, in 2011 the Irish Supreme Court found that the statutory provisions under which agreements were registered and made universally applicable were repugnant to the Irish Constitution. Those provisions were found to be invalid and of no effect. Consequently, since that ruling, there is no provision in Irish law by which a collective agreement can be declared to be universally applicable. The Government are committed to bringing forward legislation to address this situation.

5. What is the relationship between collective agreement and individual employment contract?

- Do collective regulations derogate/substitute individual agreements
 - always, without exception?
 - never? Do individual agreements always take precedence over c.a.?
 - in principle, unless the individual agreement is more beneficial to the employee? If so, how do you define “more beneficial”? Do you compare the whole contract or just that part of the contract that deals with the issue at hand (e.g. remuneration on the one hand, employment protection on the other hand)?

Answer

As pointed out above, collective agreements are not generally legally enforceable. Consequently, there is no legal impediment to individuals entering into a contract of employment for terms different to those contained in a collective agreement. However, in practice where a collective agreement provides for more favourable terms an individual can insist on the terms of the agreement notwithstanding any individual agreement.

In that sense a collective agreement takes precedence over an individual agreement.

An individual agreement can provide for more favourable terms than those contained in a collective agreement although trade unions would take the view that the same terms should apply to all. There is no settled definition of ‘more favourable’ but in practice it would be taken to apply to individual terms rather than the overall value of the remuneration package.

6. Can (or must) in your system a collective agreement (or a part thereof) be made applicable in an employment relationship by a clause of reference in the contract of employment?

- If such a clause of reference is not conditional but permissible: How often are collective agreements applied by virtue of congruent membership alone and how often by virtue of a clause of reference in the contract of employment?
- If collective agreements have normative effect in your system: What is the legal situation if both parties of a contract of employment are members of the respective collective partners – which renders the c.a. normatively applicable – and refer to the same c.a. in the contract of employment?

Answer

Where a collective agreement is in place it is common for individual contracts of employment to contain a provision to the effect that the terms of the collective agreement are incorporated into the individual contract. Those terms are then given effect through the contract of employment. Moreover, the legal obligation on an employer to provide employees with a statement of the terms under which they are employed can be fulfilled by referring the employee to the collective agreement.

As stated elsewhere in this questionnaire the current position in Ireland is that there is no mechanism by which collective agreements can be normative effect.

II. TRANSFER OF UNDERTAKING

1. In case of a transfer: Do conditions of work as ruled by a collective agreement transfer? (non-EU-members)

Answer

Yes.

2. How do conditions of work as ruled by a collective agreement transfer?

Answer

The collective agreement carries over as if it had been concluded by the party who takes over the business to which the agreement relates

- Does it make any difference whether or not the collective agreement applicable with the transferor has normative effect? Does it retain normative effect if transferee is not bound by (the same or any other) collective agreement?

Answer

It makes no difference

- How does a collective agreement transfer if the basis of validity is the contract of employment?

Answer

The individual contracts of employment transfer as does the agreement

- How does a collective agreement transfer – statically (i.e. as it stands at the time of the transfer) or dynamically (i.e. in the current version)?

Answer

It transfers as it stands at the time of the transfer unless the agreement itself provides that certain changes will take place over time

- How – if at all - can the transferee change the terms of a collective agreement for the transferred employee?

- Can he enter an employers' association and then apply the terms of that collective agreement?
- Does it depend on whether or not the employee is a member of the union which concluded that collective agreement?
- Can the terms of the transferred collective agreement be lawfully altered by amending the contract of employment? Immediately after the transfer or after a certain period of time?

Answer

The applicability of a collective agreement is not dependent on membership of a trade union or of an employers' association. Hence, an employer or an employee cannot avoid the terms of an agreement by leaving an employers association or, as the case may be, a trade union.

Generally the rights of workers are protected at the time of the transfer. An agreement cannot be unilaterally altered unless the agreement itself provides for such alteration. Agreements often provide for termination by one party giving a period of notice to the other stipulated in the agreement. If such a clause exists then the new employer can invoke it to terminate the agreement. Otherwise the agreement will remain in force until it is changed by agreement between the parties.

3. How would you solve this case:

Alemo (A) works as a kitchen helper in the restaurant of a department store. He is a member of the Trade & Services Union (TSU), the employer is a member of the association of commercial employers (ACE). The contract of employment provides, "During your employment with [the store], your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the [TSU and ACE] ...".

By virtue of the current version of the collective agreement A receives 2,500 € monthly wages. On January 1st 2014 the kitchen is transferred to Parkwood Caterers (P), a catering sector undertaking. Parkwood is member of the Caterers' association (CAT). Their collective agreement, concluded with the Union of Food and Restaurant Employees (UFO), provides monthly wages of 1,300 € for kitchen helpers.

- a) P pays A 1,300 €, A demands 2,500 €. Who is right?

Answer

A is right. His individual contract of employment would incorporate the rate of pay provided in the collective agreement. That individual agreement would carry forward as if it had been made by the new owner of the undertaking.

- b) On April 1st 2014 the collective agreement for the trade and service employees is amended. The monthly wages for kitchen helpers is increased to 2,600 €. The caterers's collective agreement remains unchanged. Can A demand to be paid 2,600 € henceforth by virtue of the clause of reference in the contract of employment)?

Answer

There is no clear answer to that question. The collective agreement, in and of itself, would not entitle A to the increased salary because changes in the terms of the

agreement after the transfer would not apply. To that extent the decision in Alemo Herron would be followed.

The wording of A's contract of employment would, however, be an important consideration. That contract provides in clear terms that A's rate of pay will be determined in accordance with collective agreements negotiated from time to time by the [TSU and ACE]. That is the fundamental provision of the contract. A is contractually entitled to payment of the rate negotiated 'from time to time' between the named parties. While A could not rely on Directive 2001/23 to obtain the increase in salary he may be able to rely on his individual contract of employment, which would remain extant notwithstanding the transfer. It is noted, however, that the wording of the contract refers to the agreement applying during the continuance of A's employment 'with the store'. If he is no longer employed by the store that point could be relied upon to argue that, as a matter of contract, the provision is no longer applicable

- c) Does it make any difference to this case if the department store is not a member ACE but applies the collective agreements for the trade and service employees because it has concluded a "Collective Agreement of Acknowledgement" with TSU stating that the employer will apply the terms of the collective agreements for the trade and service employees in its current version?

Answer

This would make no difference

4. Has the ECJ's ruling re Alemo Herron any relevance in your country? Will you have to change your jurisdiction?

Answer

The ruling of the Court in that case is in line with the position as it was previously applied in practice. That is that the collective agreement applies as it stood on the date of the transfer.

Israel

National reporter: Judge Rami Cohen, President of the Haifa Regional Labour Court, Israel

I. PRELIMINARY QUESTIONS

1. How do you define „collective agreement“ in your system? When and how does it work?

1.a The courts in Israel view a "Collective Agreement" as "a legal monsterum" - its "body" is built like an agreement, while its "soul" is like a law.

1.b A Collective Agreement is defined in article 1 of the Collective Agreements Law, 5717-1957 (hereinafter- the Law), as "... an agreement between an employer or an employer's organization and employees' organizations, made and submitted for registration under this Law, concerning all or any of the following matters: the engagement of employees and the termination of employment, terms of

employment, labour relations, and the rights and obligations of the organizations which are parties to the agreement."

- 1.c The Collective Agreement aims to define matters that are referred to in it – matters that the employees' organization and an employer or an employers' organization have agreed upon. If the party to the agreement is a particular employer, the agreement applies to the employees of the particular employer. If the party to the agreement is an employers' organization, the agreement applies to the employees employed by the members of that employers' organization. As for the employees, the agreement entitles them to a variety of rights - whether or not they are members of the aforementioned employees' organization or even if they object to the Collective Agreement's terms.
 - 1.d The duration of a Collective Agreement may be a specific period of time - as established in the agreement itself - or the Agreement may cover an indefinite period, or part of it may cover a specific period while other parts may apply for an indefinite period (art. 12 of the Law). If a Collective Agreement is for an indefinite period, any party to the agreement may terminate the Agreement, after a period which must be at least one year from its entry into force – by giving the other party advance notice at a time established in the Agreement. If no such advance notice period has been established in the Agreement, the notice must be given not less than two months before the day of cancellation (art. 14 of the Law). If the Collective Agreement is in effect for a specific period of time, its provisions will remain in effect even after the specific period has passed, as if they were terms of a personal employment agreement between the parties, until such time as a new Collective Agreement is signed, or when either of the parties gives notice of termination (art. 13 of the Law).
 - 1.e An Agreement between the employees' organization and the employer/ employers' organization comes into force on the day it is signed or on the day that is stated in the Agreement itself (art. 11 of the Law). However, it will only be considered to be a "Collective Agreement" upon its submission to the Collective Agreements' Registrar (at the Ministry of Economy) for registration (art. 1 of the Law).
2. What degree of organisation (unions and employers' associations resp) do you have nationwide?
- 2.a In Israel, the main and largest employee's union is the "Histadrut Ha Clalit", which used to include and serve almost all workers. Today, there are additional general employees' organizations - some relatively new. The employees who are members of these organizations constitute a minority among the country's organized workers. These other organizations represent less than 30% of the overall number of organized workers in Israel.
 - 2.b While the employees to whom the Collective Agreement applies must be represented by an employees' organization, the other party to the agreement may be either an individual employer or an employers' organization.

The main employers' organization is the Manufacturers Association (Federation) of Israel, which serves as the representative body of several industrial sectors in Israel.

The State itself, when acting as an employer- and not as a sovereign – may be a party to a Collective Agreement. For further information, see answer #4 below.

3. Who concludes collective agreements? Is it

- Unions and employers' associations
 - on a national level? **Yes**
 - on a regional level? **Yes**
 - on a company level? **Yes**
 - on a plant level? **Yes**
- Unions and individual employers
 - on a national level? **Yes**
 - on a regional level? **Yes**
 - on a company level? **Yes**
 - on a plant level? **Yes**
- Employees' representatives – other than unions – (e.g. works councils) and individual employer? **No**

Please summarise national peculiarities if necessary to understand the system in a European context.

The Law requires that the employees be represented by a national organization. However, this national organization may grant particular sub-divisions, which represent specific sectors - such as engineers, doctors or lawyers, etc. - the autonomy to negotiate and be a party to a Collective Agreement concerning the particular sector represented by those sub-divisions.

4. Is the state involved in the process of collective bargaining?

- by mandatory regulations as to the contents of collective agreements

4.a If the State is the employer, its involvement in a Collective Agreement is as mentioned above (see answer # 2.b).

4.b When the State funds an employer - such as local authorities, the Broadcasting Authority, etc. - the Collective Agreement's terms relating to the employees' wages must be authorized by the Regulator of the Wages and Labour Agreements in the Ministry of Finance.

- by mandatory registration and/or concession of unions or associations

In order to be a party to a Collective Agreement, the employees' organization must be considered to be the representative organization. The representative organization which is party to a special Collective Agreement is the organization

comprising, or representing for the purposes of that agreement, the greatest number of organized employees to whom the agreement is to apply - provided that this number is not less than one-third of the total number of employees to whom the agreement is to apply (art. 3 of the Law). The representative organization to a general Collective Agreement is the organization comprising the greatest number of organized employees to whom the agreement is to apply (art. 4 of the Law).

The state's involvement in this framework arises only if there is a dispute between two or more competing organizations claiming to be the true representative organization. In such cases, the State - via the Collective Agreements' Registrar - will determine which organization constitutes the representative employees' organization.

- by initiating collective agreements

The State does not initiate Collective Agreements, unless it is a party to such an agreement.

- by providing a system of or body for collective conciliation
 - o if so, please summarise how it works, whether it is mandatory and if its recommendations are in any way binding

The Settlement of Labour Disputes Law, 5717-1957 (hereinafter: Labour Disputes Law) establishes a mechanism of State employees (a Chief Labour Relations Officer and Regional Labour Relations Officers), whose function is to try to resolve Labour Disputes concerning Collective Agreements (art. 1-2 of the Labour Disputes Law). Any party to a Collective Agreement may notify the Chief Labour Relations Officer of a Labour Dispute; and if there is an intention to start a strike or a lockout over such dispute, the relevant party is required to give the other party and the Chief Labour Officer notice, at least fifteen days before the commencement of such action (art. 5 and 5A of the Labour Disputes Law, respectively).

The Chief Labour Officer may propose to the parties that they enter a conciliation procedure, with either him or the Regional Labour Relations Officers serving as a conciliator, in an attempt to resolve the dispute via negotiation (art. 6-8 of the Labour Disputes Law). If the parties settle the dispute and reach an agreement - either on their own, or with the assistance of the conciliator - it is put in writing, and the parties sign it (art. 9 of the Labour Disputes Law). The Labour Disputes Law also allows the parties to a labour dispute to refer any matter that they have consented upon in writing to arbitration (art. 15 of the Labour Disputes Law).

- by having the authority to declare a collective agreement universally applicable?

The Minister of the Economy has the authority - either on his own initiative or at the request of one of the parties to a general Collective Agreement – to expand the terms and provisions of a collective agreement in an extension order. (art. 25 of the Law).

An extension order must be published in the Official Gazette, specifying the terms that were expanded and the type of employers and employees to which it applies. Once a general Collective Agreement is cancelled, any extension order that expanded its terms is also cancelled.

5. What is the relationship between collective agreement and individual employment contract?

- Do collective regulations derogate/substitute individual agreements
 - always, without exception?
 - never? Do individual agreements always take precedence over c.a.?
 - in principle, unless the individual agreement is more beneficial to the employee? If so, how do you define “more beneficial”? Do you compare the whole contract or just that part of the contract that deals with the issue at hand (e.g. remuneration on the one hand, employment protection on the other hand)?

If an employee is covered by the personal provisions of the Collective Agreement, he or she may not waive these terms - whether they grant rights or create obligations. (art. 20 of the Law).

A Collective Agreement may not derogate from rights granted to an employee by law, but may only add to them. (art. 21 of the Law).

According to art. 22 of the Law, when an employment contract contains terms that differ from the personal provisions of a Collective Agreement applying to the parties to the contract, the provisions of the Collective Agreement will prevail. However, if the terms listed in the employment contract are preferable to those granted under the Collective Agreement - the personal terms in the employment contract will apply, as long as the Collective Agreement does not forbid such application specifically.

In order to determine whether or not a provision under the Collective Agreement is preferable to those in a personal employment contract or not, both the personal provisions of the Collective Agreement and the employment contract are examined as a whole, and not with regard to a specific item (for instance- the amount of the wages to be paid).

6. Can (or must) in your system a collective agreement (or a part thereof) be made applicable in an employment relationship by a clause of reference in the contract of employment? **Yes.**

- If such a clause of reference is not conditional but permissible: How often are collective agreements applied by virtue of congruent membership alone and how often by virtue of a clause of reference in the contract of employment?

Usually, if a Collective Agreement applies, the employer and employee will not enter into a separate contract of employment between themselves, since the Collective

Agreement will serve as an employment contract. Nevertheless, the parties to a personal employment contract may, in the provisions of that contract, adopt the terms of a Collective Agreement.

- If collective agreements have normative effect in your system: What is the legal situation if both parties of a contract of employment are members of the respective collective partners – which renders the c.a. normatively applicable – and refer to the same c.a. in the contract of employment?

In such a case, the above-mentioned provisions of the Law (see answer #5) will apply.

II. TRANSFER OF UNDERTAKING

1. In case of a transfer: Do conditions of work as ruled by a collective agreement transfer? (non-EU-members)

If the identity of the employer changes - whether because the undertaking was transferred, divided or merged with another - the Collective Agreement will continue to bind the new employer (art. 18 of the Law).

Note- with regard to the Collective Agreement's applicability upon a transfer to a new employer, it is important to note the differences between the characteristics of Collective Agreements that are entered into for a specific period of time and those that apply for an indefinite period of time.

2. How do conditions of work as ruled by a collective agreement transfer?

The terms and provisions of the Collective Agreement transfer as is, with no modification.

- Does it make any difference whether or not the collective agreement applicable with the transferor has normative effect? Does it retain normative effect if transferee is not bound by (the same or any other) collective agreement?

The personal provisions of the Collective Agreement will continue to apply to the employee after the transfer, even if the personal provisions mentioned do not apply to the new employer according to a different Collective Agreement to which the employer is a party, in relation to his employees in other undertakings.

- How does a collective agreement transfer if the basis of validity is the contract of employment?

The personal provisions of the Collective Agreement transfer automatically upon the transfer of the undertaking/ change of employers/ merger or split. The validity of the Collective Agreement is not based on the existence of a separate contract of employment between the employer and a specific employee.

- How does a collective agreement transfer – statically (i.e. as it stands at the time of the transfer) or dynamically (i.e. in the current version)?

The provisions of the Collective Agreement are transferred as they were prior to the transfer. However, if the provisions of the transferred Collective Agreement themselves include rights that are meant to change over time, they will continue to change, in a dynamic manner, as long as the Collective Agreement applies.

- How – if at all - can the transferee change the terms of a collective agreement for the transferred employee?

If the Collective Agreement is for a specific period of time it is changed through the cancellation of the Agreement – before its original expiration date - with both parties' consent; or by the signing a new Collective Agreement that specifically establishes the changed terms. If the Collective Agreement is for an indefinite period of time, it is changed by cancelling it with prior notice as stipulated in the agreement or in the Law.

- Can he enter an employers' association and then apply the terms of that collective agreement?

Yes.

The changes in the Collective Agreement will be made according to the same conditions listed above (see answer #5, art. 21 and 22 of the Law).

If the new employer enters into a new Collective Agreement, which contains preferable provisions - these provisions will apply, unless either the old Collective Agreement or the new one includes a provision stating that no other terms will apply.

- Does it depend on whether or not the employee is a member of the union which concluded that collective agreement?

Not necessarily. The revised Collective Agreement has to be entered into with the representative employees' organization.

- Can the terms of the transferred collective agreement be lawfully altered by amending the contract of employment? Immediately after the transfer or after a certain period of time?

Yes, only if the transferred Collective Agreement may be amended, or cancelled (see answer # 1 above).

3. How would you solve this case:

Alemo (A) works as a kitchen helper in the restaurant of a department store. He is a member of the Trade & Services Union (TSU), the employer is a member of the association of commercial employers (ACE). The contract of employment provides, "During your

employment with [the store], your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the [TSU and ACE] ...”.

By virtue of the current version of the collective agreement A receives 2,500 € monthly wages. On January 1st 2014 the kitchen is transferred to Parkwood Caterers (P), a catering sector undertaking. Parkwood is member of the Caterers’ association (CAT). Their collective agreement, concluded with the Union of Food and Restaurant Employees (UFO), provides monthly wages of 1,300 € for kitchen helpers.

- a) P pays A 1,300 €, A demands 2,500 €. Who is right?

A is correct. With the transfer to P, the terms of the Collective Agreement between TSU and ACE will continue to apply.

- b) On April 1st 2014 the collective agreement for the trade and service employees is amended. The monthly wages for kitchen helpers is increased to 2,600 €. The caterers’s collective agreement remains unchanged. Can A demand to be paid 2,600 € henceforth by virtue of the clause of reference in the contract of employment)?

If the Collective Agreement that applies to A at the time of the transfer to P includes a clause that allows for an automatic change of wages while the Collective Agreement is still in force, A is entitled to € 2,600. However, if the provisions of the Collective Agreement that applied to A at the time of the transfer did not include a clause that allows for an automatic wage update, and the wage update was the result of negotiations between the parties to the Collective Agreement, and these negotiations thus led to the wage increase after A was already employed by P, the conditions of the amendment will not apply to A, and A will continue to receive the last wage set by the Collective Agreement that applied to him at the time of the transfer, i.e. € 2,500 .

- c) Does it make any difference to this case if the department store is not a member ACE but applies the collective agreements for the trade and service employees because it has concluded a “Collective Agreement of Acknowledgement” with TSU stating that the employer will apply the terms of the collective agreements for the trade and service employees in its current version?

It does not matter.

4. Has the ECJ’s ruling re Alemo Herron any relevance in your country? Will you have to change your jurisdiction?

Generally speaking, the ECJ's decisions have no relevance nor do they have any bearing over the Israeli legal system. That is why the Israeli law will apply. However, the result of the preliminary ruling procedure is similar to the Israeli norms in this area, as specified above.

Case from Israel on collective agreements

Case Nun-Dalet/1-4

The General Federation of Labour in Israel

v.

1. Israel Aircraft Industries Ltd.
2. Ramta Ltd.

Case Nun-Dalet/3-4

1. Israel Aircraft Industries Ltd.
2. Ramta Ltd.

v.

The General Federation of Labour in Israel

The National Labour Court

*Before President Menachem Goldberg, Judge Yzchak Eliasof,
Judge Elisheva Barak-Ussoskin,
Labor Representative Ziv, Management Representative Dudai*

For The General Federation of Labour in Israel: D. Israel

For Israel Aircraft Industries Ltd. & Ramta Ltd.: C. Berenson & G. Rubin

JUDGMENT

The Court ruled that workers who refuse to be transferred to a new employer after privatization or transferal of part of the enterprise have no right to remain in the former enterprise and no right to benefit from redundancy pay.

The dissenting opinion was confirmed by The High Court of Justice (with dissent).

Dissenting Opinion - Vice President E. Barak-Ussoskin

70. I accept the opinion of the Court, according to which workers of an enterprise which changed hands who did not agree to be transferred to the new owner should be seen as having been dismissed pursuant to article 11(a) of The Severance Pay Law, 5723-1963; in other words, dismissal due to a change in circumstances after which the worker cannot be expected to continue to work. The enterprise is the property of its owner. As a property owner, the enterprise owner has the power to dispose of his property and transfer it – power toward all persons, *in rem* – and no one has the right to prevent him from doing so. An enterprise owner is not the owner of the workers in the enterprise. Neither the workers nor their labour are the property of the employer. Slavery, which saw the worker as the property of the employer, has disappeared and is no longer legal.

At most, a worker's labour can be seen as the property of the worker, which he leases to the employer.

"Labour services can only be rented; workers themselves cannot be bought and sold. Further, because labour services cannot be separated from workers, the conditions under which such services are rented [are] often as important as the price" (R.G. EHRENBURG & SMITH, MODERN LABOUR ECONOMICS, THEORY AND PUBLIC POLICY 1-2 (2d. ed. 1985); Frances Raday, *Status and Contract in Employment Relationship*, 23 ISR. L. REV 79, 80 (1989)).

Professor Raday discussed that point in that article, noting:

"Thus humanitarian concern for the wellbeing of employees led to a reflection of the concept of labour as a mere commodity which can be bought and sold on the free market at the going rate" (Frances Raday, *op. cit.*).

Thus, workers and their labour are not the property of the employer, and the employer does not have the power to take his workers and transfer them to another owner as property is transferred. They are not legal tender. The workers are party to an *in personam* contract with him, some merely a personal contract and some as part of a group which made a collective bargaining agreement with the enterprise owner.

The Significance of the Relations as *in Personam* and not Property, and the Uniqueness of the Employment Contract

In discussing employment contracts we are discussing a unique type of contract. I shall discuss what makes it unique. I shall also discuss what makes labour law, which stems from the special essence of the employment contract, unique.

Potential workers and workers negotiate with the enterprise owner, by themselves or via their representative organization, until ultimately a personal employment contract (in the case of workers) or collective bargaining agreement (in the case of a representative organization) is made. An employment contract, as *The Court* stated, is a unique creation in the world of contracts. It is a contract which creates long term relations. Being a long term contract, its provisions change from time to time. On the personal level, the worker might progress in position and rank. The contract conditions might improve. On the organized level, a collective bargaining agreement is signed for a defined period, and at the end of that period collective bargaining is renewed between the parties to the collective bargaining agreement: the workers' organization and the employer, or the workers' organization and the employers' organization. Thus the employment contract is different from a regular sales contract, for example. In a regular sales contract, at the end of the negotiations and the signing of the contract, the transfer of the merchandise and the payment of the stipulated consideration, the relations between the parties come to an end. In employment contract, at the end of negotiations and the signing of a contract, the relations between the parties are only beginning, and they are long term relations which will continue until the expiration of the contract. An employment contract, then, is a dynamic and not static contract; its provisions change from time to time during the period of employee-employer relations. The National Labour Court discussed that in National Labour Court Appeal Lamed-Hey/30-3 *Zohar-Galblum v. "HaBimah" National Theatre Trust*, 6 PDA 309, 313:

"The central point is that it is not a new contract, rather an existing and continuing contract, whose content is occasionally renewed, whether due to collective bargaining agreements or by personal mutual stipulation – a phenomenon which is almost unique to the employment contract and called 'revision'."

As I shall discuss, change in the contract up until a certain limit – change within the limits of reasonableness – is anchored in the employer's prerogative to do as he wishes in his enterprise. An unreasonable change might constitute breach of the employment contract (regarding what makes the employment contract unique *see* Menachem Goldberg, '*Chofesh haChozim*' *ve'Hagbalato ba'Heskem Avoda Kibutzi u'ba'Chozeh Avoda Ishi*, 2 MISHPATIM 177 (5755) [Hebrew] [*'Freedom of Contract' and its Limitation in a Collective Bargaining Agreement and in a Personal Employment contract, LAW*]).

Changing the Contractual Conditions – Legitimacy's Limit

I should like to return to primary, undisputed concepts. A contract is made after negotiations between parties, when a meeting of minds indicating both parties' intent to form a legally binding contract is ultimately reached (*see* GAVRIELLA SHALEV, DINEI CHOZIM *starting on* p. 83 (2d ed. 5755) [Hebrew] [CONTRACT LAW]). Without a meeting of the minds, and without intent to form a legally binding contract, no contract is made. As we are discussing a contract creating long term relations, alteration of the conditions of the employment contract also becomes effective only after a meeting of the parties' minds regarding the alteration. One party's desire for a change is insufficient; the consent of both parties must be attained, and only after a meeting of the minds proving both parties' intent to form a legally binding contract do the new provisions become an integral part of the employment contract. That is the case both on the personal level, and on the organized labour level. A party's consent can be via conduct (article 6 of The Contracts Law (General Part), 5733-1973; *see* National Labour Court Appeal Lamed-Chet/3-4 Ma'arachot Meida M. B. D. Ltd. v. Avidan, 10 PDA 309, 329; National Labour Court Case Lamed-Zayin/2-26, The Jewish National Fund v. Salman, 9 PDA 102, 107). *Barak J.* discussed that in HCJ 239/83 Milfelder v. The National Labour Court, 41 PD (2) 210, 216. In that case, the words of *Berenson J.* in CA 53/71 Rosen-Yankelewitz Partnership v. Leirowitz, 26 PD (1) 48, 55:

"An alteration to working conditions, or to existing personal rights and duties, means replacing the existent with the new: and it appears that it can only come about by mutual agreement."

When after a change in the conditions of a contract the injured party decides not to cancel the contract, the contract remains in effect despite the breach (*see* *Milfelder* at p. 216; GAVRIELLA SHALEV at p. 470, text accompanying note 26).

(a) The Limit of the Legitimacy of Altering Contractual Conditions – The Managerial Prerogative

I have discussed the fact that the employer is not entitled to unilaterally change the conditions of the contract. However, the very essence of labour relations requires allowing an employer to change the conditions. The employer has the right to run his

business according to what he understands to be best. In doing so – in employing his prerogative to run his enterprise to the best of his understanding – he alters the working conditions in order to improve the performance of his enterprise. However, that right of the employer is not absolute. It is balanced by the worker's right not to have his working conditions changed unilaterally. When the changes are reasonable, or even beneficial to the worker, the worker can be seen as consenting to the change by his continued work. In any case, reasonable changes are within the boundaries of that prerogative. Changes which go beyond the zone of reasonableness, which harm workers in an unreasonable way, may be beyond that prerogative. The managerial prerogative is not an absolute right of the employer. It must be balanced with the workers' rights. Thus, it must be balanced with workers' autonomy, their human dignity, and their right to freedom of occupation. A unilateral change in working conditions which goes beyond reasonableness and harms the worker is not legal. Transferring a department manager from his position to another comparable position, due to the closing of said department, is reasonable, and can thus be done without his consent. Transferring him to the position of receptionist is an unreasonable unilateral change which violates the worker's rights beyond the necessary extent. Thus, it is not legal as long as the worker's consent has not been given.

(b) The Parties' Good Faith

Needless to say, the general law regarding the duty to act in good faith certainly applies to the worker and to the workers' organization. That duty is determined in statute, and The Labour Court examines whether it has been properly fulfilled. That duty is intensified in labour relations (*see* Menachem Goldberg, *Tom Lev baMishpat haAvoda*, SEFER BAR NIV 139 (5747) [Hebrew] [*Good Faith in Labour Law*, THE BAR NIV BOOK]). The National Labour Court stated:

"Employee-employer relations require the worker to act in a way compatible with the trust necessitated by his role, and the employer – according to his duty to take care of the worker's welfare (*fursorge*) and the duty of fairness. Those duties are even beyond the duty of 'performance in good faith' in article 39 of The Contracts Law (General Part), 5733-1973" (National Labour Court Appeal Mem-Bet/3-74 Vardi v. The Netanya Municipality, 14 PDA 59, 65-66).

Nonetheless it must be remembered that the employer has to run his enterprise. We must find the proper balance between that prerogative and the workers' rights; between the employer's right to autonomy and to freedom of occupation, and those same rights of the workers. The requirement of good faith on the part of the employer requires that the employer not take advantage of his managerial prerogative beyond what is reasonable, in a way to which a reasonable worker cannot consent. The requirement of good faith on the part of the worker requires that the worker not oppose every change made by the employer during the span of labour relations, and thus prevent the employer from running his business.

That is the manifestation of the idea behind article 11(a) of The Severance Pay Law, 5723-1963:

"If a worker resigns due to a substantial worsening of working conditions, or due to other circumstances of labour relations regarding that worker, under

which he is not to be required to continue working, his resignation is seen, for the purposes of this statute, as dismissal".

That statutory provision expresses the idea that the employer does not have the power to unilaterally change the conditions of the contract, and that if he does so and the change is a negative one from the worker's point of view, to which the worker cannot consent, it is to be seen as a step on the employer's part to terminate the relations. The article does not speak of resignation entitling the worker to severance pay; rather only of "dismissal". An employer who unilaterally changes the circumstances at work to the extent that it is unreasonable to demand that the worker continue working under the new conditions, leads, *de facto*, to the unilateral cancellation of the original employment contract.

Transferring an Enterprise to a New Employer

I shall now progress to discuss the question in this case: the question of transferring an enterprise to a new employer by way of division or any other way.

Transferring an enterprise from one owner to another is a drastic change: it causes the worker or the workers' organization to be left without the employer with whom they made a contract, and to find their workplace in other hands. That is an extreme change, as the contract is now supposed to be a contract with a different employer. The question is whether one can say to the workers, "you are now party to an employment contract with the new employer, and your will is irrelevant. It is the right of the property owner to transfer the enterprise to a new owner, and you, the workers, are part of that enterprise." It seems to me that that is illegitimate. Workers, as stated above, are not property. Workers are entitled to say that it is not with that employer that they made a contract. Clearly, even in such a case, where a worker or a workers' organization consents to continue working with the new employer according to the prior conditions, a contract with new conditions is made, by which the other party is different than who he was previously. Thus workers can also consent to the transfer by their conduct, when a worker continues to work despite the exchange of employers. This was discussed in C. HARDUF, ZCHUYOT OVDIM BA'CHILUFEI MA'AVIDIM, BAFIRUK CHEVRA U'BAKINUS NECHASIM 38 (5748) [Hebrew] [WORKERS' RIGHTS IN EXCHANGE OF EMPLOYERS, IN CORPORATE WINDING DOWN, AND IN RECEIVERSHIP]:

"The worker who knowingly transfers to a new employer is seen as having consented to the transfer, even if he didn't give his express consent; by his conduct, the worker accepted the new employer's offer to employ him, and an employment contract was made between them."

Application of article 11(a) of The Severance Pay Law upon Exchange of Employers

The opinion of *The Court*, that article 11(a) of The Severance Pay Law applies to such a situation, is acceptable to me. Exchange of an employer, who is party to the employment contract, is an essential change to the employment contract. The exchange may be to the benefit of the worker, and thus he may agree to it. But he is not obligated to agree to the exchange as an event which is taken for granted. An employer who causes a severance of the relations must, by law, pay severance pay to the worker. When an employer severs the relations by changing working conditions for the worse, which is naturally a change in the contract provisions without the consent of the worker, or causes the work

circumstances to change so that it is unreasonable for a worker to consent to continue working under those changed circumstances, (in other words, a unilateral change of circumstances), he is considered to have breached the contract, and thus must bear the results of the breach: payment of severance pay to the worker, as is paid to any dismissed worker. In my opinion article 11(a) of The Severance Pay Law expresses the concept that the employer is not entitled to unilaterally change the conditions of the contract in an unreasonable way, and that such a change is a breach of the employment contract. Such a change constitutes a violation of the autonomy of the workers or the workers' organization, who have the right to be an equal party to negotiations. Such a change is a violation of worker's autonomy, and thus of the worker's human dignity. Such a change constitutes a violation of the worker's right to freedom of occupation. That is true in collective labour law as well. Such a change violates the autonomy of the workers' organization which is party to the collective bargaining agreement.

The objective of labor law – personal and collective – is to protect the worker, who is in a weak bargaining position during negotiation with the employer. On the personal level, labour law protects the worker or potential worker, by determining that a worker's waiver of his statutory or collective bargaining agreement rights – is no waiver at all. On the collective level, the collective negotiates with the employer in the worker's name, as the collective's bargaining power is greater than that of the lone worker.

The Meaning of Transferring an Enterprise to a New Owner

I shall now discuss the effect of an enterprise owner's decision to use his power and transfer his property in his enterprise to another person; what happens to the contractual relations between the parties. As mentioned above, on the personal level, if the worker agrees to be transferred to the new employer, expressly or impliedly, a new contract, or a contract of which part of the provisions are new, is made between the parties (*see C. HARDUF*). However, an employer who transfers his property – his enterprise – to another person may not and cannot take for granted the worker's transfer to the new employer. He must receive the worker's consent to continue to work with the new employer, consent which can be given expressly or impliedly. That is the case when dealing with a grocery employing one employee. At the time of the owner's death, when the ownership of the grocery is transferred to his widow, the worker is entitled to say that with the widow he has made no contract. Assume he doesn't fancy working with the widow, and that he didn't work under her supervision previously. The same is the case with the transfer of a large enterprise to a new owner. The worker is entitled to say that he is unwilling to work with the new owner. The same is true when dealing with the relations between parties to a collective bargaining agreement. However, in my opinion, when dealing with the parties to a collective bargaining agreement, consent must be given both by each of the workers and by the representative organization. The lone worker is entitled to say – it is not with the new employer that I made a contract. The new employer is not a person with whom I am willing to spend time on a daily basis for hours on end. I don't like the way he looks. I don't like the way he acts. The representative organization is entitled to say that the new employer is different from the former one in an essential way. The new owner may be a small operation, and the bargaining power of the organization might be weakened. The new owner may have characteristics which are different from those of the former employer, which the organization did not foresee at the time it made the contract with the former employer. It may say to itself "with such an operation I, the organization, would have made a different

contract." Even if the same collective bargaining agreement which the organization had with the previous employer applies to the parties – the organization and the new employer – it still may be that, *de facto*, the working conditions have been worsened, since the new employer is smaller, and that may reduce the bargaining power of the workers' organization.

I thus agree with the approach of *The Court* regarding the application of article 11(a) of The Severance Payment Law to such cases.

The Meaning of The Requirement of Good Faith in Exchange of Employers

As I noted above, every refusal to transfer to the new employer is subject to the requirement of good faith, and a Labour Court must examine the good faith of the worker or workers' organization when they refuse to transfer to the new employer under the same working conditions. It is not right to unduly burden the employer. If the worker, or the workers' organization, does not agree to transfer to the new employer according to the previous working conditions, and the new employer is willing to negotiate new conditions with them, they must negotiate in good faith. When the new employer is a small enterprise, the bargaining power of the organization might, as previously mentioned, be reduced. In such a case, if the new employer is willing to negotiate new conditions with the organization, whether by changing the collective bargaining agreement or by canceling it and reaching a new collective bargaining agreement, the workers' organization must negotiate with the new employer fairly, and in good faith. Good faith is required from both parties, and in fact from three parties: the representative workers' organization, the transferor employer, and the transferee employer. Thus, our same worker in the grocery whose owner died may not argue that he is unable to work with the widow, when in fact it was the widow who was already managing the grocery. The same is the case with negotiations with a representative organization. The representative organization must also negotiate in good faith, and not in order to sabotage the transfer of the enterprise for no reason.

Corporate Transfer

When the employer is an "artificial" legal person (*e.g.* a company), transferring a worker from one legal person to another requires the consent of the workers, and, in cases where there is a collective bargaining agreement, the consent of the workers' organization. In other words:

"The directive applies to the transfer of an undertaking, business or part of a business . . . to another employer as a result of a legal transfer or a merger The key element of the definition lies in the fact whether the employees are, as a consequence of the transfer of the undertaking, confronted with a new, legal employer, in other words, the selling of a number of shares with the consequence that there is a new, economic owner is not relevant" (R. BLANPAIN, C. ENGELS, *EUROPEAN LABOUR LAW*, p. 180, § 317 (2d ed. 1993)).

The authors quote a passage in the same vein from a European Court of Justice judgment:

"The directive is applicable where, following a legal transfer or merger, there is a change in the legal or natural person who is responsible for carrying on the

business and who, by virtue of that fact, incurs, the obligations of an employer vis-a-vis the employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred" (COJ, 5 May 1988, H. Berg and J.T.M. Bussehers v. IM. Besselen, Joined Cases Nos. 144 and 145, 87, IELL, Cases Law, 122).

That is not the case if the legal person remains, but changes its name. The question, what the law is regarding a stock corporation when control over it is transferred, is left undecided. Clearly, in such a situation, one also must act in good faith according to the circumstances.

The purpose of the Statutory Provisions Indicating the Continuity of the Employment Contract when Ownership of the Enterprise is Transferred

A number of statutory provisions on the levels of personal and collective relations are intended to ensure that a new employer who decides to buy an enterprise will be obligated to continue to honor the rights which the worker attained in his relations with his former employer, and on the collective level, will be a party to the agreement which the workers had with the former employer. *The Court* discussed those statutory provisions.

(a) On the Level of Personal Labour Law

On the individual level, a number of statutes determine the continuation of rights of a worker. Those clauses all deal with the obligation of the new employer to ensure that the worker doesn't get the raw end of the deal. Thus states article 30 of The Pay Protection Law, 5718 – 1958:

"New Employer's Guarantee of Predecessor's Debt	30. (a) If an enterprise is transferred from one owner to another, or divided, or merged, the new employer is responsible to pay the workers' pay and the allocations for them to a provident fund, to which they were entitled from the previous employer. However the new employer may, by publishing a notice in the plant and in the press in the fashion set out in the regulations, demand that claims for such payments be submitted to him within three months of the date of the transfer, division, or merge, and if he published the notice after that day, from the date of the publication. The new employer shall not be responsible for paying claims submitted to him after the period of said three months."
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Article 1(a) of The Severance Pay Law, 5723-1963 also protects the continuation of rights of the worker:

"A person who has worked continually for one year – and in the case of a seasonal worker, two seasons in two consecutive years – with one employer or in one place of work, and is dismissed, is entitled to receive severance pay from the employer who dismissed him."

In other words, it is sufficient that a worker has worked constantly in one place of work, in order for his rights to be protected with the new employer when he is dismissed.

So it is also in other statutes, including The Annual Vacation Law and The Sick Pay Law, which were discussed by *The Court*. The National Labour Court has previously discussed the purpose of said legislation on the individual level. In discussing the purpose of article 30(a) of The Pay Protection Law, The National Labour Court stated:

"The provisions in article 30(a) of the statute are intended to protect workers so that the continuation of their insurance rights will not be harmed by exchange of employers in the enterprise in which they are employed (National Labour Court Appeal Lamed-Dalet/1-6 The Accadia Junction Garage Ltd. v. Mivtachim Ltd (unpublished), quoted in National Labour Court Appeal Mem-Tet/2-4 Sabach v. Hed Agricultural Export Ltd., 20 PDA 370, 372).

Article 30(a) of The Pay Protection Law does not obligate the worker to consent to exchange of employers. Article 1(a) of The Severance Pay Law also provides for continuity, in that it sees the new employer as obligated regarding the prior period and not just prospectively. It does not obligate the worker to work for the new employer. The same is true for article 3(a) of The Annual Vacation Law, 5711-1951 which deals with the period worked for one employer or in one place of work, and additional statutory provisions. All those statutory provisions obligate the employer to ensure the continuation of the worker's rights.

The Supreme Court discussed the objective of those statutory provisions:

"Those statutes were intended to protect certain rights, and thus this principle of ensuring continuity of rights applies only to those rights . . . it is understood that that does not prevent the worker from arguing that despite the fact that the business changed hands, he remains the worker of the original employer and that there is an express contract on the subject. However, it seems that when a worker is aware that the business has been transferred to a different employer and he continues to work at the same place of work for a long period, it is to be assumed that he thus expressed his consent to the creation of employee-employer relations between him and the business' new owner" (CA 415/90 Mizrahi v. Pilpel, Trustee of the Assets of Shtender, Bankrupt, 46 PD (4) 601, 607, (*Barak J.*)).

Thus, on the level of personal labour law, the statutory provisions determine continuation of rights. The new employer is obligated to provide certain rights which the worker attained from his former employer. Those statutory provisions do not obligate the former employer's workers to work for the new employer. Their objective is to protect the rights of workers when the enterprise is transferred to a new employer.

The same idea is manifest in article 8 of the Employment Contract Law Bill, 5745-1985, but the bill goes further: the new employer would not only have to protect the continuation of certain rights which the worker attained from his former worker; the new employer, determines the bill, becomes, by force of the statute, at the time the enterprise is bought, party to the employment contract which the worker had with his former employer:

"Change in 8. If there is a change in the ownership of the

Ownership of Place of Work	place of work, whether due to transfer to another person or due to the death of the owner, corporate winding up, or any other reason, the new employer shall replace the former employer for all purposes regarding the employment contract."
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(Proposed Bills, 129, 130).

In the explanatory notes to the proposed bill, the following appears:

"Whereas the work given to the worker must be done by him personally . . . it is proposed to put emphasis on the worker's connection to the place of work, and thus a change in ownership of the place of work shall lead to severance of employee-employer relations, rather the new employer shall replace the former employer, for all purposes regarding the employment contract. A similar principle is determined in article 18 of the Collective Bargaining Agreements Law, 5717-1957."

Professor Raday commented upon the explanatory notes to article 8 of The Employment Contract Law Bill, saying (Frances Raday, *Status and Contract in the Employment Relationship*, 23 ISR. L. REV. 79, 92 (1989)):

"The Explanatory note is convincing in so far as it reveals concern for protecting the employee's terms and conditions of employment. Thus, new employers will not be able to acquire the work place while disposing of the work force, just as they cannot dispense of the collectively agreed terms and conditions according to which that work force is employed."

That is what it means, and nothing more. It contains no obligation of the workers, who find themselves without their employer who got rid of his enterprise and transferred it to another person; and it rightly contains no such obligation. Raday points out that legislation obligating the workers to remain in the workplace when ownership is transferred would cause a situation in which the workers find themselves with an employer for whom they might not consent to work.

(b) The Collective Labour Law Level

The law is the same in collective labour law. The employer may not present the workers' organization with a *fait accompli* without negotiating with it. The collective, like the individual worker, is not property which passes from hand to hand, rather is party to a collective bargaining agreement. However, on the collective level it has been determined that not only is the new employer responsible for the fulfillment of all the social rights which the worker had with his former employer, but according to law he becomes party to the collective bargaining agreement which the representative organization had with the former employer. Thus article 18 parallels The Employment contract Law Bill. The intention of the provision is that if a workers' organization consents to the transfer of the workers to the new employer according to the former conditions, the new employer shall become party to the collective bargaining agreement, instead of the former employer. The purpose of that provision is to obligate the new employer to adopt the former

collective bargaining agreement and to make him a party to that agreement. I shall discuss that purpose later. I shall now examine the language of article 18 of The Collective Bargaining Agreements Law, 5717-1957:

"Change of Employers 18. If an enterprise is transferred, or divided, or merged, the new employer shall be seen as the employer to whom the collective bargaining agreement applies."

Thus, on the collective level, article 18 of The Collective Bargaining Agreements Law is intended to fulfill the role of obligating the new employer, and of turning the new employer into a party to the collective bargaining agreement which the representative organization had with the former employer, whereas without such a statutory provision the new employer would not be party to the agreement, rather a party foreign to it: a third party. Article 18 turns him into a party to the agreement. That is all that the article does. It does not obligate the workers to transfer to the new employer, or the workers' organization to become party to an identical collective bargaining agreement with the new employer against his will. The article does not obligate the organization to agree that from now on, the other party to its contract – the contract it had with the former employer – will now be the new employer. The article does not obligate the individual workers in the collective to transfer to the new employer with the same conditions. In order for the representative organization to become party to the collective bargaining agreement with the new employer, the consent of the workers' organization to be party to a collective bargaining agreement with the new employer must be attained, and it is to be negotiated with for that purpose; the representative organization and the workers are not to be presented with a *fait accompli*. That is, *inter alia*, an issue of policy at the foundation of labour law: the representative organization has the right to be negotiated with at the time of changing circumstances.

(c) Do Said Statutory Provisions Create Asymmetry and Imbalance between Employer and Employee?

The contention may be raised that such an interpretation causes inequality between the employer and the employees. Such an argument is to be rejected. The new employer buys the enterprise of his own free will. He buys the enterprise knowing that he will become party to the collective bargaining agreement which the workers had with the former employer. The employer purchases the enterprise with equipment, goodwill, and a collective bargaining agreement and workers with social rights as well. He has the option of examining the previous collective bargaining agreement, and deciding not to buy the enterprise if he is not interested in the agreement. He has the option of negotiating a new contract with the workers or with the representative organization. The workers have no such option. They are not the ones who decide on transferring the enterprise; they are presented with a *fait accompli*.

Comparative Law

As *The Court* noted, there is a European Community directive dealing with exchange of employers ["transfer of an undertaking . . . to another employer"] (Directive 77/187). The purpose of the directive was to ensure workers' security during a period in which there is a tendency to make economic structural changes which lead to changes in and

transfer of some or all of the enterprises. The purpose of the directive, according to CATHERINE BARNARD, *EC EMPLOYMENT LAW starting at p. 354* (1996), is to protect the workers in those situations.

Barnard points out three goals of the directive:

1. It ensures automatic transfer of labour relations, including all the rights and obligations, in the case of a transfer of an enterprise;
2. It protects workers from dismissal by either the transferor – the previous employer – or by the transferee – the new employer, subject to the employer's right to dismiss workers for reasons of economic, technical, or organizational needs of the enterprise.
3. The directive requires the transferee – the new employer – as well as the transferor – the previous employer – to inform and consult the representatives of the workers affected by the transfer ("representatives of the workers" meaning the workers' representatives as they are defined in each state). The directive nevertheless leaves the member states a free hand to act in that area as they see fit:

"The purpose of the directive is therefore to ensure that the restructuring of undertakings within the common market does not adversely affect the workers in the undertakings concerned"

(*id.*, at the bottom of §314). At first, the states of the Continent and in the European Community saw, alongside the duty upon the new employer to adopt the previous agreement, an obligation on the part of the workers to continue to be party to the previous agreement, in order to make easier the free transfer of enterprises or control thereof. However, there was consensus that the purpose of the directive was to protect the workers. The directive was seen as a means of broadening the protection of workers in the situation of enterprise transfer, via the laws of the Community member states. However, at first, the member states were granted freedom of action on the subject.

The German Federal Labour Court validated the protection of workers in its caselaw. It reached the conclusion that the obligation to be party to the previous labor contract, whether personal or collective, is the obligation of the new employer. The German legislature legislated clauses similar to ours on the personal and collective levels, ensuring that the rights and responsibilities in the previous collective bargaining agreement are preserved when ownership is transferred. However, regarding workers, the German Federal Labour Court ruled:

"According to the Federal Labour Court's long standing jurisdiction the employee, whose employment relationship is supposed to be transferred automatically to the new owner or leaseholder, may declare his opposition to the transfer and opt to remain employed by the old employer. This especially makes sense in case only a part of an establishment is transferred to a new owner or leaseholder. Due to European Court of Justice's judgment referring to a rather different case in the Netherlands for a while it was highly contested whether this employee's right as developed by German jurisdiction is compatible with the EEC Directive. In the meantime, however, the European Court of Justice has expressly confirmed its compatibility" (Manfred Weiss, *Federal Republic of Germany*, 5 INTERNATIONAL ENCYCLOPEDIA FOR

The German Federal Labor Court further took a stand regarding the validity of dismissal in the case of transfer of ownership to a new employer. In Germany there is a statute prohibiting dismissal of workers after they have received job permanence, in enterprises of a certain size and up. The Court ruled that if a worker is transferred from one employer to another, in an enterprise in which dismissal is usually valid pursuant to that statute, the transfer, or dismissal of the worker if he does not consent to be transferred, are void *ab initio* if done for reasons of transferring the enterprise to the new employer and the workers' refusal.

"Any dismissal for reason of the transfer of an establishment or of parts of an establishment is null and void. The Federal Labour Court applies this rule very strictly: if there is any indication that the transfer could have caused the dismissal it is considered to be valid. This prohibition to dismiss also applies to situations where the Act on Protection against Dismissals does not apply because either the establishment is too small or the worker has not yet been employed for at least six months. Hence in cases where normally dismissals are possible without giving any reason, now in this context justification is necessary" (*op. cit.*, at p. 102).

The Court of the European Community changed its caselaw as a result of the caselaw of the German Federal Labor Court. After it had left the states a free hand regarding the workers' status, it now ruled, in a series of consolidated judgments interpreting the directive, that the consent of the workers who are to be transferred to the new employer is required. The court stated, regarding the directive's purpose:

"The Court in *Wendelboe* summarized the rights conferred upon employees as follows: '... the scheme and purposes of the directive, which is intended to ensure, as far as possible, that the employment relationship continues unchanged with the transferee and by protecting workers against dismissals motivated solely by the fact of the transfer ...'. The Directive is intended to protect those employees who are performing an identical job but under the orders of a different employer. The individual protection conferred has two pillars – firstly, the transfer of rights and obligations arising from the contract of employment and collective agreements (Article 3) and secondly, the protection against dismissal (Article 4)" (CATHERINE BARNARD, *EC EMPLOYMENT LAW* 375 (1996)).

The Court of the EC discarded the approach by which not only is the employer bound by the previous agreement, but also the workers. The EC Court ruled that the workers are not able to waive the rights in the directive. Following the German caselaw, the European court ruled that the workers are no longer to be seen as bound by the old agreement with the new employer:

"Since transferees are bound by the terms of the Directive it was assumed that the employees' contracts were also transferred whether they liked it or not. The recent decisions of *Kastikas v. Konstantinidis* and *Skreb and Schroll v.*

Savereibetrieb Paetz & Co Nachfolger GmbH have, however, cast doubt on this assumption. . . .

The Court argues the Directive permitted an employee to remain in employment with the new employer on the same terms and conditions as those agreed with the transferor, the Directive did not impose an obligation on the employee to continue the employment relationship with the transferee. Such an obligation would undermine the fundamental rights of employees who must be free to choose their employer and cannot be obliged to work for an employer whom they have not freely chosen. . . .

However, in *Kastikas* the Court said that if the employee decides voluntarily not to continue the contract of employment or employment relationship with the transferee, the Directive does not oblige Member States to provide that the contract of employment or employment relationship be continued with the transferor. Instead, it recognized that the Member States must determine the fate of these contracts of employment. While in Germany the contract of employment generally continues with the transferor, in the United Kingdom and France the contract of employment is considered as terminated with no protection from the law of dismissal. This may negate the effect of the Court judgment: the employee transfers or is dismissed (*op. cit.*, at pp. 377-378).

The judgment of the European court *Kastikas v. Konstantinidis* (European Court of Justice) [1993] 1C.M.L.R 845) reached the following conclusion:

[31] Although the directive . . . permits an employee to stay with the new employer on the same conditions as those agreed upon with the transferor, it cannot be interpreted as compelling the employee to continue the employment relationship with the transferee.

[32] Such an obligation would call into question the employee's basic rights: he must be free to choose his employer and cannot be compelled to work for an employer whom he has not voluntarily chosen.

[33] It follows that Article 3(1) of the directive does not prevent an employee from deciding to object to the transfer of his contract or employment relationship and thus not obtain the benefit of the protection given by the directive.

[34] However, as the Court has also held, . . . it is not the purpose of the directive to ensure that the contract to employment or the employment relationship with the transferor is continued if the employee does not wish to remain in the transferee's employee" (pp. 856-866).

Challengers of the French approach, which forces the workers to transfer to the new employer, have arisen.

Thus, according to CATHERINE BARNARD's abovementioned book on EC labour law, as I demonstrated above. The same has been said in criticism in the various states. Professor Raday, in her abovementioned article, quotes some of Schaeffer's criticism in France (*id.*, at p. 93):

"Investigating the applications of the French rule of transferability, the author concludes that there should not be a reciprocal limitation of an employee's contractual liberty in order to guarantee the continuity of the enterprise. Such a limitation work in an enterprise whoever the employer 'An employee would be transferred with the goods of the enterprise and like them; this would lead to involuntary servitude, with an employer who is perhaps insolvent, with whom the employee had not wished to work and of whom he will become the victim' (Schaeffer, 'L'envers de L'articles 23, 70 livre 1 du Code du Travail' Etude J.C.P 1963 I 1753, (1963) 37 La Semaine Juridique 1753)".

From Comparative Law to Israeli Law

We shall now return to the provisions of our statutes. There is, in my opinion, neither in the statutory provisions on the personal level, nor in article 18 on the collective level, any obligation on the part of the workers to consent to become party to the new collective bargaining agreement.

I should like to repeat, and emphasize, that that legislation is not to be seen as obligating the new employer to become party to the previous collective or personal contract, against his will. It does, albeit, determine that he is party to the new agreement; but only if he wishes to buy the enterprise. I have already mentioned that the employer buys the enterprise of his own free will. He must be aware that he is buying the factory with a certain goodwill, certain equipment, and workers with certain personal rights and collective bargaining agreements. The new employer is not compelled. He has the choice not to buy the enterprise. The employer has the freedom to choose to buy the enterprise if he so wishes, and if he does not want the agreements, to choose not to buy the enterprise. Both sides thus act of their own free will.

As it appears to me, that is how article 1(b) of the Severance Pay Law is to be understood. All it does is protect the new employer from the duty of continuity cast upon him by the statute, only in a very specific case, of a worker who transfers to a different place of work with the same employer, followed by exchange of employers. The article states that the new employer is not obligated to ensure continuity when the specific circumstances described in the article arise. Article 1(b) of The Severance Pay Law, 5723-1963 states:

"When a worker transfers from one place of work to another under the same employer, and then the employer is replaced in the present place of work, that worker is entitled to receive severance pay from the previous employer, for the period of work for him or in the previous place of work, as if the worker was dismissed on the day of said exchange of employers; if the new employer takes on the obligation to pay the said severance pay which the worker was entitled to receive from the previous employer, in a written obligation toward the worker, the previous employer is exempt from the obligation to pay the severance pay, and the period of the worker's work for the previous employer or in the previous place of work will be seen, for the purposes of this law, as if it was work in the present place of work."

Article 1(b) does not obligate the worker to work for the new employer.

The Court discussed the link between the worker and the place of work. I accept that that is the objective of those clauses and the objective of labour law in general. That link, determined in caselaw, indicates labour law's objective of preventing moving workers around. It emphasizes the deep link between the worker and the place of work. That is indeed the reason that local jurisdiction is determined in the procedural regulations, first and foremost according to the place of work. That does not negate the link between the worker and his employer. The goal is to protect the worker in the workplace; not to revoke the worker's right to choose with whom he is willing to be bound in an employment contract. Furthermore, that link to the place of work is weakened today, in light of the growing tendency to employ workers via manpower companies, when those companies, and not the user, are considered the employer.

The Assignment of Debt Law

I shall now discuss The Assignment of Debt Law, discussed by the parties, pursuant to which, as well, workers are not to be transferred to a new employer without their consent. The Assignment of Debt Law, 5729-1969 makes possible assignment of rights:

Assignment of Rights	1. (a) "a right of a creditor, including a conditional or future right, can be assigned without the consent of the debtor, unless its alienability has been revoked or limited by law or due to the essence of the right..."
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Article 6 of the statute, as quoted by *The Court*, states that it is not possible to assign a debt without the consent of the creditor. The qualification to assignment of a right in article 1(a) of the law has been interpreted as prohibiting assignment of a right of personal nature. Thus, the objective of the law is to allow assignment of rights, not assignment of debts. Debts can only be assigned with the consent of the creditor. There are two conditions for assignment pursuant to the statute:

- a) a right of personal nature is not to be assigned;
- b) a debt is not to be assigned without the consent of the creditor.

In our case, both qualifications apply:

a) the assigned right is of personal nature – labour relations – not commercial nature. As *The Court* demonstrated, employee-employer relations are a typical example of personal rights. The link is personal, and is not to be assigned to another person without the consent of the creditor – the worker.

b) The entire contract is being assigned, so both rights and obligations are transferred. The statute does not allow assignment of an obligation without the consent of the creditor – the worker in our case. Of course, one cannot transfer the rights in the contract alone, without the obligations.

Thus, division of an enterprise, or privatization, cannot be done without the consent of the workers, even in the eyes of The Assignment of Debt Law, and the employer who transfers the enterprise must bear the results of the transfer: redundancy dismissal or dismissal with severance pay.

Summary of My Opinion Regarding the Law in the Case of Transfer of an Enterprise to a New Employer

To summarize this part of my opinion, transferring workers to a new employer without their consent in the way described above is not legally effective. The workers are not "transferred", and their employment by the new employer without their consent is conduct in bad faith, as it purports to force onto the workers an agreement to which they do not consent, and thus violates their individual autonomy, which stems from human dignity, and their freedom of occupation.

I thus accept the opinion of *The Court* that article 11(a) of the Severance Pay Law applies, but it seems to me that if the new employer exists, and the workers do not transfer to the new employer after good faith negotiation, they are to be seen as workers of the previous employer, and if the previous employer wishes to downsize his enterprise due to transfer of part of it to another employer, he must dismiss them by redundancy dismissal. Thus the proper weight will be given to the various human rights: the employer's property right and his right to freedom of occupation, so that he can run his business properly, and the employer's individual autonomy, versus the right of the workers and the representative organization to fair negotiations in the framework of their individual autonomy, and the workers' freedom of occupation.

Decision of the Case Before Us

If my opinion would have been accepted, we would have ruled that *Histadrut* is right to contend that when an enterprise is divided or privatized, the workers are not to be seen as obligated to transfer to the new, private employer without their consent. For all the reasons I discussed, negotiations should be held with them regarding new conditions, unless they agree to adopt the previous collective bargaining agreement with the new employer as well. A party to a collective bargaining agreement should not make drastic changes in the working conditions, *e.g.* division and privatization – which are one and the same as far as the workers are concerned – without consulting the representative organization and receiving its consent. Furthermore, in the case before us, the *Histadrut* is right: transferal to *Ramta Ltd.* without the consent of the workers is liable to harm them, as *Ramta* is a smaller company than *Israel Aircraft Industries*, and thus the organization's bargaining power is much smaller. The *Histadrut* is right in claiming that if the workers, or some of them, do not consent to transfer to *Ramta Ltd.* with the same conditions, it is their right to see themselves as continuing to work for the former employer, *Israel Aircraft Industries*. If their prior employer should wish to dismiss the workers of the plant it divided and unloaded from itself, since it reduced its activity when dividing the *Ramta* enterprise, it must do so according to the rules in the collective bargaining agreement regarding redundancy. As I demonstrated above, The German Federal Labour Court acts as follows:

"According to the Federal Labour Court's long standing jurisdiction the employee, whose employment relationship is supposed to be transferred automatically to the new owner or leaseholder, may declare his opposition to the transfer and opt to remain employed by the old employer. This especially makes sense in case only a part of an establishment is transferred to a new owner or leaseholder" (Manfred Weiss, *op. cit.*).

Alternatively, or in the case that there is no longer an existing and running previous employer, the *Histadrut* claims that the previous employer must pay severance pay to the workers who do not consent to transfer over and work for the new employer. A change of employers is, for the individual workers, a change of circumstances as a result of which the workers cannot be required to work, and they are entitled to severance pay according to the statute requiring severance pay in cases of dismissal or change of circumstances. Even in that situation, it seems to me, the workers are to be dismissed via redundancy, and only if the parties cannot manage that, the workers are to be paid statutory severance pay pursuant to the abovementioned article 11(a), assuming that the workers and the workers' organization tried in good faith to negotiate with the new company.

I accept, therefore, the opinion of *The Court* that if the workers or the representative organization do not agree to work for the new employer at all, or do not agree to work for him with the same conditions – the same employment contract they had with the previous employer – if should they choose to resign, they should be seen as dismissed according to article 11(a) of The Severance Pay Law.

For the same reason, whether the previous employer exists or not, if he dismisses workers by way of redundancy, under special conditions, the workers who do not agree to work for the new employer are entitled to be included in the redundancy arrangement. I do not accept the position that article 18 of The Collective Bargaining Agreements Law obligates the workers to transfer to the new employer or obligates them to adopt the same collective bargaining agreement that they had with the prior employer. It is unclear to me how the obligation which *The Court* casts upon the workers, to transfer to the new employer with the same conditions under which they worked for the previous employer, is compatible with the right to severance pay pursuant to article 11(a).

It should be kept in mind that each side – the individual worker, the workers' organization, and the new employer – must negotiate conditions of a contract to work for the new employer in good faith, fairly, and openly. Thus we should, in my opinion, allow the *Histadrut's* appeal in National Labour Court Appeal Nun-Dalet/4-1.

I also agree that the appeal in National Labour Court Appeal Nun-Dalet/4-3 should be allowed.

Conclusion

71. In light of all the above, we decide, with dissenting opinion, to reject the appeal in National Labour Court Appeal Nun-Dalet/4-1.

The appeal in National Labour Court Appeal Nun-Dalet/4-3 is unanimously allowed, as detailed in paragraph 69 above.

Collective Labour Law - Employees' Organization - Division of a bargaining unit

National Labour Court of Israel, case 26445-09-13 and 26700-09-13 Histadrut Ha-Ovdim Ha-hadasha and the State of Israel v. Ahdut- the Organization of employees employed via contracts in the Public Sector (March 26, 2014)

Decision summary

The National Labour Court of Israel (President Yigal Plitman, Judge Amiram Rabinovich and Judge Lea Glicksman and Public Representatives Mr. Israel Doron and Mr. Itzhak Doitch) (hereinafter- **the NLC**) held that State employees, who are employed via personal contracts, do not constitute a separate bargaining unit than the rest of the State employees, and that Ahdut organization (hereinafter- **Ahdut**) is not an employees organization as defined in the Collective Agreements Act, 5717-1957 (hereinafter- **the Act**).

Background: Ahdut was established in order to represent the State employees, who are employed via personal contracts. The organization claims that the Histadrut, which is the representative employees' organization of the State employees, does not represent the aforementioned employees, and that it even excluded them specifically from the Collective Agreements it signed with the State.

Ahdut has petitioned the Regional Labour Court in November 2011 (hereinafter- **the Regional Court**), while the dispute regarding the "Mega Strike" was being deliberated in the NLC. In its petition, Ahdut asked the Regional Court to issue orders forcing the State to conduct collective negotiations solely with it and to forbid the State to negotiate with any other organization with regard to matters concerning employees, who are being employed via personal contracts. The Regional Court rejected the State and the Histadrut's motion for summary dismissal of Ahdut's petition.

The Regional Court held that the State employees, who are employed via personal contracts, do in fact constitute a separate bargaining unit. It also held that Ahdut is the employees' organization that represents them in the framework of a breaking initial organization, although it has not become their representative employees' organization, as defined in the Act.

The State and the Histadrut appealed the Regional Court's ruling. The NLC allowed the appeals. President Plitman ruled the following:

As for the issue of subject matter jurisdiction- it was held that the Regional Court had no jurisdiction over the case, since the true nature of the dispute was inter-organizational- between Ahdut and the Histadrut- and as such may only be deliberated in the NLC, as first instance, since it has the sole and exclusive jurisdiction over this matter. The NLC also ruled that since Ahdut petitioned the Regional Court while the NLC held hearings regarding the dispute over the "Mega Strike", which among other things dealt with employees that are being employed via personal contracts, it was appropriate to transfer the matter to the NLC.

As for the issue of splitting from the existing bargaining unit, which currently includes all of the State employees, the NLC held that the State employees, who are employed via personal contracts, do not constitute a bargaining unit which is separate from the one which includes all of the State employees.

The NLC reviewed the current case law regarding the definition of a bargaining unit, and the relevant law that applies to its splitting. The NLC explained that the basic rule that was determined in previous rulings regarding the definition of a bargaining unit, is that its definition and modification will be made by the parties to a collective work relationship, with their consent- whether explicitly, in a specific manner, or via their behavior- and that the Court should not hurry and interfere with this consent.

An additional rule the courts have outlined with regard to the definition of a bargaining unit is that as a rule the factory based bargaining unit should be preferred and not be

divided. In certain cases, where the Court allowed for the split of an existing bargaining unit, it was in circumstances after the parties proved that the group of employees, who wish to separate from the existing bargaining unit, shared a common interest that went beyond petitioning for higher pay. The Courts have also held before that more flexibility should be demonstrated with regard to the definition of a bargaining unit, when it comes to initial employees' organization in the workplace, in order to allow for the realization of the freedom of association.

As for Ahdut, the NLC held that the fact that the Collective Agreements do not apply to the employees that are employed via personal contracts does not make them a separate bargaining unit.

The Court explained that even when the employer signs a Collective Agreement with the representative employees' organization and that agreement only applies to a significant number of the employees- but not to all- it does not change the bargaining unit at this employer. The fact that the Collective Agreement does not apply to all of the employer's workers does not change the bargaining unit, and does not turn the employees that were excluded from the Collective Agreement to a separate bargaining unit, since the bargaining unit is not determined by the scope of the Collective Agreement's application. The NLC held that the Histadrut is the representative employees' organization of the State employees, and it seems that it now works in order to advance the interests of different groups of State employees that are being employed by means of personal contracts. Therefore, recognizing these employees as a separate bargaining unit may harm their collective power and weaken the Histadrut's organizational power. In addition, under these circumstances the Histadrut should enjoy the "representative presumption" that will enable it to continue working in order to benefit the State employees, who are being employed via personal contracts.

It was also held that the State may- according to the law and its terms- employ workers via personal contracts. Therefore, with regard to those State employees, who are employed via personal contracts, the Histadrut has the power to, first, operate to represent them in their negotiations with the State in order to improve their terms of employment, and second, to work towards the application of the existing Collective Agreements to them as well. The Histadrut may also sign on special new Collective Agreements that will apply- all or in part- to the State employees, who are employed by the means of personal contracts.

As for the division of a bargaining unit in an organized workplace, the NLC held that the rule is that the factory based bargaining unit is preferable to a sectoral/ professional bargaining unit, since dividing a bargaining unit in the same factory to different professional units will decrease the organizational power of its workers.

Obviously, in an organized workplace, where several people work, there are different groups- each with its own different interests that do not coexist with one another. However, if the argument is that the representative employees' organization does not represent one of the employees' groups properly- for example, the employees who work by the means of a personal contract- the answer is not to split the bargaining unit in that workplace, which will lead to the decrease of the organizational power of the employees that comprise this group and harming their solidarity. Rather, the answer lies in the activity of that particular group within the framework of the existing representative organization, and in extreme cases to file a lawsuit against the existing representative organization, claiming it does not grant them adequate representation.

The NLC held that the rule will be different in an unorganized workplace, since in that case there is not an issue of dividing an existing bargaining unit among the organized employees in the workplace, but rather the fulfillment of the freedom of association. In

that particular case, the guideline will be that the bargaining unit is the largest unit that enables organizing employees who share a common and unique interest in that workplace, in the form of a representative organization. Under these circumstances, realizing the freedom of association, even partially, and establishing a representative organization, is preferable to not realizing the freedom of association in that workplace altogether.

As for the justification in splitting the existing bargaining unit that represents all of the State employees, and creating a new bargaining unit that includes only the employees, who are employed via personal contracts, the NLC held that Ahdut did not demonstrate that this group shares a common and unique interest that justifies its split from the existing bargaining unit. This is because the group consists out of a variety of State employees, who vary from one another in many aspects, and in fact their sole commonality is being employed via personal contracts. This common denominator is not sufficient to be regarded as a unique common interest which justifies being recognized as a separate bargaining unit from all of the State employees. It also cannot be said that all of these employees have a common interest to have the Collective Agreements the State had signed with the Histadrut applied to them, as some of them enjoy preferable employment conditions compared to those granted in the Collective Agreements. In addition, some of these employees have the option of choosing whether to be employed under the provisions of the Collective Agreements or alternatively via a personal and special contract, based on the inherent advantages each of these employment options may hold with regard to them.

It was also held that splitting the bargaining unit will make it harder for State employees and their employer to create a stable collective work relationship, by generating an absurd result of two types of Collective Agreements that apply to two groups of employees in the same workplace, employees who sometimes hold the same position. In addition, this second bargaining unit will frequently be modified, as its members will often change- according to the amount of employees the State will employ by means of a personal contract.

Based on the aforementioned arguments, the NLC held that employees who are being employed via personal contracts should not be recognized as a separate bargaining unit.

As for Ahdut being an employees' organization- the Court held that Ahdut does not meet the terms specified in the Act and in previous rulings to qualify as one. As such, it has no power to play a role in the field of collective labour relationship according to the Act.

The NLC held that the purpose of creating an employees' organization according to the Act, is to represent the employees by organizing them vis-à-vis their employer, with the inherent notion that it may be a representative organization, and forcing the employer to negotiate with that organization towards the signing of a Collective Agreement. The option of realizing the purposes behind creating an employees' organization according to the Act, must be examined with regard to the existing bargaining unit in the workplace. This is why an employees' organization- as defined by the Act- with regard to a bargaining unit, may only be an employees' organization that has the ability to take side in an inter-organizational competition, prior to claiming it is the employees' organization in that workplace.

As for Ahdut- it has defined its aim in its articles of association as follows: "to become the representative employees' organization for the public sector employees who are employed via personal contracts". The NLC explained that based on Ahdut's agenda- as specified in its articles of association- even if all of the aforementioned employees will join Ahdut, the number of its members, i.e., those employees who are employed via

personal contracts, will only amount to 1/8 of the State employees in the bargaining unit. Therefore, Ahdut may not take part in an inter-organizational competition for representing the bargaining unit of the employees in the State vis-à-vis the State as an employer, may not negotiate with the State and may not sign a Collective Agreement with it.

What follows from these statements is that Ahdut's activity may not be in the field of the inter-organizational competition of an employees' organization vis-à-vis the State, based on the purpose of creating an employees' organization mentioned in the Act, but rather should be viewed as the organization of an organized employees group, which field of operation is limited to representing its members' interests within the representative organization. In this framework Ahdut may represent its members- from inside the Histadrut and towards it- but may not represent the employees that are employed via personal contracts that are not Ahdut members.

For all of these reasons, the NLC ruled that Ahdut is not an employees' organization, as defined by the Act.

Judge Glicksman, in her opinion, agreed to president Plitman's final decision, but also added some comments:

With regard to the subject matter jurisdiction, Judge Glicksman noted that under these circumstances the Regional Court had to transfer the case to the NLC. However, she added that it is wrong to set a rule according to which any time an employees' organization joins a proceeding between another employees' organization and an employer, involving a bargaining unit, it should be regarded as an inter-organizational dispute, which will cause the Regional Court to lose its jurisdiction.

As for the question of dividing a bargaining unit, judge Glicksman concluded that there is no identity between the bargaining unit and the scope of the Collective Agreement and that the bargaining unit is not defined based on the employees to whom the Collective Agreement applies. As a result, the fact that the State employees who are being employed by means of personal contracts were excluded from the Collective Agreement does not mean that they form a separate "bargaining unit" in the State. In light of this, it should be examined whether the group of State employees, who are being employed via personal contracts, forms a separate bargaining unit in the State, according to the rules that were determined in the case law with regard to the recognition of a group of employees as a bargaining unit.

Judge Glicksman agreed that the State employees, who are being employed via personal contracts, do not form a separate bargaining unit since they do not share a common and unique interest- which is the basic condition for defining a group of employees as a bargaining unit. In this case, the lack of such common interest is inherent to the criteria of the bargaining unit's definition which Ahdut set- being employed via a personal contract.

Judge Glicksman rejected Ahdut's main argument, that the State employees, who are being employed by way of personal contracts, should be regarded as a separate bargaining unit based on the "agreement rule"- considering the fact that the State and the Histadrut agreed to exclude this type of employees from the scope of the Collective agreements. Such rejection is both from a factual and a legal perspective: from the factual standpoint- since it was proven that the Histadrut does in fact operate to benefit the interests of these employees (although Judge Glicksman refrained from determining whether it constitutes an adequate representation, as there was no need to make a decision on this matter); and in the legal aspect- as excluding these employees from the scope of the Collective Agreements does not make them a separate bargaining unit.

Judge Glicksman further clarified on this issue that sometimes it is possible to learn from the representative employees' organization decision to exclude application of provisions of Collective Agreements to a certain group of employees, that the aforementioned group of employees is a separate bargaining unit. In addition, the fact that the representative employees' organization does not provide a group of employees with an adequate representation may also serve as a consideration for recognizing that group as a separate bargaining unit. However, a determination that a group of employees forms a separate bargaining unit should be made based on examining all of the facts, circumstances and considerations that are relevant to that workplace, according to the rules the courts have set on this matter, and not based on one fact- the exclusion of said employees from the scope of the Collective Agreements that apply in that workplace.

Judge Glicksman noted that in this case there is no reason to address the issue of "representation presumption", as the NLC held that the State employees, who are being employed by means of a personal contract, do not form a separate bargaining unit in the State.

As for the question of Ahdut being an employees' organization, judge Glicksman determined that due to the fact that Ahdut- based on its Articles of Association- limited its membership to employees, who are employed by way of personal contracts, and in light of the fact that this type of employees does not form a separate bargaining unit, Ahdut may not be regarded as an "employees' organization", as defined by the Act, in its relationship with the State, in the sense that it may not represent the employees who are employed via personal contracts in the collective dimension with the State. Meaning, Ahdut may not negotiate with the State towards the signing of a Collective Agreement that will apply to the State's employees. However, judge Glicksman added that previous rulings on this issue did recognize the possibility of an "employees' organization", even when such an organization lacks the characteristics to become a legitimate and recognizable one in the Collective Labour Law. According to judge Glicksman, since the parties did not argue on this issue, there is no need to determine, at such an early stage, the limits of the field of operation of an "employees' organization", meaning whether it is limited to solely representing its members' interests opposite the employees' representative organization, or may it also operate vis-à-vis the employer in a "personal dimension"- such as representing an employee who is employed via a personal contract in a hearing- and in other ways. Judge Glicksman held that these issues will be decided in the appropriate instances.

Judge Rabinovich joined President Plitman's decision and judge Glicksman's comments. The Employees' Public Representative joined President Plitman decision and judge Glicksman's comments. The Employer's Public Representative joined President Plitman's decision.

Norway

Jakob Wahl, Tron Løkken Sundet and Marit B. Frogner - Labour Court of Norway

I. PRELIMINARY QUESTIONS

1. A collective agreement is defined as an agreement between *a trade union* on the one hand and an employer or employers' association on the other hand, regarding wages, employment terms or other working conditions, cf. the Labour Disputes Act 2012 section 1 litra e. The agreement must be made in writing.

A “trade union” is defined as “any federation of employees or employees’ unions with the purpose of safeguarding the employees’ interests vis-à-vis their employers”, cf section 1 litra c.

2. Per 31 December 2012, 55 per cent of all employees were organised. There are, however, significant differences between public and private sector, and in the different trades. In public sector, 82 per cent of all employees are organised, compared to 40 per cent in private sector. Around 65 per cent of employers in private sector are members of an employers’ organisation.

3. The answer to question 3 is in essence “all of the above”. Any individual employer and any trade union can enter into collective agreements. Within the framework of unions’ and employers’ associations, the trade unions or the employer’s authority to enter into collective agreements may be restricted by the Basic Agreements or other existing collective agreements between the parties.

In private sector, the typical hierarchy of collective agreements between the major union (LO – the Norwegian Federation of Trade Unions) and the major employers’ association (NHO – the Confederation of Norwegian Enterprise), consists of the Basic Agreement between LO and NHO, and wage/collective agreement setting out specific terms and conditions (working hours, salary etc.) concluded on national branch level. In addition, there may be “local” collective agreements entered into at an enterprise – “special agreements”. According to section 4-1 of the Basic Agreement between LO and NHO, special agreements can not be in conflict the collective agreement adopted by the organisations for the enterprise. Unless the (superior) agreement permits derogation (typically levels for minimum salary), this applies both to more favourable terms and to agreements to the detriment of the employees. As an example, if the provisions in the collective agreement (on national branch level) concerning working hours are construed to contain a floor as well as a ceiling, the parties can not enter into a special agreement with shorter working hours than determined by the collective agreement both parties are bound by.¹

Works councils – other elected representatives for the employees:

The Working Environment Act 2005 has rules on safety representatives and works council (bipartite working environment committee). The Act uses the term “the employees’ elected representatives”. This includes, *inter alia*, safety representatives and other elected representatives – not only “shop stewards” from the union.

In case of transfer of undertaking, the previous and new employer is obliged to as early as possible to provide information and discuss the transfer with the employees’ “elected representatives”.

4. The state is to a certain degree involved in the process of collective bargaining.

In the private sector (and for municipalities) there are no rules on registration etc. as a condition for entering into a collective agreement; any association of employees with the purpose of safeguarding the employees’ interests vis-à-vis their employers, is a trade union (see above). On the other hand, any employer or any association of employers may enter into collective agreements with a trade union.

¹ In a decision by the Labour Court 3 July 2012 (ARD 2012 page 196) the court found that shorter working hours than determined by the national collective agreement (within the oil industry) was contrary to the collective agreement – regardless of the fact that the company since 1986 had practiced shorter working hours than determined by the national collective agreement.

The Act of 1958 Relating to Civil Service Disputes (public administration) limits the right to negotiate to unions with a “right to negotiate”. In general, unions that satisfy the required number of members and certain other criteria are considered to be unions with a right to negotiate. In these cases, the employer has a duty to negotiate: Section 2 reads:

“The State and the Civil Service unions with a right of negotiation shall be mutually bound, at the request of the other party, to engage in negotiations for concluding collective agreements.»

There are no specific regulations as to the **content of collective agreements**. However, collective agreements must, as all other agreements, comply with mandatory Norwegian law. Of particular importance is the general prohibition against discrimination on the basis of political views, membership of a trade union, sexual orientation, age, gender etc.

The “Norwegian model”:

In NOU 2009:10 (official Norwegian Report) page 179, included in paragraph 159 of the Supreme Court’s decision in the “STX-case” (5 March 2013), the Norwegian model wage settlement was described as follows:

«The Norwegian wage negotiation model is characterised by a high degree of co-ordination compared to many other countries. There is a long tradition for such co-ordination in Norway. The main industrial organisations play essential roles in the wage settlement process, and a number of mechanisms and institutions support the co-ordinating aspect of the wage formation process, such as *the Technical* Calculating Committee, the State Mediator and the National Wages Board. The model rests on, among other things, the recognition that over time, wage formation impacts significantly on the level of unemployment, while the development of real wages is primarily linked to the development in productivity. Experience from Norway and other countries indicates that a high nominal wage growth which is not matched by a similar growth in productivity will over time essentially give rise to higher inflation and increased unemployment rather than a rise in real wages, cf. Holden I (NOU 2000:21). A smoothly running wage formation system helps maintain a low level of unemployment, a high level of labour force participation and good framework conditions for businesses.

Facilitating a shared understanding of the current economic situation in Norway is an important part of incomes policy cooperation relating to wage formation, to ensure that the social partners agree, as far as possible, on the numerical basis of their negotiations. However, it is the responsibility of the respective parties to conduct the collective wage settlement negotiations.

The Norwegian tradition is one of broad social dialogue and the participation of the social partners. The Government’s Contact Committee and *the Technical* Calculation Committee for Wage Settlements contribute significantly to this dialogue. »

The union’s right to enter into agreements deviating from statutory rules:

Several rules laid down in labour laws, including the Working Environment Act and the Holiday Act 1988, allows the union to enter into agreements that deviate from the general statutory rules. This applies in particular to working hour regulations, where the parties may enter into agreements that to a fairly large extent deviate from the statutory working hour regulations. The right to enter into such agreements may rest on (local) unions in the enterprise, or, as quite common, be limited to larger unions (unions with a minimum of 10 000 members).

The National Mediator

The state is involved in the collective bargaining process as a mediator. The purpose of the National Mediator is to avoid conflict. The Labour Disputes Act and Act Relating to Civil Service Disputes (disputes involving public administration) have rules on (mandatory) mediation. According to section 8 subsection 2 of the Labour Disputes Act, disputes of interest shall not be resolved through strike, lockout or other industrial action until the terms laid down in the Act (section 18 and 25) have been met. The reference to section 18 and 25 are to the rules on time limits for the mediation (a “cooling off”-period). Once the National Mediator has received a notice that negotiations in creating or revising a collective agreement have not started or have broken down and a notice of strike or lockout is issued, he will temporarily prohibit the work stoppage may harm public interests. In any case, the parties will be summoned to a mediation meeting. Once industrial action has been temporarily prohibited, ten days must pass (as of the following day) before one of the parties may demand the mediation terminated. The mediator then has four days to conclude the mediation. This means that at least 14 days must pass from the date of a temporary work stoppage prohibition and until a conflict can start.

The Act of 4 June 1993 No. 58 relating to General Application off Wage Agreements (the General Application Act):

The purpose of the Act is stated in section 1-1:

“The purpose of the Act is to ensure foreign employees terms of wages and employment which are equivalent to those of Norwegian employees. This is in order to prevent employees from performing work on terms which, viewed as a whole, are demonstrably inferior to what is stipulated in nationwide collective agreements that apply to the trade or industry concerned or what is otherwise normal for the place and occupation concerned.”

The Tariffboard (“Tariffnemda”) may declare that “a nationwide collective agreement shall apply, in full or in part, to all employees who perform work of the kind comprised by the agreement, in an industry or part of an industry», cf. section 5 of the Act. The general application can only be extended to the parts of the collective agreement which regulate the wage and working conditions of the individual workers.

In a decision 5 March 2013, the Norwegian Supreme Court (STX-case) found that the provisions provided in the Regulation concerning partial general application of the Engineering Industry Agreement to the Maritime Construction Industry was not in breach of Article 36 of the EEA Agreement concerning on free movement of services (equivalent to Article 56 TFEU). Further, the Supreme Court did not find that the regulations were in breach of the Posted Workers’ Directive.

5. As a general rule – members of a union (workers) are bound by the collective agreements entered into by the union.

The collective agreement is thus legally binding on the parties that have entered into the agreement and their members (subordinate organisations, individual employers and employees). The agreement will typically define the work/categories of employees comprised by the agreement.

According to section 6 of the Labour Disputes Act, “any provision in an employment contract which conflicts with a collective agreement to which both parties are bound, is invalid”. The

invalidity applies as far as there is a conflict – the entire employment agreement does not become invalid. In cases of congruent membership and an applicable collective agreement, the provisions in the collective agreement will apply either way: If the individual agreement has more beneficial provisions than the collective agreement, the provisions in the collective agreement will apply, unless the collective provisions are derogable, i.e. provisions on minimum wage.

(As mentioned above, the same rule of invalidity will apply in the relationship between superior and subordinate agreements – the special (subordinate) collective agreement cannot be in conflict with the superior collective agreement.)

“Norms of inderogability”:

In general, the collective agreement is assumed to be based on duty for the employer to respect the terms of the collective agreement in employment contracts with non-unionized employees performing work that is governed by the collective agreement.

However, in the relationship between the individual non-unionized employee and the employer, the individual employment agreement is valid and binding. The Labour Disputes Act section 6 does not apply between the employer and the non-unionized employee. The non-unionized employee cannot derive any rights from the collective agreement – unless this (which is quite common) has been integrated as part of his or her individual employment contract. In such case, the employee has a right according to the individual employment contract.

6. As mentioned above in no. 5, the collective agreement binds the parties that have concluded the agreement and the members affiliated to the parties. Thus, there is no requirement that the individual employment agreement contains a reference to the agreement.

In regard to non-unionized employees (including members of an union that have not entered into a collective agreement with the employer), the norms of inderogability described above implies a duty for the employer to respect the collective agreement in relation to those employees as well. (However, the employees cannot derive any rights from directly from the collective agreement – as they are not members of the union and thus not bound by its agreements.) From a practical point of view, it is common that the individual employment states that the at any time applicable (relevant) collective agreement shall apply.

Employees employed by the state are comprised by collective agreement and employed on the terms laid down in collective agreement.

In practice, all employees (organised and non-organised) in public sector are covered by/employed on terms laid down in collective agreement, while the corresponding number for private sector is around 50 per cent (per 31 December 2013).

II. TRANSFER OF UNDERTAKING

1 and 2:

The Norwegian Working Environment Act implements Council Directive 2001/23/EC. Section 16-2 subsection 2 of the Working Environment Act has rules on transfer of the collective agreement and individual terms laid down in collective agreement:

“The new employer shall be bound by any collective pay agreement that was binding upon the former employer. This shall not apply if the new employer within three weeks after the date of transfer at the latest declares in writing to the trade union that the new employer does not wish to be bound. The transferred employees have nevertheless the right to retain the individual working conditions that follow from a

collective pay agreement that was binding upon the former employer. This shall apply until this collective pay agreement expires or until a new collective pay agreement is concluded that is binding upon the new employer and the transferred employees.”

Transfer of the collective agreement:

With effect from 2005, the new employer will be bound by the collective agreement that was binding upon the former employer, see above. (Previously, the general rule was that the collective agreement was not transferred.) Unless the new employer within three weeks after the date of transfer declares in writing that he will not be bound, he will be bound by the (whole) collective agreement binding upon the former employer at the date of transfer. This applies regardless of whether the new employer is already bound by another collective agreement.

Regardless, the new owner may in some cases be bound by the previous owner’s collective agreement based on general labour law principles laid down in case law. The assessment has been whether there has been a real transfer to a new owner, or if the transfer is made with a view to be free from the collective agreement. It is in particular in cases of transfer between group companies that the Labour Court has found that the transfer did not release the new owner from the collective agreement that was binding upon the former employer. The Labour Court has found that the new owner will not be bound by the collective agreement binding upon the previous owner based on the principle on continuity that applies in case of merger according to Norwegian Limited Liability Companies Act.

Transfer of individual terms based on collective agreement:

If the collective agreement is not transferred, the individual employees have the right to retain the individual working conditions that was binding upon the previous employer, cf. section 16-2 subsection 2 above.

This applies until the collective agreement expires – it is normally entered into for 2 years, or until a new collective agreement is concluded that is binding upon the new employee and the transferred employees. This could be the situation if the new employer enters into a collective agreement with the union that organises the transferred employees.

The collective agreement that applies to the new employer does not apply to the transferred employees at the date of transfer. A new agreement must be entered into. Consequently, for a period after the transfer, different collective agreements may imply that different terms and conditions apply to employees performing the same work.

3 a) The Parkwood Carterers would have to pay A € 2500.

If Parkwood Carteres did not make an express reservation against the collective agreement, the company would be bound by the collective agreement between TSU and ACE at the date of transfer. If the company declared that it would not be bound, the terms of the previous collective agreement (between TSU and ACE) apply until the agreement expires (the case does not say when the agreement between TSU and ACE expires).

b) Assuming that the agreement between TSU and ACE – that applied on the date of transfer – expired 31 March 2014 and was replaced by a new agreement with higher salary (€ 2600) from 1 April 2014, A will not be entitled to the increase based on statutory rules, see above. Since A’s individual terms was based on a collective agreement which has expired (31 March 2014), he may no longer derive any rights on this basis according to section 16-2 subsection 2 of the Working Environment Act. (We assume that he does not have an individual agreement which may support a claim for higher salary.)

c) No.

4 There is limited case law concerning transfer of undertaking. In general, the cases heard by the Norwegian Supreme Court concern whether the rules on transfer of undertaking apply – i.e. whether there has been a transfer of undertaking.

The ECJ's ruling in the *Alemo Herron* case has not direct relevant in Norway as ECJ based its assessment on Article 16 of the Charter. Since Norway is not a member of the EU, the Charter does not apply.

Norway

National reporters: Judges Jakob Wahl, Tron Løkken Sundet and Marit B. Frogner - Labour Court of Norway

I. PRELIMINARY QUESTIONS

1. A collective agreement is defined as an agreement between a trade union on the one hand and an employer or employers' association on the other hand, regarding wages, employment terms or other working conditions, cf. the Labour Disputes Act 2012 section 1 litra e. The agreement must be made in writing.

A "trade union" is defined as "any federation of employees or employees' unions with the purpose of safeguarding the employees' interests vis-à-vis their employers", cf section 1 litra c.

2. Per 31 December 2012, 55 per cent of all employees were organised. There are, however, significant differences between public and private sector, and in the different trades. In public sector, 82 per cent of all employees are organised, compared to 40 per cent in private sector.

Around 65 per cent of employers in private sector are members of an employers' organisation.

3. The answer to question 3 is in essence "all of the above". Any individual employer and any trade union can enter into collective agreements. Within the framework of unions' and employers' associations, the trade unions or the employer's authority to enter into collective agreements may be restricted by the Basic Agreements or other existing collective agreements between the parties.

In private sector, the typical hierarchy of collective agreements between the major union (LO – the Norwegian Federation of Trade Unions) and the major employers' association (NHO – the Confederation of Norwegian Enterprise), consists of the Basic Agreement between LO and NHO, and wage/collective agreement setting out specific terms and conditions (working hours, salary etc.) concluded on national branch level. In addition, there may be "local" collective agreements entered into at an enterprise – "special agreements". According to section 4-1 of the Basic Agreement between LO and NHO, special agreements can not be in conflict the collective agreement adopted by the organisations for the enterprise. Unless the (superior) agreement permits derogation (typically levels for minimum salary), this applies both to more favourable terms and to agreements to the detriment of the employees. As an

example, if the provisions in the collective agreement (on national branch level) concerning working hours are construed to contain a floor as well as a ceiling, the parties can not enter into a special agreement with shorter working hours than determined by the collective agreement both parties are bound by.²

Works councils – other elected representatives for the employees:

The Working Environment Act 2005 has rules on safety representatives and works council (bipartite working environment committee). The Act uses the term “the employees’ elected representatives”. This includes, *inter alia*, safety representatives and other elected representatives – not only “shop stewards” from the union.

In case of transfer of undertaking, the previous and new employer is obliged to as early as possible to provide information and discuss the transfer with the employees’ “elected representatives”.

4. The state is to a certain degree involved in the process of collective bargaining.

In the private sector (and for municipalities) there are no rules on registration etc. as a condition for entering into a collective agreement; any association of employees with the purpose of safeguarding the employees’ interests vis-à-vis their employers, is a trade union (see above). On the other hand, any employer or any association of employers may enter into collective agreements with a trade union.

The Act of 1958 Relating to Civil Service Disputes (public administration) limits the right to negotiate to unions with a “right to negotiate”. In general, unions that satisfy the required number of members and certain other criteria are considered to be unions with a right to negotiate. In these cases, the employer has a duty to negotiate: Section 2 reads:

“The State and the Civil Service unions with a right of negotiation shall be mutually bound, at the request of the other party, to engage in negotiations for concluding collective agreements.»

There are no specific regulations as to the **content of collective agreements**. However, collective agreements must, as all other agreements, comply with mandatory Norwegian law. Of particular importance is the general prohibition against discrimination on the basis of political views, membership of a trade union, sexual orientation, age, gender etc.

The “Norwegian model”:

In NOU 2009:10 (official Norwegian Report) page 179, included in paragraph 159 of the Supreme Court’s decision in the “STX-case” (5 March 2013), the Norwegian model wage settlement was described as follows:

«The Norwegian wage negotiation model is characterised by a high degree of co-ordination compared to many other countries. There is a long tradition for such co-ordination in Norway. The main industrial organisations play essential roles in the wage

² In a decision by the Labour Court 3 July 2012 (ARD 2012 page 196) the court found that shorter working hours than determined by the national collective agreement (within the oil industry) was contrary to the collective agreement – regardless of the fact that the company since 1986 had practiced shorter working hours than determined by the national collective agreement.

settlement process, and a number of mechanisms and institutions support the co-ordinating aspect of the wage formation process, such as *the Technical* Calculating Committee, the State Mediator and the National Wages Board. The model rests on, among other things, the recognition that over time, wage formation impacts significantly on the level of unemployment, while the development of real wages is primarily linked to the development in productivity. Experience from Norway and other countries indicates that a high nominal wage growth which is not matched by a similar growth in productivity will over time essentially give rise to higher inflation and increased unemployment rather than a rise in real wages, cf. Holden I (NOU 2000:21). A smoothly running wage formation system helps maintain a low level of unemployment, a high level of labour force participation and good framework conditions for businesses.

Facilitating a shared understanding of the current economic situation in Norway is an important part of incomes policy cooperation relating to wage formation, to ensure that the social partners agree, as far as possible, on the numerical basis of their negotiations. However, it is the responsibility of the respective parties to conduct the collective wage settlement negotiations.

The Norwegian tradition is one of broad social dialogue and the participation of the social partners. The Government's Contact Committee and *the Technical* Calculation Committee for Wage Settlements contribute significantly to this dialogue. »

The union's right to enter into agreements deviating from statutory rules:

Several rules laid down in labour laws, including the Working Environment Act and the Holiday Act 1988, allows the union to enter into agreements that deviate from the general statutory rules. This applies in particular to working hour regulations, where the parties may enter into agreements that to a fairly large extent deviate from the statutory working hour regulations. The right to enter into such agreements may rest on (local) unions in the enterprise, or, as quite common, be limited to larger unions (unions with a minimum of 10 000 members).

The National Mediator

The state is involved in the collective bargaining process as a mediator. The purpose of the National Mediator is to avoid conflict. The Labour Disputes Act and Act Relating to Civil Service Disputes (disputes involving public administration) have rules on (mandatory) mediation. According to section 8 subsection 2 of the Labour Disputes Act, disputes of interest shall not be resolved through strike, lockout or other industrial action until the terms laid down in the Act (section 18 and 25) have been met. The reference to section 18 and 25 are to the rules on time limits for the mediation (a "cooling off"-period). Once the National Mediator has received a notice that negotiations in creating or revising a collective agreement have not started or have broken down and a notice of strike or lockout is issued, he will temporarily prohibit the work stoppage may harm public interests. In any case, the parties will be summoned to a mediation meeting. Once industrial action has been temporarily prohibited, ten days must pass (as of the following day) before one of the parties may demand the mediation terminated. The mediator then has four days to conclude the mediation. This means that at least 14 days must pass from the date of a temporary work stoppage prohibition and until a conflict can start.

The Act of 4 June 1993 No. 58 relating to General Application off Wage Agreements (the General Application Act):

The purpose of the Act is stated in section 1-1:

“The purpose of the Act is to ensure foreign employees terms of wages and employment which are equivalent to those of Norwegian employees. This is in order to prevent employees from performing work on terms which, viewed as a whole, are demonstrably inferior to what is stipulated in nationwide collective agreements that apply to the trade or industry concerned or what is otherwise normal for the place and occupation concerned.”

The Tariffboard (“Tariffnemda”) may declare that “a nationwide collective agreement shall apply, in full or in part, to all employees who perform work of the kind comprised by the agreement, in an industry or part of an industry», cf. section 5 of the Act. The general application can only be extended to the parts of the collective agreement which regulate the wage and working conditions of the individual workers.

In a decision 5 March 2013, the Norwegian Supreme Court (STX-case) found that the provisions provided in the Regulation concerning partial general application of the Engineering Industry Agreement to the Maritime Construction Industry was not in breach of Article 36 of the EEA Agreement concerning on free movement of services (equivalent to Article 56 TFEU). Further, the Supreme Court did not find that the regulations were in breach of the Posted Workers’ Directive.

5. As a general rule – members of a union (workers) are bound by the collective agreements entered into by the union.

The collective agreement is thus legally binding on the parties that have entered into the agreement and their members (subordinate organisations, individual employers and employees). The agreement will typically define the work/categories of employees comprised by the agreement.

According to section 6 of the Labour Disputes Act, “any provision in an employment contract which conflicts with a collective agreement to which both parties are bound, is invalid”. The invalidity applies as far as there is a conflict – the entire employment agreement does not become invalid. In cases of congruent membership and an applicable collective agreement, the provisions in the collective agreement will apply either way: If the individual agreement has more beneficial provisions than the collective agreement, the provisions in the collective agreement will apply, unless the collective provisions are derogable, i.e. provisions on minimum wage.

(As mentioned above, the same rule of invalidity will apply in the relationship between superior and subordinate agreements – the special (subordinate) collective agreement cannot be in conflict with the superior collective agreement.)

“Norms of inderogability”:

In general, the collective agreement is assumed to be based on duty for the employer to

respect the terms of the collective agreement in employment contracts with non-unionized employees performing work that is governed by the collective agreement.

However, in the relationship between the individual non-unionized employee and the employer, the individual employment agreement is valid and binding. The Labour Disputes Act section 6 does not apply between the employer and the non-unionized employee. The non-unionized employee cannot derive any rights from the collective agreement – unless this (which is quite common) has been integrated as part of his or her individual employment contract. In such case, the employee has a right according to the individual employment contract.

6. As mentioned above in no. 5, the collective agreement binds the parties that have concluded the agreement and the members affiliated to the parties. Thus, there is no requirement that the individual employment agreement contains a reference to the agreement.

In regard to non-unionized employees (including members of an union that have not entered into a collective agreement with the employer), the norms of inderogability described above implies a duty for the employer to respect the collective agreement in relation to those employees as well. (However, the employees cannot derive any rights from directly from the collective agreement – as they are not members of the union and thus not bound by its agreements.) From a practical point of view, it is common that the individual employment states that the at any time applicable (relevant) collective agreement shall apply.

Employees employed by the state are comprised by collective agreement and employed on the terms laid down in collective agreement.

In practice, all employees (organised and non-organised) in public sector are covered by/employed on terms laid down in collective agreement, while the corresponding number for private sector is around 50 per cent (per 31 December 2013).

II. TRANSFER OF UNDERTAKING

1 and 2: The Norwegian Working Environment Act implements Council Directive 2001/23/EC.

Section 16-2 subsection 2 of the Working Environment Act has rules on transfer of the collective agreement and individual terms laid down in collective agreement:

“The new employer shall be bound by any collective pay agreement that was binding upon the former employer. This shall not apply if the new employer within three weeks after the date of transfer at the latest declares in writing to the trade union that the new employer does not wish to be bound. The transferred employees have nevertheless the right to retain the individual working conditions that follow from a collective pay agreement that was binding upon the former employer. This shall apply until this collective pay agreement expires or until a new collective pay agreement is concluded that is binding upon the new employer and the transferred employees.”

Transfer of the collective agreement:

With effect from 2005, the new employer will be bound by the collective agreement that was binding upon the former employer, see above. (Previously, the general rule was that the

collective agreement was not transferred.) Unless the new employer within three weeks after the date of transfer declares in writing that he will not be bound, he will be bound by the (whole) collective agreement binding upon the former employer at the date of transfer. This applies regardless of whether the new employer is already bound by another collective agreement.

Regardless, the new owner may in some cases be bound by the previous owner's collective agreement based on general labour law principles laid down in case law. The assessment has been whether there has been a real transfer to a new owner, or if the transfer is made with a view to be free from the collective agreement. It is in particular in cases of transfer between group companies that the Labour Court has found that the transfer did not release the new owner from the collective agreement that was binding upon the former employer.

The Labour Court has found that the new owner will not be bound by the collective agreement binding upon the previous owner based on the principle on continuity that applies in case of merger according to Norwegian Limited Liability Companies Act.

Transfer of individual terms based on collective agreement:

If the collective agreement is not transferred, the individual employees have the right to retain the individual working conditions that was binding upon the previous employer, cf. section 16-2 subsection 2 above.

This applies until the collective agreement expires – it is normally entered into for 2 years, or until a new collective agreement is concluded that is binding upon the new employee and the transferred employees. This could be the situation if the new employer enters into a collective agreement with the union that organises the transferred employees.

The collective agreement that applies to the new employer does not apply to the transferred employees at the date of transfer. A new agreement must be entered into. Consequently, for a period after the transfer, different collective agreements may imply that different terms and conditions apply to employees performing the same work.

3: a) The Parkwood Carterers would have to pay A € 2500.

If Parkwood Carteres did not make an express reservation against the collective agreement, the company would be bound by the collective agreement between TSU and ACE at the date of transfer. If the company declared that it would not be bound, the terms of the previous collective agreement (between TSU and ACE) apply until the agreement expires (the case does not say when the agreement between TSU and ACE expires).

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c) No.

4: There is limited case law concerning transfer of undertaking. In general, the cases heard by the Norwegian Supreme Court concern whether the rules on transfer of undertaking apply – i.e. whether there has been a transfer of undertaking.

The ECJ's ruling in the *Alemo Herron* case has not direct relevant in Norway as ECJ based its assessment on Article 16 of the Charter. Since Norway is not a member of the EU, the Charter does not apply.

Slovenia

National reporter: Miran Blaha, Supreme Court Judge, Supreme Court of Slovenia

I. PRELIMINARY QUESTIONS

1. *How do you define „collective agreement“ in your system? When and how does it work?*

A contract concluded by Trade unions or Trade union federations on the one hand and employers or employers' associations, on the other hand, and which clarify the rights and obligations of workers and employers arising from the employment relationship.

2. *What degree of organisation (unions and employers' associations resp) do you have nationwide?*

Today in Slovenia are 7 representative Trade union confederations, as well as 38 Trade unions which are representative of a particular industry or profession. The involvement of Trade unions in the first half of the nineties decreased to about 60% of the active population in Slovenia. In the second half of the nineties, the Trade unions have lost about a third of the membership. In 1998, the rate of unionisation fell to 42.8%. In 2009, new data showed a further decline in membership to 27%.

In Slovenia are four major employers' associations Chamber of Commerce, Slovenian Chamber of Commerce, Association of Employers of Slovenia and Association of Employers of Slovenia crafts and entrepreneurs.

3. *Who concludes collective agreements? Is it*

- Unions and employers' associations
 - on a national level?
 - on a regional level?
- Unions and individual employers
 - on a company level?
- Employees' representatives – other than unions – (e.g. works councils) and individual employer?

No, only Trade union can conclude collective agreement on the side of employees.

Please summarise national peculiarities if necessary to understand the system in a European context.

4. Is the state involved in the process of collective bargaining?

No, except that

- in the public sector the government is party and signatory to a collective agreement as an employer
- by having the authority to declare a collective agreement universally applicable?

5. What is the relationship between collective agreement and individual employment contract?

- Do collective regulations derogate/substitute individual agreements
 - in principle, unless the individual agreement is more beneficial to the employee? If so, how do you define “more beneficial”? Do you compare the whole contract or just that part of the contract that deals with the issue at hand (e.g. remuneration on the one hand, employment protection on the other hand)?

The employment contract and/or collective agreement may lay down rights which are more favourable for the worker than those laid down in Employment Relationship Act.

On the other hand, if a provision of the employment contract is contrary to the general provisions on minimum rights and obligations of contracting parties laid down by law, collective agreement and/or employer’s general acts, the provisions of law, collective agreements and/or employer’s general acts, which partly lay down the content of employment contract, shall be used as the constituent part of the employment contract.

To find out what is more beneficial Court in principle compare just that part of the contract that deals with the issue at hand.

6. Can (or must) in your system a collective agreement (or a part thereof) be made applicable in an employment relationship by a clause of reference in the contract of employment?

- *If such a clause of reference is not conditional but permissible: How often are collective agreements applied by virtue of congruent membership alone and how often by virtue of a clause of reference in the contract of employment?*
- *If collective agreements have normative effect in your system: What is the legal situation if both parties of a contract of employment are members of the respective collective partners – which renders the c.a. normatively applicable – and refer to the same c.a. in the contract of employment?*

Employment Relationship Act determines mandatory components of the employment contract. Regarding the issues referred to:

- stipulation on normal daily or weekly working time and the organisation of working time,
- stipulation on other components of the worker's wage, payment period, payment day and manner of payment of the wage,
- stipulation on the annual leave and/or the manner of determining the annual leave, and
- the length of periods of notice,

in the employment contract, the parties may refer to the laws, collective agreements and/or employer's general acts in force.

II. TRANSFER OF UNDERTAKING

1. In case of a transfer: Do conditions of work as ruled by a collective agreement transfer? (non-EU-members)

2. How do conditions of work as ruled by a collective agreement transfer?

- *Does it make any difference whether or not the collective agreement applicable with the transferor has normative effect? Does it retain normative effect if transferee is not bound by (the same or any other) collective agreement?*

Collective agreement retains normative effect.

- *How does a collective agreement transfer if the basis of validity is the contract of employment?*
- *How does a collective agreement transfer – statically (i.e. as it stands at the time of the transfer) or dynamically (i.e. in the current version)?*

Statically - as it stands at the time of the transfer.

- *How – if at all - can the transferee change the terms of a collective agreement for the transferred employee?*

- *Can he enter an employers' association and then apply the terms of that collective agreement?*

Yes

- *Does it depend on whether or not the employee is a member of the union which concluded that collective agreement?*

No

- *Can the terms of the transferred collective agreement be lawfully altered by amending the contract of employment? Immediately after the transfer or after a certain period of time?*

After one year.

3. How would you solve this case:

Alemo (A) works as a kitchen helper in the restaurant of a department store. He is a member of the Trade & Services Union (TSU), the employer is a member of the association of commercial employers (ACE). The contract of employment provides, "During your employment with [the store], your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the [TSU and ACE] ...".

By virtue of the current version of the collective agreement A receives 2,500 € monthly wages. On January 1st 2014 the kitchen is transferred to Parkwood Caterers (P), a catering sector undertaking. Parkwood is member of the Caterers' association (CAT). Their collective agreement, concluded with the Union of Food and Restaurant Employees (UFO), provides monthly wages of 1,300 € for kitchen helpers.

a) *P pays A 1,300 €, A demands 2,500 €. Who is right?*

A is right. In a similar case, the Slovenian court ruled that the necessary changes can occur until later - that is, after the expiration of the time within which the transferee is obliged to take into account the collective agreement of the transferor.

b) *On April 1st 2014 the collective agreement for the trade and service employees is amended. The monthly wages for kitchen helpers is increased to 2,600 €. The caterers's collective agreement remains unchanged. Can A demand to be paid 2,600 € henceforth by virtue of the clause of reference in the contract of employment)?*

No. There must be taken in account the collective agreement that is and as is applicable at the time of transfer, but not its subsequent amendments.

c) *Does it make any difference to this case if the department store is not a member ACE but applies the collective agreements for the trade and service employees because it has concluded a*

"Collective Agreement of Acknowledgement" with TSU stating that the employer will apply the terms of the collective agreements for the trade and service employees in its current version?

No difference.

4. Has the ECJ's ruling re Alemo Herron *any relevance in your country? Will you have to change your jurisdiction?*

No relevance. Having a clear legal basis, the Labor Courts all the time decided according to the judgment in the case Alemo.

Employment Relationship Act determines: The rights and obligations under the collective agreement which bound the transferor shall be assured by the transferee to workers for at least one year, unless the collective agreement terminates prior to the expiration of one year or unless prior to the expiration of one year a new collective agreement is concluded.

Spain

National reporter: Judge Antonio Martín Valverde, Supreme Court of Spain

I. PRELIMINARY QUESTIONS

1. How do you define „collective agreement“ in your system? When and how does it work?

Agreement reached through the collective bargaining process between the employer or employer's associations and the workers' representative bodies with a view to regulate individual and collective relations.

In Spain this term applies particularly (not exclusively) to generally applicable collective agreements; i.e. agreements with *erga omnes* force: each agreement applies to all workers and employers in the plant, enterprise or sector concerned. This kind of collective agreement must be drawn up in accordance with the requirements laid down by the “Workers’ Statute Act”, first approved in 1980.

Generally, the content of collective agreements may cover very different types of issues; they essentially concern: a) terms and conditions of employment – pay, working hours, occupational groups, promotion, geographical and functional mobility, disciplinary procedures, etcetera –; and b) collective aspects of labour relations – rights of workforce representatives in addition to the legal ones, settlements of disputes concerning the interpretation and application of the own agreement, (occasionally) no-strike clauses, etcetera.

Collective bargaining now occupies a central position in the Spanish industrial relations system, despite its troubled early days during the first decades of the XX century, and despite the fact that one of the distinctive features of the *erga omnes* collective agreement is the important part played by state legislation in determining its structure, development and effects. Until 1936, collective bargaining was assigned to joint committees, whose members included government officials with major decision making powers. After the hiatus of Civil War and following a period during which collective bargaining was banned, a *sui generis* system of collective bargaining emerged (Act of 1958), in which the state maintained a high degree of involvement.

2. What degree of organisation (unions and employers' associations resp) do you have nationwide?

Under Spanish law the status of nationwide “most representative unions” opens the access to main areas of trade union activity (negotiation of generally applicable collective agreements, representation on public bodies), and facilitates the grant of financial and economic means of action (state subsidies, possession of public premises). The quality of “most representativeness” is objectively assessed on the basis of the support (minimum of 10 %) won by the trade unions lists or candidates in electoral ballots of workers' representatives in enterprises or workplaces: “staff delegates” in small enterprises, “workplace committee” in medium size and great enterprises. Since the eighties the status of “most representative unions” is obtained by and recognized to

two nationwide trade unions organizations: *Comisiones Obreras* (CC.OO.) and *Unión General de Trabajadores* (UGT).

For the Employer's Associations the criteria for assessing the quality of nationwide most representative are a minimum number (percentage: 10 %) of affiliated enterprises and a minimum number (the same percentage of 10 %) of workers employed in them. Only one amalgamation of Employer's Associations, called *Confederación Española de Organizaciones Empresariales- Confederación Española de la Pequeña y Mediana Empresa* (CEOE-CEPYME), meets these requirements, that enable to similar position and advantages enjoyed by the nationwide most representative trade unions.

3. Who concludes collective agreements? Is it

– Unions and employers' associations

+ on a national level?

+ on a regional level?

○ on a company level?

○ on a plant level?

– Unions and individual employers

○ on a national level?

○ on a regional level?

+ on a company level?

+ on a plant level?

– Employees' representatives – other than unions – (e.g. works councils) and individual employer?

Company collective agreements and plant collective agreements may be concluded either by union representatives or elected representatives: "staff delegates" and "workplace committee". Since 2010, preference between union/elected representatives is granted to the firsts, if they are members of the elected representatives and amount a majority of the whole body.

Please summarise national peculiarities if necessary to understand the system in a European context.

- 1)The right to collective bargaining of "workers' and employers' representatives" is enshrined in section ("article") 37.1 of the Constitution of 1978;
- 2)The process of collective bargaining, as regulated in Section Heading III of the "Workers' Statute Act, is not continuous but static: collective agreements are not "open ended" but "closed", and can be renegotiated only on expiry;
- 3)The generally applicable (*erga omnes*) collective agreements regulated in the "Workers' Statute" may be negotiated on a sectoral level (product-sector or industry agreement) or on an enterprise or workplace level (company or plant agreement);
- 4)The negotiation of company or plant agreements is frequent in medium-size and great enterprises;

- 5) Product-sector or industry agreements and company or plant agreements may meet or come together, and in the event of conflict of dispositions the law (“Workers’ Statute”, section 84) provides rules of priority and/or precedence;
 - 6) Generally speaking, an agreement may not, while it is in force, be affected by another agreement of different scope (principle of non-concurrence);
 - 7) Precedence is assigned to the company-plant agreements in matters like pay, working-time, or “conciliation of professional and personal-familial life”;
 - 8) Precedence is assigned to the product sector-industry agreement in matters like probationary period, types of employment contracts, occupational groups (that may, nevertheless, be adapted at the level of enterprise) and disciplinary measures;
 - 9) Besides, general multi-industry agreements may regulate the relations between the various bargaining units and levels;
 - 10) When the requirements of the law for the *erga omnes* collective agreement are not fulfilled, the concluded collective agreements (“extra-statutory agreements”) have limited force, applying only to members of the contracting organisations as an implied term of the contract of employment.
4. Is the state involved in the process of collective bargaining?
- by mandatory regulations as to the contents of collective agreements
 - by mandatory registration and/or concession of unions or associations
 - by initiating collective agreements
 - by providing a system of or body for collective conciliation
 - if so, please summarise how it works, whether it is mandatory and if its recommendations are in any way binding
 - by having the authority to declare a collective agreement universally applicable?
- The state-legislator establishes the requirements (bargaining units, parties, limits, procedures) of the generally applicable collective agreements. The agreements that comply with the whole requirements are “universally” applicable.
- The Labour Administration is charged of the registration and official publication of the concluded generally applicable collective agreements; and can contest its supposed illegal clauses in Labour Courts. The Labour Administration can, in very exceptional circumstances, extend the in force collective agreement of a sector to a different field of activity.
- The “Workers’ Statute Act” (section 85) fixes a minimum content of the generally applicable collective agreement, that consists essentially in establishing a body and a procedure in order to solve discrepancies about its interpretation and application. In principle, the decisions of this body are not binding.
5. What is the relationship between collective agreement and individual employment contract?
- Do collective regulations derogate/substitute individual agreements
 - always, without exception?

- never? Do individual agreements always take precedence over c.a.?
- + in principle, unless the individual agreement is more beneficial to the employee? If so, how do you define “more beneficial”? Do you compare the whole contract or just that part of the contract that deals with the issue at hand (e.g. remuneration on the one hand, employment protection on the other hand)?

The parties in the employment contract may establish terms and conditions of work “not less advantageous or contraries” to the dispositions of collective agreements [“Workers’ Statute Act”, section 3.1 c)]. Not less advantageous (“more beneficial”) to the employee implies neither a whole comparison nor an “atomistic” one, but a comparison between the respective issues, elements or matters of the agreement and of the contract: quantity of pay, system of pay, working time, hours of work, etcetera.

6. Can (or must) in your system a collective agreement (or a part thereof) be made applicable in an employment relationship by a clause of reference in the contract of employment?
 - If such a clause of reference is not conditional but permissible: How often are collective agreements applied by virtue of congruent membership alone and how often by virtue of a clause of reference in the contract of employment?
 - If collective agreements have normative effect in your system: What is the legal situation if both parties of a contract of employment are members of the respective collective partners – which renders the c.a. normatively applicable – and refer to the same c.a. in the contract of employment?

The generally applicable collective agreement has universal normative effect according section 82.3 “Workers’ Statute Act” (“Collective agreements regulated by this Act are binding for all the employers and workers included in the bargaining unit during the whole time of being in force”).

The “extra-statutory agreements” (see 3.10) apply only to members of the contracting organisations as an implied term of the contract of employment, but it is permissible to expand its application by virtue of (individual or collective) clauses of adherence. For the time being, these clauses (and the same “extra-statutory agreements”) are not very frequent.

II. Transfer of Undertaking

1. In case of a transfer: Do conditions of work as ruled by a collective agreement transfer? (non-EU-members)
2. How do conditions of work as ruled by a collective agreement transfer?
 - Does it make any difference whether or not the collective agreement applicable with the transferor has normative effect? Does it retain normative effect if transferee is not bound by (the same or any other) collective agreement?
 - How does a collective agreement transfer if the basis of validity is the contract of employment?
 - How does a collective agreement transfer – statically (i.e. as it stands at the time of the transfer) or dynamically (i.e. in the current version)?

– How – if at all - can the transferee change the terms of a collective agreement for the transferred employee?

- Can he enter an employers' association and then apply the terms of that collective agreement?
- Does it depend on whether or not the employee is a member of the union which concluded that collective agreement?
- Can the terms of the transferred collective agreement be lawfully altered by amending the contract of employment? Immediately after the transfer or after a certain period of time?

Section 44.4 "Workers' Statute Act": "The employment contracts of the workers affected in a transfer of undertaking continue to be regulated by the collective agreement that is in force in the transferred plant, workplace or enterprise at the moment of transfer, unless pact in contrary subscribed after the transfer by the new employer and the workers' representatives.

The application shall remain till the day of expiry of the original collective agreement or till the date of coming into operation of another collective agreement applicable to the transferred entity".

Then: 1) the collective agreement subscribed by the transferee after the transfer prevails against the collective agreement of the transferor; 2) if not, the collective agreement of the transferor is maintained in force only till the date of its expiry.

3. How would you solve this case:

Alemo (A) works as a kitchen helper in the restaurant of a department store. He is a member of the Trade & Services Union (TSU), the employer is a member of the association of commercial employers (ACE). The contract of employment provides, "During your employment with [the store], your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the [TSU and ACE] ...".

By virtue of the current version of the collective agreement A receives 2,500 € monthly wages. On January 1st 2014 the kitchen is transferred to Parkwood Caterers (P), a catering sector undertaking. Parkwood is member of the Caterers' association (CAT). Their collective agreement, concluded with the Union of Food and Restaurant Employees (UFO), provides monthly wages of 1,300 € for kitchen helpers.

- a) P pays A 1,300 €, A demands 2,500 €. Who is right?
- b) On April 1st 2014 the collective agreement for the trade and service employees is amended. The monthly wages for kitchen helpers is increased to 2,600 €. The caterers's collective agreement remains unchanged. Can A demand to be paid 2,600 € henceforth by virtue of the clause of reference in the contract of employment)?
- c) Does it make any difference to this case if the department store is not a member ACE but applies the collective agreements for the trade and service employees because it has concluded a

“Collective Agreement of Acknowledgement” with TSU stating that the employer will apply the terms of the collective agreements for the trade and service employees in its current version?

4. Has the ECJ’s ruling re *Alemo Herron* any relevance in your country? Will you have to change your jurisdiction?

The case *Alemo Herron* is not possible in our collective bargaining system of *erga omnes* agreements. In any case, as established by TJUE, section 44.4 *Worker’s Statute* is not compatible with a rule of “dynamic” application after the transfer of the original collective agreement.

Sweden

National reporters: Judges Cathrine Lilja Hansson, Carina Gunnarsson and Karin Renman

I. PRELIMINARY QUESTIONS

1. The term "collective bargaining agreement" is in Swedish law defined as an agreement in writing between an employers' organisation or an employer and an employees' organisation in respect of conditions of employment or otherwise about relationship between employers and employees. (Section 23 Co-Determination in the Workplace Act [1976:580].)

A collective bargaining agreement that has been concluded by an employers' organisation or an employees' organisation is binding, not only upon the parties of the agreement, but also, within its area of applicability, upon a member of such organisation. This applies irrespective of whether the member joined the organisation before or after the agreement was entered into, but not to the extent that he is already bound by another collective bargaining agreement. In the event that a member resigns from an organisation that has concluded a collective bargaining agreement he will not cease to be bound by the agreement as a consequence of such resignation. Normally you will in such a situation not cease to be bound by the agreement until the term of the agreement has expired. (Section 26 of the before mentioned act.)

2. About 70 percent of the employees are organised in a trade union and almost 90 percent of the employers are member of an employers' association (the figures includes the whole labour market, both the private and the public sector). About 90 percent of the workforce is covered by collective bargaining agreements. The latest figure includes employees who are not themselves members of a union and, consequently, not bound by a collective agreement but whose employer is bound by such an agreement and therefore obliged to apply the conditions laid down in the collective agreement also on employees who are not members of a union (se more question 6 below).

3. Unions and employers' associations conclude collective bargaining agreements on a national level and (local) unions and individual employers conclude collective bargaining agreements on a local (company) level. It is quite common that a national wide agreement, which contains comprehensive regulation of the overall principles concerning wages and general terms of employment, is supplemented with a local agreement witch deals with the implementation of the national wide agreement on the workplace.

It follows by the definition that a collective agreement must be concluded by employees' organisations, unions; on the employees' side.

4. The state is not involved in the process of collective bargaining and collective agreement can not be made universally applicable.

There is a central government agency answerable to the Ministry of Employment, The National Mediation Office in Sweden. It is required to strive for an efficient process of wage formation. This means combining real wage growth with higher employment, facilitating changes in relative pay, and ensuring compatibility with the principles whereby the competitive sector (the export industry) establishes the norm for pay rises and industrial cost levels do not exceed those of Sweden's competitors. The National Mediation Office holds regular talks with the social partners and organises conferences on wage formation several times a year. It also publishes reports and anthologies on the subject, all with a view to pushing wage formation in the right direction. The National Mediation Office in Sweden shall also mediate in labour disputes and oversee the provision of public statistics on wages and salaries.

Bargaining a collective agreement or adjustments in the agreement take place at various levels between the unions and the employers organisations. At the national level there are nationwide collective agreements covering a whole sector, but there are also single employer collective agreements and for instance supplementary workplace agreements.

5. As said above (question 1.) the provisions in a collective agreement are binding on signatories (the union and the employers organisation) *and* the members of the organisations (the employee and the employer).

The fact that members are bound by the collective agreement means, *inter alia*, that employers and employees may not reach separate agreements in violation of the collective agreement. Such agreements are invalid, according to section 27 in abovementioned act. If there is a dispute concerning if an individual agreement or a clause in such an agreement is violating a collective agreement the question has to be answered through an interpretation of the collective agreement. The regulation does not mean that individual agreements are prohibited, on the contrary supplementary individual contracts are common, depending on what sector is concerned. As a main rule one can say that clauses in an individual contract that are more beneficial are lawful and permitted.

6. If the employer is bound by a collective agreement with a union that the employee is a member of the agreement is, as said above, binding for both parties. There is then no need, legally, to mention the collective agreement in the contract of employment.

A collective agreement is however normally also applicable on a worker that is not a member of the union (who is part in a collective agreement that is binding for the employer). According to the collective agreement the employer is normally obliged to apply the agreement on even non-members. If the employer violates that, the employer can be held responsible and forced to pay damages to the union who is part in the agreement. To make the conditions of an agreement legally binding between the employer (bound by an

agreement) and the employee that is a non-member, there has too be an agreement on that between the employer and the employee in the individual employment contract.

If the employer is not bound by a collective agreement the employer and the employee can agree on the terms and the conditions or some of them in the employment contract. The collective agreement, especially certain clauses as pay, has a normative effect even without such an agreement.

II. TRANSFER OF UNDERTAKINGS

1. ---

2. Where an undertaking, a business or a part of a business is transferred from an employer who is bound by a collective bargaining agreement to a new employer through a transfer, the agreement shall apply, where relevant, to the new employer. This shall not apply, however, where the new employer is already bound by another collective bargaining agreement that may be applied to the employees whose contracts of employment are assumed by the new employer.

The employee party may, within thirty days of receipt of notice of the transfer, give notice of termination of the agreement. If notice of termination is given within this period, the agreement shall cease to apply upon transfer, or, if notice to terminate is given after the transfer, immediately upon the giving of such notice. Nor shall the collective bargaining agreement apply to the new employer if, prior to the transfer, the previous employer gives notice to terminate the agreement. However, if such notice to terminate is given less than sixty days before the transfer, the agreement shall apply to the new employer until sixty days after notice to terminate was given.

Where an employee's contract of employment and conditions of employment have been transferred to a new employer, the new employer shall be obligated, for a period of one year from the time of the transfer, to apply the conditions of employment contained in the collective bargaining agreement that applied to the previous employer. Such conditions shall be applied in the same manner as the previous employer was obligated to apply them. The provision shall, however, not apply where the term of the collective bargaining agreement has expired or where a new collective bargaining agreement has entered into force for the employees subject to the transfer.

3. a and b) During the first year after the transfer, the first agreement is applicable.

c) No it's the same rules.

4. The ruling doesn't seem to have any direct relevance in Sweden. No changes in law are needed.