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General report

Decision-making in Labour Courts

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Introduction

The purpose of the meeting in Helsinki is to discuss the procedure of decision-making in labour courts in a very practically oriented way. This stage of the trial is only in part governed by legal rules concerning e.g. voting and other formal questions of procedure. Yet the result of the whole litigation is ultimately produced and formulated at this stage. The work is done in sessions where the members of the court meet in private, or at the desk of the chairperson.

A questionnaire was sent out to national reporters in order to gather information about how labour courts represented in the meeting proceed in decision-making. The viewpoint was mainly that of the presiding judge. It is obvious that only some aspects of the theme have been covered in the questionnaire, and the material is intended to be complemented in discussions.

The fourteen national reports also include sample decisions passed in each country in cases where the matter under dispute is similar, the dismissal of an employee. The replies and the decisions show certain similarities, but also remarkable differences in the methods of judicial work. The following presentation contains a synopsis of the national reports accompanied with some comparative remarks. As a final result of the meeting the participants are hoped to gain useful information and insight for developing their work.

The general report is structured roughly in the order of the questionnaire. The report also lists a number of additional questions as suggestions for items to be discussed in the meeting.

Is the case decided immediately upon the main hearing, or is a separate session held for that purpose?

The proceedings come to an end when the parties present their final statements and leave the case to be decided. One may assume that the length of the following time, available for decision-making, has an influence on the outcome and the practical working methods of the court.

The replies to the questionnaire reveal that labour courts do not necessarily follow strict practices in this matter, although there are clearly differing main rules. In a number of participating countries, such as Germany, Hungary, Italy, Spain and Venezuela, the case is usually decided immediately upon the main hearing. This is the main rule also in the Belgian Court of Cassation and the Employment Tribunal in the UK. In the lower courts of Belgium there is a special reason for deferring the decision. If a public official (Ministère Public) decides to intervene and to give an advisory opinion in the case, the parties are allowed extra time to comment on the opinion, and the judgement is based on the opinion and replies thus delivered. In Israel individual judges seem to have their habitual ways of deciding the case immediately, or after a deliberation.

In Denmark a large share of disputes coming to the labour court are settled already in pre-trial conciliation proceedings conducted between the parties and chaired by a judge or the head of the court's secretariat. The settlement may be an agreement concluded by the parties, but also a statement issued by the chair. If the statement is issued immediately upon the negotiations, the reasons may be given orally, whereas in more complicated cases the resolution is formulated in writing and issued later.

The few cases that proceed to hearing in full court in Denmark follow a scheme which is common also in several other countries and includes a separate deliberative session after the main hearing. The report from the Irish labour court is illustrative in this respect. Following the hearing the members of the court have a preliminary discussion on the case. If a decision is not reached, the members hold a further meeting later and generally a decision is reached at that stage. This is standard practice also in Finland, France, Iceland, Slovenia, and Sweden. It is common practice to have a draft judgement prepared and sent out to the members of the court before the deliberative meeting.

Items to discuss

1. Is there a tension between making a decision promptly while the details of the case are still in fresh memory, and a carefully weighed decision which may require more time to prepare?

The role of a presenting official in the process

The composition of a court may in some legal systems be supplemented with a presenting official, a legal secretary, or a referendary, who may have various functions in the proceedings. Of interest here is, if such an official assists in decision-making for instance by drawing up a report on the case or a proposal for a decision which he or she presents to the court panel.

According to the replies, in most labour courts there is no such official involved in the process. In some of these labour courts, however, one of the members is appointed as a presenting member, who presumably has similar functions but also takes part in decision-making. Thus, in the German labour court and in the French Cour de Cassation there is a reporting professional judge. Also the Spanish reply tells of a *reporter*, but his task seems to consist of putting together a draft decision *after* the deliberations of the panel.

A presenting official or a law clerk does appear in the labour courts of at least Slovenia, Sweden and Finland. In the Slovenian Supreme Court there are also assigned judges, who carry out more demanding work of preparatory or auxiliary nature. The respective roles of the law clerk and the assigned judge in decision-making are not specified in the reply.

In Sweden the legal secretary, usually a junior judge is engaged but is said to have a less important role in the deliberations after a main hearing. In Finland the presiding judge and the presenting official work together as a sort of a team in formulating a draft judgement on the basis of the preliminary views that the members have presented immediately upon the main hearing. The presenting official draws up a first draft, which the chair then looks through and revises more or less thoroughly, depending on the complexity of the case. There are also simple cases in which no witnesses are heard and which are decided on the basis of the presenting official's proposal without any oral session.

A partly different system is place in the labour courts of three countries, where an official, whose role resembles that of the Advocate General in the ECJ, takes part in the proceedings. In France the public prosecutor or the Advocate General (or a special authority in discrimination cases), in Belgium the Advocate General, and in Spain the representative of the General Attorney holds an independent position and participates in the proceedings by giving an advisory opinion to the court. This opinion is communicated also to the parties, who have an opportunity to reply to it. Judging from the French report, a special duty of the Advocate General is to attend to the public interest in cases brought to justice.

Items to discuss

2. How much weight does the opinion of the Advocate General carry? What is the main contribution of the opinion to decision-making - in comparison with an internal, undisclosed draft decision, drawn up by the court's own legal secretary?
3. Are there reporting members in other labour courts as well?

The role and main contribution of lay members in the decision-making process

Most labour courts have a tripartite composition consisting of a professional judge or judges and other members who represent the worker side and the employers' side. Methods of appointing these members vary, but usually they are chosen on recommendation or nomination by trade unions and employers' associations. We may speak of lay members (lay assessors) in the sense that these members are not necessarily legally trained, although in practice they often are. In the Swedish reply they are aptly characterised as expert members. Indeed, they do not involve only common sense in the court's decision-making, but also special knowledge of labour market affairs.

Although lay members have a background in interest groups, they have an independent position and an equal vote with the neutral members of the court. Only in the Slovenian report do we find an express reference to the risk of lay members taking uncritically sides in the process. The General Reporter's experience is that even if lay members' ethics as judges cannot be questioned, they sometimes tend to look at the case from the point of view of one

of the parties to the dispute. This can, however, be regarded as a fruitful input, especially as it is balanced by the other view which is also represented in the panel.

The significance of lay members' participation is described in a very similar way in the national reports. Lay members contribute through their experience and knowledge of e.g. collective agreements and secure that judgements are practical and acceptable at the work places. It seems, however, that especially in proceedings in the first instances the role of lay members is limited in that issues of law rest on the professional judge. Also in the Irish labour court the main input of lay members is in relation to the findings of fact in a case. At least in the Nordic labour courts lay members have an independent view on complicated questions of interpretation as well. Since lay members usually form the majority in the court panel, they may, theoretically, even outvote the chair, but this seldom happens in practice.

Not all labour courts have lay members. This is the case in Italy, Spain and Venezuela. The Irish Equality Tribunal sits as a single judge court, as does the Slovenian labour court of first instance in simple matters. In Belgium the last instance, the Cour de Cassation sits with professional judges only, and in France, Hungary and Slovenia also the appellate courts are thus composed.

One may ask if there are any difficulties in retaining consistency in the appraisal of a case, which is heard and tried through all three instances of such a mixed system. Are professional judges of a higher court perhaps reluctant to intervene, if the decision subject to appeal is passed unanimously by a lower court with the support of lay members?

Items to discuss

- In the deliberations of the court panel (with or without lay members), is there always a given formal order for the members to state their opinions, or can the chair influence the course of the discussion – perhaps for some tactical reasons?
- If the chair notices that members of the panel have differing views as to the solution of the dispute, does he of she easily approve that there is going to be a vote? How important is it to reach unanimity and what means can the chair use to this end?

To what extent does the presiding judge take part in writing the decision?

There are procedures for example in courts or tribunals of first instance, where the main thing is just to resolve a dispute and communicate the final decision to the parties. In these cases writing the decision is not a complicated matter. But as regards labour courts of last instance, the decisions of which may also serve as precedents, perhaps the most demanding task of the judge is in formulating the judgement, especially the reasons. The Swedish report gives us an illustrative description of the time and effort spent on this last phase of deciding a case. Thus it is interesting to analyse and compare how a judgement actually gets its final shape, and what the chairperson’s role is in this process.

There seem to be two basic models in use in this respect. First, the presiding judge writes the decision or gives the oral decision alone, if it is a single judge court or if the chair is the only professional judge in a panel. Lay members take part only in the discussion. This is more or

less the case in Denmark, Hungary, Ireland, Iceland, in the Belgian Labour Tribunal and Labour Court of Appeal, and in the UK Employment Tribunal.

Secondly, a presenting official or a reporting judge may write at least the first draft of the decision, which is then discussed and, if necessary, revised in a collegial procedure. In some countries, as in Finland and in Sweden, it is not excluded that any of the members, even a lay member, comes out with a written proposal for a change in the decision. If a whole new draft has to be written, this is obviously the duty of the chair. However, in Slovenia and in Spain the presiding judge can only indirectly influence the content of the written decision, the formulation of which is ultimately the task of a reporting judge.

In this context the question of dissenting opinions comes up. It is natural that such an opinion is written by the dissenting member himself or herself. It is another matter that in some countries dissenting opinions are not handed down at all. This is the practice in France, Denmark and Ireland, where only a single decision is issued.

Items to discuss

- What kind of compromises in the contents, e.g. the reasons of a judgement do you find necessary and acceptable to make, if full unanimity cannot be reached otherwise?

- Where dissenting opinions are not released, is it the practice of the labour court only, or is it a national tradition followed in the whole judiciary in question? What is the rationale of this practice? – An example of a dissenting opinion and its function is found in the Swedish sample judgement in a dismissal case.

The main legal sources used in deciding a case

According to the national reports the judgements of labour courts are based on fairly similar legal sources, the hierarchy of which also has common features. Thus, if the matter under dispute is regulated in statutory law, this is applied in resolving the case. Constitutional law and international legal sources, such as EU law, are on a high level in the hierarchy. Depending on the nature of the dispute, certain sources, such as collective agreements in many Nordic judgements and case law of the ECJ in decisions of the Irish Equality Tribunal, may have special relevance. There is slight variance in the importance of court practice, probably in line with the role accorded to precedents in individual countries. In the UK, which is a common law country, previous decisions of appeal courts carry special weight. Opinions presented in legal writing generally seem to be less important legal sources.

Even though labour courts utilise several legal sources in decision-making, these sources are not always explicitly referred to in judgements. National practices vary in this respect, and there may be differences even between the lower and the higher instances of a single country (Belgium). Germany, Ireland, Israel, Italy and Slovenia report that references to various legal sources are frequently made, whereas in the Nordic labour courts a more restrained line seems to prevail. Also the practice of referring to case law is diverse. Previous appeal cases are regularly referred to in the UK. A French labour court may refer to legal practice in general, but not to its own previous decisions, because the court's practice may change.

Decisions in dismissal cases, included in the national reports, are good examples of the varying practices. In the German decision there are meticulous references to provisions of applicable statutes, to case law, and also to statements in domestic legal literature. In the Slovenian decision the range of referred legal sources is further expanded to International Human Rights Conventions and ILO Conventions, as well as case law of another EU country. The French and the Icelandic courts have found it sufficient to briefly mention the provision in which the ground for dismissal is laid down. The Swedish decision refers also to the preparatory materials of such a provision (*travaux préparatoires*), which are traditionally extensive in that country and regarded as an important legal source.

In Italy it is compulsory to refer to the legal sources on which bases the case has been discussed; if the legal source is not clear, it can refer also to preparatory materials; referring to legal literature is admitted, but without quoting the authors. The Corte di Cassasione refers also to decisions of other countries' Supreme Courts and of international Courts, especially in new issues such as human rights and jurisdiction on acts of other countries sovereign powers on human rights, as acts of war.

Additional observations on decisions in dismissal cases

The decisions issued in similar kind of cases by the national labour courts show remarkable differences. There are some obvious explanations to this. There are decision handed down on appeal, and decisions issued by the first (or the only) instance dealing with labour law disputes. The competence of the appellate court may vary so that it may consider only points of law, not of fact, or the court may only uphold the decision subject to appeal or quash the decision without changing it (Cours de Cassation).

Also the structures of the decisions vary considerably, following national traditions. In this respect perhaps the most divergent of all is the judgement of the French Cour de Cassation. The judgement is concise and framed basically in one single sentence, in which the resolution is presented almost as a logical conclusion.

Setting aside this kind of differences, we may look at the decisions from a more general perspective. They all give us *information* about the grounds on which the case was decided. This information can be graded on two scales: *open versus closed* and *concrete versus abstract*.[1]

The information is *open* if the written reasons correspond to the real reasoning which has led the court to the resolution. A feature that often tells of openness is if not only the reasons for the outcome are written down, but also the relevant counter-arguments, and the resolution is based on weighing and balancing such aspects. A *closed* reasoning, in its turn, consists of arguments which reveal nothing, or reveal only a part, of the actual argumentation.

The distinction concrete/abstract indicates the way in which the normative information (the "message" of the decision, *ratio decidendi*) relates to the facts of the case. Entirely *concrete* information tells us about a unique case, a decision which is based on a single combination of

[1] For these distinctions and other issues of reasoning judgements in a number of countries, see Interpreting Precedents. A Comparetive Study. Edited by Neil MacCormick and Robert Summers (1998).

facts. The court does not formulate a general norm but simply tells us how it has solved a single case. If the information is *abstract*, the court formulates a more general norm, which is then used as a guideline in resolving the case at hand and is applicable to similar type of future cases, too. An example of this kind of reasoning could be the following: "Prior to the termination of his employment relation, the plaintiff had been issued a warning for reporting late for work. The court finds, however, that an oral warning given one year or longer before the dismissal of an employee cannot any more be taken into account …"

It is interesting to read the national decisions in dismissal cases with the distinctions described above in mind. No doubt the decisions tell us more or less *openly* of the reasoning that has led the courts to the final results adopted. Particularly illustrative examples are the Swedish decision with its careful overall assessment of the circumstances in which the worker had repeatedly refused to carry out work tasks, and the evaluation of countervailing factors in the decision of the Irish Labour Court in a case where the claimant, a nurse, was dismissed and allegedly discriminated against on disability ground.

The national reports include, however, also decisions in which the court refers merely to arguments that speak for the solution without considering any possible counter-arguments. In a clear dismissal case this may be the obvious thing to do. The question is illustrated by the decision of the German Federal Labour Court in a case where the plaintiff had generated a false record in a registration device in order to create an impression that he had arrived at work. The detailed reasoning of the court lays a strong emphasis on the aggravating aspects of the plaintiff's action, both before the dismissal and afterwards in the court proceedings.

The decision of the Irish Employment Appeals Tribunal provides a good example of *concrete information*. The decision contains a lengthy recital describing the facts of the case, the claimant's absences from work and a cash shortfall detected at the work place. The Tribunal's legal assessment of these events is a short statement according to which the evidence shows that the claimant was fairly dismissed and that the employer had used fair procedures in arriving at that decision. Although the reasoning in many other decisions included in the national reports is more elaborate, the information thus provided may not have much normative significance beyond the individual cases. This is perhaps typical of judgements in dismissal cases.

However, some decisions of national labour courts contain also more *abstract* interpretations of the law. Thus, the Slovenian decision contains a statement on the scope of the principle *in favorem laboratories*, and an interpretation of the relationship between disciplinary measures and the termination of an employment relationship. The Spanish decision lays down a similar kind of general statement on the effect of imprisonment on the position of an employee who is already suspended from work for another reason. Especially in decisions of the highest instance such formulations may be intended to guide future practice. This function is promoted if the decision is equipped with a headnote, which includes a summary of the legal question solved in the decision and the principal reasons indicating the *ratio decidendi* of the case.

Items to discuss

- Are there particular reasons for formulating a judgement in a concrete or in a more general style? Is this a choice that is made knowingly?

- Are there differences in writing the reasoning of a decision in a dismissal case, and the reasons for decisions in other kinds of labour law cases?

- When writing a judgement, who do you have in mind as addressees of the decision? The parties to the actual case, the labour market parties, other (lower) courts etc.?