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New initiatives to make Labour Court hearings more efficient: use of alternative disputes methods, collective (class) action

Questionnaire

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[1] The traditional methods to facilitate efficient mechanisms, which have been used since the early 1970's are pretrial hearings, direct testimony by written affidavits (instead of oral testimony), efforts to reach a compromise agreement during the hearing, appointment of neutral expert medical experts, referring cases to arbitration and summary (small claims) hearings.

In recent years the traditional methods mentioned above have been augmented by new mechanisms: alternative dispute resolution by lay members and outside mediators, the parties authorizing the court to give compromise judgments and early neutral evaluation. In addition case management and intensive computerization have made courts more efficient.

Here is a brief description of these mechanisms, as they exist today:

Traditional efficiency methods

A] **Pre-trial hearings by a registrar or judge** – are used to explore the possibility of settling a case. This often results in a settlement and ends the case. It is also used to convince the parties to agree on many facts, narrow the issues and plan the trial. The registrar or judge conducting these hearings usually issue decisions about submission of testimony in writing and when the witnesses will testify.

B] **Submission of written testimony and documents prior to the hearing** – In the Israeli general courts, where hearings are based on the Anglo-Saxon adversary system, both direct testimony and cross-examination are oral. The Labour Courts have pioneered a system of direct testimony by affidavits, prepared and submitted by the party. At the hearing there is no direct examination of the witnesses and only cross-examination. In addition, parties are required to submit, together with their direct testimony affidavits, all documents they intend to rely on during the hearing. This

allows the other party to prepare and bring documents, so there are few surprises during the hearing.

C] **Settlements during the hearing** – are common. After hearing part of or all of the testimony judges can usually tell what the judgment will be. Therefore, they attempt to convince the parties to settle the case based on their evaluation of the expected trial results and other interests of the parties. According to Labour Court procedural regulations the parties may empower the court to give a compromise judgment, with or without reasons. Thus, when parties desire to settle during the hearing but cannot agree on the terms, they can empower the court to determine the settlement terms. When this happens the court can take into account factors which are not relevant for a regular judgment but make for a fair settlement of the dispute.

D] **Court appointed neutral medical experts** – Since the Labour Courts have jurisdiction over social security cases, some of which require medical testimony, it was decided that this testimony would be in writing by a court appointed physician. This replaced the procedure whereby each party would bring his expert. This system has also been adopted by the general courts. However, in the Labour Courts the experts are paid by the court, whereas in the general courts they are paid by the parties.

E] **Arbitration** – the Labour Courts sometimes suggest to the parties that their dispute be submitted to arbitration. This cannot be done by the court but is done by private arbitrators, the government mediation and arbitration service, or knowledgeable experts in a particular industry or trade.

F] **Summary (small claims) hearings**
Under the Labour Court Law claims for less than $4,000 US are heard under a special simplified procedure.

Recent innovations

G] **ADR - Mediation** – the use of ADR, especially mediation, has been increased in recent years. In 2001 the lay members settled 4,500 cases and this number increases slightly every year. Outside mediators settled about 500 cases.

H] **Early neutral evaluation** – This procedure is done mainly in social security cases. Parties are summoned to a special hearing session before a neutral expert and often required to submit their claims in writing. This expert in social security law reviews the file prior to the court session. At the beginning of the ENE session the parties state their claims orally and present the evidence they intend to submit during the actual hearing. The neutral expert then tells the parties what, in his/her expert opinion the result of the case will be. Generally, the parties accept the opinion and act accordingly. This usually concludes the case. Where the expert thinks that further written medical testimony or other evidence is necessary the parties usually agree to do so, which saves a court hearing during which the same action would be decided on. ENE has been used in both trial and appeal courts, with great success. At the trial level about 60% of the cases are settled and at the appeal level about 30% are settled when the ENE is done by a court appointed expert and 70% when done by a judge. The experts are chosen and paid by the court.

I] **Case management** – when a case is filed and registered by the clerks it is brought to the case management department, which classifies it by type of case and difficulty, writes a brief summary of the case (one page) and determines which "track" it will take. The various tracks are: mediation by lay members; mediation by outside private mediator; preliminary hearing before the court registrar (who is an attorney with limited judicial authority); early neutral evaluation; request for further court papers such as affidavits of direct testimony, documents which the party intends to submit during the hearing, information; hearing before the judge. In the Tel Aviv and Haifa Regional Courts case management is computerized and this will be extended to the other three regional courts. Case management in the National Court is partly computerized and will be fully computerized within a few months. The case management department is staffed by young lawyers, with administrative support and sometimes law clerks.

J] **Intensive computerization** – The court administration has been computerized for about ten years. However, in recent years the courtrooms are computerized, so that the testimony and lawyers' arguments are typed into a computer. Court files are party computerized. The information is on the internet, so that it is possible for judges, lawyers, parties and court administrators to see from their computers papers filed, information about the case (date of hearing, whether parties have received the summons to the hearing, etc) and the trial transcript.

In addition, computerized statistics concerning cases are analyzed and available to court administrators – and sometimes the public – to assist them to best handle the cases.

2] **Pre-trial procedures**

[a] Pre trial procedures exist and are mandatory.

[b] These procedures are administered by the court and usually take place in a court building.

[c] Pre-trial procedures usually last for a few months. In simple cases they take weeks but in complex cases they may take six months or more. The main part of the pre-trial procedure is a hearing before a court Registrar, sometimes a judge, which lasts between 30 minutes to two hours. At the pre-trial hearing the parties list the agreed facts, the issues which the trial will relate to and the witnesses. The Registrar or judge conducting the pre-trial hearing estimates the time needed for the hearing and sometimes sets a hearing date during this procedure.

[d] Costs of pre-trial procedures are generally born by the courts' budget.

[3] **Assisting plaintiffs to file complaints**

The court has only a few services for assisting plaintiffs' in filing complaints. Forms for preparing complaints are provided for simple cases, such as failure to pay wages or severance pay. There are two pilot projects in which law faculty students, supervised by a professor, assist plaintiffs to write their complaints. However, these students are forbidden to give plaintiffs advice.

Free legal aid is provided by law for plaintiffs who cannot afford a private lawyer. This is done by a Legal Aid Office of the Justice Ministry. In addition, unions provide free legal aid for some private claims, sometimes by union lawyers and sometimes by

union representatives. Also, various non-profit organizations provide free legal aid; for women, Palestinian Arabs, foreign workers, etc. Some of these organizations offer free legal consultation.

[4] **New defenses**
The defendant is required to submit his/her compete defense within 30 days of receiving the plaintiff's complaint. To add a new defense or claim a party must receive court permission and show good cause. The court is generally flexible and liberal in its' approach to new claims or defenses prior to the hearing and strict after the hearing has begun. New claims or defenses are generally not allowed after the hearing has begun and their acceptance will require re-examination of witnesses. However, when the new claim or defense is based on facts and documents already before the court, it is often allowed to add them.

5] **Procedure which reduces hearing length**
Procedure in the Labour Courts is relatively flexible and simple. Parties can usually amend their claim and defense prior to the hearing. Once the hearing has begun a special reason is required to amend complaints or defenses. Evidence is usually submitted prior to the hearing and a special reason is required for submission of new evidence once the hearing has begun. New evidence can be submitted to rebut testimony or evidence which was not foreseen. To submit new evidence a party must request permission, explaining why the evidence was not submitted prior to the hearing. This can sometimes be done during the hearing and very infrequently after the hearing and before the judgment is handed down. The National Labour Court does not hear testimony or receive new evidence, except for the rare occasion when the evidence is very important and was not available the party during the trial.

[5] **Summary (small claims) hearings**
Under the Labour Court Law claims under a certain amount (about US $4,000) are "small claims" and processed by a summary procedure, which is usually very short. These are usually heard by a Registrar, but are also heard by judges. There are few formal procedural rules, the Registrar can decide how much testimony to hear and judgments should be brief. Such judgments can be appealed only if permission is received from the National Labour Court.

[6] **Interest on non-payment of claims**
When a judgment is given requiring payment, generally by the employer, it is common to give the employer a short time (two weeks, one month) to pay, without adding interest. However, if the award is not paid within that short period the amount must be paid with interest and linkage to the cost of living index.

When wages and severance pay are awarded they often have a special penalty called "wage delay compensation", which is 10% a week for wages and 20% a month for severance pay. This penalty is extremely high so at to deter employers from non-payment of wages and severance pay. The court is generally authorized to reduce this very high penalty.

[7] **Compulsory mediation**
Mediation of collective disputes is mandatory and is done by the Labour Ministry's Labour Relations Officers during the 15 day cooling off period. However, the court cannot compel parties to mediate individual claims. Introducing compulsory

mediation is being considered. Some courts attempt to convince the parties to mediate.

[8] **Regulations governing mediation**
There are regulations governing mediation, which govern both the general courts and labour courts.
[a] see section 7 above.
[b] Mediation by lay members, done at court expense, is common in the Labour Courts. The lay members are chosen by the court and must have taken a basic mediation course.

When the court recommends that parties do private mediation it sometimes recommends a list of experienced mediators, generally knowledgeable in labour law. Court sponsored mediation is generally administered by the case-handling department.

During the hearing the judge often attempts to settle the case. Sometimes special mediation hearings are held before a judge. When the judge meets with the parties separately, as is allowed in ADR, he does not conduct the trial.

Sometimes the parties chose their own mediator and the court has no further administration role but the parties generally submit their agreements to the court, requesting they be given force as a judgement.

[c] Information given a mediator is confidential. Regulations and case law prohibit the mediator from passing on such information or testifying in court about what he learned during the mediation.

[d] The mediation may go on for as long as the parties agree on. When the hearing date is set the parties may request an extension until the mediation is completed. The mediation is concluded when the parties reach an agreement, which is generally given the standing of court judgment, or one or both parties decides to stop the mediation.

[e] When the mediation is done by lay members they are paid by the court and there is no expense to the parties. However, if the mediation is private the cost is born by the parties, generally half by each party. Mediation by the Chief Labour Relations Officer of the Labour Ministry is without charge.

Lawyers fees are paid for by the party who hired the lawyer.

[f] The court tries to set the hearing date without regard to the mediation, so that the parties do not lose waiting time because they agreed to mediate.

[g] Mediators are required to take at least one mediation course of about 40 hours. The Labour Courts also give training at annual meetings and lecturers held for lay members. Many mediators have taken more than one mediations course.

Recently, a new program has begun for advanced training, at which the mediator doing advanced training actually does mediations in the Regional Courts, with an instructor present. The mediators pay for this training, which do not involve payment by the courts.

[9] In 2001 and 2002 about 4,500 cases were settled by lay members, 500 by private mediators. In most labour law cases the Labour Court recommends that the parties go to mediation. About a third of the cases set for mediation are actually mediated, since

about a third notify the court of their refusal to participate in mediation and another third do the show up at the mediation hearing.

[10] There are great advantages to mediation. Often, the best solution to a dispute is the one agreed to by both parties. In an on going employment situation mediation allows the parties to continue to work together. Parties generally feel better about agreed settlements; when there is a court judgment the winner says that he was right and didn't need a court to confirm this and the loser still thinks he is right and that the court erred. Mediation allows parties to address all their real problems and not just legal problems. Mediation is generally less costly that a court hearing.

The disadvantage to mediation is that some cases are not suitable since a precedent is required. There is a danger of mediators who are not properly trained.

[11] In most cases, the Labour Court, at all stages, suggests that the parties reach a settlement. Registrars and judges are usually willing to assist the parties explore a settlement or refer them to a court or private mediator.

[12] A judgment of the Regional Labour Court (the trial court) is enforceable. The losing party must obtain a stay order if he appeals and wants delay of enforcement.

[13] In the Tel Aviv Regional Labour Court files are managed electronically by the court secretary and by the case management department. This will soon be done by all labour courts in a special computer program developed for the purpose.

[14] Labour Courts are part of the general court system, which has a central court administration providing support services for all courts.

[15] There are about 90,000 cases a year at the Labour Courts' trial instance and 2,000 at the appeal court. This is about the same number of cases which are filed. For every 100,000 employees in the work force there were about 2.700 cases for each 100,000 workers.

[16] The number of cases pending at the end of each year is approximately equal to the number of cases filed during that year.

[17] Few disputes are settled by arbitration, which is not widely used in Israel.

II. Collective (class) action

While a class action is possible in Israel, it is not common.

The National Labour Court rejected a class action by workers at an organized work place, stating that it was the unions' role to represent all the workers. This did not prevent individual workers from filing a suit to obtain what they were entitled to. When that is done the judgment which one worker obtained regarding a collective agreement is binding for all other workers covered by that agreement.

When there are cases against the government or National Insurance Institute (which administers social security legislation) they generally apply judgments regarding one worker to all workers in similar situations. Therefore, class actions are not necessary to ensure that groups of workers obtain their rights.

Possible future use of class actions may be in the non-organized sector (about 2/3 of the workforce) and if organized employers refuse to apply judgments to all workers with similar circumstances.