Eleventh Meeting of European Labour Court Judges

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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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Prefatory note:

The Questionnaire explicitly excludes collective disputes of interests but may be interpreted so as to include collective disputes of rights. However, when read in context its focus clearly appears to be on individual employment law disputes, not including rights disputes concerning collective agreements (or industrial action) as such. Hence, collective disputes of rights in the latter sense will not be addressed in the answers below (albeit with some reservation as for Part II of the Questionnaire). That being the case, it needs however to be recalled that in Norway, individual employment law disputes are not within the jurisdiction of the Labour Court, which is a specialized (and essentially one-tier) court that holds exclusive and final jurisdiction over disputes concerning collective agreements (interpretation, validity, breach, and sanctions) and the lawfulness of industrial action. Individual employment law disputes, on the other hand, fall to the general, three-tiered, ordinary courts system, which holds jurisdiction in all forms of disputes concerning employment contracts and individual workers' statutory rights (including matters that may be seen as pertaining to social, administrative, and criminal law).

Matters of jurisdiction and procedure have been dealt with at several previous meetings; see, in particular, the proceedings of the 1st, 2nd, and 3rd ELCJMs. Reference may also be made to the more recent presentation by S. Evju, «Norwegian courts and labour jurisdiction», in Espace judiciaire et social européen. Actes du colloque des 5 et 6 novembre 2001 (sous la direction de Georges de Leval et Joël Hubin), Bruxelles, De Boeck & Larcier s.a., 2003, pp. 61-82.

I. Are there new initiatives to make Labour Court hearings more efficient?

1. What are the main aspects, mechanisms, or measures that traditionally facilitate most the efficiency of the hearings of the Labour Tribunals in general and of your Court in particular, concerning either their organisation and functioning, or the procedure, and which have been adopted by law, by the judiciary or that are customary?

In matters of individual employment law or individual labour rights a certain distinction obtains as the law of procedure is concerned, between "dismissal disputes" and other disputes. The notion of "dismissal disputes" is set out in sec. 61 of the 1977 Worker Protection and Working Environment Act (WEA) (and sec. 19 of the 1983 State Civil Servants Act; CSA) and covers disputes "regarding whether an employment relationship exists [including, evidently, the lawfulness of dismissal with or without notice] or on compensation in connection with termination of employment".

"Dismissal disputes" in the above sense are heard in the first instance by a limited number only of designated Municipal Courts. The court, and in the event of an appeal the Court of Appeal (but not the Supreme Court on further Appeal) as a rule shall sit with lay assessors drawn from a panel appointed specifically for this category of cases. Also, in the Municipal Court as well as in a Court of Appeals, "dismissal disputes" shall be given priority in docketing.

The otherwise geographically competent Municipal Court hears other forms of individual labour disputes in the first instance. It may sit with lay assessors, who are then drawn from a different (essentially general) panel. No particular rules on priority in docketing obtain. The same applies at the Court of Appeals level.

2. Are there any pre-trial procedures?

a. Are they mandatory?

In "dismissal disputes" WEA provisions accord the employee a right of "grievance negotiation" (a form of "dispute bargaining") once a dismissal is given or, as the case may be, a disputes arises, and the right during such negotiations to be assisted by an adviser (a trade union official, a lawyer, or someone else of the employee's choice). "Dismissal disputes" are exempt from the otherwise applicable, but not generally mandatory, procedure of pre-trial conciliation before a (lay) Court of Conciliation. Grievance negotiation is however not mandatory; the employee may file suit without having made use of this right.

Under the CSA the right of grievance negotiation in "dismissal disputes" does not apply; instead, employer decisions on termination of employment are on administrative law appeal and exhaustion of the administrative law appeal remedy is a precondition to filing suit with the courts.

b. In which way is the court involved?

The court (of first instance) is not involved in any such pre-trial procedures.

c. How long may they go on for?

Pursuant to WEA sec. 61 grievance negotiations must be requested within two weeks of receipt of dismissal, they should commence within two weeks, and be terminated within yet another two weeks. Parties may however agree on extensions of the time limit for the conclusion of negotiations.

As for the other pre-trial procedures (conciliation, administrative law appeal), no specific regulations on their (maximum) duration apply. Data on their duration in practice are not available.

d. Who has to bear the legal costs?

In all "dismissal disputes", parties bear their own costs at the pre-trial stage, unless otherwise agreed as part of a possible amicable settlement. (An exception applies to conciliation where the Court of Conciliation in the absence of obtaining friendly settlement in certain, minor, cases may grant an award, in which case the winning party may also be awarded costs pursuant to the general rules on costs of the 1915 Civil Procedure Act.)

e. What effect do they have on the time of prescription?

Time limits for prescription (limitation) are interrupted by the filing of an administrative law appeal or a complaint to a Court of Conciliation; otherwise, generally the filing of suit with a court of first instance is required. Grievance negotiations under the WEA do not interrupt limitation periods; normally however, the time limits for filing suit in order to bring a claim are significantly shorter and their non-observance have a similar effect.

3. Are there specific ideas for providing assistance to the plaintiff in order to raise his claim more effectively?

At present, no such ideas are in discussion (but may, perhaps, emerge with a "green paper" on reform of employment law legislation due to be tabled in December, 2003).

4. Are there any plans or proposals currently in place to restrict the possibility of making new defences after the defendants answer or for a time limit for admissibility of new evidence?

No. Provisions of this nature exist, being set out in the general 1915 Civil Procedure Act.

5. Are there any specific measures in procedural law to reduce the length of the hearings?

No specific measures (apart from priority in docketing rules as indicated above).

6. What interest has to be paid for remunerations, which are not paid at the date of maturity?

Generally, 12 per cent per annum (by virtue of Regulations issued in pursuance of the 1976 Interests in the Event of Delayed Payments Act).

7. Is the Court entitled to send the parties before a mediator?

No. A court may propose but not compel parties to subject a dispute to mediation.

Are there procedural regulations for mediation?

Not generally. A trial program, not specific to labour cases, involving court-assisted mediation after a suit has been filed is currently in operation in 20 (i.e., roughly one fourth of all) Municipal Courts. A "green paper" tabled in 2001 on reform of civil procedure law in general proposes to expand on this and generalize the scheme, as well as to introduce rules on out-of court mediation prior to filing suit; those proposals (and others) have yet to be acted on.

a. Is mediation compulsory?

No. (See 7, above.)

b. How are the mediators selected? In what way is the court involved? Are the judges different from trial judges?
Subject to their own agreement, parties may at the pre-trial stage subject a dispute to mediation and then themselves choose a mediator. If the court proposes mediation, the judge that has been assigned the preparation of the case will act as a mediator or appoint an external mediator with the agreement of the parties. A different judge at a subsequent trial hearing will replace a judge having conducted mediation.

c. Is it a confidential exercise?
Yes, in principle and to the extent not otherwise agreed upon by the parties.

d. How long may mediation go on for? How does it finish?
No specific rules on time limits apply; and mediation finishes in principle if one party declines to continue.

Who has to bear the legal costs?
See item 2, d.

f. What effect does mediation have on the time of prescription?
See item 2 e, and c.

g. What training in law and procedure is given to mediators?
Judges in courts participating in the trial program (see item 8) are offered specific courses on mediation. Also, the National Bar Association has developed a special program (based to some extent on U.S. ADR methods and experience) under which advocates may qualify as “advocate mediators”.

9. How often do the parties use this possibility?
There are no data to indicate that mediation, whether pre-trial or at the preparatory stage in court, is being used to any notable extent in labour disputes.

10. Do you perceive there to be:
a. advantages and
b. disadvantages in mediation
This is open to debate, in terms of costs, time consumption, the workload of courts, etc. Presently, opinions are not settled and no particular views prevail.

11. Does the Labour Court request the parties to explore a possible amicable settlement and does it assist them?
Usually, any court at the first or second instance level will, if not earlier then at the trial stage, explore the possibilities of an amicable settlement and in so doing also assist the parties to reach one if the opportunity is taken.

12. Is it possible to obtain an order of execution even if the defendant appeals against a judgement of first instance?
As a main rule, no; a final court decision is required.

Are the files managed electronically?

Not files as such, but generally, courts now maintain case lists and statistical records electronically.

14. Are there other measures concerning the organisation and functioning of courts?
No specific points to be mentioned.

15. What is the number of: a. cases
b. judgements of first instance and
c. appeals
per year per 100.000 employees?

Regrettably, reliable statistics on the issues in question are not available. At a rough estimate, the number of individual labour cases, including "dismissal disputes" which is clearly the predominant category, filed with courts of first instance may amount to some 700 to 1 000 per year, i.e., approximately 33 to 50 per 100 000 employees per year. The number of judgments by courts of first instance is considerably lower; at an estimate, perhaps some 40 per cent of cases filed result in an actual judgment. The appeal rate to the second instance on judgments is maybe 30 per cent, whereas the number of appeals to the Supreme Court is perhaps a similar percentage part of second instance judgments (and out of those, few appeals are granted leave by the Supreme Court "screening panel" to actually be heard by the Supreme Court).

16. What percentage of cases remains pending for longer than one year?
Again, reliable data are not available. However, the great majority of cases that do not move beyond the first instance are dispensed with within a year from the time of the filing of a complaint. If a case goes on appeal, it is on the other hand exceptional if the procedure as a whole takes less than a year.

17. How many disputes are settled by arbitration?
Here, as well, reliable data are not available. Nonetheless, it is common knowledge that arbitration is not in frequent use in the field of labour and employment law; the number of disputes settled by arbitration amounts perhaps to a dozen to 20 per year, mainly involving higher level management employees.

II. Collective (class) action.

Prefatory note:
On the basis of the present state of procedural law, and for reasons of expediency, answers to the questions in this Part of the Questionnaire are to some extent given jointly to more than one question, and to fill in the picture some brief observations are made on rights disputes concerning collective agreements.

1. Are collective actions admissible in your Country? If they are, what type of collective actions does your Country have?
2. Who are the Parties to these procedures?
3. Which courts are competent?

Essentially, the first question must be answered in the negative. In general procedural law, today no provisions obtain on "class action" as a form of legal action before the general courts. In the field of collective agreement disputes, which are under the

jurisdiction of the Labour Court, the right of action (active and passive) rests in principle exclusively with the parties (the trade union/federation, and the employer/employers' association) to the collective agreement at issue. As far as individuals' rights – pertaining to the general courts – are concerned, a more restrictive requirement of "legal interest" (rechtliche Interesse) applies. As a general rule a complaint may only be filed in respect of the complainant's own rights or obligations vis à vis the defendant. An organization may support its member, in practical or financial terms, and, as the case may be, may act as an intervener in legal proceedings taken by its member; the organization does however not have an independent standing or right of action to act on members' or other individuals' behalf. (See also item 6, below.)

4. What effects does their decision have?
5. For whom is this decision binding?

A judgment by a general court, even if an organization has appeared as an intervener, is technically binding only on the individual parties to the litigation. A notion of "general legal force" (genereller Rechtskraft) applies only in the field of collective agreement disputes (pursuant to sec. 9 of the 1927 Labour Disputes Act; LDA): A decision by the Labour Court on the interpretation, etc., of a collective agreement is legally binding on all employment contracts concluded between individual members that are bound by the collective agreement itself, as well as on all other courts of law (which may be called upon, in the context of an individual rights case, to apply collective agreement provisions; this, a general court can do but only in a premised and non-binding way).

6. Is it possible for a works' council or trade union to sue or request for ascertainment of rights or legal relations, if some employees are involved? Do they have to specify these employees?

As a point of departure, see the answer to items 1, 2, and 3, above. Under the LDA, sec. 9, a trade union (or employers' association) party has a limited right to append to a legal action concerning the collective agreement a claim on behalf of one or more individual members; the members and the claims filed on their behalf must in such a case be specified. The Labour Court then may give a decision on the individual claims concerned, however solely if those claims are contingent on the decision given on the collective agreement issue at hand and provided a decision on the individual claims can be rendered without it being necessary to resolve further questions of law or fact in order to decide on the latter. The possibility of a trade union party acting also for its member in this way does however not pre-empt the individual's independent right to bring a claim in the general courts. (See, for a pertinent illustration and some further discussion, «Rt. 1987 p. 98, Supreme Court Appeals Committee» [annotated by S. Evju], 7 International Labour Law Reports (1989) 12-17.)

In the Norwegian context, the notion of "works council" is not one of statute law. The term is commonly used in translation to denote various forms of – mainly bi-partite – bodies for information/consultation/co-determination that are provided for by (framework, or "basic") collective agreements. As a collective agreement-based body a "works council" has no independent standing or right of action; the legal right of action rests with the parties proper to the collective agreement concerned (cf. at items 1, 2, and 3, above).

One reservation applies, to a European Works Council, which is a statutory body. An EWC as such has a right of action before the special disputes resolution Board as far as disputes on EWC rules and agreements are concerned (under Regulations issued in pursuance of the 1996 EWC Act implementing Directive

94/45/EC). Presumably, the same applies to legal action in courts; the issue has yet to be put to a test.

7. Who has to bear the cost?
8. What effect do these procedures have on the time of prescription?

See, mutatis mutandis, item 2, d and e, in Part I, above.

9. Do public complaints procedures leading to an out of court settlement exist?

If by "public complaints procedures" it is referred to administrative law procedures, the answer is yes. A number of different such procedures exist for the purpose of facilitating simplified settlement of certain individual statutory rights issues (e.g., certain form of leave, right to reduced working time, employer payments during sickness, etc.), and also for "collective" issues concerning employee representation rights under legislation on companies or EWCs. Recourse may be had to the Labour Inspectorate or, as the case may be, to a special Board. E.g., pursuant to legislation on companies and EWCs a specialized administrative law Board is vested with dispute resolution jurisdiction. Generally, recourse to such procedures does not preclude (subsequent) recourse to the courts; the latter is however virtually non-existent in practice.

No such procedures exist for matters of contractual rights, be they individual or collective.

10. What are the main advantages and disadvantages of collective (class) actions?

At the present stage, this is a mainly hypothetical question in the Norwegian context. It may nonetheless be noted that in the "green paper" on reform of general civil procedure law it is proposed to introduce provisions on "class action" (on an "opt in" basis), based on a compound discussion of pros and cons in which, i.a., considerations of procedural economy is centrally focused. (See NOU 2001: 32 Rett på sak, in particular Vol. I Ch. 17.) The proposals are not specific to, and do not specifically discuss, labour and employment law matters, but if enacted – which remains to be seen – in principle they will apply in this field as well.