

„Strike in the public sector“

1. Introduction

If engine drivers or air controllers are on strike all traffic comes to a halt. At least all travellers, young and old, students and business folk, are affected. The same applies if hospital doctors or nurses are on strike or dustmen refuse to collect the refuse.

Services of General Interest (SGI) depend on highly specialised staff such as doctors and pilots so lock outs to counter strikes are not an option on account of the public utility mandate.

Unlike a “normal” strike at a production plant which involves only employers or their unions on the one side and trade unions on the other side a strike in the public sector does not only concern the economic and political interests of the public employers. Third parties – the general public – have to bear the consequences of such strikes.

Accordingly strikes in the public sector are viewed differently – much more critically - than even major disputes in the metal industry.

The organizing committee thought this was a good enough reason to look into the phenomenon of “strike in the public sector”, to analyse its occurrence (also in comparison with “normal” industrial action) and to enquire into its causes.

According to the questionnaires from Australia, Denmark, Finland, Germany, Israel, Italy, Norway, Slovenia, Spain, Sweden and – a little bit late – Hungary there are major differences between these countries.

The statistics on strikes in these and other European countries vary considerably.

Remarkably, in many countries there are more strike days in the public sector than in the industry.

In France (which – alas – did not take part in our survey) according to official records twice the number of working days were lost due to strikes in the public sector as in the private sector.

Generally it can be said that in Europe in recent years about 2/3 of all strike took place in the public sector, whereas in the old days it used to be only 20 %. One may speculate about the causes of this development. In a number of countries political strikes which by necessity rather affect the public sector are legal. Then there is the growing number of smaller craft unions (engine drivers, pilots, doctors) particularly in the public sector keen on industrial action.

The increase of industrial action in the public sector has put the legal framework into the limelight.

- Can strikes in the public sector be completely or partially banned?
- Are special requirements to be observed or certain procedures (arbitration or mediation) to be adhered to? Do emergency services have to be provided? How can bans or restriction be enforced by law?

The answers to these questions – put up from a German labour court judge’s perspective - should be discussed comparing the legal situation in all participating countries.

Here are our preliminary results:

II . Definition and general regulations

The term “public sector” does not have the same connotation within Europe or around the world. Largely it comprises more than just national or communal SGI.

Somewhat narrower is the definition in Denmark, according to which public services are „owned/operated by the state, region or municipality“, „whereas services owned or operated by the private sector“ are not regarded as public services. The situation seems to be similar in Finland and Hungary. In Germany we apply the term “Daseinsvorsorge”. It does not only refer to the civil service as such, but includes - as in most other countries, such as Australia, Italy, Israel, Slovenia and Spain - activities of private enterprises such as the German railways (wholly owned by the federation - same as the Norwegian NSB), Lufthansa, Air Control, energy suppliers (EON) and hospitals regardless of public or private ownership.

In Italy and Spain the term “essential services” is used - it will be interesting to find out what differences there might be between this term and “public services”, SGI or the German “Daseinsvorsorge”.

Churches as such are mostly not considered to be public services. Exceptions are Denmark, Finland, Norway and - to an extent - Israel.

According to the latest statistics in Germany of the 81 Mio inhabitants 43.4 Mio were able to work. 40.1 Mio were economically active of which 35.7 Mio were employed.

There are no exact data of employment in the public sector in Germany unless one counts only the hard core of the civil service.

In Germany ca. 12 % of all employees are civil servants, in Slovenia 22 %.

The relationship between all employees and those in the public sector are:

- Norway 2.517 Mio - 754.000
- Denmark 2.6 Mio - 775.000
- Finland 27 %
- Sweden 30 %
- Israel 20 %
- Hungary 20 %
- Spain 18.4 Mio - 3.168 Mio (17 %)

- In Italy a minority of employees works in essential services; exact figures are not available.

In Germany of 4.58 civil servants 457.00 are employed by the federation, 1.94 Mio by the 16 federal states and 1.24 Mio by the municipalities. Another 844.000 are employed by secondary bodies and institutions of the state (universities, social security).

The rate of unionisation is generally rather low:

- Australia 20 %
- Germany 17 %
- Hungary 12 %
- Slovenia 25%
- Spain 15-17 %
- Israel and Italy 40 %
- Belgium 54 %
- Top of the list are Finland: 69 % and Sweden: 73 %.

In the public sector the rate is mostly higher:

Australia 41 %; Spain 35 %; Germany 30 %; Hungary: 20 %; Finland: der,in 80 %; Norway 80 % However, in Italy and Belgium the rate is considerably lower in the public sector.

- Australien: 117.500
- Deutschland: 26.000
- Dänemark: 15.600
- Israel: 168.800
- Italien: 2,6 Mio working hours in 2009
- Norway: 500.000
- Spanien: 671.500
- Schweden: 28.900

Statistics on strikes seem to be somewhat unreliable. In Germany alone three different institutions (employment agency, trade unions, employers' unions) have different figures.

Commonly a comparison is made according to the number of working days lost by industrial action.

These were in 2010:

- Australia: 117.500
- Germany: 26.000
- Denmark: 15.600
- Finland: 314.000
- Israel: 168.800
- Italy: 2,6 Mio working hours in 2009
- Norway: 500.000 – due to a main settlement
- Spain: 671.500
- Sweden: 28.900
- Hungary: 18.854

There are but few precise figures on strikes in the public sector.

Denmark: 2000 working days lost and Norway (health & social services) 276.000 education 110.000 days and Spain with 232.500 days.

In Germany: According to the German employment agency in 2010 strikes affected 132 undertakings (2009: 454).

26.000 working days were lost (2009: 63.000).

According to the trade unions 173.000 days were lost, 120.000 employees went out on strike.

The reason for this discrepancy might be the different methods of counting.

The civil service union Verdi noted a decrease of applications to strike from 163 (2009) to 107 (2010).

Even more interesting are the figures from Austria: no strike days were recorded in 2009 and 2010.

III. The Legal Framework

For a German it is surprising that in most other countries industrial action is regulated by statute law. Only Belgium (with the exception of an act of 1948), Italy and Germany have no such legislation – particularly due to the resistance of both social partners.

Statute law on industrial action in some other countries:

- Australia: Fair Work Act (2009)
- Denmark: Labour Court and Industrial Arbitration Act (2008)
- Finland: Collective Agreement Act (436/1946) ; Act for the municipalities (669/1970) and the Evangelical-Lutheran Church (968/1974); Labour Disputes Mediation Act (420/1962)
- Israel: Collective Agreement Act and Settlement of Labour Disput Act (1957)
- Norway: Labour Disputes Act (1927) and Public Service Labour Disputes Act (1958)
- Sweden: Employment Act (1976), section 41-44 providing regulations/limitations of the right to strike
- Slovenien: Strike Act (from Yugoslav times)
- Spanien: Labour Relation Decree Law (1977)

We limit this presentation to some aspects which are dealt with in the questionnaire.

Those countries that have introduced legislation do not need case law to regulate industrial action. Even countries without statutes on industrial action get by to a large extent without case law, because the right to strike is guaranteed by the constitution. Therefore participation in a strike can principally not be considered as a “wrongful act” (Belgium).

Some constitutions (Italy, Slovenia and Spain) guarantee the right to strike, but provide some limitations.

Art. 77 of the slovenian constitution rules: „Employees have the right to strike. Where required by the public interest, the right to strike may be restricted by law, with due consideration given to the type and nature of activity involved“,

Art. 28.2 of the Spanish Consitution: “The right of workers to strike in defense of their interests is recognized. The law governing the exercise of this right shall establish the safeguards necessary to ensure the maintenance of essential public services.“

Other countries’ constitutions do not provide similar regulations. However, freedom of association is widely guaranteed (Belgium, Germany, Finland, Norway) or is accepted as

a constitutional right including the right to strike (Israel, Italy; in Italy the “constitutional right to strike” is limited by the protection of essential services.

On account of the constitutional guarantees or the statutory provisions in all countries Union law, in particular Art. 6.4 ESC, has no major role concerning industrial action, not even in the interpretation of national law.

Concerning strikes in the public sector regulations differ considerably.

Some countries deny certain groups of civil or public servants the right to strike (Germany: “Beamte”; Denmark: certain functionaries, e.g. police; Slovenia: police, firemen, doctors and nurses; Israel: police, prison wardens, soldiers; Italy: soldiers, police; similar: in Hungary).

Many countries do not have such special rules; however, such special rules might not be necessary on account of the general statutory limitations of the right to strike when essential services are concerned.

Apart from these limitations for essential services many countries provide further restrictions of industrial actions. Among these are:

- ban on political strikes (Germany, Israel, Norway, Spain)
- strikes for reinstatement of dismissed employees
- strikes during the life of a collective agreement (in Germany: Friedenspflicht – duty to uphold the peace; similar in Finland)
- In some countries only strikes led by a trade union are legal (Germany, Israel, Sweden). Other countries do not have this requirement (Australia, Belgium, Denmark) as long as it is a collective action (Italy).

Due to an ongoing discussion in Germany we were most interested to hear the answers to questions II 7 and 8.

In most countries obligatory arbitration or mediation may be provided by collective agreements. Statutory obligations by the state do not exist in Australia, Germany, Israel (except in the public sector), Italy and Slovenia.

In Scandinavia (Denmark: Act on conciliation at the „officer of conciliation“; in Finland the “National Conciliator” or Norway and Sweden: „special mediator office“ (Sec. 45); breach of this obligation will not render a strike illegal but constitute liability to damages) and Spain state-sponsored arbitration is obligatory either in general or in certain cases.

Apart from Belgium, Germany and Israel all countries demand a cooling down period and a period of notice before a strike. The period of notice is in

- Australia: 3 working days,
- Slovenia 5,
- Denmark and Sweden 7,
- Spain 5 (public sector 10),
- Finland: 14 days
- Israel 15 days.
- Norway provides a cooling down period, if the national mediator demands it.

Some specific questions and problems of strikes in the public sector:

In all of the countries returning the questionnaires strikes in the “p.s.” are legal in principal.

Some countries, however, report limitations in certain areas or concerning the issues of industrial action (Germany: only demands that can be ruled in collective agreements; no political strikes; Sweden: no political strikes) or limitations concerning certain groups of employees (Germany: no right to strike for Beamte; Denmark, Israel, Sweden, Norway, Spain: no right to strike for employees with executive powers (police, prison wardens).

In Belgium these kinds of employees have been allowed to strike since 1995 under certain conditions according to the provisions of the ESC – excepting policemen.

In Germany we have not got this far despite the jurisdiction of the ECHR (12.11.08 – Nr. 34503/97 – Demir and Baykara; 21.04.09 – Nr. 68959/01 – Enerji Yapi-Yol Sen).

Spanish colleagues have asked if judges and prosecutor should be denied the right to strike.

In some countries there are limitations for certain types of public services. In Italy and Spain strikes may not endanger health care, transport, energy supply, bank and postal services. These countries put up some special rules as well: 10 days period of notice, obligatory minimal services (Servicios minimos) in Spain; obligatory arbitration. In Italy there are longer periods of notice. On top of this 50 % of the services must be provided and 30 % of the staff must be at work. In Slovenia „employees of state bodies or local administration .. shall exercise their right to strike provided that the fulfilment of functions of these bodies and organisations are not significantly threatened“. Similar rules apply in Sweden on account of collective agreements.

There are particular rules for strikes which might affect vital interests of the state or the municipalities (national security, health care).

We were surprised that in many countries there are no provisions for establishing emergency services (providing essential goods and services to the population during industrial action). In Germany – and in Finland - this obligation is derived from the principle of proportionality and the purpose of the freedom of industrial action. We can understand the absence of such an obligation in countries which have special rules for essential services. Interestingly the Spanish colleague used the term „Notstand“ (Emergency) which entitles the state to interfere with industrial action (e.g. strike of air controllers. Only in Germany (and possibly Spain) the striking trade unions have to guarantee emergency services. The scope of emergency services depends on the sector which is on strike. We have not been told who – if not the unions – organizes emergency services.

In all countries apart from Germany and Belgium strikes can be interdicted in principle in certain situations; an injunction may be granted. This is related to the general understanding of such industrial action on the one side and the existence of mandatory arbitration on the other side.

In some countries arbitration or mediation is provided by the state. In these cases strikes mostly have to be postponed while the arbitration is going on. In Denmark and Finland the conciliator and in Italy the „Commissione di Garanzia per lo sciopero“ can postpone the strike. In Norway a period of mediation of min. 14 days has to be observed before a strike in the public sector. Parliament may refer the industrial conflict to the „National Wages Board“ for mandatory arbitration by act of parliament. In Sweden interference with industrial action by act of parliament is possible and so happened in 1971. Slovenian parliament interfered with industrial action in the public sector in two cases: „rail strike“ and „veterinarians at border crossing“. In Spain last year the strike of air controllers was interfered with by act of parliament.

Most countries – apart from Belgium, Italy and Sweden - allow judicial control of industrial action in the public sector.

In Finland and Spain the Labour Courts are not authorised to suspend a strike but only declare it unlawful. This might result in claims for damages. The same thing seems to apply in Denmark. In Germany and Hungary an injunction may be granted by which the union is temporarily interdicted to lead a strike if the court considers the strike as a whole or some measures unlawful.

If the union does not comply with the court order it can be fined or its functionaries can be sent to prison at the court's discretion. Furthermore it can be liable for damages.

