XXVI MEETING OF EUROPEAN LABOUR COURT JUDGES
25-26 SEPTEMBER 2018, MADRID (SPAIN)

EVIDENCE IN LABOUR COURT PROCEEDINGS

National Reports[1] – Preparatory Questionnaire for the European Labour Court Judges Meeting

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[1] The views and opinions expressed therein are those of the authors and do not necessarily reflect those of the International Labour Organization.

BELGIUM

A. THE GENERAL CONTEXT OF THE LABOUR COURTS AND TRIBUNALS IN YOUR LEGAL SYSTEM

1. Where are Labour Law cases/disputes heard and determined within your legal system?

   Please elaborate on the legal system context for Labour Law litigation/dispute resolution in your country.

Answer: in Labour Courts (first instance) and Higher Labour Courts (second instance). Judgments rendered in last instance can be appealed to the Court of Cassation.
To situate the Labour Courts in our Court System, I can refer to my answer to question 1 of the questionnaire on Judicial Ethics and Independence (2015 meeting in Stockholm).

2. Do you have a specialised system of "Labour Courts" in your country?

   Do you treat Labour Law cases/disputes in common with other cases in general (*e.g.* as part of normal civil law litigation); or do you have some mixture of the two approaches?

   Please elaborate on some of the key features of the arrangements in your country.

Answer:
Yes. (Higher) Labour Courts also treat Social Security (contributory) an Social Welfare (non-contributory) Law cases and, since 2007, collective debt arrangement for private persons (not running any kind of undertaking).

3. Do you have specialised "Labour Judges", or are Labour Law cases/disputes litigated in front of judges with general jurisdiction and experience?

   Please elaborate on the qualifications, background, experience, and training of judicial officers in your country who deal with Labour Law cases/disputes.

Answer:
Since Labour Law cases are treated in Labour Courts by judges appointed only to these Courts, the judges are specialised in Labour Law and Social Security Law. However, they aren't necessarily already specialised before getting appointed. The qualifications needed are the same as to get appointed in a Civil/Criminal or Commercial Court.

4. Do you have any specialised institutions which operate alongside or in conjunction with courts to deal with Labour Law cases/disputes?

   If so, please outline what these are and what role they undertake in the process of litigation/dispute resolution.

Answer:
Our Labour Courts have a separate State Counsel's office, in French called 'Auditorat du travail". The role of the 'Auditeur du travail' (= Statsanwalt) in Labour Law cases is similar to the role of the Advocate General at the ECJ.

5. Does a generalised framework for conducting civil litigation (*e.g*. a Civil Procedure Code, or the like) operate in relation to Labour Law cases/disputes in your country, or are there special rules/procedures which have been developed for Labour Law litigation/dispute resolution?

   Please elaborate on what the relevant procedural framework might be.

Answer:
Labour Law cases are conducted along the rules/procedures of het Civil Procedure Code.

6. Do special arrangements operate in your national legal system for situations in which regulatory provisions under consideration are derived from supra-national sources – (*e.g*. within the framework of the European Union; by reference to the regulatory ambit of the Council of Europe; or by reference to the regulatory framework established at the level of the ILO)?

   If so, having regard specifically to Labour Law cases, please elaborate on how these differ from the "normal" situation governing the treatment of non-Labour Law cases/litigation in your legal system.

Answer: No

7. Are the hearings of trials (and, where these are available, appeals) in your country's legal system normally heard in public?

Answer: Yes

8. Is the press, TV, radio, and other media entitled to attend and report proceedings in trials in your country?

Answer: Yes

9. Is it permitted to show film/video (*e.g*. TV footage) of court proceedings in your country?

Answer: film or TV footage can only be recorded with the permission of the presiding judge; in principle the presiding judge only allows the press to shoot some pictures before the start of the actual proceedings.

10. Is it permitted to play sound recordings of court proceedings in your country?

Answer: no

11. Having regard to this first set of questions, please summarise briefly any situations in which the "normal" arrangements are not applied in relation to Labour Law cases/litigation.

Answer: ***///***

B. EVIDENCE GATHERING FOR THE PURPOSES OF FIRST INSTANCE TRIAL

12. Please describe briefly the process whereby evidence is prepared for a first instance trial.

In particular:

Is there a process of "discovery", through which the parties have to notify each other about what relevant documents or other items are (or have been) in their possession?

Is there a process of "exchange of documents"?

Answer:
Although a case is in principle finally pleaded in a trial hearing, our procedure is basically a written procedure. The parties have to present their factual and legal argumentation in a paper (conclusions). A calendar is agreed or decided for that purpose shortly after the case has been filed.
Any relevant document a party wants to present to the court to support its argumentation, has to be listed in an inventory at the end of the conclusion and has to be exchanged with the opponent. The claimant has to exchange his documents within 8 days of the introduction of the case. The defendant has to do it together with his conclusion.

Who is given the primary responsibility for compiling the evidence for a trial hearing, and how is this normally done (*e.g*. in a "bundle" of documents, electronically, *etc*.)?

Where are the "rules of the game" for these preparatory procedures set out, and who supervises this pre-trial process?

In particular, is a specified judge allocated to a case, or is oversight of a case "shared" between available judges from time to time?

Answer:
It is entirely the responsibility of the parties to compile the evidence. It is normally presented in a bundle of documents.
The rules are set out in articles 736 to 740 of the Civil Procedure Code.
There is no pre-trial supervision of these preparatory procedures. The judge who is hearing the case will also decide on any incident that may have risen concerning the exchange of conclusions and evidence documents.

Are there penalties/sanctions if a party fails to discharge any duty at this stage?

Answer:
Yes, according to article 740 CPC any document that hasn't been exchanged properly, is excluded ex officio from the debate. However, if the parties haven't discussed on this already, the judge can't exclude a document from the debate without hearing the parties on it first.

13. What is the normal procedure for compiling and presenting "hard copy" (*i.e*. paper or similar) documents for trial?

Answer:
According to article 737 CPC compiled evidence is exchanged by depositing the bundle of documents at the court's registry, but can also be done amicably. The latter is customary amongst lawyers. In that case the bundles of evidence documents should be deposited at the registry 15 days before the trial hearing at the latest (article 757 CPC).

14. Do you have special rules for the presentation of "electronic communications" (*e.g*. records of e-mails, social media communications, or the like)? How are these displayed for the court?

Answer: No. By (screenshot) print.

15. How do you deal with video, Closed Circuit Television (CCTV), or other such forms of visual images when these are to be presented before the court?

Answer:
Our courtrooms are not equipped to present such forms of visual images.
In criminal cases the State Counsel's Office will see to it that the equipment is available

if it is necessary to present such forms of evidence.
In civil cases such as Labour Law cases, it is in principle not necessary to present visual images at the trial hearing.
If a party absolutely insists that visual images are presented in the presence of the parties at the trial hearing, the court will normally decide on this request after the trial hearing. If the court deems that it is useful to watch the images in the presence of the parties, it will render an interim judgment to reopen the debate and organise a special hearing.

16. How do you deal with issues arising in relation to "personal" communications *etc*. (*e.g*. as issues of "privacy"; issues of "confidentiality" (whether said to arise out of private contractual arrangements or otherwise); or issues of "business confidentiality" – including where information may be "market sensitive" and subject to separate rules established by a Stock Exchange, a financial regulator, or the like?

Answer:
We don't have special arrangements for such issues. Apart from some specific cases concerning Family Law that according to article 757, § 2, CPC are in principle heard behind closed doors, trial hearings can only be held behind closed doors if public order or morality could be endangered by a public hearing (needs to be decided by an interim judgment).
But as was said before, our civil procedure is basically a written procedure. Parties are not obliged to present their case orally at the trial hearing. Thus they can refrain from discussing confidential issues in a public hearing.

17. Do you have special arrangements to deal with issues of "national security" in relation to documentary or other evidence?

Answer: No

18. Do you have special arrangements to deal with issues of "legal privilege" (if your country's legal system provides for such protection) if this arises in relation to documentary or other evidence?

Answer: No

19. Where it is normal to have a public hearing in your country, do you nevertheless have the possibility of hearing or receiving evidence in private in certain circumstances? If so, please indicate in what circumstances that might happen.

    Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to hold a hearing in private?

Answer:
In civil proceedings the hearing of witnesses isn't held in a public hearing. If a party offers to deliver proof of a specific and relevant fact by witness evidence and this form of proof is admissible, the judge can allow a witness hearing to be held. He can also decide ex officio to hold a witness hearing. Since it has to be decided by interim judgment, it is necessarily decided after the trial hearing. The interim judgment will mention place, date and time of the hearing, as well as which facts the party concerned is allowed to prove. The witness hearing is held behind closed doors. The opposing party is entitled to request for a contra hearing to hear possible witnesses who weren't summoned by the opponent.

20. Is it possible otherwise to limit the extent of publicity given to court proceedings in your country (*e.g*. by not reporting the names of some or all participants/witnesses; by anonymising the public reports of proceedings and/or the judgments given in the case, *etc*.)?

Please give examples where this might happen and what powers the court has in these circumstances.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to restrict the extent to which proceedings or parts of proceedings can be made public?

If so, what form will such a challenge take?

Answer:
Reports of civil proceedings, including reports of witness hearings, are not public. The original judgment has to identify the parties involved but when publicity is given, an anonymised copy is used.
It is not necessary to identify witnesses in the judgment. If the judge needs to relate the statement of a witness in his judgment, he doesn't have to reveal the name of the witness but can for instance refer to that particular witness by his role, e.g. 'the head of the department".
This can't be challenged but it will not stop the media to find out the identity of participants/witnesses if they are interested in a case (usually because one of the participants has informed them).

C. THE TRIAL STAGE AND BEYOND

21. Is it possible (or helpful) to describe the role of the judge in your country's legal system arrangements for Labour Law cases/litigation as being "inquisitorial" or to oversee "adversarial" proceedings?

Answer: No

22. Does the judge question witnesses who appear to give oral evidence before the court, or is this task undertaken by lawyers appearing for the parties?

Do witnesses give their evidence on the basis of prepared documents (e.g. a "witness statement")? If so, who (in your experience) generally undertakes the task of preparing such a document?

Answer:
It's the judge who questions witnesses. The parties and their lawyers can't interrupt the witness. They can't speak directly to the witness but need to address the judge (article 936 CPC).

Witnesses are not allowed to read aloud a written report. But after having heard the remarks of the parties, the judge can allow or request a witness to consult documents that could be useful for his testimony (article 937 CPC).

It is not common that a witness asks or is asked to consult documents, unless perhaps if it concerns an expert witness who wants to consult his report.

Before evidence is given, the judge has to ask the witness a number of questions on his relation to the parties, such as whether the witness has personal interest in the outcome of the trial. If a witness needs to consult a document, a question the judge can ask to assess the credibility of the witness is how, when and by whom that document was prepared.

23. What rules does the judge apply in relation to the admissibility of evidence?

In brief terms, what kinds of evidence may not be admissible before the court?

Answer:
In Labour Law cases the form of evidence is basically free: unlike in Civil Law cases, witness evidence is almost always admissible.
Illegally obtained evidence isn't necessarily not admissible, even if it was obtained in violation of a fundamental right like the right to privacy. If it is obtained by transgression against an obligation required on pain of nullity, the evidence has to be disregarded. If

the violated rule isn't required on pain of nullity, the judge has to weigh several considerations, such as: did the irregularity affect the reliability of the evidence ?; is the right to a fair trial compromised by it ?; was the irregularity committed deliberately ?; how important is the violated rule compared to subject of the evidence?. Depending on which aspect(s) he finds preponderant, the judge can admit illegally obtained evidence or not.

24. In relation to the litigation of labour disputes in your country, is there a single forum where cases are determined, or are there further instances of appeal or review?

Is the fact-finding exercise in Labour Law litigation/cases something which is confined to the first instance court?

If so, is it possible to appeal against findings of fact made at the first instance level?

In what circumstances might an appeal level court make further or alternative findings of fact?

Answer:
Except for some specific decisions regarding the elections of employee's representatives in the undertakings, any judgment of a first instance Labour Court can be appealed to a Higher Labour Court.
Unless the parties agree to limit the appeal to a specific point of law, the Higher Labour Court will have to review the case entirely, including the fact-finding. In my experience, the findings of fact made at the first instance level is appealed in the vast majority of cases. The Higher Labour Court regularly makes an alternative findings of fact, quite often because the parties make a greater effort to present relevant evidence at the appeal instance. It also happens regularly but not that often that the Higher Labour Court decides to hold a hearing of witnesses where the first instance Labour Court was not asked to do so or had rejected such a request.
Last instance judgments can be appealed to the Court of Cassation but only on a point of law. The Court of Cassation constitutionally has no competence to make findings of fact. It has to accept the findings of fact made by the last instance judgment. The Court of Cassation can only sanction some 'mistakes' made by the last instance judge, e.g. if there is a contradiction in the findings of fact or if the judge has made a document 'lie'. In that case, the Court of Cassation can't make an alternative findings of fact but has to squash the judgment and send the case to another Higher Labour Court to be re-judged.

25. In relation to "normal" matters arising in the context of Labour Law litigation/cases, who carries the burden of proof to establish a matter of evidence?

Answer: Each party has to prove the facts that it is alleging (article 870 CPC). The claimant will carry most of the burden of proof, but the defendant will carry the burden of proof of what he pleas in his defence.

Does this include the burden of proof in relation to, *inter alia* (1) the establishment of the existence of an employment relationship; (2) the validity of a collective agreement; (3) the question of whether there has been a termination of employment; (4) the reason underlying a termination of employment?

Answer: (1) (3) and (4): Yes
(2) The validity of a collective agreement isn't a matter of 'fact' in our legal system but is entirely regulated by law. The parties don't have to prove anything regarding this. It's the duty of the judge to control the validity of a collective agreement and apply the concerning rule of law.

Does your country's legislation make use of the notion of "presumptions" – *i.e*. where a situation is presumed to exist unless and until a party proves that the situation does not apply?

Answer: Yes, in Labour Law for instance there are a couple of situations where the existence of an employment relationship is presumed.

Are there any matters in respect of which the "normal" rule on the burden of proof does not apply (*e.g*. in consequence of implementation of Directive 97/80/EC or otherwise)? If so, what are these and how do they operate in your country's system?

Answer: Yes, in some matters where the legislator decided to offer the employee a form of protection against the termination of employment or other form of reprisal, e.g. in case of pregnancy or in case of filing a complaint for discrimination or harassment, etc., the employer has the burden of proof that the termination of employment (or other criticised measure) has nothing to do with the reason for the protection. This will always be clearly formulated in the act that regulates the matter.

The 2007 Gender Discrimination Act (that implements Directive 97/80/EC) provides that the defendant must prove that there has been no discrimination when an alleged victim of discrimination, or a person acting on his behalf, has established facts that indicate that the existence of discrimination on grounds of a protected criterion may be presumed.
Facts that the existence of a direct discrimination on grounds of a protected criterion can be presumed, include, but are not limited to: (a) data from which a particular pattern of unfavourable treatment shows towards persons of the same sex, *e.g,.* different, unconnected claims filed at the Institute for Equality of Women and Men or at interest groups and (b) information that indicates that the situation of the victim of less favourable treatment is similar to the situation of the reference person.
Facts that the existence of an indirect discrimination on grounds of a protected criterion can be presumed, include, but are not limited to: (a) general statistics on the situation of the group to which the victim of discrimination belongs or facts of general awareness, (b) the use of an intrinsically suspicious criterion of distinction or (c) elementary statistical material which shows an unfavourable treatment.

Does your country's legislation make use of the terminology of "reversed burden of proof"?

Answer: The terminology "reversed burden of proof" is not used in the legislation itself. But it is frequently used in law literature to describe a rule regarding a matter of evidence and in an appeal the claimant will sometimes criticise the judgment for having "reversed the burden of proof".

Does the approach in your country recognise any notion of a "neutral burden of proof"?

Answer: No

26. Once a judgment has been given by the court, is it possible for that decision to be appealed or otherwise revisited on the basis that "new evidence" has come to light?

If so, are there any time limits placed upon this?

Are conditions placed upon the admissibility of any such "new evidence"?

Who makes the decision as to whether "new evidence" has been presented and whether it should be considered?

Is there a right to appeal against such a determination on the admissibility of "new evidence"?

Answer:
Yes, a judgment that can't be appealed any longer, can be revisited for a limited number (6) of reasons, enumerated in article 1133 CPC. Only 3 reasons are relevant for this question: 1° if personal fraud was involved (this is if, due to unfair trial behaviour of a party, the other party was unable to defend his rights or the judge was prevented to learn of decisive facts); 2° if since the judgment decisive pieces of evidence that were withheld by a party, have come into light; 3° if the decision is based on evidence that since has been declared false.
A request to revisit a judgment can't be made by a party if the alleged reason was known or could have been known to that party before the end of the term to appeal the judgment.
A request tot revisit a judgment needs to be signed by 3 lawyers, amongst whom at least 2 have more than 20 years experience at the bar.
A request to revisit a judgment is submitted to the Court that has pronounced the judgment. There is a right to appeal against the decision.

FINLAND

A. THE GENERAL CONTEXT OF THE LABOUR COURTS AND TRIBUNALS IN YOUR LEGAL SYSTEM

1. Where are Labour Law cases/disputes heard and determined within your legal system?

   Please elaborate on the legal system context for Labour Law litigation/dispute resolution in your country.

Answer: Labour Law cases are heard and determined in general courts (20 district courts in 2019, five Appeal Courts, the Supreme Court), in administrative courts (seven administrative courts and the Supreme Administrative Court) or in the Labour Court. All labour law disputes not belonging to the competence of other organs are heard and tried by the general courts - for instance disputes concerning the interpretation of individual employment contracts, other claims based on individual employment contracts or legislation pertaining to such contracts, claims for overtime compensation, holiday pay, etc. based on legislation on hours of work, annual holidays etc., prosecutions for violations of labour legislation. Also disputes concerning individual claims based on collective agreements are heard in general courts or in administrative courts as far as such disputes are nor to be tried by the Labour Court. The Labour Court, founded in 1946, hears disputes arising from collective agreements, collective civil cervants´ agreements, Collective Agreements Act or the Act on Collective Civil-Servant Agreements. A prerequisite for a matter to fall within the competence of the Labour Court is that the specific question involves the competence, validity, contents or extent of a collective agreement or the correct interpretation of a clause in such an agreement. In addition, cases that concern a question whether a course of action is in accordance with the collective agreements fall within the competence of the Labour Court. Suits at the Labour Court are regularly brought by and against the parties to the collective agreement in question.

2. Do you have a specialised system of “Labour Courts” in your country?

   Do you treat Labour Law cases/disputes in common with other cases in general (*e.g.* as part of normal civil law litigation); or do you have some mixture of the two approaches?

   Please elaborate on some of the key features of the arrangements in your country.

Answer: Yes, the Labour Court is a single specialized court for matters connected with collective agreements, see the answer above.

3. Do you have specialised “Labour Judges”, or are Labour Law cases/disputes litigated in front of judges with general jurisdiction and experience?

   Please elaborate on the qualifications, background, experience, and training of judicial officers in your country who deal with Labour Law cases/disputes.

Answer: In general courts and in administrative courts labour law cases are litigated in front of judges with general jurisdictions and experience. However, in some district courts and appeal courts there are judges that have specialized in labour law.

4. Do you have any specialised institutions which operate alongside or in conjunction with courts to deal with Labour Law cases/disputes?

   If so, please outline what these are and what role they undertake in the process of litigation/dispute resolution.

Answer: The Labour Council is an independent special authority coming under the Ministry of Economic Affairs and Employment. It has a minimum of nine part-time members three of whom are independent. The other members represent employer and employee organisations. The Labour Council issues opinions on the application and interpretation of legislation on working hours, annual holidays and occupational safety and health and a number of other acts on the protection of employees. The Labour Council also considers the requests for correction concerning the decisions on occupational safety and health derogation permits issued by Regional State Administrative Agencies.

5. Does a generalised framework for conducting civil litigation (*e.g*. a Civil Procedure Code, or the like) operate in relation to Labour Law cases/disputes in your country, or are there special rules/procedures which have been developed for Labour Law litigation/dispute resolution?

   Please elaborate on what the relevant procedural framework might be.

Answer: A generalised framework for conducting civil litigation (Code of Judicial Procedure) operates also in Labour Law cases. In Labour Court also the law on Judicial Procedure in Labour Court is applied beside the general procedural law.

6. Do special arrangements operate in your national legal system for situations in which regulatory provisions under consideration are derived from supra-national sources – (*e.g*. within the framework of the European Union; by reference to the regulatory ambit of the Council of Europe; or by reference to the regulatory framework established at the level of the ILO)?

If so, having regard specifically to Labour Law cases, please elaborate on how these differ from the "normal" situation governing the treatment of non-Labour Law cases/litigation in your legal system.

Answer: There are no special arrangements unless there is a need to ask for a preliminary ruling.

7. Are the hearings of trials (and, where these are available, appeals) in your country's legal system normally heard in public?

Answer: Normally, yes. The principle of publicity of the court proceedings is one of the leading principles in the Finnish procedural law. However, according to the laws concerning the publicity in court proceedings in general courts and in administrative courts it is possible to restrict the publicity in certain circumstances.

8. Is the press, TV, radio, and other media entitled to attend and report proceedings in trials in your country?

Answer: Yes.

9. Is it permitted to show film/video (*e.g*. TV footage) of court proceedings in your country?

Answer: Normally that is not allowed.
In open proceedings, someone other than the court may take a photograph, tape record and in another manner record and transfer video and audio image by technical means only with the permission of the chairperson and in accordance with his or her instructions.
Permission for recording before the beginning of consideration of the case or when the decision of the court is pronounced may be granted if
(1) the recording does not cause significant detriment to the protection of the privacy of a party or another person to be heard and it does not endanger his or her safety; and
(2) there are no other weighty reasons for refusing permission.
Permission to record other parts of court proceedings may be granted if these conditions have been met and in addition the recording causes no detriment to the undisturbed conduct of the oral proceedings and the participants in the court proceedings consent to the recording.

10. Is it permitted to play sound recordings of court proceedings in your country?

Answer: See the answer above.

11. Having regard to this first set of questions, please summarise briefly any situations in which the "normal" arrangements are not applied in relation to Labour Law cases/litigation.

Answer: In Labour Law cases all the normal arrangements are applied.

B. EVIDENCE GATHERING FOR THE PURPOSES OF FIRST INSTANCE TRIAL

12. Please describe briefly the process whereby evidence is prepared for a first instance trial.

In particular:

Is there a process of "discovery", through which the parties have to notify each other about what relevant documents or other items are (or have been) in their possession?

Is there a process of "exchange of documents"?

Answer: In a civil case, the party shall prove the circumstances on which his or her claim or objection is based. Each party shall obtain the evidence required in the case. There is no process of "discovery". The court may order that an object or document be brought to court or that a judicial view be conducted if the object or document could be of significance as evidence or if the conducting of a judicial view could be of significance in obtaining evidence.

Who is given the primary responsibility for compiling the evidence for a trial hearing, and how is this normally done (*e.g*. in a "bundle" of documents, electronically, *etc*.)?

Where are the "rules of the game" for these preparatory procedures set out, and who supervises this pre-trial process?

In particular, is a specified judge allocated to a case, or is oversight of a case "shared" between available judges from time to time?

Answer: The office personnel in the court compiles the evidence for a trial, normally in a bundle of documents but more and more electronically.

Are there penalties/sanctions if a party fails to discharge any duty at this stage?

Answer: If the court orders that an object or document be brought to court, the court may as necessary order that the person in question is to fulfil his or her obligation under threat of a fine. The court may also order that a distraint officer bring the document or object to court.

13. What is the normal procedure for compiling and presenting "hard copy" (*i.e*. paper or similar) documents for trial?

Answer: Documents have been compiled as a "bundle" of documents, and each party and judges has his/her own copy of documents. Nowadays documents are more often presented electronically.

14. Do you have special rules for the presentation of "electronic communications" (*e.g*. records of e-mails, social media communications, or the like)? How are these displayed for the court?

Answer: No special rules. Normally copies of those have been printed on paper.

15. How do you deal with video, Closed Circuit Television (CCTV), or other such forms of visual images when these are to be presented before the court?

Answer: Those are accepted.

16. How do you deal with issues arising in relation to "personal" communications *etc*. (*e.g*. as issues of "privacy"; issues of "confidentiality" (whether said to arise out of private contractual arrangements or otherwise); or issues of "business confidentiality" – including where information may be "market sensitive" and subject to separate rules established by a Stock Exchange, a financial regulator, or the like?

Answer: According to the Act on the Publicity of Court Proceedings in General Court the trial document shall be kept secret to the extent that it contains sensitive information regarding matters relating to the private life, health, disability or social welfare of a person. The court may, on the request of a party or also for a special reason, decide that a trial document shall be kept secret to the extent necessary if it contains for instance issues of business confidentiality.

17. Do you have special arrangements to deal with issues of “national security” in relation to documentary or other evidence?

Answer: No one may testify regarding information which is to be kept secret for the purposes of national security or this information concerns the relations of Finland with another state or an international organization. A trial document shall be kept secret to the extent that it contains information which if made public would probably endanger the external security of the State or cause significant damage or detriment to the international relations of Finland or Finland’s ability to engage in international cooperation.

18. Do you have special arrangements to deal with issues of “legal privilege” (if your country’s legal system provides for such protection) if this arises in relation to documentary or other evidence?

Answer:

19. Where it is normal to have a public hearing in your country, do you nevertheless have the possibility of hearing or receiving evidence in private in certain circumstances? If so, please indicate in what circumstances that might happen.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to hold a hearing in private?

Answer: Oral proceedings in a case are public unless the court orders that the oral proceedings shall be held without the presence of the public. The court may, on the request of a participant in the case or also for a special reason, decide that oral proceedings shall be held in full or to the necessary extent without the presence of the public if:
(1) public proceedings in the case would probably endanger the external security of the State or cause significant damage or detriment to the international relations of Finland or Finland’s ability to engage in international cooperation;
(2) sensitive information regarding matters relating to the private life, health, disability or social welfare of a person are presented in the case;
(3) a trial document that is to be kept secret is presented in the case
(4) public proceedings could endanger the safety of an asylum seeker or of someone close to him or her;
(5) a person below the age of 18 years is charged with an offence and closed proceedings would not be in violation of an exceptionally

important public interest;
(6) a person below the age of 15 years or a person whose legal capacity is limited is heard in the case; and in some other cases.

A decision is subject to separate ordinary appeal following the procedure for the decision of the court on the principal claim. A decision on the publicity of oral proceedings is subject to appeal only by a participant in the case.
The court decision shall be followed regardless of appeal. If the seeking of appeal would otherwise be frustrated, the court may when making its decision order that the decision shall not be enforced before it has become legally final, unless the appellate court orders otherwise.

20. Is it possible otherwise to limit the extent of publicity given to court proceedings in your country (*e.g*. by not reporting the names of some or all participants/witnesses; by anonymising the public reports of proceedings and/or the judgments given in the case, *etc*.)?

Please give examples where this might happen and what powers the court has in these circumstances.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to restrict the extent to which proceedings or parts of proceedings can be made public?

If so, what form will such a challenge take?

Answer: The court may order that the following be kept secret:
(1) the identity of the injured party in a criminal case that concerns a particularly sensitive aspect of his or her private life; or
(2) the identity of an asylum seeker in a case concerning taking into custody, unless it is apparent that releasing the information would not endanger the safety of the asylum seeker or of a person close to him or her.

A trial document can be ordered to be kept secret in certain circumstances, as well as a court decision. In such a case the conclusions of the decision and the legal provisions applied are public. A witness may be heard in a criminal case in a manner that does not reveal his or her identity or contact information (anonymous witness).

A decision is subject to separate ordinary appeal following the procedure for the decision of the court on the principal claim.

C. THE TRIAL STAGE AND BEYOND

21. Is it possible (or helpful) to describe the role of the judge in your country's legal system arrangements for Labour Law cases/litigation as being "inquisitorial" or to oversee "adversarial" proceedings?

Answer: The role of the judge is to oversee adversarial proceedings.

22. Does the judge question witnesses who appear to give oral evidence before the court, or is this task undertaken by lawyers appearing for the parties?

Do witnesses give their evidence on the basis of prepared documents (e.g. a "witness statement")? If so, who (in your experience) generally undertakes the task of preparing such a document?

Answer: Lawyers appearing for the parties question witnesses, but also the judge may ask questions. Prepared documents are not allowed. A party being examined as a witness, and a witness, shall present his or her testimony orally without referring to a written statement. The person being heard may nevertheless use written notes as memory aids.

23. What rules does the judge apply in relation to the admissibility of evidence?

In brief terms, what kinds of evidence may not be admissible before the court?

Answer: If a piece of evidence that a party wishes to present pertains to a fact that is not material to the case or that has already been proven, or if the fact can be proven in another manner with considerably less inconvenience or cost, the court shall not admit this piece of evidence.

24. In relation to the litigation of labour disputes in your country, is there a single forum where cases are determined, or are there further instances of appeal or review?

Is the fact-finding exercise in Labour Law litigation/cases something which is confined to the first instance court?

If so, is it possible to appeal against findings of fact made at the first instance level?

In what circumstances might an appeal level court make further or alternative findings of fact?

Answer: Cases heard in general courts, the judgements of the district court can be appealed in the Appeal Courts, and the judgments of the Appeal Courts can be appealed in the Supreme Court. A leave to appeal is required. The judgements of the Labour Court are final, and there is no ordinary appeal against its decisions to a higher instance. However, the judgements may be annulled by the Supreme Court upon demand. Thus far such appeals have not been successful.

25. In relation to "normal" matters arising in the context of Labour Law litigation/cases, who carries the burden of proof to establish a matter of evidence?

Answer: In a civil case the plaintiff shall prove the facts that support the action. If the defendant presents a fact in his or her favour, also he or she shall prove it. In Labour Law cases it is usually the employer who carries the burden of proof, for instance in the cases of termination of employment.

Does this include the burden of proof in relation to, *inter alia* (1) the establishment of the existence of an employment relationship; (2) the validity of a collective agreement; (3) the question of whether there has been a termination of employment; (4) the reason underlying a termination of employment?

Answer: See above.

Does your country's legislation make use of the notion of "presumptions" – *i.e*. where a situation is presumed to exist unless and until a party proves that the situation does not apply?

Answer: Yes, for instance in cases of termination of employment of pregnant employee.

Are there any matters in respect of which the "normal" rule on the burden of proof does not apply (*e.g*. in consequence of implementation of Directive 97/80/EC or otherwise)? If so, what are these and how do they operate in your country's system?

Answer: In discrimination cases for example when the court has to first assess whether the prima facie case has been established, and after that, whether the respondent has been able to demonstrate that there has been no breach of the prohibition of discrimination.

Does your country's legislation make use of the terminology of "reversed burden of proof"?

Answer:

Does the approach in your country recognise any notion of a “neutral burden of proof”?

Answer:

26. Once a judgment has been given by the court, is it possible for that decision to be appealed or otherwise revisited on the basis that “new evidence” has come to light?

If so, are there any time limits placed upon this?

Are conditions placed upon the admissibility of any such “new evidence”?

Who makes the decision as to whether “new evidence” has been presented and whether it should be considered?

Is there a right to appeal against such a determination on the admissibility of “new evidence”?

Answer: In a civil case, the appellant may not refer in the Court of Appeal to other circumstances or evidence than those presented in the District Court, unless he or she establishes a probability that he or she had not been able to refer to the circumstance or evidence in the District Court or that he or she has had a justifiable reason for not doing so. The same applies when appealing to the Supreme Court.
In the extraordinary means of appeal a final judgment (also the Labour Court judgements) in a civil case may be reversed if reference is made to a circumstance or piece of evidence that has not been presented earlier, and its presentation would probably have led to a different result. However, the judgment shall not be reversed unless the party can establish a probability that he or she could not have referred to the fact or piece of evidence in the court that gave the judgment or on appeal, or that he or she has had another justified reason not to do so.

GERMANY

A. THE GENERAL CONTEXT OF THE LABOUR COURTS AND TRIBUNALS IN YOUR LEGAL SYSTEM

1. Where are Labour Law cases/disputes heard and determined within your legal system?

   Please elaborate on the legal system context for Labour Law litigation/dispute resolution in your country.

Answer:

In Germany Labour Law cases/disputes are heard by the Labour Courts.

A legal action can be brought before a Labour Court if the matter disputed is covered by the Labour Court Act (Arbeitsgerichtsgesetz; ArbGG[2]). In such cases, Labour Courts have exclusive jurisdiction.

According to the German Labour Court Act, the Labour Courts have exclusive jurisdiction

- in *all individual legal disputes* between the employee and the employer (employment law), including those dealing with the question of the existence or non-existence of a contract of employment. Also similar disputes arising from contractual relationships of development aid workers, volunteers and disabled persons working in sheltered workshops are covered by the Labour Court Act and can thus be brought before a Labour Court.

Furthermore, German Labour Courts hear disputes related to *collective labour/employment law* such as:

- Disputes between the employer and the works council (Betriebsrat; disputes arising from the Works Constitution Act [Betriebsverfassungsgesetz, BetrVG[3]], such as the existence and scope of works council participation rights and the employer's responsibility to meet the expenses of works council activities) and disputes arising from the Senior Management Representatives Committee Act (Sprecherausschussgesetz, SprAuG);

- Matters arising from several co-determination acts such as the election of employee representatives to the supervisory board of a company;

- Disputes in connection with questions of freedom of association (the right to organise) and the right of activity of an employer or employee representative or

[2] The Labour Court Act: https://www.gesetze-im-internet.de/arbgg/ (no translation online available).
[3] The Works Constitution Act, Translation provided by the Language Service of the Federal Ministry of Labour and Social Affairs: http://www.gesetze-im-internet.de/englisch_betrvg/englisch_betrvg.html *(as consulted online on 13 July 2018)*. Translations may not be updated at the same time as the German legal provisions displayed on the website http://www.gesetze-im-internet.de.

disputes arising about the question of inadmissible action for the purposes of industrial action;

- Disputes of rights between the parties to a collective agreement, including those dealing with the question of the existence or non-existence of collective agreements;

- Disputes between one party to a collective agreement and third parties arising from collective agreements.

2. Do you have a specialised system of "Labour Courts" in your country?

Do you treat Labour Law cases/disputes in common with other cases in general (e.g. as part of normal civil law litigation); or do you have some mixture of the two approaches?

Please elaborate on some of the key features of the arrangements in your country.

Answer:

Germany has a specialised system of Labour Courts. Proceedings at labour courts are regulated by a special law, the Labour Court Act (Arbeitsgerichtsgesetz, ArbGG). It contains special rules for labour disputes, but also refers to the Code of Civil Procedure (Zivilprozessordnung, ZPO) *(see the answer to question 5)*.

Jurisdiction in employment/labour matters is organizational independent from civil jurisdiction. It is a three-tier system consisting of:

- first-instance Labour Courts,
- second-instance Land Labour Courts (belonging - as well as the first-instance Labour Courts - to the level of the 16 States of the Federal Republic of Germany) and
- the final-instance Federal Labour Court.

First-instance Labour Court cases are heard by a panel made up of one judge and two lay members representing the employers' and employees' sides respectively. A special feature of first-instance Labour Court proceedings was (and is still) the preliminary conciliation hearing (Güteverhandlung) before the chair of the panel without the lay members *(section 54 para. 1 Arbeitsgerichtsgesetz - ArbGG - Labour Court Act)*. Since 1st January 2002, it has also been used in civil jurisdiction. It is the aim of the conciliation hearing to settle a case without a court hearing. The conciliation hearing is used to speed up the procedure and reach agreement between the parties or – if a settlement is not reached – to prepare the court hearing. In the conciliation hearing (more precisely: in an immediately following hearing), it is also possible for the judge to enter default judgment (Versäumnisurteil) as a result of the non appearance of one of the parties, or to issue a judgment based on the respondent's admission/ acknowledgement (Anerkenntnisurteil).

First-instance labour court procedures are intended to ensure that the risk of costs to be incurred is kept low for both sides. In contrast to legal procedures in civil jurisdiction Labour Court fees are comparatively low and should not fall due until the end of the

instance concerned. There are two different kinds of Labour Court procedures, “Urteil/Judgement”-procedures and “Beschluss/Order”-procedures *(see the answer to question 5)*; in the "Beschluss/Order"-procedure (procedure only for some of the disputes related to *collective labour law*, *see the answer to question 1 for further details*), no court fees are payable at all. In first-instance Labour Courts the parties may either appear on their own behalf, or be represented by a lawyer, a representative of an employer’s association or a trade union or any other authorised person. The unsuccessful party has to meet the costs (with the exception of costs incurred in “Beschluss”-procedures). However, expenses incurred for income loss or representation in court (in first-instance labour court proceedings) are not reimbursed. There is the possibility to apply for legal aid.

The unsuccessful party can lodge an appeal (“Berufung”) against the first-instance Labour Court’s judgment with the relevant **Land Labour Court** if the lower court has granted leave to appeal or if the value of the cause of appeal exceeds 600 Euro. Additionally, an appeal can be lodged for all claims relating to the existence, non-existence or termination of an employment relationship. In the case of a default judgment, not normally open to appeal, an appeal is possible if the failure to appear at a hearing can be justified with good reason. A “Beschluss”-procedure appeal against orders made by a Labour Court of first instance is heard by the relevant Land Labour Court. “Beschluss”-procedure appeals neither require leave to appeal nor a minimum value of the cause of appeal. In the Land Labour Courts, the parties may not (unlike in the first-instance labour courts) appear without representation; there must be representation by lawyers, or union and employer’s association representatives.

At appeal, the case is reheard by the higher court both on points of law and the facts of the case, which means that a fresh statement of the facts is generally admissible. The individual panels of Land Labour Courts, as with the first-instance Labour Courts, are made up of one judge and two lay members. Under certain conditions, appeals on points of law can be lodged against Land Labour Court judgments. These appeals, as well as judicial review applications in the case of Land Labour Court “Beschluss”-procedures, are heard by the Federal Labour Court.

The **Federal Labour Court** - the court of last instance in the German Labour Court system - is one of the five Supreme Federal Courts in Germany. The Panels at the Federal Labour Court (Senates) are made up of three judges (one chair and two other judges in the capacity as rapporteurs) and two lay members representing the employers' and employees' sides respectively. In the Federal Labour Court, the parties must be represented by lawyers admitted to practise in Germany. An appeal on a point of law (Revision) can be lodged against an appeal judgment by a Land Labour Court if the lower court has granted leave to appeal. By law, leave to appeal must be granted, amongst others, if a legal issue relevant to the decision of the case is of fundamental legal significance or if the judgment deviates in a point of law from a judgment given by the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), given by the Joint Senate of the five Supreme Federal Courts (Gemeinsamer Senat der Obersten Gerichtshöfe des Bundes, including the Federal Labour Court) or given by the Federal Labour Court. If the Land Labour Court does not grant leave to appeal, an “appeal

against denial of leave to appeal" (Nichtzulassungsbeschwerde) can be lodged.

By way of exception, an appeal against a judgment of a first-instance Labour Court can be lodged directly to the Federal Labour Court using a "direct appeal on a point of law" or a "direct judicial review application" (Sprungrevision). This is only possible on application, requiring the parties to agree to it, and the case to be of fundamental importance to labour/employment law. A "direct appeal on a point law" is only allowed for disputes between the parties to a collective agreement, or for disputes relating to the existence or non-existence of collective agreements. Furthermore, it is allowed for disputes concerning the interpretation of collective agreements whose scope goes beyond that of a specific Land Labour Court and for disputes arising from inadmissible action for the purposes of industrial action or in connection with questions of freedom of association and the right of activity of an employer or employee representative.

Appeals on a point of law do not enable the appeal judgment to be re-examined on questions of fact, only on questions of law. Apart from very few exceptions, new facts to the case cannot be considered for the judgement. Although the Federal Labour Court has to administer justice in specific cases, its main task is to promote the consistency of court decisions in the area of employment/labour law and develop the law in areas left unregulated by legislation either intentionally (e.g. in the law relating to industrial action) or unintentionally.

The Federal Labour Court examines whether a Land Labour Court judgment failed to achieve a rule of law because the rule of law was either not applied, or not interpreted correctly, or the judgment entered was not correct for other reasons. Should the facts of the case established at the Land Labour Court hearing not be sufficient to enter a final judgment, the Land Labour Court judgment will be set aside and the case will be remitted to the Land Labour Court.

For further information please see the answer to question 1.

3. Do you have specialised "Labour Judges", or are Labour Law cases/disputes litigated in front of judges with general jurisdiction and experience?

   Please elaborate on the qualifications, background, experience, and training of judicial officers in your country who deal with Labour Law cases/disputes.

Answer:

To become a judge in a German court - and thus including Labour Courts - it is required to have the "qualifications to be a judge" (Befähigung zum Richteramt) according to the German law defining the functions and powers of judges (Deutsche Richtergesetz, DRiG), for which the passing of two law degrees is necessary.

The university part of the training with a standard period of study of four years leads to the first law examination. The second law examination (zweite Staatsprüfung, section 5 para. 1 DRiG) has to be passed after a practical legal preparatory service

(Rechtsreferendariat) in the responsibility of the state. That traineeship lasts for a period of two years and consists, in particular, of compulsory periods of training which take place at a general civil law court, at the Public Prosecutor's Office or at a criminal court, with the public authorities, and with a lawyer. In additional elective periods of training, amongst others, supranational, inter-state/intergovernmental or foreign training segments are to a reasonable extent possible. The aim is to train “unitary jurists” (so called “Einheitsjuristen”): Having the capability to work in all legal fields, equipped with a standard education in the core areas of law and limited specialization in sub-areas.

According to the DRiG, the judges shall be appointed for life after having first passed a probation period of about three years.

Conferences and meetings, including training activities at the German Judicial Academy, are aimed at furthering and increasing competencies.

The recruitment decisions for first-instance Labour Courts are made by the relevant States of the Federal Republic of Germany (Länder). The “qualification to be a judge” (Befähigung zum Richteramt) according to the DRiG is in any case necessary. Additionally, some of the Länder pay particular attention to already acquired professional experience in law or in other professional fields. The promotion decisions for second-instance Labour Courts are also made by the relevant Länder. The judges of the Federal Labour Court have experience as judges of the lower courts and many have additional experiences in the judiciary, in public administration, in the private sector or as academics.

4. Do you have any specialised institutions which operate alongside or in conjunction with courts to deal with Labour Law cases/disputes?

   If so, please outline what these are and what role they undertake in the process of litigation/dispute resolution.

Answer:

1. First of all a special, additional feature inside the first-instance Labour Court is to mention:

- Conciliation judge (Güterichter)

As mentioned above, a first-instance Labour Court proceeding begins with the preliminary conciliation hearing (Güteverhandlung) before the chair of the panel without the lay members *(see the answer to question 2)*.

In addition to this the chair of the panel may - if both parties agree to this - refer the matter before a conciliation judge (Güterichter) *(section 54 para. 6 Arbeitsgerichtsgesetz - ArbGG - Labour Court Act)*. This is a judge in the same court, chair of another panel, who is - in addition to the main task as trial judge - designated to the function of conciliation judge of the court. He or she is not competent to make a decision in the case.

2. Further there are some specialised institutions which operate alongside or in conjunction with courts to deal with Labour Law cases/disputes:

- Mediation and other forms of out-of-court dispute resolution

The panel of the court may suggest mediation or other alternative out-of-court dispute resolution to the parties *(section 54a para. 1 Arbeitsgerichtsgesetz - ArbGG - Labour Court Act)*.

Mediation as a confidential and structured process in which the parties strive, on a voluntary basis and autonomously, to achieve an amicable resolution of their conflict with the assistance of one or more mediators is regulated by the Mediation Act (Mediationsgesetz, MediationsG)[4]. A mediator is an independent and impartial person without any decision-making power who guides the parties through the mediation *(section 1 Mediationsgesetz - Mediation Act)*.

- Conciliation committee / arbitration board (Einigungsstelle) for the settlement of disputes between employer and works council about rights and obligations under the Works Constitution Act *(BetrVG)*:

Whenever the need arises a conciliation committee shall be set up for the purpose of settling differences of opinion between the employer and the works council, central works council or combine works council. A standing conciliation committee may be established by works agreement *(section 76 para. 1 BetrVG - Works Constitution Act*[5]*)*.

The conciliation committee shall be composed of assessors / panel members appointed in equal number by the employer and the works council and of an independent chairperson accepted by both sides (not infrequently the chairpersons are labour court judges). If no agreement can be reached on a chairperson, the chairperson shall be appointed by the labour court. The latter shall also decide in cases where no agreement can be reached on the number of assessors *(section 76 para. 2 BetrVG)*.

In cases where the award of the conciliation committee takes the place of an agreement between the employer and the works council (areas in which the Works Constitution Act grants the works council an enforceable right of co-determination), the conciliation committee shall act at the request of either side. In taking its decisions the conciliation committee shall have due regard to the interests of the establishment and of the employees concerned as reasonably assessed. The employer or the works council may make an appeal to the labour court on the grounds that the conciliation committee has exceeded its powers *(section 76 para. 5 BetrVG)*.

In all other cases the conciliation committee shall act only if both sides so request or

[4] The Mediation Act (MediationsG), Translation provided by the Language Service of the Federal Ministry of Justice and Consumer Protection: http://www.gesetze-im-internet.de/englisch_mediationsg/englisch_mediationsg.html *(as consulted online on 13 July 2018)*. Translations may not be updated at the same time as the German legal provisions displayed on the website http://www.gesetze-im-internet.de.

[5] The Works Constitution Act, Translation provided by the Language Service of the Federal Ministry of Labour and Social Affairs: http://www.gesetze-im-internet.de/englisch_betrvg/englisch_betrvg.html *(as consulted online on 13 July 2018)*. Translations may not be updated at the same time as the German legal provisions displayed on the website http://www.gesetze-im-internet.de.

agree to its intervention. In such cases its award shall take the place of an agreement between the employer and the works council only if both sides have accepted the award in advance or accept it subsequently *(section 76 para. 6 BetrVG)*.

The conciliation committee shall adopt its decisions by majority vote after oral proceedings. The chairperson shall not participate in the voting; in the case of a tie the discussion shall be resumed and the chairperson shall participate in the subsequent vote. The decisions of the conciliation committee shall be recorded in writing, signed by the chairperson and transmitted to the employer and the works council *(section 76 para. 3 BetrVG)*.

In as far as other provisions allow for judicial proceedings, such proceedings shall not be precluded by the award of the conciliation committee *(section 76 para. 7 BetrVG)*.

It may be stipulated by collective agreement that an arbitration body set up under the collective agreement shall take the place of the conciliation committee *(section 76 para. 8 BetrVG)*.

The costs of the conciliation committee shall be borne by the employer *(section 76a para. 1 BetrVG)*.

- Duties of the Works Council under the Works Constitution Act *(BetrVG)*:

To see that effect is given to Acts, ordinances, safety regulations, collective agreements and works agreements for the benefit of the employees is part of the duties of the works council *(section 80 para. 1 BetrVG)*.

- Arbitration in industrial disputes (Schlichtung in Tarifauseinandersetzungen)

Some agreements of collective bargaining parties contain regulations about arbitration procedures and the establishment of an arbitration board for industrial disputes.

- Arbitration in disputes about pay scale classification/grouping of employees (Schlichtung im Eingruppierungsstreit)

Agreements of collective bargaining parties in the metal and electrical industry (Framework Agreement on Pay for the Metals and Electrical Industry - ERA - Entgelt Rahmenabkommen, a regional sectoral collective agreement) contain different dispute resolution procedures in case of disputes about pay scale classification/grouping of employees (initially a commission at enterprise level and in the event of failure an arbitration board of the collective bargaining parties).

- Assistance of the Federal Anti-Discrimination Agency (Antidiskriminierungsstelle des Bundes[6])

Any person who believes he or she has been discriminated against on any of the

[6] http://www.antidiskriminierungsstelle.de/EN/Home/home_node.html *(as consulted online on 16 July 2018)*

grounds referred to in Section 1 of the General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz, AGG[7]) may take their case to the Federal Anti-Discrimination Agency *(section 27 para. 1 AGG - General Act on Equal Treatment)*. The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation *(section 1 AGG)*.

The Federal Anti-Discrimination Agency provides confidential counselling free of charge. It can also help to find a regional counselling centre. The Federal Anti-Discrimination Agency shall give independent assistance to persons addressing themselves to the Agency in asserting their rights to protection against discrimination.

Such assistance may, among other things, involve

1. providing information concerning claims and possible legal action based on legal provisions providing protection against discrimination;
2. arranging for advice to be provided by another authority;
3. endeavouring to achieve an out-of-court settlement between the involved parties.

Where responsibility lies either with a Parliamentary Commissioner of the German Bundestag or a Federal Government Commissioner, the Federal Anti-Discrimination Agency shall immediately pass on the matters, with prior approval of the person who seeks assistance *(section 27 para. 2 AGG)*.

- Customs officers monitor compliance with Minimum Wage Act and some other legislation laying down certain minimum requirements for the terms and conditions of employment

Violations of the provisions of the Minimum Wage Act (Mindestlohngesetz - MiLoG), the Posted Workers Act (Arbeitnehmer-Entsendegesetz - AEntG), the Act on the Provision of Temporary Workers (Arbeitnehmerüberlassungsgesetz - AÜG) and infringements against the Act on Securing Labour Rights in the Meat Industry (Gesetz zur Sicherung von Arbeitnehmerrechten in der Fleischwirtschaft - GSA Fleisch) are punishable as administrative offences entailing a fine pursuant to Art. 21 MiLoG, Art. 23 AEntG, Art. 16 AÜG and Art. 7 GSA Fleisch. Compliance is inspected by customs officers.

5. Does a generalised framework for conducting civil litigation (*e.g*. a Civil Procedure Code, or the like) operate in relation to Labour Law cases/disputes in your country, or are there special rules/procedures which have been developed for Labour Law litigation/dispute resolution?

   Please elaborate on what the relevant procedural framework might be.

[7] The General Act on Equal Treatment, Translation provided by the Language Service of the Federal Ministry of Health: http://www.gesetze-im-internet.de/englisch_agg/index.html *(as consulted online on 13 July 2018)*. Translations may not be updated at the same time as the German legal provisions displayed on the website http://www.gesetze-im-internet.de

Answer:

In Germany, proceedings at labour courts are regulated by a special law, the Labour Court Act (Arbeitsgerichtsgesetz, ArbGG). It contains special rules for labour disputes, but also refers to the Code of Civil Procedure (Zivilprozessordnung, ZPO).

There are two different kinds of Labour Court procedures, “Urteil”-procedures and “Beschluss”-procedures *(see the answer to question 2)*. They differ in terms of the kind of decision they lead to (“Urteil/Judgement” or “Beschluss/Order”). The main difference is, however, that in “Urteil”-procedures, it is the responsibility of the parties to provide the court with the necessary information and evidence needed to make a decision, while in “Beschluss”-procedures, it is largely the responsibility of the court to establish the facts of the case within the scope of what the “participants” involved (“Beteiligte”: the employer and the works council) set out.

Labour Court “Urteil”-procedures are used in disputes between employees and employers arising from the employment relationship, including those dealing with the existence or non-existence of a contract of employment, negotiations on entering an employment contract and its continuing effects, inadmissible action in the employment relationship and employment papers. This covers all possible claims and matters relating to an employment relationship, for example compensation and benefits, leave, employment references and other employment papers, compensation for loss, damage or time of competitive restriction, breach of prohibition of competition, company pensions, unfair dismissal, the validity of fixed-term contracts or the termination of contracts.

Additionally, Labour Court “Urteil”-procedures are used in disputes of rights between the parties to a collective agreement or between one party to a collective agreement and third parties arising from collective agreements, or in disputes relating to the existence or non-existence of collective agreements. Furthermore they are used in disputes arising from inadmissible action for the purposes of industrial action or in connection with questions of freedom of association (the right to organise) and the right of activity of an employer or employee representative.

The “Beschluss”-procedure, on the other hand, is used for disputes arising from the Works Constitution Act (such as the existence and scope of works council participation rights and the employer’s responsibility to meet the expenses of works council activities). Equally, it is used for disputes arising from the Senior Management Representatives Committee Act. Furthermore, “Beschluss”-procedures deal with matters arising from several co-determination acts such as the election of employee representatives to the supervisory board of a company, the capacity to conclude collective agreements and collective bargaining jurisdiction of trade unions and employers’ organisations.

6. Do special arrangements operate in your national legal system for situations in which regulatory provisions under consideration are derived from supra-national sources – (*e.g*. within the framework of the European Union; by reference to the regulatory ambit of the Council of Europe; or by reference to the regulatory framework established at the level of the ILO)?

If so, having regard specifically to Labour Law cases, please elaborate on how these differ from the "normal" situation governing the treatment of non-Labour Law cases/litigation in your legal system.

Answer:

There are no special arrangements for situations in which regulatory provisions under consideration are derived from supra-national sources. Judges are obliged to take all provisions into account which are relevant for the decision of the individual case. The principle 'iura novit curia' applies to the proceedings, including provisions derived from supra-national sources.

7. Are the hearings of trials (and, where these are available, appeals) in your country's legal system normally heard in public?

Answer:

Yes.

The hearing before the adjudicating court, including the taking of evidence and the pronouncement of the court decision, shall be public *(section 52 sentence 1 ArbGG [Labour Court Act/Arbeitsgerichtsgesetz]; see also section 169 sentence 1 and section 173 GVG [German Courts Constitution Act*[8]*/Gerichtsverfassungsgesetz])*. Accordingly, the hearings of first-instance Labour Courts, second-instance Land Labour Courts and the Federal Labour Court are, apart from a few exceptions *(see answer to question 18)* public.

8. Is the press, TV, radio, and other media entitled to attend and report proceedings in trials in your country?

Answer:

They may attend the hearing including the pronouncement of judgments and rulings as part of the public. But audio and television or radio recordings as well as audio and film recordings intended for public presentation or for publication of their content shall be inadmissible *(section 169 sentence 2 GVG)*.

[8] The Courts Constitution Act, Translation provided by Kathleen Müller-Rostin: http://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html *(as consulted online on 16 July 2018)*. Translations may not be updated at the same time as the German legal provisions displayed on the website http://www.gesetze-im-internet.de.

More media publicity is provided since recently by the Act of 2017 pertaining Extension of Media Publicity in Court Proceedings (Gesetz zur Erweiterung der Medienöffentlichkeit in Gerichtsverfahren und zur Verbesserung der Kommunikationshilfen für Menschen mit Sprach- und Hörbehinderungen - Gesetz über die Erweiterung der Medienöffentlichkeit in Gerichtsverfahren - EMöGG).

For pronouncement of decisions - not for the court proceedings/the hearing itself - of the Federal Labour Court and other Federal Courts these courts may admit audio and television or radio recordings as well as audio and film recordings intended for public presentation or for publication of their content (since the EMöGG came into force).

Sound recordings of the hearing (of all courts) and the pronouncement of judgments and rulings may be admitted by the court for scientific or historical purposes in cases/proceedings of particular contemporary-historical importance to the Federal Republic of Germany in order to archive them in the Federal Archive or the States archives (belonging to the level of the 16 States of the Federal Republic of Germany).

9. Is it permitted to show film/video (e.g. TV footage) of court proceedings in your country?

Answer:

No, see the answer to question 8.

Recordings of the hearing may only be admitted under certain circumstances to archive them in the Federal Archive or the States archives for scientific or historical purposes.

Only for the moment of the pronouncement of decisions - not for the court proceedings/the hearing itself - of the Federal Labour Court and other Federal Courts these courts may admit audio and television or radio recordings as well as audio and film recordings intended for public presentation or for publication of their content *(see the answer to question 8)*.

10. Is it permitted to play sound recordings of court proceedings in your country?

Answer:

No, see the answers to questions 8 and 9.

11. Having regard to this first set of questions, please summarise briefly any situations in which the “normal” arrangements are not applied in relation to Labour Law cases/litigation.

Answer:

No other comments besides those already presented in the answers to this first set of questions.

Of particular importance here are the two different kinds of Labour Court procedures, "Urteil"-procedures and "Beschluss"-procedures *(see the answers to questions 2, 5)* with the main difference that in "Urteil"-procedures, it is the responsibility of the parties to provide the court with the necessary information and evidence needed to make a decision, while in "Beschluss"-procedures, it is largely the responsibility of the court to establish the facts of the case within the scope of what the "participants" involved ("Beteiligte") set out.

B. EVIDENCE GATHERING FOR THE PURPOSES OF FIRST INSTANCE TRIAL

12. Please describe briefly the process whereby evidence is prepared for a first instance trial.

a) In particular:

Is there a process of "discovery", through which the parties have to notify each other about what relevant documents or other items are (or have been) in their possession?

Is there a process of "exchange of documents"?

Answer:

In German civil law litigation, including litigation before Labour Courts, there is no formal pre-trial step. There is in general no pre-trial "discovery" or similar process.

On the contrary, a discovery process like in common law would be in conflict with German civil process law. German civil law litigation, including litigation before Labour Courts, is based inter alia upon the principle that each party shall be itself responsible for preparing its claim or statement of defence. This includes to set out/adduce the facts and present the necessary evidence completely under the relevant parties own direction in a consistent statement of facts (schlüssiger Tatsachenvortrag). Parties are not obliged to notify each other about what relevant documents or other items are (or have been) in their possession. There is no pre-trial process of "exchange of documents". Away from the obligation that the parties are to make their declarations as to the facts and circumstances fully and completely and are obligated to tell the truth *(section 138 para. 1 ZPO*), there is no obligation for a party to provide information or disclose evidence for the benefit of the case of the adverse party. Any "scrutinizing evidence"/ "fishing expedition" (Ausforschungsbeweis), which seeks to obtain facts through the requested evidence, is not allowed.

When preparing the **trial**, the court has to reflect which facts adduced/presented by the party bearing the burden of proof and contested by the adverse party will be relevant

to the decision. This may in consequence limit or exclude the need for a taking of evidence *(see the answer to question 21)*.

Each party is to react in substance to the facts alleged by the opponent. Facts that are not expressly disputed are to be deemed as having been acknowledged unless the intention to dispute them is evident from the other declarations made by the party. A party may declare its lack of knowledge only where this concerns facts that were neither actions taken by the party itself, nor object of their own perception *(section 138 ZPO)*. Facts that are common knowledge with the court need not be substantiated by evidence *(section 291 ZPO, common knowledge)*. For legal presumptions see the answer to question 24 C. Anyone who is to demonstrate an allegation as to fact to the satisfaction of the court may use all evidence and may also be permitted to make a statutory declaration in lieu of an oath *(section 294 ZPO)*.

To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions. The court may base its decision on an aspect that a party has recognisably overlooked or has deemed to be insignificant, provided that this does not merely concern an ancillary claim, only if it has given corresponding notice of this fact and has allowed the opportunity to address the matter. The same shall apply for any aspect that the court assesses differently than both parties do *(section 139 ZPO)*.

Evidence - if necessary - shall be taken in accordance with the Code of Civil Procedure (German Zivilprozessordnung[9], ZPO) before the court hearing the case *(section 355 para. 1 sentence 1 ZPO*) (principle of immediacy of the taking of evidence/Grundsatz der Unmittelbarkeit der Beweisaufnahme) and therefore not in the responsibility of the parties like in pre-trial “discovery” in common law.

For the trial stage the ZPO regulates in a detailed manner many questions of evidence: Title 5 (General regulations on taking evidence: *sections 355 - 370 ZPO*), Title 6 (Evidence taken by visual inspection: *sections 371 - 372a ZPO*), Title 7 (Taking of evidence by hearing witnesses: *sections 373 - 401 ZPO*), Title 8 (Evidence provided by experts: *sections 402 - 414 ZPO*), Title 9 (Evidence provided by records and documents: *sections 415 - 444)*, Title 10 (Evidence provided by examination of a party: *sections 445 - 455)*.

The taking of evidence is decided upon by the courts, following a request by a party to the proceedings, and it takes place in the responsibility of the courts. A record is to be prepared by the court of the hearing and of all evidence taken *(section 159 ZPO)*.

[9] The Code of Civil Procedure, Translation provided by Samson-Übersetzungen GmbH, Dr. Carmen von Schöning: https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html *(as consulted online on 16 July 2018)*. Translations may not be updated at the same time as the German legal provisions displayed on the website http://www.gesetze-im-internet.de.

Evidence that cannot be taken immediately shall not be admitted *(section 294 ZPO)*. The court may direct that visual evidence is to be taken on site, and may also direct that experts are to prepare a report *(section 144 ZPO)*. Should a party frustrate the taking of visual evidence on site that it can reasonably be expected to tolerate, the court may deem the allegations made by the opponent regarding the nature of the object to have been proven *(section 371 para. 3 ZPO)*.

The Code of Civil Procedure allows exceptions to the principle of "immediacy of the taking of evidence" (Grundsatz der Unmittelbarkeit der Beweisaufnahme: "Evidence shall be taken before the court hearing the case") only in very particular cases: Only in cases determined by the ZPO shall the taking of evidence be transferred to a member of the court hearing the case or to another court *(section 355 para. 1 sentence 2 ZPO)*.

Admittedly, however, the Code of Civil Procedure includes independent evidentiary proceedings (Selbständiges Beweisverfahren, *sections 485 - 494a ZPO)*. In general they take place in the responsibility of the courts and only exceptionally "pre-trial": Upon the corresponding petition having been filed by a party, the court may direct in the course of litigation or outside of the proceedings that visual evidence be taken on site, that witnesses be examined, or that an expert prepare a report, provided that the opponent consents to doing so, or provided that there is the concern that evidence might be lost, or that it will become difficult to use it *(section 485 para. 1 ZPO)*. Wherever a legal dispute is not yet pending, a party may petition that an expert prepare a written report if it has a legitimate interest in establishing:

1. The state of a person or the state or value of an object;
2. The cause of personal injury, property damage, or a material defect;
3. The effort required to remedy a personal injury, property damage or material defect.

Interests under law are assumed to be given if the establishment of the above facts may serve to avoid a legal dispute *(section 485 para. 2 ZPO)*. These provisions apply to Labour Court proceedings.[10] In Employment/Labour law practice the independent evidentiary proceedings do not play a major role.

And finally admittedly, section 142 ZPO regulates the "order to produce records or documents". But this does concern the trial itself, not a pre-trial step. Moreover it does concern only records or documents, as well as any other material, to which one of the parties has already made reference in a consistent statement of facts.

b) Who is given the primary responsibility for compiling the evidence for a trial hearing, and how is this normally done (*e.g*. in a "bundle" of documents, electronically, *etc*.)?

Where are the "rules of the game" for these preparatory procedures set out, and who supervises this pre-trial process?

In particular, is a specified judge allocated to a case, or is oversight of a case "shared" between available judges from time to time?

[10] Federal Labour Court 05.10.2000 – 1 ABR 52/99 – No. 16; 30.09.2008 – 3 AZB 47/08 – No. 17.

Answer:

No answer because of absence of a pre-trial “discovery” or similar process.

(Trial stage: *See the answer to question 11a*.)

c) Are there penalties/sanctions if a party fails to discharge any duty at this stage?

Answer:

No duty because of absence of a pre-trial “discovery” or similar process *(see the answer to question 11a)*, no sanctions.

13. What is the normal procedure for compiling and presenting “hard copy” (i.e. paper or similar) documents for trial?

Answer:

No answer because of absence of a pre-trial “discovery” or similar process.

Trial stage:

In section 131 ZPO - Attachment of records or documents - is regulated that the records or documents at hand to the party that are referred to in the preparatory written pleading are to be attached to same as copies. Where only individual parts of a record or document are relevant, attaching excerpts shall meet this requirement; said excerpts shall set out the introduction, the parts addressing the matter in dispute, the closing of the document, as well as its date and signature. Should the records or documents be known to the opponent already, or should they be very extensive, it shall suffice to exactly specify them and to offer the opportunity to inspect them.

Should the party tendering evidence allege that a record or document is in the hands of the opponent, evidence shall be offered by filing a petition that the court direct the opponent to produce said record or document *(section 421 ZPO)*. The opponent is under obligation to produce the record or document if, pursuant to the stipulations of civil law, the party tendering evidence may demand the surrender or production of the record or document *(section 422 ZPO)*. In the event the record or document is to be produced by the opponent, the petition shall designate the record or document, designate the facts the record or document is intended to prove, designate - as completely as possible - the contents of the record or document, cite the circumstances based on which it is being alleged that the opponent has possession of the record or document and designate the grounds based on which the obligation results to produce the record or document. These grounds must be demonstrated to the satisfaction of the court *(section 424 ZPO)*. Should the court deem the facts or circumstances to be significant that are to be proven by the record or document, and the petition to be justified, it shall order the opponent to produce the record or document if the opponent has acknowledged that the record or document is in his hands, or in the event that the opponent fails to react to the petition in

substance *(section 425 ZPO)*. Should the opponent dispute that the record or document is in his possession, he is to be examined as to its whereabouts. In the summons to the hearing at which he is to be examined, he is to be directed to carefully research the whereabouts of the record or document. Should the court become convinced that the record or document is in the opponent's possession, it shall order it to be produced *(section 426 ZPO)*. Should the opponent fail to comply with the order to produce the record or document, or should the court become convinced that he has not carefully researched the whereabouts of the record or document, a copy of the record or document produced by the party tendering evidence may be deemed to be proper evidence. Where no copy of the record or document has been produced, the allegations made by the party tendering evidence regarding the nature and content of the record or document may be assumed to be proven *(section 427 ZPO)*. The ZPO regulates in a similar detailed manner many other questions of evidence provided by records and documents *(Title 9 of the ZPO, sections 415 - 444)*, for instance when the record or document is in the possession of a third party.

Related to presenting "hard copy" documents there is, however, a major process of change inside the German judicial system because of the step by step introduction of electronic judicial file and record of the proceedings and electronic legal transactions with the courts to be implemented by January 1, 2026 at the latest. The court records of the dispute may currently be kept as electronic files and by January 1, 2026 they have to be kept as electronic files *(section 46e para. 1 and para. 1a Arbeitsgerichtsgesetz - ArbGG - Labour Court Act; see also section 298a ZPO)*. Documents and other records already submitted on paper will be step by step changed to electronic format by way of replacing the original. Where the written form is required for preparatory written pleadings and their annexes, for petitions of and declarations by the parties as well as for information, testimonies, reports, and declarations by third parties, recording them as electronic documents shall comply with this requirement provided that this is currently suited for processing by the court. The person responsible for the written pleading is to furnish the document with a qualified electronic signature. An electronic document shall be deemed submitted as soon as the court office designated as the recipient has recorded it *(section 46c ArbGG; see also section 130a ZPO)*.

14. Do you have special rules for the presentation of "electronic communications" (*e.g.* records of e-mails, social media communications, or the like)? How are these displayed for the court?

Answer:

No answer because of absence of a pre-trial "discovery" or similar process.

Trial stage: The party may adduce evidence in form of inter alia electronic communication and visual images in the course of its statement of facts. If the statement of facts is consistent [schlüssiger Tatsachenvortrag], the court has to reflect, whether the evidence adduced is relevant to the decision.

If it is relevant: Evidence taken by visual inspection - If an electronic document is to serve as evidence, it shall be so offered as evidence by producing or transmitting the file *(section 371 para. 1 sentence 2 ZPO)*. If the files are still kept in paper, a printout is to be prepared of an electronic document for inclusion in the files. If this is not or only with disproportionate effort possible for annexes to preparatory written pleadings, a printout may be omitted. The data must be stored permanently in this case; the storage location is to be recorded *(section 298 ZPO)*.

The hard copy must include inter alia a note as to the result of the integrity check performed for the document and as to whom the signature verification has established as the owner of the signature.

However, the requirements of data protection law including the EU-General Data Protection Regulation [GDPR] are to be respected. These requirements have to be met on a case-by-case basis depending on the circumstances and the relevant scope of protection. Depending on the circumstances the evidence obtained might be excluded.

15. How do you deal with video, Closed Circuit Television (CCTV) (Überwachungskameras), or other such forms of visual images when these are to be presented before the court?

Answer:

No answer because of absence of a pre-trial "discovery" or similar process.

(Trial stage: see the answer to question 13).

16. How do you deal with issues arising in relation to "personal" communications *etc*. (*e.g*. as issues of "privacy"; issues of "confidentiality" (whether said to arise out of private contractual arrangements or otherwise); or issues of "business confidentiality" – including where information may be "market sensitive" and subject to separate rules established by a Stock Exchange, a financial regulator, or the like?

Answer:

No answer because of absence of a pre-trial "discovery" or similar process.

Trial stage: See the answers to questions 13, 16, 17.

In particular, the requirements of data protection law must be borne in mind.

If evidence is relevant *(see the answer to question 13)*, a refusal to testify for factual reasons is possible, among others on questions that the witness would not be able to answer without disclosing a technical or trade secret *(section 384 para. 3 ZPO)*. There is also a privilege against self-incrimination *(section 384 para. 2 ZPO)*. Where a testimony

would concern facts to which the confidentiality obligation refers: See the answer to question 17. The witness refusing to testify is to submit to the court the facts on which he is basing such refusal, and is to substantiate them, prior to the hearing scheduled for his examination; this substantiation shall be made in writing, or by recording such facts for the files of the court registry, or by submitting them to the court at the hearing itself *(section 386 para. 1 ZPO)*.

For issues of "business confidentiality" see also the possibility to exclude the public from the hearing or from a part thereof (see the answer to question 18).

17. Do you have special arrangements to deal with issues of "national security" in relation to documentary or other evidence?

Answer:

No answer because of absence of a pre-trial "discovery" or similar process.

Trial stage: The Labour Courts may/have to exclude the public from a hearing or from a part thereof if endangerment of the public order, especially state security is to be feared *(see the answer to question 18)*.

18. Do you have special arrangements to deal with issues of "legal privilege" (if your country's legal system provides for such protection) if this arises in relation to documentary or other evidence?

Answer:

No answer because of absence of a pre-trial "discovery" or similar process.

Trial stage: If an evidence is relevant *(see the answer to question 13)*, a refusal to testify on personal grounds is possible, not only for inter alia the fiancé, spouse or partner under a civil union with/of a party, clerics and members of the press under certain circumstances, but also for persons to whom facts are entrusted, by virtue of their office, profession or status, the nature of which mandates their confidentiality, or the confidentiality of which is mandated by law, where their testimony would concern facts to which the confidentiality obligation refers *(section 383 ZPO)*. These include amongst others many tasks of healing and legal professions, including the office staff. The witness refusing to testify is to submit to the court the facts on which he is basing such refusal, and is to substantiate them, prior to the hearing scheduled for his examination; this substantiation shall be made in writing, or by recording such facts for the files of the court registry, or by submitting them to the court at the hearing itself *(section 386 para. 1 ZPO)*. Where a testimony would concern facts to which the confidentiality obligation refers, the refusal shall be deemed to have been sufficiently substantiated if an assurance is given that an oath of office has been sworn *(section 386 para. 2 ZPO)*. Admission to the bar requires to swear such an oath *(section 12a Federal lawyers' regulations [Bundesrechtsanwaltsordnung, BRAO])*. Even if the persons under confidentiality obligation mentioned above do not refuse to testify, their examination is

not to be aimed at facts and circumstances regarding which it is apparent that no testimony can be made without breaching the confidentiality obligation *(section 383 para. 3 ZPO)*. They may not refuse to testify wherever they have been released from their confidentiality obligations *(section 385 para. 2 ZPO)*.

19. Where it is normal to have a public hearing in your country, do you nevertheless have the possibility of hearing or receiving evidence in private in certain circumstances? If so, please indicate in what circumstances that might happen.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to hold a hearing in private?

Answer:

Trial stage: The hearing before the adjudicating court, including the taking of evidence and the pronouncement of the court decision, shall be public *(section 52 sentence 1 ArbGG [Labour Court Act/Arbeitsgerichtsgesetz]; see also section 169 sentence 1 GVG [German Courts Constitution Act*[11]*/Gerichtsverfassungsgesetz])*.

The Labour Courts may/have to exclude the public from a hearing or from a part thereof if endangerment of the public order, especially state security, or public morals is to be feared *(ex officio)*, or - upon application being made by a party - if trade, business or invention secrets are made subject to the hearing or taking of evidence *(sections 52 sentence 2, 64 para. 7, 72 para. 6 Arbeitsgerichtsgesetz - ArbGG - Labour Court Act)*. The public may be excluded if circumstances from the private sphere of a participant in the proceedings, a witness or a person aggrieved by an unlawful act are mentioned, the public discussion of which would violate interests meriting protection. This shall not apply if there is an overriding interest in public discussion of these circumstances *(section 52 sentence 2 ArbGG; sentence 171b sentence 1 GVG)*. The first-instance Labour Court may exclude the public from a preliminary conciliation hearing (Güteverhandlung) or from a part thereof for reasons of expediency *(section 52 sentence 3 ArbGG)*.

The decision to exclude or not exclude the public from a hearing or from a part thereof shall be final and cannot be challenged.

20. Is it possible otherwise to limit the extent of publicity given to court proceedings in your country (*e.g*. by not reporting the names of some or all participants/witnesses; by anonymising the public reports of proceedings and/or the judgments given in the case, *etc*.)?

[11] The Courts Constitution Act, Translation provided by Kathleen Müller-Rostin: http://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html *(as consulted online on 16 July 2018)*. Translations may not be updated at the same time as the German legal provisions displayed on the website http://www.gesetze-im-internet.de.

Please give examples where this might happen and what powers the court has in these circumstances.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to restrict the extent to which proceedings or parts of proceedings can be made public?

If so, what form will such a challenge take?

Answer:

Trial stage:

Reports of proceedings are not public. An inspection of files is restricted for third persons/parties and the press. While the parties themselves may inspect the court records of the dispute and may have the court registry issue to them execution copies, excerpts, and copies *(section 299 para. 1 ZPO)*, third parties may inspect the files without the consent of the parties only if these third parties have demonstrated their legitimate interest to satisfaction of the president of the court (or his deputy) and have received permission *(section 299 para. 2 ZPO)*. Drafts of judgments, orders, and rulings, the work supplied in preparing them as well as the documents concerning the court's coordination with others will not be made available, nor will they be communicated as copies *(section 299 para. 4 ZPO*). Even in consideration of Article 5 of the Constitution (Grundgesetz, GG)[12] (Freedom of expression, arts and sciences), the press representatives' right to information "condenses" only in very particular cases to the right to inspect the court records of a dispute to which they are not themselves party.[13]

The content of Judgements (Urteile) and Orders (Beschlüsse) shall be, like the hearing before the adjudication court *(see the answer to questions 7, 8)*, public. There is a legal obligation to publish court decisions worthy of publication.[14] Only exceptionally imperative higher interests may justify their non-publishing. However, for the public court decisions are always made anonymous. Passing on anonymous transcriptions of decisions to third parties is part of the public function of courts.[15] Parties to the proceedings can therefore generally not prevent that the decision taken in their case is (anonymously) published, even if the parties have, despite anonymization of the decision, become known to the public or to individual third parties.[16]

In practice, rarely the press publishes names of parties, even if the press representatives have heard the names in the hearing or read them on the official

[12] The German Constitution, Translated by: Professor Christian Tomuschat and Professor David P. Currie; Translation revised by: Professor Christian Tomuschat and Professor Donald P. Kommers in cooperation with the Language Service of the German Bundestag: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html *(as consulted online on 20 July 2018)*. Translations may not be updated at the same time as the German legal provisions displayed on the website http://www.gesetze-im-internet.de.

[13] Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) 14.09.2015 – 1 BvR 857/15 – ECLI:DE:BVerfG:2015:rk20150914.1bvr085715

[14] Federal Constitutional Court 14.09.2015 – 1 BvR 857/15 – see footnote 12.

[15] Federal Court of Justice (Bundesgerichtshof – BGH) Germany's highest court of civil (except of civil employment/labour law) and criminal jurisdiction, 05.04.2017 – IV AR (VZ) 2/16 – ECLI:DE:BGH:2017:050417BIVAR.VZ.2.16.0.

[16] Federal Court of Justice 05.04.2017 – IV AR (VZ) 2/16 – see footnote 14.

announcement in front of the courtroom, unless sometimes, for example, if it is the name of a large and well-known employer.

C. THE TRIAL STAGE AND BEYOND

21. Is it possible (or helpful) to describe the role of the judge in your country's legal system arrangements for Labour Law cases/litigation as being "inquisitorial" or to oversee "adversarial" proceedings?

Answer:

In the field of German labour law/employment law, the role of the Court (judge) is in general determined by the principles of the adversarial system ("Verhandlungsmaxime"), including especially

- the "principle of party disposition" ("Dispositionsmaxime" - the principle that the subject-matter of a case is delimited by the parties),
- the principle that the parties - each on its own - set out/adduce the facts and present the necessary evidence,
- the principle of equality of arms.

The "principle of party disposition" applies to the facts and presentation of evidence, but not to the law to be applied. The assessment of the relevant legal provisions for the decision of the case is a matter for the court to determine (iura novit curia).

Sole exception to the general principle of "adversarial" proceedings: Insofar as the "Beschluss/Order"-procedure is concerned in the field of collective labour law, the role of the Court (judge) is determined by the "Untersuchungsmaxime" (which is - in this case - a blend of the adversarial and inquisitorial model).

Therefore, in "Urteil"-procedures, it is the responsibility of the parties to provide the court with the necessary information and evidence needed to make a decision, while in "Beschluss"-procedures *(see the answers to questions 2, 5)*, it is largely the responsibility of the court to establish the facts of the case within the scope of what the "participants" involved ("Beteiligte") set out.

22. Does the judge question witnesses who appear to give oral evidence before the court, or is this task undertaken by lawyers appearing for the parties?

Do witnesses give their evidence on the basis of prepared documents (e.g. a "witness statement")? If so, who (in your experience) generally undertakes the task of preparing such a document?

Answer:

In German civil law litigation - including litigation before Labour Courts - witnesses are heard by the court, not only by parties or counsels.

According to the Labour Court Act (Arbeitsgerichtsgesetz; ArbGG) and the Code of Civil Procedure (Zivilprozessordnung, ZPO), evidence by hearing witnesses shall be offered by naming the witnesses and designating the facts regarding which the witnesses are to be examined *(section 373 ZPO)*.

The parties shall submit their arguments regarding the legal dispute to the court of decision orally *(section 128 ZPO)*. The presiding judge of the chamber shall open the hearings and shall direct their course. He shall grant the right to speak and may deny leave to speak to persons who are not complying with his orders. Should a member of the court so request, he shall allow that member to ask questions. He shall ensure that the matter is discussed exhaustively and that the hearing is continued without interruption until its close *(section 136 ZPO)*. The case should, if possible, be decided in a single, well-prepared hearing *(section 56, 57 ArbGG)*. If this is not feasible, in particular because a taking of evidence cannot take place immediately, then the date for further proceedings, which is to follow soon, must be announced immediately *(section 57 ArbGG)*.

After discussing the matter the court will hear the evidence if (and as far as) necessary *(see the answers to questions 11, 13: When preparing the trial, the court has to reflect which facts adduced/presented by the party bearing the burden of proof and contested by the adverse party will be relevant to the decision. This may in consequence limit or exclude the need for a taking of evidence)*.

In general, hearing of evidence has to take place before the court/chamber *(section 58 para. 1 sentence 1 ArbGG)*. Evidence is to be taken directly *(section 355 para. 1 sentence 1 ZPO*), principle of “immediacy of the taking of evidence” (Grundsatz der Unmittelbarkeit der Beweisaufnahme), only exceptionally a requested judge (inter alia: if an out-of-town witness cannot travel) is to take evidence *(section 362 ZPO)*.

The court order instructing one or the other manner of taking evidence is not contestable *(section 355 para. 2 ZPO)*. During the taking of evidence, the presiding judge is to grant to each member of the court making the corresponding request the opportunity to ask questions *(section 396 para. 3 ZPO)*. The parties are entitled to have those questions put to the witness that they believe expedient for clearing up the matter, or for establishing the circumstances of the witness. The presiding judge may permit the parties to directly address questions to the witness, and is to grant this permission to their counsel upon the latter’s request. In case of doubt, the court shall rule on whether or not a question is admissible *(section 397 ZPO)*. The court hearing the case may order, at its discretion, that a witness be examined several times *(section 398 para. 1 ZPO)*.

A witness statement in the form of a signed document recording the evidence of a witness is not foreseen in the ZPO.

The court may instruct that the question regarding which evidence is to be taken may be answered in writing should it believe that, in light of the content of the question regarding which evidence is to be taken and taking into consideration the person of the witness, it suffices to proceed in this manner. The attention of the witness is to be drawn to the fact that he may be summoned to be examined as a witness. The court shall direct the witness to be summoned if it believes that this is necessary in order to further clear up the question regarding which evidence is to be taken *(section 377 para. 3 ZPO)*.

The presiding judge shall close the hearing if, in the opinion of the court, the matter has been comprehensively deliberated, and shall pronounce the rulings and orders of the court *(section 136 ZPO)*.

23. What rules does the judge apply in relation to the admissibility of evidence?

In brief terms, what kinds of evidence may not be admissible before the court?

Answer:

See the answers to questions 11 - 19.

It is the responsibility of the parties to set out/adduce the facts as substantiated as possible and present the necessary evidence.

Five types of evidence are provided for by the ZPO[17]:

- Evidence taken by visual inspection; *sections 371 - 372a ZPO (Title 6 ZPO)*,
- Taking of evidence by hearing witnesses; *sections 373 - 401 ZPO (Title 7 ZPO)*,
- Evidence provided by experts; *sections 402 - 414 ZPO (Title 8 ZPO)*,
- Evidence provided by records and documents; *sections 415 - 444 (Title 9 ZPO)*,
- Evidence provided by examination of a party; *sections 445 - 455 (Title 10 ZPO)*.

Inadmissible is an offer of proof that is not sufficiently specific, presented in order to obtain facts and further evidence ("Ausforschungsbeweis"; "scrutinizing evidence"/ "fishing expedition").

24. In relation to the litigation of labour disputes in your country, is there a single forum where cases are determined, or are there further instances of appeal or review?

Is the fact-finding exercise in Labour Law litigation/cases something which is confined to the first instance court?

If so, is it possible to appeal against findings of fact made at the first instance level?

[17] The Code of Civil Procedure, Translation provided by Samson-Übersetzungen GmbH, Dr. Carmen von Schöning: https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html *(as consulted online on 16 July 2018)*. Translations may not be updated at the same time as the German legal provisions displayed on the website http://www.gesetze-im-internet.de.

In what circumstances might an appeal level court make further or alternative findings of fact?

Answer:

There is more than one instance for litigation of labour disputes in Germany: First-instance Labour Courts, second-instance Land Labour Courts and, subject to certain conditions, the final-instance Federal Labour Court *(for details see the answer to question 2)*.

The fact-finding exercise in Labour Law litigation/cases is confined to the first and second instance courts. At appeal, the case is reheard by the relevant Land Labour Court (Landesarbeitsgericht) both on points of law and the facts of the case, which means that a fresh statement of the facts is generally admissible, although subject to certain conditions. Scope of the review by the court of appeal *(section 529 ZPO)*: The court of appeal is to base its hearing and decision on the facts established by the court of first instance, unless specific indications give rise to doubts as to the court having correctly or completely established the facts relevant for its decision, and therefore mandate a new fact-finding process. New facts and circumstances insofar as these may permissibly be considered. Any means of challenge or defence that were rightly dismissed in the proceedings before the court of first instance shall be ruled out. New means of challenge or defence are to be admitted only under certain conditions and - in the interest of a speedy procedure - as far as this does not delay the proceedings *(section 67 Arbeitsgerichtsgesetz - ArbGG - Labour Court Act)*. The second-instance Land Labour Court has to appreciate the taking of evidence itself and to repeat it if necessary.

Appeals on a point of law (Revision) to the Federal Labour Court (Bundesarbeitsgericht) do not enable the appeal judgment to be re-examined on questions of fact, only on questions of law. Only those submissions by the parties in the proceedings shall be subject to assessment by the court hearing the appeal on points of law that are apparent from the appellate judgment or the record of the session of the court *(section 559 para. 1 ZPO)*. Insofar as the appeal on points of law is based on the allegation that the law has been violated with regard to the proceedings, the reasoning for the appeal on points of law must include the designation of the facts that reflect this irregularity *(section 559 para. 1 ZPO; section 551 para. 3 sentence 2b ZPO)*. If the court of appeal has established that an allegation as to fact is true or untrue, this determination shall be binding upon the court hearing the appeal on points of law, unless it has been challenged by an admissible and justified petition that the court hearing the appeal on points of law review such determination *(section 559 para. 2 ZPO)*. Apart from very few exceptions, new facts to the case cannot be considered for the judgement. Although the Federal Labour Court has to administer justice in specific cases, its main task is to promote the consistency of court decisions in the area of employment/labour law and develop the law in areas left unregulated by legislation either intentionally or unintentionally.

25. In relation to “normal” matters arising in the context of Labour Law litigation/cases, who carries the burden of proof to establish a matter of evidence?

Answer A:

As a matter of principle, in German civil law litigation - including litigation before Labour Courts in “Urteil/Judgement”-procedures (but not in “Beschluss/Order”-procedures) - the burden of proof lies with the party alleging that the conditions of law favorable to this party are fulfilled. Only in the "Beschluss/Order"-procedure *(see the answers to questions 1, 2, 5)* the role of the Court (judge) is determined by the “Untersuchungsmaxime” *(see the answer to question 20)*.

In general, in “Urteil/Judgement”-procedures the plaintiff is responsible for the facts giving rise to the claim and the defendant for the facts hindering/destroying/inhibiting the claim. Accordingly, the rules concerning the burden of proof arise from the applicable legal norm.

In cases where the party that bears the burden of proof has typically problems to present all facts, civil law and jurisdiction provide some rules of facilitation. For example: In case of structural problems with regard to the burden of proof on the employee side and greater closeness of the employer to the facts, the burden of proof may be “graduated” in labour law cases (abgestufte Darlegungs- und Beweislast). Another example is the “secondary burden of presentation/proof”: If the defendant is aware of all the essential facts and if it is reasonable for him to give further details, he cannot simply deny a claim by the plaintiff, who is actually required to submit a detailed statement of facts but is not able to do so. In that case the defendant may have to bear the “secondary burden of proof” by disputing in detail.

Sometimes, the law provides expressly a different (reverse) distribution of the burden of proof, for example: If the Dismissal Protection Act (Kündigungsschutzgesetz, KSchG) applies, the employer has to prove the facts that cause the termination *(section 1 para. 2 sentence 4 KSchG)*.

[The KSchG applies in companies with regularly more than ten employees, excluding trainees, if the employment relationship started on 1 January 2004 or later (previously the limit was five employees) and if the employment has already lasted without interruption for more than six months.]

For some other examples see answers C - E to question 24.

In the case of "non liquet", the court decides according to the rules of the burden of proof. They are based on a generalizing risk allocation.

Does this include the burden of proof in relation to, *inter alia* (1) the establishment of the existence of an employment relationship; (2) the validity of a collective agreement; (3) the question of whether there has been a termination of employment; (4) the reason underlying a termination of employment?

Answer B:

- The establishment of the existence of an employment relationship: The burden of proof lies in general with the party alleging that such a relationship is existing.
- The validity of a collective agreement: The distribution of the burden of presentation/proof depends on the individual case.
- The question of whether there has been a termination of employment: The burden of proof lies with the party alleging the termination (in practice, this is not a major problem, since the law provides that termination of employment by notice of termination or separation agreement requires written form to be effective; electronic form is excluded *[section 623 GBG]*).
- The reason underlying a termination of employment:
  - If the Dismissal Protection Act (Kündigungsschutzgesetz, KSchG) applies, the employer has to prove the facts that cause the termination *(section 1 para. 2 sentence 4 KSchG)*. *See the answer 24 A.*
    [The KSchG applies in companies with regularly more than ten employees, excluding trainees, if the employment relationship started on 1 January 2004 or later (previously the limit was five employees) and if the employment has already lasted without interruption for more than six months.]
  - Apart from that: The party alleging that conditions favorable to this party are fulfilled.

Does your country's legislation make use of the notion of "presumptions" – *i.e*. where a situation is presumed to exist unless and until a party proves that the situation does not apply?

Answer C:

Yes.

Should the law make a presumption as to a certain fact being given, its opposite may admissibly be proven unless otherwise provided for by the law. This proof may also be established by petitioning the examination of a party *(section 292 ZPO, legal presumption)*.

An example in labour law is the litigation related to the content of the certificate of employment/reference: Insofar the burden of presentation/proof depends on the content of the obtained certificate, by using legal presumptions. If the employer has certified an overall average performance, the burden of proof lies with the employee alleging a better assessment. If the employer has certified a below-average performance, the burden of proof lies with the employer to present and, if necessary, prove the facts underlying this assessment.

Are there any matters in respect of which the "normal" rule on the burden of proof does not apply (*e.g*. in consequence of implementation of Directive 97/80/EC or otherwise)? If so, what are these and how do they operate in your country's system?

Answer D:

Yes, there are matters in respect of which the "normal" rule on the burden of proof does not apply.

See answer 24 A for an example in the context of termination of employment.

Anti-Discrimination Law: Where, in case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds referred to in Section 1 of the AGG, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination *(section 22 AGG - General Act on Equal Treatment[18])*.

[Section 1 AGG: The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.]

Does your country's legislation make use of the terminology of "reversed burden of proof"?

Answer E:

The term "reversed burden of proof" can be translated into German as "umgekehrte Beweislast".

Expressly mentioned is the notion "Beweislastumkehr" in the German Civil Code (Bürgerliches Gesetzbuch, BGB[19]) in Subtitle 3 (Purchase of consumer goods) in the heading of section 477 BGB. It can however be argued that the content of section 477 BGB *(If, within six months after the date of the passing of the risk, a material defect manifests itself, it is presumed that the thing was already defective when risk passed, unless this presumption is incompatible with the nature of the thing or of the defect.)* is a good example for a legal "presumption" as the basis of a reversed burden of proof.

Without going into details about the question of a uniformity understanding of concepts, similarities and differences of the concept of "reversal burden of proof", it can be noted that in Germany the law may stipulate a "Beweislastumkehr". A good example could be section 1 para. 2 sentence 4 KSchG *(See the answer 24 A)*.

[18] The General Act on Equal Treatment, Translation provided by the Language Service of the Federal Ministry of Health: http://www.gesetze-im-internet.de/englisch_agg/index.html *(as consulted online on 22 July 2018)*. Translations may not be updated at the same time as the German legal provisions displayed on the website http://www.gesetze-im-internet.de.

[19] The German Civil Code, Translation provided by the Langenscheidt Translation Service. Translation regularly updated by Neil Mussett and most recently by Samson Übersetzungen GmbH, Dr. Carmen v. Schöning: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html *(as consulted online on 23 July 2018)*.
Translations may not be updated at the same time as the German legal provisions displayed on the website http://www.gesetze-im-internet.de. The content of section 477 BGB has previously been regulated in section 476 BGB.

Does the approach in your country recognise any notion of a “neutral burden of proof”?

Answer F:

A concept of a “neutral burden of proof” is not provided for under current German law.

In addition to question 24 - appraisal of evidence/ assessment of evidence:

The court is to decide, at its discretion and conviction, and taking account of the entire content of the hearings and the results obtained by evidence being taken, if any, whether an allegation as to fact is to be deemed true or untrue. The judgment is to set out the reasons informing the conviction of the judges *(section 286 para. 1 ZPO)*. For the conviction, such a high degree of likelihood is sufficient that reasonable doubts no longer exist. However, the evaluation of evidence at the court’s discretion and conviction may not infringe the general rules of logic, of empirical knowledge or laws of nature (Denk-, Erfahrungs- und Naturgesetze). This is subject to review by the Federal Labour Court in case of corresponding action against a Land Labour Courts judgments. Insofar as the appeal on points of law is based on the allegation that the law has been violated with regard to the proceedings, the reasoning for the appeal on points of law must include the designation of the facts that reflect this irregularity *(section 559 para. 1 ZPO; section 551 para. 3 sentence 2b ZPO)*.

The court shall be bound to statutory rules of evidence only in the cases designated in the ZPO *(section 286 para. 2 ZPO)*. Examples:

- Evidentiary value of the (courts) hearing record *(section 165 ZPO)*: Compliance with the formal requirements stipulated for the hearing can be proven only by the record of the hearing. The exclusive means of admissibly challenging the content of the record concerning these formal requirements is the submission of proof that it has been forged.

- Evidentiary value of the section of the judgment of the court addressing the facts and the merits of the case *(section 314 ZPO)*: The section of the ruling that addresses the facts and the merits of the case shall establish evidence for the submissions made by the parties in oral argument. Such evidence can be invalidated only by the record of the hearing.

- Evidentiary value of public records and documents regarding declarations *(section 415 ZPO)*: Records and documents that have been prepared, in accordance with the requirements as to form, by a public authority within the scope of its official responsibilities, or by a person or entity vested with public trust within the sphere of business assigned to him or it (public records and documents), shall establish full proof, provided they have been executed regarding a declaration made before the public authority or the public official issuing the deed. Evidence proving that the transaction has been improperly recorded is admissible.

- Evidentiary value of private records and documents *(section 416 ZPO)*: To the extent that private records and documents are signed by the parties issuing them, or have been signed using a mark that has been certified by a notary, they shall establish full proof that the declarations they contain have been made by the parties who prepared such records and documents.

- Evidentiary value of the hard-copy printout of a public electronic document *(section 416a ZPO)*.

- Evidentiary value of public records and documents regarding a directive, ruling or decision issued by an authority *(section 417 ZPO)*.

- Evidentiary value of public records and documents with other content *(section 418 ZPO)*.

26. Once a judgment has been given by the court, is it possible for that decision to be appealed or otherwise revisited on the basis that "new evidence" has come to light?

If so, are there any time limits placed upon this?

Are conditions placed upon the admissibility of any such "new evidence"?

Who makes the decision as to whether "new evidence" has been presented and whether it should be considered?

Is there a right to appeal against such a determination on the admissibility of "new evidence"?

Answer:

At appeal (Berufung; before a second-instance Land Labour Court), the case is reheard by the higher court both on points of law and the facts of the case, which means that a fresh statement of the facts is generally admissible *(see the answer to question 2)*. Any means of challenge or defence submitted only after the deadline imposed in its regard are to be admitted at the court's discretion and conviction only if admitting them to the proceedings would not delay the process of dealing with and terminating the legal dispute, or if the party provides sufficient excuse for such delay *(section 56 para. 2 and section 61a para. 5 Arbeitsgerichtsgesetz - ArbGG - Labour Court Act)*.

Appeals on a point of law (Revision; before the final-instance Federal Labour Court) do not enable the appeal judgment to be re-examined on questions of fact, only on questions of law. Apart from very few exceptions (especially undisputed or manifestly correct facts), new facts to the case cannot be considered for the judgement *(see the answer to question 2)*.

As far as this question should be understood that it is not about the already discussed possibilities of appeal and appeal on a point of law ("Berufung" and "Revision" in the context of the German Code of Civil Procedure [Zivilprozessordnung, ZPO] and

the German Labour Court Act [Arbeitsgerichtsgesetz, ArbGG]), but about proceedings already terminated by a final judgment that has become res judicata:

The very fact, that “new evidence” has come to light, does not give a right to a reopening of proceedings. A Reopening of proceedings is regulated in Book 4 of the ZPO. Proceedings terminated by a final judgment that has become res judicata may be reopened by an action for annulment and by an action for retrial of the case *(section 578 ZPO)*.

An action for annulment may be brought: 1. Where the composition of the court of decision was not compliant with the relevant provisions; 2. Where a judge was involved in the decision who, by law, was prohibited from holding judicial office, unless this impediment had been asserted by a motion to recuse a judge or by filing appellate remedies without meeting with success; 3. Where a judge was involved in the decision although he had been recused for fear of bias and the motion to so recuse him had been declared justified; 4. Where a party to the proceedings had not been represented in accordance with the stipulations of the law, unless it had expressly or tacitly approved the litigation. No complaint may be filed in the cases set out under numbers 1 and 3 if it was possible to enforce such annulment by appellate remedies *(section 579 ZPO)*.

An action for retrial of the case may be brought: 1. Where the opponent, by swearing an oath regarding his testimony, on which latter the judgment had been based, has intentionally or negligently committed perjury; 2. Where a record or document on which the judgment was based had been prepared based on misrepresentations of fact or had been falsified; 3. Where, in a testimony or report on which the judgment was based, the witness or experts violated their obligation to tell the truth, such violation being liable to prosecution; 4. Where the judgment was obtained by the representative of the party or its opponent or the opponent’s representative by a criminal offence committed in connection with the legal dispute; 5. Where a judge contributed to the judgment who, in connection with the legal dispute, violated his official duties vis-à-vis the party, such violation being liable to prosecution; 6. Where judgment by a court of general jurisdiction, by a former special court, or by an administrative court, on which the judgment had been based, is reversed by another judgment that has entered into force; 7. Where the party a) Finds, or is put in the position to avail itself of, a judgment that was handed down in the same matter and that has become final and binding earlier, or where it b) Finds, or is put in the position to avail itself of, another record or document that would have resulted in a decision more favourable to that party’s interests; 8. Where the European Court of Human Rights has established that the European Convention for the Protection of Human Rights and Fundamental Freedoms or its protocols have been violated, and where the judgment is based on this violation *(section 580 ZPO)*.

In the cases set out in the above section 580 ZPO in numbers 1 to 5, an action for retrial of the case may be brought only if a final and binding conviction has been issued as a result of the criminal offence, or if it is not possible to initiate or implement criminal proceedings for other reasons than the lack of evidence. Evidence of the facts justifying the action for retrial of the case cannot be provided by examination of a party *(section*

581 ZPO). An action for retrial of the case may admissibly be brought only if the party, through no fault of its own, was unable to assert the cause for retrial of the case in the earlier proceedings, in particular by filing a protest or an appeal, or by joining an appeal *(section 582 ZPO)*.

HUNGARY

A. THE GENERAL CONTEXT OF THE LABOUR COURTS AND TRIBUNALS IN YOUR LEGAL SYSTEM

1. Where are Labour Law cases/disputes heard and determined within your legal system?

   Please elaborate on the legal system context for Labour Law litigation/dispute resolution in your country.

Answer:

Labour law disputes are heard and determined at first instance by one of the 20 administrative and labour courts, located in each county seat and in the capital. *Appeals against their decisions can be lodged with the high courts, having specialised labour law panels, located similarly in each county and in the capital. A petition for judicial review against the final decision of a high court can be submitted to the Curia (Kúria), which is the single highest judicial forum in Hungary.*[20] *The Curia guarantees the uniform application of law.*[21]

Mediation and arbitration services in labour law disputes are provided by private entities, and even the judiciary provides free of charge mediation services as well. In labour cases, mediation is not compulsory, so parties are free to decide whether they use these services or directly the judicial way. Thus, mediation and arbitration do not play a significant role in the resolution of labour law disputes in Hungary.

In most of the labour law disputes of civil servants, the plaintiff is required to lodge his claim with the so called Civil Service Arbitration Panel, which is authorised to rule on the case in a one-instance procedure. The decision of this panel can be challenged before the administrative and labour court.[22]

2. Do you have a specialised system of "Labour Courts" in your country?

   Do you treat Labour Law cases/disputes in common with other cases in general (*e.g.* as part of normal civil law litigation); or do you have some mixture of the two approaches?

   Please elaborate on some of the key features of the arrangements in your country.

[20] The Hungarian judiciary includes four levels:
1st level: district courts (110) + administrative and labour courts (20)
2nd level: high courts (20)
3rd level: regional appellate courts (5) (playing no role in labour law disputes)
4th level: Curia (1).

[21] Act no. CXXX of 2016 on the Code of Civil Procedure (hereinafter: CCP 2016), sec. 8

[22] Act no. CXCIX of 2011 on Civil Servants, sec. 190

Answer:

Yes, in Hungary there are specialised "administrative and labour courts". See the answer given under Question 1.

Most of the labour law cases are part of normal civil litigation. The general rules of Act no. CXXX of 2016 on the Code of Civil Procedure (hereinafter: CCP 2016) are applicable, but the provisions of the CCP 2016 shall apply to labour disputes subject to the derogation provided for in Chapter XXXIX on labour disputes.

It is notable that the CCP 2016 entered into force on 1 January 2018, replacing Act no. III of 1952 on the Code of Civil Procedure (hereinafter: CCP 1952) in civil lawsuits beginning from this date. The new code represents an enormous shift in the structure of civil litigation, introduces many new legal institutions and concepts (specified later on in this questionnaire) and provides considerably redesigned roles for the actors of civil procedures. In this questionnaire we introduce the rules of Hungarian labour law disputes based primarily on the new code, even though the development of the judicial practice related to this code is in a very initial stage, and obviously the judges have to face numerous uncertainties and open questions of application in respect of the new rules. Where it is appropriate, we refer to the practice developed on the basis of the CCP 1952 as well.

Under the CCP 2016, there are some important key features for labour law cases, such as the followings:

- The concept of "labour disputes" is clearly defined.[23]
- Labour disputes are heard by the court of first instance with the participation of lay assessors.[24]
- If the absentee pay from an employment relationship to which the labour dispute pertains does not exceed a specific sum provided for by law, the employee involved in the action as a party shall be entitled to cost allowance granted to employees.[25] Accordingly, on the basis of employees' cost allowance the party shall be granted cost exemption throughout the entire duration of the judicial proceedings and the enforcement procedure as well.
- In labour disputes the employee as plaintiff shall be entitled to bring action before the administrative and labour court of jurisdiction by reference to his home address, or failing this, his habitual residence in Hungary, instead of the court of ordinary jurisdiction for the defendant, or bring action before the administrative and labour court in whose area of jurisdiction he is or has been working for any extended period of time, instead of the court of ordinary jurisdiction for the defendant.[26]
- A special feature of labour law disputes is that, if the parties are duly represented at the case initiation hearing[27] in person or by way of their counsels,

[23] CCP 2016, sec. 508
[24] CCP 2016, sec. 9(2), 510
[25] CCP 2016, sec. 525
[26] CCP 2016, sec. 513
[27] The case initiation hearing takes place in the course of the so called case initiation stage of the first instance proceedings. About the stages of court proceedings, see in more detail the answer given in Section B, under Question 11.

the hearing begins with conciliation in an attempt to reach a settlement between the parties (it is a kind of "mini mediation" conducted by the court). To this end, the head of the judicial panel discusses the entire legal dispute with the parties.[28] If no settlement can be concluded and approved by the court, the court shall continue the hearing immediately according to the general rules. This also means that in labour law disputes, contrary to civil law cases, it is mandatory to hold an oral hearing in the case initiation stage, so this stage cannot be closed exclusively based on the written statements of the parties.

From 1 January 2018, the so called "lawsuits connected with civil service relationship"[29] are excluded from the scope of labour law disputes, governed by the CCP 2016, and count as administrative law disputes, falling under the scope of Act no. I of 2017 on the Code of Administrative Litigation (hereinafter: CAL). Previously, such lawsuits were dealt with according to the provisions on labour law disputes under the CCP 1952, by labour law judges. These lawsuits are by nature labour law disputes as well. Even though the CAL envisages some special rules for lawsuits connected with civil service relationship, the general rules of administrative lawsuits, which are designed primarily for the judicial review of administrative acts, are very difficult to apply for these labour law disputes. These lawsuits are also heard by the administrative and labour court at first instance, so, instead of administrative law judges, still labour law judges deal with these cases, even if they are registered as administrative law cases. However, according to a recent amendment of the Fundamental Law of Hungary, administrative and labour panels are expected to be allocated to separate organisational units, so this solution is not going to be viable any more (the details of the oncoming organisational changes are not clear yet).
The CAL entered into force on 1 January 2018 as well, so it is currently a huge challenge for labour law judges to hear lawsuits connected with civil services according to the rules of administrative lawsuits.

3. Do you have specialised "Labour Judges", or are Labour Law cases/disputes litigated in front of judges with general jurisdiction and experience?

   Please elaborate on the qualifications, background, experience, and training of judicial officers in your country who deal with Labour Law cases/disputes.

Answer:

In Hungary, there are specialised labour law judges: they deal with labour cases, in addition to some types of administrative law disputes (especially social security cases) according to the case assignment order of the court where they serve. There are no special requirements for becoming a "labour law judge", but local and central trainings, seminars, or further education courses are regularly organised for judges

[28] CCP 2016, sec. 520

[29] Civil service relationship is defined as a legal relationship between the state or a body acting on behalf of the state and a person employed on behalf of the state for the purposes of performance of work or performance of service, containing special obligations and rights aimed at serving the public, stipulated by the law; not including the service relation of judges, judicial employees and employees of the public prosecutor's office as well as the legal relationship of persons in an employment relationship [CAL, sec. 7(4)3].

dealing with labour law disputes. Labour law judges on higher court levels are normally recruited from labour law judges on lower levels.

The National Office for the Judiciary (hereinafter: NOJ) was established in 2012 as the central administrative organ of the judicial system, which is an independent entity from the Government. The activity of the President of the NOJ is controlled by the National Judicial Council. The National Academy of Justice as the training centre of the NOJ plays an important role in the provision of trainings for the members of the judicial staff in order to extend their professional knowledge, including organizing trainings in connection with labour law and the relevant EU law as well.

Furthermore, there are eight, so called "regional administrative and labour colleges". These bodies comprise all the administrative and labour judges in a specific region plus a liaising judge from the Curia. These are not courts, so they do not hear cases, but they constitute forums for very vivid, fruitful and intensive professional discussions within the two concerned branches and between the judges in them, so they play an eminent role in the development of the professional community of labour law judges.

4. Do you have any specialised institutions which operate alongside or in conjunction with courts to deal with Labour Law cases/disputes?

   If so, please outline what these are and what role they undertake in the process of litigation/dispute resolution.

Answer:

In Hungary, there are no such specialised institutions.

5. Does a generalised framework for conducting civil litigation (*e.g*. a Civil Procedure Code, or the like) operate in relation to Labour Law cases/disputes in your country, or are there special rules/procedures which have been developed for Labour Law litigation/dispute resolution?

   Please elaborate on what the relevant procedural framework might be.

Answer:

See the answer given under Question 2.

6. Do special arrangements operate in your national legal system for situations in which regulatory provisions under consideration are derived from supra-national sources – (*e.g*. within the framework of the European Union; by reference to the regulatory ambit of the Council of Europe; or by reference to the regulatory framework established at the level of the ILO)?

If so, having regard specifically to Labour Law cases, please elaborate on how these differ from the "normal" situation governing the treatment of non-Labour Law cases/litigation in your legal system.

Answer:

In Hungary, there are no special arrangements for the abovementioned situation.

7. Are the hearings of trials (and, where these are available, appeals) in your country's legal system normally heard in public?

Answer:

Except where otherwise provided for by an act of law, the court shall adjudge legal disputes between the parties in public hearing and shall deliver its judgment of the case publicly.[30] This is the general rule for hearings at all instances.

The court may, of its own motion or at the party's reasoned request, hold the hearing on the whole or certain sections of the hearing in closed session, where this is deemed appropriate for the protection of classified information, business secrets or any other information that is rendered confidential by an act of law, for the purpose of protecting public morals, for the protection of a minor or the personal rights of the party. Furthermore, in particularly justified cases the court may bar the public from attending the hearing when examining witnesses with a view to keeping their personal data confidential, and when holding the hearing in closed session is absolutely necessary for the protection of the life and physical integrity of the witness and his family members.[31]

8. Is the press, TV, radio, and other media entitled to attend and report proceedings in trials in your country?

Answer:

The publicity of hearings also means that the press is entitled to attend and report.

A media content provider defined in Act no. CLXXXV of 2010 on the Freedom of the Press and on the Basic Rules Relating to Media Content shall be allowed to make, in the manner prescribed by the court, audiovisual recordings of public hearings, for the purpose of reporting to the public.

When so requested by the court the person making the recording shall provide authentic proof of operating on behalf of a media content provider. If unable to provide

[30] CCP 2016, sec. 231(1)
[31] CCP 2016, sec. 231(2)

such proof, or if the proof offered cannot be verified, the court shall not permit the use of any recording equipment.

Audiovisual recordings can be made of members of the court, the court reporter and the public prosecutor, and – unless otherwise provided for by an act of law – persons performing any State or municipal government function, or performing other public duties provided for by law, if this person is involved in the proceedings in connection with discharging his public function, without their consent. With the exception of the public prosecutor, audiovisual recordings may be made of the parties and other persons involved in the action, including their counsels, witnesses, experts, and of the holders of the subject matter of inspection subject to their express consent.[32]

9. Is it permitted to show film/video (*e.g*. TV footage) of court proceedings in your country?

Answer:

See the answer given under Question 14.

10. Is it permitted to play sound recordings of court proceedings in your country?

Answer:

See the answer given under Question 14.

11. Having regard to this first set of questions, please summarise briefly any situations in which the "normal" arrangements are not applied in relation to Labour Law cases/litigation.

Answer:

In relation to labour law cases/litigation in Hungary, it can be said that the generic rule is the application of the "normal" arrangements of the CCP 2016. So the court's proceedings in a labour law dispute are quite similar to the district courts'[33] proceedings dealing with civil lawsuits at first instance. However, labour law judges need to apply a few special regulations for labour disputes referred to in the answer given under Question 2, but they do not considerably alter the basic features of civil law cases.

As it was mentioned, lawsuits connected with civil service relationship are recently qualified as administrative law cases and shall be litigated according to the rules of

[32] CCP 2016, 231
[33] See in more detail Footnote 1.

the CAL (see in more detail the answer given under Question 2). According to the general opinion of the community of labour law judges, it is far from being an ideal situation, and the fact that labour law related lawsuits are governed by two separate and completely different codes of procedure goes contrary to the Hungarian judicial traditions.

B. EVIDENCE GATHERING FOR THE PURPOSES OF FIRST INSTANCE TRIAL

12. Please describe briefly the process whereby evidence is prepared for a first instance trial.

In particular:

Is there a process of "discovery", through which the parties have to notify each other about what relevant documents or other items are (or have been) in their possession?

Is there a process of "exchange of documents"?

Answer:

One of the most important innovations of the CCP 2016 is the introduction of a divided process structure within the first instance procedure, with a view to ensure the conditions for the consolidation of actions.[34]

The first instance procedure in the CCP 2016 is divided into three stages.

(1) In the „stage of bringing action" the plaintiff initiates the legal procedure by submitting the statement of claims, in which, among others, he motions for the court to give right to his claims and includes all available supporting evidence. The complete statement of claims accepted by the court for case initiation is presented to the defendant which makes the legal effects of bringing an action transpire.[35]

(2) In the „stage of case initiation", the parties define and finalise the framework of the dispute with the active involvement of the judge. The defendant presents evidence and motions for the delivery of evidence in his statement of defence. In possession of the statement of claims and the statement of defence the court of first instance decides whether further case initiation is necessary, which includes further exchange of documents. When the parties present evidence for ascertaining the relevant facts, make statements relating to the assessment of evidence, motion for the delivery of evidence and make available means of evidence, their actions might be considered as part of a process of "discovery". Once the framework of the case is finalised, the court

[34] See the Preamble of the CCP 2016.
[35] Chapter XI of the CCP 2016

closes the case initiation stage with an order, and moves on to the next stage.[36]

(3) In the "stage of hearing as to merits" the court shall take evidence within the framework defined for the dispute in the case initiation stage, and shall decide on the case. Subsequent filing of evidence during this second stage is exceptional.[37]

Who is given the primary responsibility for compiling the evidence for a trial hearing, and how is this normally done (*e.g*. in a "bundle" of documents, electronically, *etc*.)?

Where are the "rules of the game" for these preparatory procedures set out, and who supervises this pre-trial process?

In particular, is a specified judge allocated to a case, or is oversight of a case "shared" between available judges from time to time?

Answer:

Submitting evidence or motioning for the delivery of evidence falls within the primary responsibility of the parties.[38] Nevertheless, if data or documents cannot be obtained directly by the parties, the court is obliged to take measures to obtain them in case the parties so request.[39]

The procedure of compiling evidence is managed by the judicial panel of the court of first instance assigned to hear the specific case. In labour law disputes the first instance panel consists of a professional judge (head of panel) and two lay assessors, as referred to in the answer given under Question 2.[40] The head of panel plays a predominant role in the conduct of the proceedings.

In the structure of the three-stage first instance procedure, the compilation of the relevant facts, legal allegations and pieces of evidence is carried out in the course of the case initiation stage.

According to the new rules introduced by the CCP 2016, in the case initiation and the hearing as to merits stages, the head of panel is obliged to conduct the proceedings not only in a formal sense (*i.e.* the determination of the procedural acts' time and sequence etc.),[41] but also in a substantive sense, including *inter alia* the following activities:

- If the party's case initiation statement, including the one indicated in the statement of claims, is incomplete, not sufficiently detailed or contradictory, the

[36] Chapters XII and XIV of the CCP 2016
[37] Chapters XIII and XIV of the CCP 2016
[38] CCP 2016, sec. 4(2)
[39] CCP 2016, sec. 322
[40] At second instance and in proceedings before the Curia, the court's panel consists of three professional judges, one of them is permanently assigned to preside the panel (head of panel).
[41] CCP 2016, sec. 213

court shall advise the party to complete his case initiation statement, or to correct the errors it may contain.

- Where the case initiation statement fails to cover the taking of evidence with respect to certain facts of importance, or if there is disagreement between the parties as to where the burden of proof lies with respect to certain facts, the court shall inform the parties concerning the consequences applicable to failure to present evidence, failure to submit a motion for the delivery of evidence and to the eventuality where the taking of evidence has failed.
- The court shall assist in defining the framework of the dispute by informing the parties: a) if the legal provision they refer to is interpreted differently by the court; b) if it discovers – relying on available data or information – any fact that must be taken into consideration of its own motion; or c) if it is not legally bound by their request.

The court shall carry out the substantive conduct of proceedings only within the framework of the parties' motions and legal allegations, hence, the court is not supposed *e.g.* to give advice on further legal grounds the parties could refer to.[42]

The rules on the substantive conduct of proceedings demonstrate well that the head of panel has to play a proactive role in the compilation of evidence.

The same judicial panel is allocated to the whole three-stage procedure, there is no judge specifically designated to oversee the process of compiling evidence.

Evidence lodged by the parties is presented to the opposing party by the court. The exchange of documents is done either electronically or by lodging bundles of documents depending on whether the parties are obliged to communicate electronically under special law. Electronic communication is always mandatory for parties with legal representation.[43]

Are there penalties/sanctions if a party fails to discharge any duty at this stage?

Answer:

Yes, there are such penalties and sanctions.

The non-fulfilment of these obligations may trigger various sanctions, including the following ones:

- The court rejects the claim (of parties with legal representation), or orders the remedy of the deficiencies of the claim (of parties without legal representation), if the statement of claims does not contain all the compulsory elements, or if the plaintiff has failed to enclose other mandatory attachments.[44]
- If the defendant fails to lodge a written defence statement and does not submit

[42] CCP 2016, sec. 237(1) to (3), (5)
[43] CCP 2016, sec. 608
[44] CCP 2016, sec. 176(1)(j), 248(1)

a setoff certificate, the court shall of its own motion issue – outside a hearing – an order against the defendant as requested in the statement of claims served.[45]

- If the party fails to make a case initiation statement despite the court's substantive conduct of proceedings, or if he did so improperly, the court shall judge it consistently with the discrepancies in the party's case initiation statement, relying on the information available in the case file.[46]
- Where a party makes a case initiation statement, or makes changes therein, after missing the opportunity to do so in the course of case initiation in the case initiation document or during the case initiation hearing, the court shall (mandatorily) impose a fine upon such party.[47]

13. What is the normal procedure for compiling and presenting "hard copy" (*i.e*. paper or similar) documents for trial?

Answer:

In labour law disputes, parties without legal representation are not obliged to communicate electronically. However, if the employer is an economic operator, which is the case in most of the employment relationships, electronic communication is mandatory for it, irrespective of being represented by a legal counsel or not.[48] If the non-obliged party opts for electronic communication, this party and/or his representative shall communicate with the court electronically, and returning to the traditional ways of communication can be authorized only in a justified situation.[49]

In case the parties are obliged to communicate electronically, they must submit and receive all documents this way, so no hard copy is admissible.[50] Exceptionally, the document is to be presented on paper for inspection, in particular, if the authenticity of the paper-based document is disputed. The court may order submission on paper of its own motion and at the party's request.[51]

In case of electronic communication, it is up to the court to present a hard copy for the purposes of the trial and for sending it to the opposing party if the latter is neither obliged to nor has chosen to communicate electronically. In case the parties are authorized to communicate in writing, they have to produce and provide as many written copies as there are recipients including the court.[52]

[45] CCP 2016, sec. 181
[46] CCP 2016, sec. 183(6)
[47] CCP 2016, sec. 183(5)
[48] Act no. CCXXII of 2015 on the General Rules for Trust Services and Electronic Transactions (hereinafter: E-Government Act), sec. 9(1)(a); CCP 2016, sec. 514
[49] CCP 2016, sec. 605(3), 606
[50] CCP 2016, sec. 608
[51] CCP 2016, sec. 613(3)
[52] CCP 2016, sec. 605

The language of court proceedings is Hungarian, thus the parties have to provide translations of foreign language documents into Hungarian.[53]

An expert involved in the procedure may also be obliged to communicate electronically according to the rules of the E-Government Act. Even if electronic communication is mandatory for the expert or the expert body, the court, in duly justified cases, may authorize him or it to submit the expert report or part of such report on paper also where electronic communication is used.[54]

14. Do you have special rules for the presentation of "electronic communications" (*e.g*. records of e-mails, social media communications, or the like)? How are these displayed for the court?

Answer:

There are no specific rules for presenting such documents. They might be submitted either printed out or by means of electronic communication depending on whether electronic communication is mandatory for the parties. Nevertheless, the archives always contain a printed-out version of the electronic documents.

15. How do you deal with video, Closed Circuit Television (CCTV), or other such forms of visual images when these are to be presented before the court?

Answer:

There are no specific rules on how audiovisual forms of evidence are to be presented before the court. The court provides for devices for viewing visual images or playing sound recordings during the trial.

The court may, either of its own motion or at the request of the party, order by way of ruling that the hearing of the party, other persons involved in the action, witnesses or experts shall be carried out through electronic communications networks (such as CCTV), as well as the conduct of inspections. The CCP 2016 lays down detailed rules on using electronic communications networks in the procedure.[55]

[53] CCP 2016, sec. 113
[54] CCP 2016, sec. 609
[55] CCP 2016, sec. 622 to 627

16. How do you deal with issues arising in relation to “personal” communications *etc*. (*e.g*. as issues of “privacy”; issues of “confidentiality” (whether said to arise out of private contractual arrangements or otherwise); or issues of “business confidentiality” – including where information may be “market sensitive” and subject to separate rules established by a Stock Exchange, a financial regulator, or the like?

Answer:

The protection of rights relating to personality has a constitutional basis and it is regulated by Act no. V of 2013 on the Civil Code (hereinafter: CC) in the first place. The provisions of the CC cover, among others, the protection of the right to privacy, the right to commercial secrecy and know-how as well as the right to facial likeness and recorded voice.[56] The protection of professional secrecy is regulated in the respective substantive laws, *e.g.* by Act no. XLVII of 1997 on the Protection and Processing of Health Data and relating Personal Data and Act no. I of 2012 on the Labour Code (hereinafter: LC).[57] Act no. CXII of 2011 on Information Self-Determination and the Freedom of Information must also be applied by the judicial authorities.

The CCP 2016 ensures that these provisions be respected during the civil procedure *e.g.* by granting the right to refuse to testify, by the provisions relating to the protection of witness data or other personal data as well as by the use of sound and audiovisual recording equipment during the trial.[58]

- Confidentiality rules related to the hearing of witnesses

The personal and availability data of witnesses are required to be submitted in a confidential form by the parties initiating the hearing of the witness. If the witness so requests, the court shall keep these data confidential during the entire procedure.[59]

Giving testimony may be refused:

a) by the family members of either of the parties;

b) by any person whose testimony would implicate himself or his family member in the commission of a criminal offence, to the extent covered by that subject;

c) by persons bound to confidentiality stemming from their profession, if their testimony would entail their having to breach the obligation of confidentiality, except if the party concerned granted an exemption from this obligation;

d) by persons bound to keep business secrets in respect of the subjects if their testimony would entail their having to breach the obligation of confidentiality, except

[56] CC, sec. 2:43
[57] LC, sec. 9
[58] CCP 2016, sec. 290(1)(c)(d)(f), 290(4) to (6)
[59] CCP 2016, sec. 285, 293

where such data affected by the testimony do not qualify as business secrets according to the Act on the Availability of Public Information and Information of Public Interest, or if the subject matter of the action is to decide whether the data affected should be considered public information or information of public interest;

e) by mediators and experts involved in mediation proceedings pertaining to the case at hand;

f) by media content providers and persons they employ under contract of employment or some other form of employment relationship, if their testimony would expose the identity of any person from whom they receive information relating to the media content they provide, to the extent covered by that subject.[60]

- Access to documents

Access to documents may be limited on grounds of the protection of personal rights and on grounds of national security (see the answer given under Question 16) and data protection.

The parties, the public prosecutor and other persons involved in the action, and their representatives may exercise the right to access documents for inspection and to make copies, where such documents contain business secrets, privileged information or other secrets provided for by an act of law, other than classified information – subject to a confidentiality agreement made out in writing –, according to the rules and under the conditions laid down by the judge hearing the case. If, however, the party entitled to grant an exemption from the obligation of confidentiality made a statement in due time, in which he refused to allow access to the document containing any business secret, privileged information or other secret provided for by an act of law, apart from the court and the court reporter and/or the transcriber no other person shall be allowed access to that part of the document containing such secrets, and it may not be copied and no extracts can be made thereof.[61]

- Publicity of hearings and decisions

In general, legal disputes shall be adjudged in public hearing and judgements shall be delivered publicly. The relevant exceptions are described in the answer given under Question 7.

The court shall issue the anonymized version of its decisions and other documents in cases detailed in the CCP 2016.[62]

[60] CCP 2016, sec. 290(1)
[61] CCP 2016, sec. 163(2)
[62] CCP 2016, sec. 164

17. Do you have special arrangements to deal with issues of "national security" in relation to documentary or other evidence?

Answer:

Yes, the Code of Civil Procedure ensures that the provisions of Act no. CLV of 2009 on the Protection of Classified Information be respected during court proceedings.

The court records of any hearing that was held in closed session with a view to protecting so called classified information (*i.e.* State secrets), and any document that contains classified information may not be copied and no extracts can be made thereof. In these cases the documents may be reviewed only in possession of an authorization granted by the classifier according to specific provisions provided for by the Act on the Protection of Classified Information, subject to conditions established by the head of the judicial panel seized with the case.[63]

Any document, or part of a document, that contains classified information shall not be admissible as evidence in the action, if the original classifier refused to allow the party to have access thereto.[64]

18. Do you have special arrangements to deal with issues of "legal privilege" (if your country's legal system provides for such protection) if this arises in relation to documentary or other evidence?

Answer:

Regarding legal privilege, the provisions concerning professional secrecy shall apply (see the answer given under Question 15 regarding "other secrets").

19. Where it is normal to have a public hearing in your country, do you nevertheless have the possibility of hearing or receiving evidence in private in certain circumstances? If so, please indicate in what circumstances that might happen.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to hold a hearing in private?

Answer:

About hearing witnesses in private see the answer given under Question 7. Should the witness be heard through CCTV, the CCP 2016 details the rules on keeping the hearing confidential.[65]

[63] CCP 2016, sec. 163(1)
[64] CCP 2016, sec. 322(5)

The court shall give reasons for its ruling on holding the hearing in camera.[66] This court order cannot be contested separately, but it may be challenged by the party in an appeal lodged against the court's judgment.[67]

If the party presents a motion for the hearing of a witness by breaching the provisions on the confidential treatment of the witness's personal and availability data, and the witness subsequently files a complaint, the court shall impose a fine upon the person who unlawfully reported the data.[68]

If a witness is forced to testify in spite of his right to refuse to testify,[69] the witness's testimony shall be inadmissible as evidence.[70]

As for access to court files, see the answer given under Question 16**.**

20. Is it possible otherwise to limit the extent of publicity given to court proceedings in your country (*e.g*. by not reporting the names of some or all participants/witnesses; by anonymising the public reports of proceedings and/or the judgments given in the case, *etc*.)?

Please give examples where this might happen and what powers the court has in these circumstances.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to restrict the extent to which proceedings or parts of proceedings can be made public?

If so, what form will such a challenge take?

Answer:

In general, the disclosure of the full name and audiovisual recordings of natural persons in the media is subject to their express consent.[71]

See also the answers given under Questions 15 and 16.

[65] CCP 2016, sec. 626
[66] CCP 2016, sec. 231(3)
[67] CCP 2016, sec. 365(3)
[68] CCP 2016, sec. 285
[69] See the answer given under Question 15.
[70] CCP 2016, sec. 290(6)
[71] CCP 2016, sec. 233(4)

C. THE TRIAL STAGE AND BEYOND

21. Is it possible (or helpful) to describe the role of the judge in your country's legal system arrangements for Labour Law cases/litigation as being "inquisitorial" or to oversee "adversarial" proceedings?

Answer:

The role of the judge in the Hungarian legal system for labour law cases is to oversee adversarial proceedings.

22. Does the judge question witnesses who appear to give oral evidence before the court, or is this task undertaken by lawyers appearing for the parties?

Do witnesses give their evidence on the basis of prepared documents (e.g. a "witness statement")? If so, who (in your experience) generally undertakes the task of preparing such a document?

Answer:

Commonly, the judge questions the witness at first and then the parties or the parties' representatives may address him, but it is merely a practice. There is also possibility that the judge may authorize, if proposed by the party, that the witness be first questioned directly by the party having requested the examination of the witness, followed by the opposing party. In that case, after the parties, the head of panel and other members of the judicial panel shall be entitled to put questions to the witness.[72]

There is no such "witness statement" under Hungarian law.

23. What rules does the judge apply in relation to the admissibility of evidence?

In brief terms, what kinds of evidence may not be admissible before the court?

Answer:

Both the CCP 1952 and the CCP 2016 are based on the principle of freedom in ascertaining the relevant facts of the case.[73] Therefore the court shall not be bound by formal requirements relating to the taking of evidence, and may freely use any pieces of evidence deemed admissible for ascertaining the relevant facts of the case.

[72] CCP 2016, sec. 295
[73] CCP 1952, sec. 3(5); CCP 2016, sec. 263

The CCP 1952 had no regulation relating to illegal evidence, so the courts developed some kind of practice that has the essence that all the circumstances including the other pieces of evidence, the intent and others' rights are to be weighed in the course of the decision on the admissibility of any illegal evidence.[74] According to the relevant case-law developed under the CCP 1952, pieces of evidence violating the personal rights of others could be used in court proceedings, if this violation was not disproportionate and no other evidence existed.

The CCP 2016 provides explicit regulation in terms of referring to unlawful pieces of evidence as follows:

A general prohibition states that the court cannot use evidence if the given method of taking of evidence is considered contrary to public order.[75]
There is also a general provision – with certain exceptions – stating that should the evidence be considered unlawful, it shall not be admissible. The CCP 2016 defines what kind of pieces of evidence shall be considered unlawful. These are the followings:

1. if it was obtained or produced by violating one's right to life and physical integrity, or by use of threat to that effect – this evidence must never be used in the court process;
2. if it came to existence by other illegal means;
3. if it was obtained unlawfully (for example through theft); or
4. if it would constitute a violation of rights relating to personality if put before the court.

Except for the first case mentioned above, the court may exceptionally admit an unlawful means of evidence by weighing the nature and gravity of the infringement, the legal interest affected by the infringement, the effect the unlawful evidence may have on investigating the facts of the case, the weight of other evidence available and all circumstances of the case.[76]

24. In relation to the litigation of labour disputes in your country, is there a single forum where cases are determined, or are there further instances of appeal or review?

Is the fact-finding exercise in Labour Law litigation/cases something which is confined to the first instance court?

If so, is it possible to appeal against findings of fact made at the first instance level?

In what circumstances might an appeal level court make further or alternative findings of fact?

[74] See for instance the final decision of the Regional Appellate Court of Pécs (decision no. Pf.I.20 081/2009/3).
[75] CCP, sec. 267
[76] CCP, sec. 269(1) to (4)

Answer:

In labour law cases three levels of the judiciary play a role in determining their outcome, as described in the answer given under Question 1.

Based on the CCP 1952, the fact-finding exercise had been normally confined to the first instance court.[77] Then the courts' practice has changed and appeal courts started to complete and amend the fact-finding process with increasing frequency.

The CCP 2016 made an explicit shift by authorizing both the first instance and appeal courts to find facts, however, the latter may do so only with certain restrictions.
It is possible to appeal against the fact-findings made at first instance.

The appeal court may make further or alternative findings of fact if the judgement of the court of first instance is not in compliance with substantive law. The court:

- may declare the evidence presented unsubstantial, and may reverse or supplement the relevant facts of the case accordingly,
- may take evidence to establish a fact alleged by the party in the first or second instance proceedings, and may reverse or supplement the relevant facts of the case accordingly,
- may decide on questions that the court of first instance did not address or did not decide on.[78]

25. In relation to "normal" matters arising in the context of Labour Law litigation/cases, who carries the burden of proof to establish a matter of evidence?

Answer:

In general, in case of labour disputes the plaintiff bears the burden of proof, but in some specific cases the substantive or procedural law may shift or share the burden of proof.

Examples from the substantive law:

- termination of the employment relationship by the employer

The LC states that the burden of proof to verify the authenticity and substantiality of the grounds of the act of termination shall lie with the party taking the legal acts.[79] Therefore, if the subject matter of the dispute is a termination by the employer, the burden of proof lies on the employer.

- liability for damages under labour law

[77] See: CCP 1952, sec. 235(1)
[78] CCP, sec. 369(3)
[79] LC, sec. 64(2)

The LC lays down complicated rules on the burden of proof in cases concerning liability for damages.[80] Without describing them in detail, it should be highlighted that the employer is in a considerably more disadvantageous position in terms of the onus of evidence compared, on the one hand, to the employee and, on the other hand, to cases concerning liability for damages under civil law.

- breaching the duty of equal treatment

Act no. CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (hereinafter: ETA Act), in compliance with the relevant EU directives, shares the burden of proof between the employer and the employee.

  - The employee must show the probability (and not prove!) that he suffered a disadvantage and exhibits at least one of the protected characteristics.
  - Then, it is for the employer to prove, that a) he has observed the principle of equal treatment, or b) he, in respect of the relevant legal relationship, was not obliged to observe such principle (*e.g.* with reference to an exemption or exception laid down in the ETA Act).[81]

Relevant provisions of the procedural law:

In labour disputes it is incumbent on the employer to show or produce:

- the contents of the collective agreement, internal policies and instructions required for determining the claim, and documents on the employer's operations required for adjudicating the dispute,
- the correctness of the calculations related to the benefit claimed, if disputed, and
- proof of payment in the case of a wage dispute.[82]

These rules ultimately have the effect that in labour cases it is mainly the employer who bears the burden of proof.

Does this include the burden of proof in relation to, *inter alia* (1) the establishment of the existence of an employment relationship; (2) the validity of a collective agreement; (3) the question of whether there has been a termination of employment; (4) the reason underlying a termination of employment?

Answer:

Regarding the establishment of the existence of an employment relationship, the validity of a collective agreement and the question of whether there has been a

[80] LC, sec. 166, 179
[81] ETA Act, sec. 19
[82] CCP, sec. 552

termination of employment, the general rules are applicable, thus, the plaintiff carries the burden of proof regardless of whether he is an employee or employer.

In cases where the dispute concerns the reasoning of the termination of an employment relationship, the burden of proof is reversed, and the party who made the legal statement on the termination needs to prove the authenticity and substantiality of the grounds of the act.[83]

Does your country's legislation make use of the notion of "presumptions" – *i.e*. where a situation is presumed to exist unless and until a party proves that the situation does not apply?

Answer:

Yes, there are such presumptions and fictions under Hungarian law.

The CCP 2016 has introduced a few new, very strict consequences of default of appearance at the judicial hearing in the case initiation stage of the first instance procedure.[84]

If one of the parties does not appear at the case initiation hearing, but the hearing is held at the request of the party present:

a) it shall be construed that the factual claims, legal allegations and evidence presented by the party in attendance during or before the hearing are not contested by the party in default, and that the granting of the former's requests and motions is unopposed, except if the latter previously made any statement to the contrary (it is a presumption),

b) it shall be construed that the party in default does not wish or is unable to make any additional case initiation statement in support of his claim or statement of defence (it is a presumption),

c) it shall be construed that the statements of the party in attendance have been delivered to the party in default, as well as any documents attached thereto or that they can be delivered during the hearing (it is a fiction).[85]

Another presumption is stipulated in case of private documents with full probative force. The CCP 2016 states (as the old code) that a private document with full probative force shall – until proven otherwise – have full probative value verifying that the signatory has in fact made or accepted the statement it contains, or undertakes to consider himself bound by such statement.[86]

[83] LC, sec. 64(2)
[84] See in more detail the answer given in Section B, under Question 11.
[85] CCP 2016, sec. 190(2)
[86] CCP 2016, sec. 325(3)

A further example to mention is the fiction of service. It entails – *inter alia* – that judicial documents shall be considered served on the day of attempted delivery if the addressee refused to accept it. If service failed because the addressee did not collect the document, it shall be considered served on the fifth working day following the day of the second attempted delivery.[87] The addressee, under certain circumstances, has the possibility to prove that he was unable to collect the judicial document by reasons of irregularities of the service or for other reasons beyond his control.[88]

Are there any matters in respect of which the "normal" rule on the burden of proof does not apply (*e.g*. in consequence of implementation of Directive 97/80/EC or otherwise)? If so, what are these and how do they operate in your country's system?

Answer:

In non-discrimination cases, the general rule on the burden of proof is more or less in compliance with the relevant EU directives. See in detail the answer given under Question 24.

The courts' practice was a little bit ambivalent regarding the interpretation of this rule. The administrative law courts (having competence to review the administrative decisions of the Equal Treatment Authority)[89] interpreted this rule in a way that the injured party also needs to prove the casual link between the harm/disadvantage and the protected characteristics. However, the case-law of the labour courts has been consistent in that it is not the injured party but the employer who needs to prove that there is no casual link between the characteristics and the harm/disadvantage. In a recent position paper, the Curia declared that the employee is not required to attest the causality between the protected characteristics and the disadvantage suffered.[90]

Does your country's legislation make use of the terminology of "reversed burden of proof"?

Answer:

See the answer given under Question 24, Section 1.

Does the approach in your country recognise any notion of a "neutral burden of proof"?

[87] CCP 2016, sec. 137(2)
[88] CCP 2016, sec. 138(4)
[89] The Equal Treatment Authority is an administrative organ authorised to investigate and sanction cases concerning breaches of the equal treatment duty.
[90] Opinion no. 4/2017 (of 28 November 2017) of the Administrative and Labour Department of the Curia on specific issues related to labour disputes on breaches of the equal treatment duty. (This document is not binding, however, it has high authority and provides the lower instance courts with valuable guidelines.)

Answer:

No such concept is recognised in Hungarian procedural law.

However, there are facts that may be investigated of the court's own motion, hence, in such cases none of the parties shall bear the burden of proof. For instance, the court shall take its lack of competence or jurisdiction into consideration *ex officio*.[91]

26. Once a judgment has been given by the court, is it possible for that decision to be appealed or otherwise revisited on the basis that "new evidence" has come to light?

If so, are there any time limits placed upon this?

Are conditions placed upon the admissibility of any such "new evidence"?

Who makes the decision as to whether "new evidence" has been presented and whether it should be considered?

Is there a right to appeal against such a determination on the admissibility of "new evidence"?

Answer:

There are two procedural stages where there is a possibility to put across new pieces of evidence: in the appeal process and in the so called retrial process.

I. Appeal

The deadline for launching an appeal against the first instance decision is fifteen days from the time of delivery of the decision.[92]

The general rule is that in the appeal and during second instance proceedings no changes are allowed in the legal action and in the statement of defence, and no subsequent filing of evidence is permitted.

However, there are certain exceptions:

1) The party shall be able to change his factual claims if offering facts that came to his knowledge for reasons beyond his control or has occurred after the close of the hearing held before the judgment was given at first instance, provided that it would have resulted in a more favourable judgment if introduced previously. In that case the party may present another motion for the delivery of evidence, or offer further means of evidence if it serves the purpose of corroborating his factual claims or for corroborating any fact presented previously to support his claim, counter-plea, provided it came to his knowledge for reasons beyond his control, or has occurred after the close of the hearing held before the judgement was given at first instance.

2) There is also a possibility for offering new evidence in the appeal process if the

[91] CCP 2016, sec. 24, 30

[92] CCP 2016, sec. 365(3)

court of first instance failed to inform the parties of the facts it has detected *ex officio* or of its intention to consider an interpretation of legislation in derogation from the parties' standpoint, or to deviate from their petition by law. The same is applicable if the court of second instance informs the parties of the abovementioned circumstances.[93]

The court of second instance has the right to make a decision on whether new pieces of evidence should be considered or not. There is no right to appeal against a decision on the admissibility of any new evidence.

II. Retrial (after the final judgement)

The deadline for the submission of petitions for retrial is six months from the date when the contested judgment has become final, or if the party gained knowledge of the reason for retrial subsequently, or had the opportunity to lodge a petition for retrial thereafter, it shall begin at that time (subjective deadline). After five years from the date when the judgement became final no petition for retrial may be submitted (objective deadline).[94]

New pieces of evidence may be referred to if
1) they would have resulted in a more favourable decision for the party concerned;
2) the party had not been in a situation during the previous proceedings to enforce the evidence through no fault of his own.[95]

The court of first instance that originally heard the case makes a decision on the admissibility of retrial and the new pieces of evidence,[96] however, any judge who participated in proceedings in which the contested decision was adopted is excluded from the retrial.[97]

The court's ruling concerning admissibility may be appealed separately.[98]

[93] CCP 2016, sec. 373(1) to (5)
[94] CCP 2016, sec. 395(1) to (3)
[95] CCP 2016, sec. 393(a), 394(1)
[96] CCP 2016, sec. 397(1)
[97] CCP 2016, sec. 13(2)
[98] CCP 2016, sec. 401(1)

IRELAND

A. THE GENERAL CONTEXT OF THE LABOUR COURTS AND TRIBUNALS IN YOUR LEGAL SYSTEM

1. Where are Labour Law cases/disputes heard and determined within your legal system?

   Please elaborate on the legal system context for Labour Law litigation/dispute resolution in your country.

Answer:
Employment law disputes are litigated within a new arbitral system introduced in Ireland in 2015 by the Workplace Relations Act of that year. Cases are heard at first instance by an Adjudication Officer of the Workplace Relations Commission. The Adjudication Officer hears the parties and such evidence as they may adduce. A decision is then issued.

An appeal lies against the decision of an Adjudication Officer to the Labour Court. The appeal is by way of a de novo hearing of the case decided by the Adjudication Officer. The parties may make new submissions and adduce new evidence at the appeal, but the nature of the claim must remain the same. The Labour Court, having heard the parties and the evidence, issues a Determination.

There is a further appeal available to the High Court which is confined to a point of law. There is no appeal available beyond the High Court

With respect to other aspects of broader labour law issues, such as the legality of strikes or industrial action, the ordinary civil courts have exclusive jurisdiction. The ordinary civil courts also have exclusive jurisdiction in the enforcement of Labour Court Determinations

2. Do you have a specialised system of "Labour Courts" in your country?

   Do you treat Labour Law cases/disputes in common with other cases in general (*e.g.* as part of normal civil law litigation); or do you have some mixture of the two approaches?

   Please elaborate on some of the key features of the arrangements in your country.

Answer:
Employment law litigation is dealt with exclusively within the system referred to at 1 above. Consequently, the answer to this question is that Ireland does have a system of specialist Labour Courts.

3. Do you have specialised "Labour Judges", or are Labour Law cases/disputes litigated in front of judges with general jurisdiction and experience?

Please elaborate on the qualifications, background, experience, and training of judicial officers in your country who deal with Labour Law cases/disputes.

Answer:
The Adjudication Officers and the 'Labour Court Judges' have exclusive first instance and appellate jurisdiction, respectively, in employment law disputes. 'Labour Court Judges' have specialised jurisdiction and experience. They only hear cases involving employment rights and industrial relations matters.

4. Do you have any specialised institutions which operate alongside or in conjunction with courts to deal with Labour Law cases/disputes?

If so, please outline what these are and what role they undertake in the process of litigation/dispute resolution.

Answer: Yes. The Workplace Relations Commission (WRC), which is a State Institution charged with promoting harmonious workplace relations, has a role in providing mediation services in employment law disputes. It also has a statutory mandate to provide guidance and assistance to workers, employers, trade unions and the public on good employment practice.

The mediation service is offered to parties on a voluntary and selective basis as an alternative to litigation. If mediation is unsuccessful the case proceeds through the normal process. Apart from mediation and the Adjudication service of the WRC, the other services are not directly related to the process of litigation.

Adjudication Officers of the WRC hear employment law cases at first instances.

5. Does a generalised framework for conducting civil litigation (*e.g*. a Civil Procedure Code, or the like) operate in relation to Labour Law cases/disputes in your country, or are there special rules/procedures which have been developed for Labour Law litigation/dispute resolution?

Please elaborate on what the relevant procedural framework might be.

Answer: The Labour Court is empowered to make its own procedural rules. Pursuant to this power the Labour Court has adopted "The Labour Court (Employment Enactments) Rule 2016, which set out the practice and procedure requirements for the initiation, pre-hearing, case management and substantive hearing of appeals. These rules deal with the process of initiating appeals, the filing of written submissions and the timeframe

within which this must be done. They also deal with the content of submissions, the notification of witnesses to be proffered, statements of evidence and the exchange of submissions as between the parties. The purpose of this process is to ensure that the issues in contention between the parties are properly identified in advance of the hearing and to avoid any element of 'ambush' by parties.

The rules also provide for a system by which case files are reviewed by the Chair or a Deputy Chair of the Court before the case is scheduled for hearing. The Purpose of this system is to ensure that all of the papers are in order before the case is set down for hearing and to ensure that the issues being litigated are sufficiently refined.

In appropriate cases the parties may be invited to a pre-hearing case management conference at which the issues may be further refined or identified. Case management conference are convened at the discretion of the Court.

6. Do special arrangements operate in your national legal system for situations in which regulatory provisions under consideration are derived from supra-national sources – (*e.g*. within the framework of the European Union; by reference to the regulatory ambit of the Council of Europe; or by reference to the regulatory framework established at the level of the ILO)?

   If so, having regard specifically to Labour Law cases, please elaborate on how these differ from the "normal" situation governing the treatment of non-Labour Law cases/litigation in your legal system.

Answer: Most employment rights enactments in Ireland are derived from Social Policy Directives of the European Union. In accordance with established jurisprudence, in applying national law provisions so derived the Courts must interpret domestic law in light of the object and purpose of the Union law so as to achieve the result envisaged by the Directive. In the case of purely domestic or national law enactments the case is decided by application of the general principles of Irish law and the jurisprudence of Irish Courts, although decisions of courts in other Common Law jurisdictions can have non-binding persuasive authority

7. Are the hearings of trials (and, where these are available, appeals) in your country's legal system normally heard in public?

Answer: Hearing at first instance are held in private. All appeals are held in open court.

8. Is the press, TV, radio, and other media entitled to attend and report proceedings in trials in your country?

Answer: Yes

9. Is it permitted to show film/video (*e.g*. TV footage) of court proceedings in your country?

Answer: No.

10. Is it permitted to play sound recordings of court proceedings in your country?

Answer: No.

11. Having regard to this first set of questions, please summarise briefly any situations in which the "normal" arrangements are not applied in relation to Labour Law cases/litigation.

Answer: The Labour Court has wide powers to prescribe or adapt its own procedures provided that it acts fairly to all parties. Special arrangements can be put in place to accommodate unrepresented parties or to accommodate parties having special needs, including translation services. The Court also has power to order that a case, or part of a case be heard in private.

B. EVIDENCE GATHERING FOR THE PURPOSES OF FIRST INSTANCE TRIAL

12. Please describe briefly the process whereby evidence is prepared for a first instance trial.

In particular:

Is there a process of "discovery", through which the parties have to notify each other about what relevant documents or other items are (or have been) in their possession?

Is there a process of "exchange of documents"?

Answer: There is no formal system of obtaining discovery either at first instance or on appeal. However, both Adjudication Officers and the Labour Court have powers to

compel the production of documents where this is considered necessary in order to fairly dispose of a case.

In employment equality cases there is a system where a questionnaire can be served by a complainant on a respondent. Where the questionnaire is not completed or where misleading information is provided the Adjudication Officer, or the Labour Court can draw such inferences as are considered appropriate.

Who is given the primary responsibility for compiling the evidence for a trial hearing, and how is this normally done (*e.g*. in a "bundle" of documents, electronically, *etc*.)?

Where are the "rules of the game" for these preparatory procedures set out, and who supervises this pre-trial process?

In particular, is a specified judge allocated to a case, or is oversight of a case "shared" between available judges from time to time?

Answer: The obligation to compile evidence rests with the parties. This is set out in written submissions and in bundles of documents submitted in advance of the hearing. In the case of the Labour Court, this is prescribed by the Court Rules (referred to above) The pre-hearing process is supervised by the Chairman of the Court or a Deputy Chairman assigned to the case.

Are there penalties/sanctions if a party fails to discharge any duty at this stage?

Answer: There are no specific penalties available for failure to adhere to the Court Rules. Non-adherence can result in delay or, in an extreme case, the Court could decline to hear a defaulting party.

13. What is the normal procedure for compiling and presenting "hard copy" (*i.e*. paper or similar) documents for trial?

Answer: Documents are submitted in hard copy in advance. If they are disputed that must be proved in evidence.

The Court is in the process of digitising the work of the Court to allow for the submission of papers electronically.

14. Do you have special rules for the presentation of "electronic communications" (*e.g*. records of e-mails, social media communications, or the like)? How are these displayed for the court?

Answer: The Rules currently require hard copies of submissions.

15. How do you deal with video, Closed Circuit Television (CCTV), or other such forms of visual images when these are to be presented before the court?

Answer:
The Court makes facilities available to view CCTV evidence

16. How do you deal with issues arising in relation to "personal" communications *etc*. (*e.g*. as issues of "privacy"; issues of "confidentiality" (whether said to arise out of private contractual arrangements or otherwise); or issues of "business confidentiality" – including where information may be "market sensitive" and subject to separate rules established by a Stock Exchange, a financial regulator, or the like?

Answer: In general, any evidence before the Court must be disclosed to the other party. It would only be in very rare exceptional circumstances that the Court might accept documents in private. Moreover, the Court can anonymise Determinations where there is good reason to do so or refrain from disclosing sensitive information in the written Determination.

17. Do you have special arrangements to deal with issues of "national security" in relation to documentary or other evidence?

Answer: There is a provision whereby evidence can be withheld on grounds of 'national security' where a relevant Minister certifies that information is withheld for that reason. This has never occurred.

18. Do you have special arrangements to deal with issues of "legal privilege" (if your country's legal system provides for such protection) if this arises in relation to documentary or other evidence?

Answer: Yes, the concept of legal privilege does apply in all legal proceedings, including those before Adjudication Officers and the Labour Court. The general and default position in this jurisdiction is that where privilege is claimed over a document a judge can read the document and rule on whether it attracts privilege. If the decision is to exclude the document another judge will hear the case

19. Where it is normal to have a public hearing in your country, do you nevertheless have the possibility of hearing or receiving evidence in private in certain circumstances? If so, please indicate in what circumstances that might happen.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to hold a hearing in private?

Answer: As indicated above, the Court has discretion to hear evidence in private. This can arise where particularly sensitive evidence in to be tendered, either of a personal nature or business sensitivity. There is authority for the proposition that media interests have locus standi to challenge a decision to exclude them from a court hearing.

20. Is it possible otherwise to limit the extent of publicity given to court proceedings in your country (*e.g*. by not reporting the names of some or all participants/witnesses; by anonymising the public reports of proceedings and/or the judgments given in the case, *etc*.)?

Please give examples where this might happen and what powers the court has in these circumstances.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to restrict the extent to which proceedings or parts of proceedings can be made public?

If so, what form will such a challenge take?

Answer: See answer above. The Court can anonymise determinations on the application of any person. This can arise where sensitive personal information is disclosed in evidence or from the nature of the case. Commonly, this arises in cases involving disability or where sexual misconduct is alleged, as in cases of sexual harassment

C. THE TRIAL STAGE AND BEYOND

21. Is it possible (or helpful) to describe the role of the judge in your country's legal system arrangements for Labour Law cases/litigation as being "inquisitorial" or to oversee "adversarial" proceedings?

Answer: The procedure in employment cases is a hybrid of both systems but is mainly adversarial in the sense that the parties are responsible for gathering and presenting evidence on questions of fact. However, the members of the Court can question

witnesses to clarify their evidence. However, the Court cannot call its own witnesses or adduce evidence on its own initiative.

22. Does the judge question witnesses who appear to give oral evidence before the court, or is this task undertaken by lawyers appearing for the parties?

Do witnesses give their evidence on the basis of prepared documents (e.g. a "witness statement")? If so, who (in your experience) generally undertakes the task of preparing such a document?

Answer: The parties question witnesses through evidence in chief and cross-examination. As indicated above the Court can question witnesses and generally does so.

Witnesses do not give evidence on the basis of prepared documents.

In preparation for a case, to establish the likely duration of a case, the Court will require the parties to indicate the number of witnesses they intend to call, and brief details of the import of their evidence.

23. What rules does the judge apply in relation to the admissibility of evidence?

In brief terms, what kinds of evidence may not be admissible before the court?

Answer: The normal rules of evidence, as they apply to civil proceedings, developed through the common law apply in Labour Court proceedings but they are applied with less strictness than in ordinary courts

24. In relation to the litigation of labour disputes in your country, is there a single forum where cases are determined, or are there further instances of appeal or review?

Is the fact-finding exercise in Labour Law litigation/cases something which is confined to the first instance court?

If so, is it possible to appeal against findings of fact made at the first instance level?

In what circumstances might an appeal level court make further or alternative findings of fact?

Answer: As indicated above, all issues of fact and law are dealt with at first instance

before an Adjudication Officer and again on appeal to the Labour Court by way of a de novo hearing. Hence, facts found at first instance are not binding on the Labour Court on appeal. Facts found by the Labour Court are unassailable on appeal to the High Court but the High Court can examine the basis upon which those facts were established.

25. In relation to "normal" matters arising in the context of Labour Law litigation/cases, who carries the burden of proof to establish a matter of evidence?

Answer: The normal rule is that that "he who asserts must prove" That means that a party contending for a finding of fact must prove that fact on credible evidence. There are exceptions. In employment equality cases there is a reversal of the burden of proof where a complainant establishes facts from which discrimination can be inferred. Also, in cases in which penalisation is alleged, and the reason why a complainant suffered a detriment is in issue, a similar shifting of the burden of proof can apply. Irish law also recognises the common law rule known as the "peculiar knowledge principal" whereby evidence of a particular fact is exclusively within the knowledge or power of procurement of one party, that party can be required to prove or disprove it.

In unfair dismissal cases the onus of proving that the dismissal was fair always rests with the employer unless dismissal as a fact is in dispute, in which case the complainant must prove dismissal. Moreover, where the existence of an employment relationship is in issue the complainant must prove that fact.

Does this include the burden of proof in relation to, *inter alia* (1) the establishment of the existence of an employment relationship; (2) the validity of a collective agreement; (3) the question of whether there has been a termination of employment; (4) the reason underlying a termination of employment?

Answer: See answer above

Does your country's legislation make use of the notion of "presumptions" – *i.e*. where a situation is presumed to exist unless and until a party proves that the situation does not apply?

Answer: Yes, there a number of presumptions of law that apply, and a number of presumptions apply where certain primary facts are established. Examples include in cases of discrimination and also were an employer fails to keep records which the law obliges the employer to maintain

Are there any matters in respect of which the "normal" rule on the burden of proof does not apply (*e.g*. in consequence of implementation of Directive 97/80/EC or otherwise)? If so, what are these and how do they operate in your country's system?

Answer:
Section 85A (1) of the Employment Equality Act transposes the provisions of Article 3(1) of Directive 97/80 on the Burden of Proof in cases of Discrimination Based on Sex into Irish Law.

Therefore, the complainant must prove on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination. It is only if these primary facts are established to the satisfaction of the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there was no infringement of the principle of equal treatment.

Does your country's legislation make use of the terminology of "reversed burden of proof"?

Answer:
Yes

Does the approach in your country recognise any notion of a "neutral burden of proof"?

Answer: No. That concept does not apply in this jurisdiction

26. Once a judgment has been given by the court, is it possible for that decision to be appealed or otherwise revisited on the basis that "new evidence" has come to light?

If so, are there any time limits placed upon this?

Are conditions placed upon the admissibility of any such "new evidence"?

Who makes the decision as to whether "new evidence" has been presented and whether it should be considered?

Is there a right to appeal against such a determination on the admissibility of "new evidence"?

Answer: As indicated above, an appeal to the Labour Court is by way of a de novo hearing and new evidence is admissible. However, neither the first instance adjudication nor the Labour Court can reopen a case based on new evidence once its determination is issued. On appeal to the High Court new evidence cannot be adduced, it may only be appealed on a point of law.

ISRAEL

A. THE GENERAL CONTEXT OF THE LABOUR COURTS AND TRIBUNALS IN YOUR LEGAL SYSTEM

1. Where are Labour Law cases/disputes heard and determined within your legal system?

Please elaborate on the legal system context for Labour Law litigation/dispute resolution in your country.

Answer:

In Israel, labour law cases and disputes are heard and determined by the Labour Courts System, which *has an exclusive jurisdiction over the Social and Labour related cases in the Country.* The System was established by the Labour Courts Law (1969) and is regulated by it. *The Labour Courts System is an integral part of the entire Israeli Judicial System*. *It consists of two divisions - the trial level and the appellate level. There are five Regional Labour courts at the trial level, within the District Courts' jurisdictions in Jerusalem, Tel Aviv-Jaffa, Haifa, Nazareth and Be'er Sheva. The Appellate Court is the National Labour Court, sitting in Jerusalem.* In addition to being the appellate court, the National Labour Court also has original jurisdiction over nationwide strikes and collective disputes.

These Courts have played a substantial role in the development of labour and social security law in Israel. With regard to *Labour Disputes, the Courts hear cases concerning* protective labour laws, which were enacted as early as the 1950's, as well as *significant legislation in the field of collective labour law. Over the years, more statutes were enacted, which were aimed at protecting workers' rights; regulating the relationships between the workers and their employers; and regulating the relationship between employers and employees' unions and their member.* As a result, the Labour Courts have gained jurisdiction over more issues dealing with work relations, employees-employers interactions, and even in matters concerning sexual harassment, libel and equality in the workplace. The Courts also deal with administrative matters relating to workers - for instance, employment agencies. In addition, the Labour Courts also have jurisdiction over criminal labour law cases*, dealing with the criminal aspects of statutes relating to labour law, such as work safety, and hiring a foreign employee without a valid license.*

The labour disputes litigated at the Labour Courts may vary in nature and significance - *ranging from individual disputes, where suits are filed to guarantee rights and sums of money individual worker, to Collective Labour Disputes, which are complex, difficult, and hold far reaching consequences on the work relations in a specific plant and the Israeli economy at large.*

2. Do you have a specialised system of “Labour Courts” in your country?

Do you treat Labour Law cases/disputes in common with other cases in general (*e.g*. as part of normal civil law litigation); or do you have some mixture of the two approaches?

Please elaborate on some of the key features of the arrangements in your country.

Answer:

Israel does have a specialized system of Labour Courts, as detailed above, which is incorporated in the *Israeli Judicial System,* and they are both administered by the Courts Authority in its fundamental and managerial aspects, such as budget, personnel, internal controls and auditing, public relations, etc.

The cases heard and decided at the Labour Courts are treated the same as any other civil law case. The trail courts- The Regional Labour Courts - hear and decide the cases, and the parties have the right to appeal the decision to the National Labour Court. The National Labour Court's rulings cannot be appealed, but are subjected to the Israeli Supreme Court's review, sitting as the High Court of Justice - which only rarely overrides them. Criminal cases may be appealed to the Supreme Court, upon receiving the Supreme Court's permission.

The Labour Courts' decisions- mainly those handed by the highest Labour Law Court - The National Labour Court - affect policy and regulate the substantial and procedural aspects of Labour Law in Israel. These decisions, much like those given by the highest civil court in Israel, may only be overruled by the High Court of Justice (which is the Supreme Court's second duty) or by a law enacted by the Israeli Parliament - The Knesset.

Although similar in nature, the Labour Courts do differ from the Civil Courts in matters of procedures and evidence law, as the former tend to be more lenient than the latter in these respects. In addition, Labour Courts' bench is composed of both professional judges and lay members (this issue will be dealt thoroughly in the next answer).

3. Do you have specialised “Labour Judges”, or are Labour Law cases/disputes litigated in front of judges with general jurisdiction and experience?

Please elaborate on the qualifications, background, experience, and training of judicial officers in your country who deal with Labour Law cases/disputes.

Answer:

As mentioned above, the panel of judges in the Labour Courts - unlike any other court in the General System - includes both professional judges, *who sit as the head of the Judges' Panel,* and lay members - Public Representatives: *one is a Workers' Representative and the other is an Employers' Representative - sitting as part of the panel, alongside the judges, in all cases but criminal. Usually, aside from criminal cases, the Regional Courts' hearings are held by a three judges panel - one professional judge and two Public Representatives (an employees' representative and an employers' representative), and The National Labour Court sits a five judges panel - three judges and two Public Representatives. This unique composition of the judges' panels - which includes members that are not necessarily jurists but have special expertise in the field of work relation - is a dramatic change from what was accepted in Israel prior to the creation of the Labour Courts.*

- *As for the professional judges of the Labour Courts - they are selected and appointed by the same* formal committee *as their colleagues in the General Court System* - the Judges’ Election Committee (hereinafter: The Election Committee)*. They possess the same skills and competences required from a District Court Judge. There are no specific qualifications, such as experience in litigating labour cases or being a scholar in this field, needed in order to be appointed to the regional Labour Court. However, due to the fact the Labour Courts are specialized, the professional members of the court are quick to master the field, even if they do not have a strong background in it.* The Election Committee consists of nine members, representing all three governmental branches, as well as the Israeli Bar Association. The Executive Branch is represented by the Minister of Justice, who heads The Election Committee, and an additional minister of the cabinet. When it comes to appointments to the Labour Courts, this additional minister is the Minister of Labour, Welfare and Social Services. The Legislative Branch is represented by two members of the Knesset - the Israeli Parliament - elected by the Knesset. The Judicial Branch is represented by three of the Supreme Court Judges - one of whom is its President. The Bar Association is represented by two of its members, chosen by its National Council. Each member of The Election Committee has one vote. Upon being elected by The Election Committee, the Minister of Justice brings the decision to the President, so the latter may appoint the elected candidate, as the law requires. The judges have compulsory retirement at the age of 70.

- In order to be qualified for a position of a judge of the Labour Courts, the candidate must be an Israeli citizen, who served for four years as a Magistrate Court judge; or be inscribed - or entitled to be inscribed - as a member of the Israeli Bar Association, and served - continuously or intermittently - at least seven years, three of which must be in Israel - as a lawyer; or in a judicial capacity or in a legal function in the service of the state; or taught law at a university or a higher school of learning as stated in the

regulations in this regard.

- Any individual who meets the requirements stated above may apply for the position of a judge in the Labour Court. In addition, a candidate for the position of judge may be proposed by the head of The Election Committee - the Minister of Justice, the President of the Supreme Court, or any three members of The Election Committee.

- The applicant must fill in and send to the head of the Director of the Courts a detailed questionnaire, academic transcripts, recommendations (around 8-10), curriculum vitae, and any other documents he/she wishes to present to The Election Committee for consideration.

- Once the request is received, the application is being thoroughly examined, and if the candidate is found eligible, a sub-committee of The Election Committee, headed by one of The Committee's judges (hereinafter: The Sub-Committee) calls the candidate for an interview. The Sub-Committee will evaluate the candidate and present its findings to The Committee. The candidate also must pass a physical examination. Labour Court Judges - of both the Regional and National Labour Court - must meet the same requirements in order to be appointed.

- *The Public Representatives are appointed by the Minister of Justice and the Minister of Labour, Welfare and Social Services, after consulting with the workers' and the employers' unions, based on their skills and competence, as stated in the Law.* They are appointed for terms of three years (an appointment that may be renewed). *The Public Representatives are not necessarily jurists but have special expertise in the field of work relations. Once they are part of the panel, the Public Representatives are considered full members with equal vote, and they hold the same rights as the presiding professional judge, i.e. they will be called for every hearing in the relevant case, they may write a separate decision - siding or objecting to the professional judge's opinion they may request a panel's discussion in order to form their decision, before the verdict is given, and they are entitled to see every document that is accepted to the court's file.*

4. Do you have any specialised institutions which operate alongside or in conjunction with courts to deal with Labour Law cases/disputes?

If so, please outline what these are and what role they undertake in the process of litigation/dispute resolution.

Answer:

Although the Labour Courts System has exclusive jurisdiction over labour disputes, there are several other mechanisms that are meant to reach a proper resolution of conflicts arising from the employee-employer work relations or their termination. These mechanisms are aimed to assist the parties to continue developing their long-term relationship - if they both choose to do so - and at times find a non-formal resolution, if one can be found. The

Alternate Dispute Resolution (ADR) programs are either operated by the Labour Courts themselves, by private institutions or are internal bodies operated by the different workplaces. For example:

- In the Labour Courts more and more cases are directed to in-court mediation, free of charge - held by either the Law Clerks of the Labour Courts or Public Representatives, and many of them are settled even before the first scheduled pre-hearing before the judge. This option is voluntary, and the parties have the right to wave it and request to appear directly in front of the judge. In addition, the judge himself, after hearing the parties and addressing their case during the first pre-hearing may recommend and refer them to arbitration or mediation, and the parties have the right to either agree to this offer or decline. If they choose to accept the Court's offer, the judge may even suggest a list of potential mediators/ arbitrators.

- There are several industries in which the employment contract/ relevant collective agreements have a specific provision obliging the parties to the work relationship to hold arbitration in an internal arbitration institute, in any case of dispute. For instance, football players must take part in an arbitration procedure, if they have a disagreement concerning their employment. It should be noted, that the National Labour Court has ruled that issues arising from employment protective rights may only be litigated in the Labour Court.

- At the unionized workplace there is a process of dispute settlement by way of negotiation between the employee representatives and management. The rules relating to dispute settlement are determined by collective agreements.

- At the national level, the Government and the Histadrut (Israel's biggest employee organization) established a body to arbitrate economic or mixed economic-rights disputes.

5. Does a generalised framework for conducting civil litigation (*e.g*. a Civil Procedure Code, or the like) operate in relation to Labour Law cases/disputes in your country, or are there special rules/procedures which have been developed for Labour Law litigation/dispute resolution?

Please elaborate on what the relevant procedural framework might be.

Answer:

Procedural aspects in the Labour Courts System are regulated by the Labour Courts Regulations (Legal Procedures) (1991). The Labour Courts may implement the procedural rules stated in the Civil Procedures Regulations (1984), but are not bound by them. For example, article 32 of the Labour Courts Law states that the courts are not bound to evidence rules, except when criminal cases are heard. According to article 33 of the Labour Courts Law (1969), in any procedural matter not regulated by the law or its regulations, the Court shall decide according to what seems just and fair.

6. Do special arrangements operate in your national legal system for situations in which regulatory provisions under consideration are derived from supra-national sources – (*e.g*. within the framework of the European Union; by reference to the regulatory ambit of the Council of Europe; or by reference to the regulatory framework established at the level of the ILO)?

If so, having regard specifically to Labour Law cases, please elaborate on how these differ from the "normal" situation governing the treatment of non-Labour Law cases/litigation in your legal system.

Answer:

The answer is no. No special arrangements operate. Israel is a member of several international organizations. As such, it is a party to numerous conventions, and has ratified many of them. However, their provisions do not apply directly as law and need to go through a process of incorporation, in order to be binding. In any event, during courts' proceedings addressing them, no special arrangements are made. Every piece of legislation is given the same weight and treatment - no matter what their background is.

It should be noted that Courts do acknowledge the importance of international standards and address them often. For example, even though Israel is not a member of the EU, and therefore not bound by directives or decisions made by any of its bodies, Israeli Courts-Labour Courts included - are not indifferent to them. Reviewing some of the case law reveals that when discussing fundamental rights, the courts do make references to the way these issues were regulated by the EU and its institutions. As for the ILO - Israel has been a member of the organization since 1949 and has ratified 49 of the ILO'S Conventions. As such, there are several cases where the principles and ideas stated in these conventions were addressed in great length and were given much consideration.

7. Are the hearings of trials (and, where these are available, appeals) in your country's legal system normally heard in public?

Answer:
The general rule, stated in article 68 of the Courts Law [consolidated version] (1984), is that court hearings, of all instances - Labour Courts included - will be open to the public. This rule does have exceptions, though. For example, if the case in question deals with issues of security or foreign affairs, or with sexual offences, the court may decide to conduct the proceedings behind closed doors.

8. Is the press, TV, radio, and other media entitled to attend and report proceedings in trials in your country?

Answer:
Yes. As long as the trail is open to the public - members of the media may also sit in, and report about the proceedings.

9. Is it permitted to show film/video (*e.g*. TV footage) of court proceedings in your country?

Answer:
No. It is not allowed to film the court's proceedings - and therefore, there is not a way for them to be shown. According to article 70(b) to the Courts Law [consolidated version] (1984) it is even prohibited to take pictures in the courtrooms or publish them, without the Court's permission.

10. Is it permitted to play sound recordings of court proceedings in your country?

Answer:
The court may accept a party's request to record a hearing, on the party's expense. In case the court rejects the party's request, it must explain its refusal in writing. If the court granted the request, and allowed for the hearing to be recorded, the recording will be kept by the court, and any party to the case will be able to listen to it. It should be noted that this recording of the hearing will not replace the formal protocol. There is no reference to the issue of sharing the recording, but one can assume that if a reporter asks for access to the recording, he will receive it, as part of the general authorization reports have to court files.

11. Having regard to this first set of questions, please summarise briefly any situations in which the “normal” arrangements are not applied in relation to Labour Law cases/litigation.

Answer:
As stated earlier, the rules of procedure in the Labour Court System, are much more lenient than in the "normal" arrangements being applied in the General Court System.

B. EVIDENCE GATHERING FOR THE PURPOSES OF FIRST INSTANCE TRIAL

12. Please describe briefly the process whereby evidence is prepared for a first instance trial.

In particular:
Is there a process of “discovery”, through which the parties have to notify each other about what relevant documents or other items are (or have been) in their possession?
Is there a process of “exchange of documents”?

Answer:
Yes. In the Labour courts, much like in the other Civil Courts, there is a process of discovery, prior to the beginning of a trail.

According to article 46 of the Labour Courts Regulations (Legal Procedures) (1991), the Labour Court - meaning one of the judges or one of the Court's Legal Registrars, may issue an order mandating the parties to provide additional information regarding the dispute, and if

one of the parties asks - even granting an order forcing the other party to discover or allow review of documents in their possession - if the court believes this procedure is necessary to enable an efficient hearing, or to save costs. The court may even allow one of the parties to present the other party with a questionnaire, if it feels it will assist in determining the issues that are in dispute.

According to article 112 to the Civil Procedure Regulations (1984), which the Labour Court may follow, one of the judges or the Court's Legal Registrars may grant a request by one of the parties to the dispute, and issue an order forcing the other party to submit an affidavit, detailing what are the documents and other evidence he possess or may have under his control, that are relevant to the dispute. According to article 114 to these regulation, a party may request that his adversary provide him with a copy of any of the documents listed in his affidavit. In addition, according to article 117, a party to a dispute may petition the Court to issue an order to allow him to review and copy documents that were not mentioned in the adversary's affidavit or pleadings. According to article 119, if a party was ordered to provide documents or answer a questionnaire, but claims that he cannot comply with that order due to confidentiality issues, the Court may choose to review said document before deciding if the confidentiality claim has any merit to it - and, therefore, refuse to grant the requested order.
It should be mentioned that according to article 120 to the Civil Procedure Regulations (1984), a party may only petition the court for an order against his adversary if he first approached his adversary, 30 days after the final pleading was submitted to the court, asking him to provide this information voluntarily, and the adversary did not respond to that request. In addition, the Court will only issue the requested order for sending questionnaire or reviewing and copying documents if it believed that that information is vital in order to allow a fair proceeding or to save costs.

Who is given the primary responsibility for compiling the evidence for a trial hearing, and how is this normally done (*e.g*. in a “bundle” of documents, electronically, *etc*.)?
Where are the “rules of the game” for these preparatory procedures set out, and who supervises this pre-trial process?
In particular, is a specified judge allocated to a case, or is oversight of a case “shared” between available judges from time to time?

Answer:

The assigned judge presiding over the case is the one who usually supervises the pre-trail proceedings, though the Court's legal registrar has the power to issue some of these orders, as stated above.

In any event, each party - or his/her lawyer, if that party has legal representation, is responsible for sending the adversary (or that adversary's lawyer) all the evidence mentioned above, as well as sending a copy to the Court. Those documents may be sent either as a “bundle” of documents, or electronically, via the Israeli Courts' internal website.

Are there penalties/sanctions if a party fails to discharge any duty at this stage?

Answer:
Yes. According to article 46(d) of The Labour Courts Regulations (Legal Procedures) (1991), if a party does not comply with the Court's orders in that regard, the Court may either allow the party more time to complete his duty or remove that party's pleading.
According to articles 114A and 116 of the Civil Procedure Regulations (1984), a party that does not comply with an order given under article 112 of these regulations will not be eligible to submit that relevant document/s as evidence, unless the court was persuaded that the said party had a reasonable justification for not adhering to the court's order. However, if the Court does allow for the relevant document to be submitted, it may impose costs on that party. In addition, if a party did not allow the adversary to copy or review a document detailed in the affidavit, as article 114 states, the Court may issue an order compelling submission of the relevant document, at the request of the party's adversary.

13. What is the normal procedure for compiling and presenting “hard copy” (*i.e*. paper or similar) documents for trial?

Answer:
Because the Israeli Courts System is regarded as "paperless", every file is managed electronically, through the courts' internal website. Pleadings and affidavits, including any documents attached to them, are either submitted in hard copy, and scanned into the electronic file (which is the norm), or sent directly in a digital format by the lawyers, to the relevant electronic file via the courts' internal website. During a Court session, hard copy documents may be submitted as evidence by the parties. They are marked by the Court as evidence and given a serial number. They are then scanned into a digital format to be uploaded to the electronic, paperless, court file.

14. Do you have special rules for the presentation of “electronic communications” (*e.g*. records of e-mails, social media communications, or the like)? How are these displayed for the court?

Answer: Electronic communications are usually printed out on paper and submitted to the court in "hard copy".

15. How do you deal with video, Closed Circuit Television (CCTV), or other such forms of visual images when these are to be presented before the court?

Answer:
According to article 173A to the Civil Procedures Regulations (1984), any party that wishes to present a video recording to the court, must inform the court about his intention at least three days prior to the relevant hearing, and must make sure that the video is submitted in a format that is compatible with the guidelines determined by the Director of the Courts. The Court will provide the relevant party with the proper means to display the requested video (such as a

television screen, DVD player, laptop, etc.).

16. How do you deal with issues arising in relation to “personal” communications *etc*. (*e.g*. as issues of “privacy”; issues of “confidentiality” (whether said to arise out of private contractual arrangements or otherwise); or issues of “business confidentiality” – including where information may be “market sensitive” and subject to separate rules established by a Stock Exchange, a financial regulator, or the like?

Answer:
As far as discovery proceedings, regarding sensitive documents, the court will have to balance between the right of privacy/ keeping trade secrets, etc., and the other party's right to have access to the relevant document. See answer # 11 for further information.
If sensitive matters arise during the court session, such as trade secrets, confidential information about witnesses, etc., the court may decide to continue the session - the present one and perhaps all future ones as well - behind closed doors. See answer # 7 for further information. In addition, according to article 70(d) of the Courts Law [Consolidated Version] (1984) the court may prohibit the publication of any information concerning hearings in a certain case, even if the hearings were not held formally behind closed doors.

17. Do you have special arrangements to deal with issues of “national security” in relation to documentary or other evidence?

Answer:
Yes, we do have special arrangements in this matter. Articles 44 and 46 of the Evidence Ordinance [New Version] (1971) address the issue of confidential evidence in the context of national security. According to these articles, evidence that the Prime Minister, the Minister of Defense or the Minister of Foreign Affairs believe might harm Israel's national security or its foreign relations if submitted, will not be presented to the court, and, if is presented, it will not be admissible. However, if the issue of the evidence's admissibility is brought before the Supreme Court by a petition filed by one of the parties to the dispute, one of its judges may decide that it will be unjust to withhold this evidence, and that the interest of justice overweigh any other argument that might be raised. When it comes to criminal proceedings, the Supreme Court will also address the issue of whether the relevant evidence might assist in the defense of the defendant and that it is benefit to the defendant in revealing this evidence outweighs the States' interest to exclude it; or that it is crucial to the defense of the defendant.

In any event, the Supreme Court's hearing in this matter will be held behind closed doors.

18. Do you have special arrangements to deal with issues of “legal privilege” (if your country’s legal system provides for such protection) if this arises in relation to documentary or other evidence?

Answer:
Yes. Article 48 of the Evidence Ordinance [New Version] (1971) addresses that issue.

According to the article, a lawyer is not required to submit materials and documents exchanged with his or her client, or anyone else, on behalf of the client, that are relevant to the legal service provided for the client, unless the client has waved that privilege.
Article 90 of the Israeli Bar Association Law (1961), discusses the lawyer's ethical duty to not reveal any material and documents exchanged between a lawyer and client, with regard to the legal service given to the client, in any legal proceeding, investigation or search, unless the client has waved that privilege.

19. Where it is normal to have a public hearing in your country, do you nevertheless have the possibility of hearing or receiving evidence in private in certain circumstances? If so, please indicate in what circumstances that might happen.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to hold a hearing in private?

Answer:
Hearing/ receiving evidence in private is only possible in the rare circumstances stipulated in laws and bylaws, where the Court has the authority to issue temporary injunctions, which are usually heard ex-parte. For example, Temporary Foreclosure Order, Anton Piller Order (a court order that provides the right to search premises and seize evidence without prior warning, in an attempt to prevent the destruction of relevant evidence; usually issued in cases of alleged trademark, copyright or patent infringements), etc. Therefore, the other party is not aware of the relevant evidence and may not object to it. Since the hearing is held in private, others (like members of the media) do not know about it, and, therefore, may not challenge the decision to hold it in private. In order to safeguard the rights of the other party, who is not present in the hearing, the Court is mandated to hold another hearing shortly after the ex-parte hearing, where all parties will be present, in order to allow the other party the right to respond to the petitioner's claims, and to have his day in court.

20. Is it possible otherwise to limit the extent of publicity given to court proceedings in your country (*e.g*. by not reporting the names of some or all participants/witnesses; by anonymising the public reports of proceedings and/or the judgments given in the case, *etc*.)?

Please give examples where this might happen and what powers the court has in these circumstances.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to restrict the extent to which proceedings or parts of proceedings can be made public?

If so, what form will such a challenge take?

Answer:
Yes. The Court may limit or prohibit altogether the publicity of a hearing, or part of the information about a certain case. See answer #15. Members of the media and other parties to the case may challenge such a decision, and the Court will grant their request, if it found, for example, that there is a public interest in the publication.

C. THE TRIAL STAGE AND BEYOND

21. Is it possible (or helpful) to describe the role of the judge in your country's legal system arrangements for Labour Law cases/litigation as being "inquisitorial" or to oversee "adversarial" proceedings?

Answer:
The Judiciary in Israel is based on a mixed system, which is mostly based on an adversarial system. Under regular circumstances, the parties are responsible for raising the relevant arguments, gathering and deciding how to present their evidence, calling and questioning witnesses, etc. The judge presiding over the trial remains neutral throughout the proceeding, though he/she is the one to ensure both sides adhere to rules of procedure and evidence. The judge may even ask the witnesses questions in order to clarify evidence.

22. Does the judge question witnesses who appear to give oral evidence before the court, or is this task undertaken by lawyers appearing for the parties?

Do witnesses give their evidence on the basis of prepared documents (e.g. a "witness statement")? If so, who (in your experience) generally undertakes the task of preparing such a document?

Answer:
The judge may question witnesses, as stated in the previous answer.
Witnesses give their answers and present their evidence based on their prepared affidavits. These documents are prepared by the witness, with the assistance given by the lawyer of the party the witness is testifying on behalf of.

23. What rules does the judge apply in relation to the admissibility of evidence?

In brief terms, what kinds of evidence may not be admissible before the court?

Answer:
The Israeli Judiciary - Labour Courts included - is moving towards an approach where any evidence is admissible, aside from specified exceptions. For example, privileged communications between a lawyer and his client - and the emphasis is put on determining its weight when it comes to decide the case.

24. In relation to the litigation of labour disputes in your country, is there a single forum where cases are determined, or are there further instances of appeal or review?

Is the fact-finding exercise in Labour Law litigation/cases something which is confined to the first instance court?

If so, is it possible to appeal against findings of fact made at the first instance level?

In what circumstances might an appeal level court make further or alternative findings of fact?

Answer:
As stated earlier, the Labour Courts System has several divisions - The trail courts are usually one of the five Regional Courts. Both parties have the right to appeal the Regional Court's decision to the National Labour Court. A second appeal - to the Israeli Supreme Court, sitting as the High Court of Justice, is possible only upon receiving permission.
The general rule is that the trail court - the Regional Labour Court in this context- is the one who hears the witnesses and examines the evidence first hand, and that is why the appellate court (The National Labour Court) will not intervene with the Trail court's factual findings. However, in rare instances, it is possible for the higher, appellate court to interfere in matters of fact. This interference will only be made in rare occasions, and only if it seems that the trail court has erred in a substantial manner. This is done, for example, when the trail court has determined the facts not by hearing witnesses, but rather by analysing documents - which the appellate court may also interpret.

25. In relation to "normal" matters arising in the context of Labour Law litigation/cases, who carries the burden of proof to establish a matter of evidence?

Answer:
Usually, the plaintiff is the one responsible for establishing and proving all of the claims in his suit. For example, the plaintiff carries the initial burden of actually proving that an employee-employer relationship took place. However, sometimes this burden of proof is shifted, and is carried by the defendant (if he is/ was the employer); most of them in cases the in which the employer did not fulfil his obligation, as stipulated by law, to maintain various records (e.g., attendance records). For example, If the employer does not keep the employee's attendance records, he will carry the burden to contradict any claim the employee might have regarding overtime pay, remainder of vacation days, etc.
In case the employer did not issue the employee a formal statement entailing the terms of employment, the employer will carry the burden to contradict the employee's claims regarding these conditions.

Does this include the burden of proof in relation to, *inter alia* (1) the establishment of the existence of an employment relationship; (2) the validity of a collective agreement; (3) the question of whether there has been a termination of employment; (4) the reason underlying a termination of employment?

Answer:
(1) As stated above, the employee is the one who is responsible to prove the existence of the employment relationship.
(2) In the matter of a collective agreement, the employee must prove that the employer is a member of the relevant employers' union that signed that agreement. In case there is an extension order, applying the terms of said collective agreement on the entire industry in which the employer is a member of, the employee is responsible for showing that the employer's business is part of that industry.
(3) The plaintiff is the one responsible for proving the employment relationship has

terminated.
(4) If the employer is the one who terminated the employment relationship, he must prove that the employee was fired based on a legitimate reason. If the employee is the one who resigns, claiming it was due to specific circumstances that grant him the right to resign and still be eligible for severance pay, as detailed in the Severance Pay Law (1963), he carries the burden to prove that the reasons for the termination of employment are such that grant him the severance pay.

Does your country's legislation make use of the notion of "presumptions" – *i.e*. where a situation is presumed to exist unless and until a party proves that the situation does not apply?

Answer:
The Labour Courts system in Israel applies several presumptions on the cases it hears. One of which is the administrative correctness. According to this presumption, the different branches of government and their affiliated bodies act in good faith and in a proper manner and consideration as employers, and their decisions are just. As a result, the Labour Courts usually do not overturn these bodies' decisions, even if the courts believe they would have acted differently under the same circumstances, arguing that they will not interfere with these bodies' considerations and priorities, as long as they are reasonable. Obviously, this presumption can be disproved by the employee, in case he shows that illegal or irrelevant considerations went into making that decision or acting in a certain way.
Another presumption is stated in the article 26(b)(c) to the Wage Protection Law (1958). This article specifies that unless the employer proves otherwise, in case the employee's pay check did not distinguish between the different components of the salary (such as payments for overtime work, pay for vacation days and travel allowance, in addition to the regular basic salary), the entire sum of money paid will be regarded as the basic salary alone, and the rest of the social benefits will be added separately.
In addition, according to article 3 to The Severance Pay Law (1963), firing an employee shortly before he completes his first year of employment will be seen as a way for the employer to evade from his duty to pay severance pay to said employee (as the entitlement to that pay raises only upon the completion of at least one year). Therefore, unless the employer proves that the termination of employment in the relevant timing was made due to a legitimate reason, the employee will be awarded severance pay for the period he actually worked.

Are there any matters in respect of which the "normal" rule on the burden of proof does not apply (*e.g*. in consequence of implementation of Directive 97/80/EC or otherwise)? If so, what are these and how do they operate in your country's system?

Answer:
Yes. As stated earlier, the regular burden of proof is the norm, unless otherwise stated. See the above answer for further information.

Does your country's legislation make use of the terminology of "reversed burden of proof"?

Answer:
Yes. Though the language of the legislation itself does not use the term "reversed", that notion is clearly implied, by specifically detailing that the regular burden of proof has shifted.

Does the approach in your country recognise any notion of a "neutral burden of proof"?

Answer:
Yes. That is the general rule - each party carries the burden to prove their version of the facts. For example, whether the employee/ employer was given proper notice prior to the termination of the employment relationship.

26. Once a judgment has been given by the court, is it possible for that decision to be appealed or otherwise revisited on the basis that "new evidence" has come to light?

If so, are there any time limits placed upon this?
Are conditions placed upon the admissibility of any such "new evidence"?
Who makes the decision as to whether "new evidence" has been presented and whether it should be considered?
Is there a right to appeal against such a determination on the admissibility of "new evidence"?

Answer:
Yes. In the Israeli legal system - Labour Courts included - it is possible to file an appeal if a new relevant evidence was discovered by one of the parties after the trail court handed down its decision. The appellate court will allow the new evidence to be admitted only if the relevant party proves that he acted in good faith and did not know of said evidence or could not have known about it - even if he would exercise due diligence - when filing the original suit or responding to it. In this matter, the Labour Courts system has adopted article 457 of the Civil Procedure Regulations (1984), which states that parties to the dispute are not entitled to submit additional evidence - written or oral - to the appellate court, unless the appellate court believes that such evidence is required in order to give its decision, to discover the truth or for any other important reason. If the appellate court allows the admission of the new evidence, it must write its reasoning for doing so. The appellate court will give great consideration to the question whether it was possible for the relevant party to submit the evidence at the trail stage. The relevant party will also have to show that the said evidence has the potential to influence the final decision. As for the time limitation, a regular appeal (for whatever reason) must be filed within 30 days of the date the original decision was given by the trail court.
It should be noted, that there is no option for the trail court to revisit its final decision if new evidence come to light - at any point after is final decision was given. A party may appeal the trail court's decision in this mater, only upon given a permission by the National Labour Court, as there is no right for an automatic appeal.

ITALY

A. THE GENERAL CONTEXT OF THE LABOUR COURTS AND TRIBUNALS IN YOUR LEGAL SYSTEM

1. Where are Labour Law cases/disputes heard and determined within your legal system?

   Please elaborate on the legal system context for Labour Law litigation/dispute resolution in your country.

Answer:
Before a specialised first instance labour judge and before a specialised labour appeal court by a panel of three judges.
Labour disputes can be also brought before the general Supreme Court where they will be dealt by a specialise chamber.
The Supreme Court examines only questions of law

2. Do you have a specialised system of "Labour Courts" in your country?

   Do you treat Labour Law cases/disputes in common with other cases in general (*e.g.* as part of normal civil law litigation); or do you have some mixture of the two approaches?

   Please elaborate on some of the key features of the arrangements in your country.

Answer:
Yes indeed. See previous answer. Labour disputes are always treated separately from other disputes

3. Do you have specialised "Labour Judges", or are Labour Law cases/disputes litigated in front of judges with general jurisdiction and experience?

   Please elaborate on the qualifications, background, experience, and training of judicial officers in your country who deal with Labour Law cases/disputes.

Answer: See previous answer. Labour court judges are appointed in the same way as the other judges. The Scuola superiore della Magistratura" provides for the training of the labour judge with specialised courses

4. Do you have any specialised institutions which operate alongside or in conjunction with courts to deal with Labour Law cases/disputes?

   If so, please outline what these are and what role they undertake in the process of litigation/dispute resolution.

Answer:
No

5. Does a generalised framework for conducting civil litigation (*e.g*. a Civil Procedure Code, or the like) operate in relation to Labour Law cases/disputes in your country, or are there special rules/procedures which have been developed for Labour Law litigation/dispute resolution?

   Please elaborate on what the relevant procedural framework might be.

Answer:
The procedural rules regarding labour disputes are a special part of the general Civil Procedure Code (artt. 409-447). The general rules regarding the disputes before the Supreme Court of cassation procedure also apply to labour disputes

6. Do special arrangements operate in your national legal system for situations in which regulatory provisions under consideration are derived from supra-national sources – (*e.g*. within the framework of the European Union; by reference to the regulatory ambit of the Council of Europe; or by reference to the regulatory framework established at the level of the ILO)?

   If so, having regard specifically to Labour Law cases, please elaborate on how these differ from the "normal" situation governing the treatment of non-Labour Law cases/litigation in your legal system.

Answer: generally speaking we consider the European Union provisions as a part of our legal system. Of course we take into considerations the various problems arising from the application of European law (consistent interpretation; direct effect etc.).
The ILO conventions when ratified are also part of our law. The same can be said as for the Council of Europe

7. Are the hearings of trials (and, where these are available, appeals) in your country's legal system normally heard in public?

Answer: In general, yes except that for the examining of witnesses

8. Is the press, TV, radio, and other media entitled to attend and report proceedings in trials in your country?

Answer: yes, being the trial public (see previous answer)

9. Is it permitted to show film/video (*e.g*. TV footage) of court proceedings in your country?

Answer:
No, unless special authorisation is granted

10. Is it permitted to play sound recordings of court proceedings in your country?

Answer:

See previous answer

11. Having regard to this first set of questions, please summarise briefly any situations in which the "normal" arrangements are not applied in relation to Labour Law cases/litigation.

Answer: see answer to question n. 5

B. EVIDENCE GATHERING FOR THE PURPOSES OF FIRST INSTANCE TRIAL

12. Please describe briefly the process whereby evidence is prepared for a first instance trial.

In particular:

Is there a process of "discovery", through which the parties have to notify each other about what relevant documents or other items are (or have been) in their possession?

Is there a process of "exchange of documents"?

Answer:
No. The claimant has just to notify to the other party the introductory act where he/she has to indicate which documents will be produced. Everything happens

afterward before the labour judge.

Who is given the primary responsibility for compiling the evidence for a trial hearing, and how is this normally done (*e.g*. in a "bundle" of documents, electronically, *etc*.)?

Where are the "rules of the game" for these preparatory procedures set out, and who supervises this pre-trial process?

In particular, is a specified judge allocated to a case, or is oversight of a case "shared" between available judges from time to time?

Answer:

No. There isn't a pre-trial process

Are there penalties/sanctions if a party fails to discharge any duty at this stage?

Answer:
No. See previous answers

13. What is the normal procedure for compiling and presenting "hard copy" (*i.e*. paper or similar) documents for trial?

Answer:
Documents have to be lodged at the registry of the judge office

14. Do you have special rules for the presentation of "electronic communications" (*e.g*. records of e-mails, social media communications, or the like)? How are these displayed for the court?

Answer:

We have recently set up a so called digital procedure whereby every act of the process, except the introductory act, must be produced electronically

15. How do you deal with video, Closed Circuit Television (CCTV), or other such forms of visual images when these are to be presented before the court?

Answer:
The parties produce the digital support and the judge office provides for making it possible to watch it

16. How do you deal with issues arising in relation to “personal” communications *etc*. (*e.g*. as issues of “privacy”; issues of “confidentiality” (whether said to arise out of private contractual arrangements or otherwise); or issues of “business confidentiality” – including where information may be “market sensitive” and subject to separate rules established by a Stock Exchange, a financial regulator, or the like?

Answer: only the parties (through their lawyers) and the Court have access to the documents and they have are obliged to treat any information arising from them as confidential.

17. Do you have special arrangements to deal with issues of “national security” in relation to documentary or other evidence?

Answer:
No. In our system if a document is relevant for national security the parties could not possibly have access to it

18. Do you have special arrangements to deal with issues of “legal privilege” (if your country’s legal system provides for such protection) if this arises in relation to documentary or other evidence?

Answer:
NO

19. Where it is normal to have a public hearing in your country, do you nevertheless have the possibility of hearing or receiving evidence in private in certain circumstances? If so, please indicate in what circumstances that might happen.

    Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to hold a hearing in private?

Answer:
See answer n. 7

20. Is it possible otherwise to limit the extent of publicity given to court proceedings in your country (*e.g*. by not reporting the names of some or all participants/witnesses; by anonymising the public reports of proceedings and/or the judgments given in the case, *etc*.)?

Please give examples where this might happen and what powers the court has in these circumstances.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to restrict the extent to which proceedings or parts of proceedings can be made public?

If so, what form will such a challenge take?

Answer:
Every judgement (which is issued "in the name of the Italian people") should be available for every person who wants to read it. However the names of the parties in the final judgement should be anonymised.

C. THE TRIAL STAGE AND BEYOND

21. Is it possible (or helpful) to describe the role of the judge in your country's legal system arrangements for Labour Law cases/litigation as being "inquisitorial" or to oversee "adversarial" proceedings?

Answer: The procedure in labour disputes is partially "inquisitorial". In fact the judge has the power of examining as a witness a person not mentioned by the parties but indicated by another witness or a person whose name was indicated in the documents brought to his attention.

22. Does the judge question witnesses who appear to give oral evidence before the court, or is this task undertaken by lawyers appearing for the parties?

Do witnesses give their evidence on the basis of prepared documents (e.g. a "witness statement")? If so, who (in your experience) generally undertakes the task of preparing such a document?

Answer:
Only the judge has the task of examining the witnesses. Witnesses are asked questions on the basis of document prepared by their lawyer. However the judge has the power to ask the witnesses any other questions related to the questions prepared by the parties (through their lawyers)

23. What rules does the judge apply in relation to the admissibility of evidence? In brief terms, what kinds of evidence may not be admissible before the court?

Answer:
In the Italian civil code there are some cases where the proof (for instance the proof of a contract whose object is a real estate property or the proof of a fixed term labour contract) cannot be given through witnesses but only through documents. This rule apply of course also in labour law disputes.
Furthermore every evidence illegally formed cannot be brought before the labour judge.

24. In relation to the litigation of labour disputes in your country, is there a single forum where cases are determined, or are there further instances of appeal or review?

Is the fact-finding exercise in Labour Law litigation/cases something which is confined to the first instance court?

If so, is it possible to appeal against findings of fact made at the first instance level?

In what circumstances might an appeal level court make further or alternative findings of fact?

Answer:
For each case there are three instance: first instance court, appeal court, Supreme Court.
Finding of facts is generally confined to the first instance Court.
However the findings made by the first instance court could be reviewed by the appeal court. Exceptionally the appeal court may also make its own findings.
The Supreme Court decides only questions of law and cannot be involved in any findings of facts

25. In relation to "normal" matters arising in the context of Labour Law litigation/cases, who carries the burden of proof to establish a matter of evidence?

Answer:
Generally speaking the burden of the proof is carried by the claimant, no matters if he/she is the employer or the employee

Does this include the burden of proof in relation to, *inter alia* (1) the establishment of the existence of an employment relationship; (2) the validity of a collective agreement; (3) the question of whether there has been a termination of employment; (4) the reason underlying a termination of employment?

Answer:
As for the termination of the employment a law dating back to 1966 (law of 15

July 1966 n. 604) and still in force establishes that the proof of the lawfulness of the dismissal is carried by the employer

Does your country's legislation make use of the notion of "presumptions" – *i.e*. where a situation is presumed to exist unless and until a party proves that the situation does not apply?

Answer:
Yes, in many cases

Are there any matters in respect of which the "normal" rule on the burden of proof does not apply (*e.g*. in consequence of implementation of Directive 97/80/EC or otherwise)? If so, what are these and how do they operate in your country's system?

Answer:
Yes; this happens for example in discrimination cases

Does your country's legislation make use of the terminology of "reversed burden of proof"?

Answer:

We do not employ this terminology but we have the same idea as expressed above

Does the approach in your country recognise any notion of a "neutral burden of proof"?

Answer:
See previous answer

26. Once a judgment has been given by the court, is it possible for that decision to be appealed or otherwise revisited on the basis that "new evidence" has come to light?

If so, are there any time limits placed upon this?

Are conditions placed upon the admissibility of any such "new evidence"?

Who makes the decision as to whether "new evidence" has been presented and whether it should be considered?

Is there a right to appeal against such a determination on the admissibility of "new evidence"?

Answer:
Yes, but it is a rather exceptional case. The decision could be revised if after the judgment documents are discovered that the interested party wasn't able to produce for reason of " force majeure" or because of the other party's conduct

LUXEMBOURG

A. THE GENERAL CONTEXT OF THE LABOUR COURTS AND TRIBUNALS IN YOUR LEGAL SYSTEM

1. Where are Labour Law cases/disputes heard and determined within your legal system?

   Please elaborate on the legal system context for Labour Law litigation/dispute resolution in your country.

Answer:

Individual disputes are heard and determined in first instance by Labour Courts (*Tribunal du travail*) and in second instance by the Court of Appeal.

For collective disputes (i.e. economic disputes), a special conciliation procedure applies. If social partners don't find an agreement (especially while negotiating collective agreements or social plans), they have to enter a formal conciliation procedure at the "*Office National de Conciliation*". Any strike that would be declared before this procedure has come to an end is deemed illegal. This system, implemented since 1936, is working well in Luxembourg, as most collective conflicts can be conciliated and strikes are nearly non-existing.

As far as I can see, this questionnaire only addresses individual legal disputes, so I will not hereafter with collective (economic) disputes.

Legal disputes are necessarily individual disputes. There is no "class action", and even if many employees are affected by the main issue, they have to file individual claims that will end up with individual judgments.

2. Do you have a specialised system of "Labour Courts" in your country?

   Do you treat Labour Law cases/disputes in common with other cases in general (*e.g.* as part of normal civil law litigation); or do you have some mixture of the two approaches?

   Please elaborate on some of the key features of the arrangements in your country.

Answer:

There are dedicated Labour Courts (*Tribunal du travail*) in Luxembourg which are competent for disputes linked to employment contracts between employers and employees (but nor, for example, for disputes between two employees). The general civil courts are not competent.

The first-instance Labour Courts are implemented within the lowest-level Courts called "Justices of Peace" (*Justice de Paix*). Luxembourg is a small country, so there are Labour Courts only in three cities (Luxembourg-City, Diekirch and Esch-sur-Alzette). The presiding judge is a professional judge; he is assisted by two non-professional assessors elected amongst the employee's and the employer's representatives.

The appeal is brought to the Court of Appeal (*Cour d'Appel*), formally called "Superior Court of Justice" (*Cour Supérieure de Justice).* There is only one Court of Appeal in the country, in Luxembourg-City. There are currently 2 chambers of 3 judges dealing with Labour law appeals.

A cassation complaint (*pourvoi en cassation*) can be brought to the court of cassation, which is composed by an unique chamber of 5 judges. Unlike larger countries, there are no specialized sections at the court of cassation.

3. Do you have specialised "Labour Judges", or are Labour Law cases/disputes litigated in front of judges with general jurisdiction and experience?

   Please elaborate on the qualifications, background, experience, and training of judicial officers in your country who deal with Labour Law cases/disputes.

Answer:

There are judges that – for a period of time in their career - mainly deal with labour law, because they are in charge of labour law at the Labour Court or because they are part of the chambers dealing with Labour law at the Court of Appeal.

In Labour Courts, they occasionally also deal with other cases (especially civil cases).

At the Court Appeal, they normally do only labour law, but they may replace other judges in different chambers at any time.

The judges can change to a different branch or a different court at any time. At any time a judge of the Justice of Peace could do a first-instance hearing on Labour law, even if he/she usually deals with different subjects. The same applies within the Court of appeal.

Thus, there are no specialised professional Labour Judges as such.

To become a judge, the candidate must have a law degree and pass an entry-level examination process. But to become a professional Labour Judge, there is no specific requirement concerning qualification and experience.

Due to the small size of the country, there is no training institute for judges. The judicial training mainly consists of a once-per-year entitlement to attend courses held in Paris by the French "Ecole Nationale de la Magistrature". Every judge is free to decide if the

wants to attend a course and to choose the subject. Attending French courses on labour law makes little sense ; European subjects might be more interesting. Furthermore, other conferences or trainings are offered occasionally. Nothing specifically focusses on Labour law.

For the non-professional assessors in first instance, there are no qualification requirements either.

4. Do you have any specialised institutions which operate alongside or in conjunction with courts to deal with Labour Law cases/disputes?

   If so, please outline what these are and what role they undertake in the process of litigation/dispute resolution.

Answer:
I could mention these institutions :

- Employee's delegates (*délégués du personnel*) have a general mandate to internally settle disputes between employees and the employer (Art. L. 414-2 (2)). This happens in practice in a very informal way.
- The Labour Inspectorate has an informal mission to conciliate parties (L. 614-2) of the Labour Code.
- In 2007, a special conciliation for individual labour law complaints (*instance de conciliation individuelle*) was introduced in article L. 652-1 of the Labour Code. However, it was never set up in practice.

5. Does a generalised framework for conducting civil litigation (*e.g*. a Civil Procedure Code, or the like) operate in relation to Labour Law cases/disputes in your country, or are there special rules/procedures which have been developed for Labour Law litigation/dispute resolution?

   Please elaborate on what the relevant procedural framework might be.

Answer:

The general framework for conducting civil litigation (*Nouveau Code de Procédure Civile*) is applicable unless special rules exist for labour law litigation.

Labour law litigation differs on some points from general civil litigation. The main difference is that, in order to reduce litigation costs, no court summoning by a bailiff (*assignation/citation en justice par acte d'huissier*) is required. A simple written request (*requête*) addressed to the Labour Court is sufficient ; the Court administration convenes the parties to the hearing.

Another major difference is that, regardless of the value of the claim, representation by

counsel/lawyer (*avocat*) is not mandatory in first-instance. It is a mainly oral procedure.

In the appeal, representation by a lawyer is required, and the procedure is in writing. However, whereas the appeals from the Justice of Peace level (currently <10.000 EUR; projected to raise it to <20.000 EUR) is brought to the District Court (*Tribunal d'Arrondissement*), the appeal for labour litigations is brought (for historic reasons) to the Court of Appeal.

6. Do special arrangements operate in your national legal system for situations in which regulatory provisions under consideration are derived from supra-national sources – (*e.g*. within the framework of the European Union; by reference to the regulatory ambit of the Council of Europe; or by reference to the regulatory framework established at the level of the ILO)?

   If so, having regard specifically to Labour Law cases, please elaborate on how these differ from the "normal" situation governing the treatment of non-Labour Law cases/litigation in your legal system.

Answer:
There are no special arrangements. Of course, if European law is affected, a preliminary question can be submitted to the Court of Justice of the European Union.

Every judge has the possibility to question the national legislation in regard of international texts (OIT, Council of Europe).

Issues of constitutionality however have to be brought, as preliminary question, to the Constitutional Court (*Cour Constitutionnelle*) which was implemented 20 years ago. Only a handful of constitutional decisions have dealt with labour law, based nearly exclusively on the principle of equality before the law

7. Are the hearings of trials (and, where these are available, appeals) in your country's legal system normally heard in public?

Answer:
As required by Article 88 of the Constitution, trials are normally heard in public. Exceptions may occur in criminal cases (*huis clos*). As from November 2018, many family law cases will be dealt with in non-public hearings.

8. Is the press, TV, radio, and other media entitled to attend and report proceedings in trials in your country?

Answer:
The press is entitled to do so. There are no clear rules that specify if the name of the parties can be published ; in practice, the press does not do so, unless the identity of the person is of importance.

In practice, the press only attends and reports on criminal proceedings. Presence of press in Labour law hearings is insignificant.

9. Is it permitted to show film/video (*e.g*. TV footage) of court proceedings in your country?

Answer:

No, it is not permitted to film court proceedings. Probably the Attorney General or the Jurisdiction's president could grant exceptions, but this never happened in practice.

10. Is it permitted to play sound recordings of court proceedings in your country?

Answer:
No, audio recordings of court proceedings are not admissible.

Exceptionally, the Court could decide to record the proceeding, but this only happened once for a larger criminal case.

However, parts of the bar association would like to have all court hearings recorded ; such records would thus be available to the parties, the judges and the appeal judges.

11. Having regard to this first set of questions, please summarise briefly any situations in which the "normal" arrangements are not applied in relation to Labour Law cases/litigation.

Answer:
There are no exception for Labour law cases. Court proceedings are not recorded in audio or video.
It is up to the court clerk (*greffier*) to write down in a special record (*plumitif*) the essential things that are said during the hearing. Of course, this system is not always fully reliable and accurate …

B. EVIDENCE GATHERING FOR THE PURPOSES OF FIRST INSTANCE TRIAL

12. Please describe briefly the process whereby evidence is prepared for a first instance trial.

In particular:

Is there a process of "discovery", through which the parties have to notify each other about what relevant documents or other items are (or have been) in their possession?

Is there a process of "exchange of documents"?

Answer:

No, there is no formal process of discovery.

Documents must be exchanged a forehead in due time (Art. 64 NCPC). Usually a minimum of 5 days is required; for larger amounts of documents, the judge may consider that 5 days are not sufficient.

If the documents were not exchanged in due time, the judge can decide either to reject them or to postpone the hearing.

On request, the judges can summon the other party, or even third parties, to deliver documents. It must however be proven that the requested document exists, which is difficult in most cases. Such injunctions are not frequent in practice.

Testimonials can be brought :

- either by written statements
- or by a request to the Labour Court, during the hearings of pleadings, to call witnesses in order to testify on certain subjects (*offre de prevue)*. If the judges consider that the request is useful for the issue of the claim, they state so in a separate, preliminary judgements. The witnesses are heard in presence of the presiding judge, the parties and their councils in a non-public hearing (*procédure d'enquête)*

The judges at Labour Court can get the documents before the hearing, but it is sufficient to hand them out during the hearing.

Who is given the primary responsibility for compiling the evidence for a trial hearing, and how is this normally done (*e.g*. in a "bundle" of documents, electronically, *etc*.)?

Where are the "rules of the game" for these preparatory procedures set out, and who supervises this pre-trial process?

In particular, is a specified judge allocated to a case, or is oversight of a case "shared" between available judges from time to time?

Answer:
Every litigating party is responsible to compile the evidence that is important to her. There is no obligation to deliver all the documents concerning a certain subject ; every party can pick the documents that are in its favour.

Nobody supervises this procedure. If one party argues during the hearing that it did not get the evidence or that it didn't get it in due time, the judges will have to decide, as mentioned above, if the documents are rejected or if the hearing is postponed.

In first instance, there is no specific judge allocated to this pre-hearing exchange of documents. At the level of appeal, one of the three judges of the chamber will monitor the written procedure (*procedure de mise en état*).

Are there penalties/sanctions if a party fails to discharge any duty at this stage?

Answer:
No, there are no specific penalties or sanctions.

13. What is the normal procedure for compiling and presenting "hard copy" (*i.e*. paper or similar) documents for trial?

Answer:

In a best case scenario, every party has prepared one binder with an inventory.

Frequently, the judges however end up with multiple binders and some lawyers lose track of what they handed out to the judges.

Especially, as individual persons can go to the Labour Court without a lawyer/counsel, the presentation of evidence can sometimes become chaotic.

14. Do you have special rules for the presentation of "electronic communications" (*e.g*. records of e-mails, social media communications, or the like)? How are these displayed for the court?

Answer:

No, there are no specific procedures. It is however not forbidden to hand out DVDs, Memory Cards, USB sticks, etc.

Exchange of procedural elements or evidence by email or other electronic means between lawyers is increasing. Electronic communication with the court is not of

common use. However, an expert group is working on the project of a "paperless justice".

The evidence must not necessarily be shown in the public hearing. The judge can however decide so, and audio or video recordings can be played during the hearing. In Labour law, this is however exceptional. Otherwise, the judge will look at the media file during deliberation and when he/she is drafting the judgement.

15. How do you deal with video, Closed Circuit Television (CCTV), or other such forms of visual images when these are to be presented before the court?

Answer:

The possibility to get electronic equipment to playback audio and video during the hearing exists, but is not frequently used.

Parties who consider that it is important that a certain video or image is presented during the pleadings will usually step beyond and bring their own device (the judge will certainly be more willing to listen/watch the file than if he/she has to interrupt the hearing and organize a device).

Every judge has to deal with the technical issues, unless he gets some help from the IT department.

16. How do you deal with issues arising in relation to "personal" communications *etc*. (*e.g*. as issues of "privacy"; issues of "confidentiality" (whether said to arise out of private contractual arrangements or otherwise); or issues of "business confidentiality" – including where information may be "market sensitive" and subject to separate rules established by a Stock Exchange, a financial regulator, or the like?

Answer:

The question whether private documents (for example emails that the employee wrote at work, but concerning private issues) can be brought as evidence or not, is still evolving in case law. Luxembourg tends to adopt the French solutions on these subjects.

There are no specific rules concerning business confidentiality or market sensitive information. The judges can however be comprehensive, and allow that certain pieces of information are handed out in writing without being read out loud during the public hearing. They also show comprehensive for example when it comes to giving the grounds for dismissal. For example, in the banking sector it is admissible if the grounds are given without indicating the client's names, but only the account numbers, in order to

preserve bank secrecy.

17. Do you have special arrangements to deal with issues of “national security” in relation to documentary or other evidence?

Answer:
There is a legislation on secret services (confidentiality of documents, witnesses that are member of the secret service), but this is of no practical relevance in labour law proceedings.

18. Do you have special arrangements to deal with issues of “legal privilege” (if your country’s legal system provides for such protection) if this arises in relation to documentary or other evidence?

Answer:
Correspondence between lawyers (e.g. arrangement offers) is deemed confidential and cannot be handed out to the court. Conflicts are solved by the president of the Bar association.

19. Where it is normal to have a public hearing in your country, do you nevertheless have the possibility of hearing or receiving evidence in private in certain circumstances? If so, please indicate in what circumstances that might happen.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to hold a hearing in private?

Answer:

Formally, there is no such possibility. However, third parties can only sit in the court room and listen; they have no right to step forward and inspect documents :

- in first instance, parties could thus arrange to speak in a way that a third party listening will have difficulties to understand the issue.
- witnesses, as said, are heard in non-public hearings. Their testimonial however will thereafter be debated in a public hearing and might thus become public.
- at the level of appeal, the proceedings are done in writing. There are oral pleadings, but it is mostly a purely formal exercise.

If the case is too sensitive, employers tend to find settlements and arrangements, especially in the banking sector.

Confidentiality agreements do not apply in court proceedings. The right of action and the rights of defence prevail.

20. Is it possible otherwise to limit the extent of publicity given to court proceedings in your country (*e.g*. by not reporting the names of some or all participants/witnesses; by anonymising the public reports of proceedings and/or the judgments given in the case, *etc*.)?

Please give examples where this might happen and what powers the court has in these circumstances.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to restrict the extent to which proceedings or parts of proceedings can be made public?

If so, what form will such a challenge take?

Answer:
The Court has no specific power.

The issue of communicating judgments to third parties is an ongoing discussion, especially now, as the GDPR (General Data Protection Regulation) came into force. Court decisions are (unfortunately) not systematically published in Luxembourg. They are delivered on request, but will be anonymized.

A third party, especially representatives of media, have the possibility to know the name by assisting to the hearings. However, they would have to know in a first step at what date, at what time and in which court room the case they are interested in is taking place. Unless they are informed by one of the parties who wants the judicial case to become public, they will have difficulties to get this information.

As mentioned before, these issues are important in criminal cases because the press frequently reports about them. For labour law, I am not aware of any problem that ever came up concerning the relations with the press.

C. THE TRIAL STAGE AND BEYOND

21. Is it possible (or helpful) to describe the role of the judge in your country's legal system arrangements for Labour Law cases/litigation as being "inquisitorial" or to oversee "adversarial" proceedings?

Answer:

The procedure can be qualified as mainly adversarial.

22. Does the judge question witnesses who appear to give oral evidence before the court, or is this task undertaken by lawyers appearing for the parties?

Do witnesses give their evidence on the basis of prepared documents (e.g. a "witness statement")? If so, who (in your experience) generally undertakes the task of preparing such a document?

Answer:
As said, the witnesses are heard in a non-public hearing, based on a request by one of the parties.
The judge will, in a first step, ask the questions that were requested and that were declared admissible by the preliminary judgement.
The judge should not go beyond this scope and ask questions on other facts. He can however ask for details or elements required to understand the global context.

Thereafter, the judge will ask the parties or their counsels if they have other questions and decide if they are admissible or not.

23. What rules does the judge apply in relation to the admissibility of evidence?

In brief terms, what kinds of evidence may not be admissible before the court?

Answer:

The most problematic evidence is the one that conflicts with private life and data privacy, such as emails, video recordings, reports by private detectives, etc.

24. In relation to the litigation of labour disputes in your country, is there a single forum where cases are determined, or are there further instances of appeal or review?

Is the fact-finding exercise in Labour Law litigation/cases something which is confined to the first instance court?

If so, is it possible to appeal against findings of fact made at the first instance level?

In what circumstances might an appeal level court make further or alternative findings of fact?

Answer:
Fact-finding is not limited to the first instance court. During the appeal, new evidence can be brought and the Court of Appeal cannot reject it. It is however somewhat harder

to convince the appeal judges to re-hear a witness or to hear additional witnesses

25. In relation to "normal" matters arising in the context of Labour Law litigation/cases, who carries the burden of proof to establish a matter of evidence?

Answer:

Article 58 of the Civil Procedure Code states that each party bears the burden of proof of the elements required to win its claim (*Il incombe à chaque partie de prouver conformément à la loi les faits nécessaires au succès de sa prétention*).

Does this include the burden of proof in relation to, *inter alia* (1) the establishment of the existence of an employment relationship; (2) the validity of a collective agreement; (3) the question of whether there has been a termination of employment; (4) the reason underlying a termination of employment?

Answer:

Yes, the party that claims that there is an employment relationship must prove it. In most cases however, this is not under discussion.

For the collective agreement, I would say that it is presumed to be valid. If the scope of application (i.e. type of professional activity) is discussed, the employee must however establish what it's employers main activity is. Collective agreements may be challenged from a legal point of view ; I don't remember a case where its validity would have been challenged on factual elements.

The person that has a claim because the employment relationship was terminated has to establish this termination. This is mainly problematic for oral dismissals.

Concerning the reasons underlying a termination of employment :

- If the **employer** terminated the contract with notice or with immediate effect, he/she will have to prove the grounds. For dismissals with notice, this important rule applies since 1989; beforehand, the employee had to prove that there was an abuse in contract termination.
- If the **employee** terminated the contract with immediate effect, he has to establish the employer's misconduct justifying the termination. Termination with notice by the employee doesn't require any grounds.

Does your country's legislation make use of the notion of "presumptions" – *i.e*. where a situation is presumed to exist unless and until a party proves that the situation does not apply?

Answer:

Legislation doesn't, but case law does, for example :

- The one that claims that there is an employment relationship has to prove it.

However, if a written employment contract exists, there is a presumption that the subordinated relationship exists.

- If the employee claims a pay for worked hours, he has to prove that he has worked. However, judges tend to presume that he worked during his normal working time. For overtime work, the employee bears the full burden of proof.

Are there any matters in respect of which the "normal" rule on the burden of proof does not apply (*e.g*. in consequence of implementation of Directive 97/80/EC or otherwise)? If so, what are these and how do they operate in your country's system?

Answer:
Luxembourg has only implemented a lightening of the burden of proof (*allègement de la charge de la preuve*) in the matters required by European law, i.e. discrimination issues and sexual harassment.

It does not apply to other matters, for example for moral harassment.

Does your country's legislation make use of the terminology of "reversed burden of proof"?

Answer:
No.

Does the approach in your country recognise any notion of a "neutral burden of proof"?

Answer:

No.

26. Once a judgment has been given by the court, is it possible for that decision to be appealed or otherwise revisited on the basis that "new evidence" has come to light?

If so, are there any time limits placed upon this?

Are conditions placed upon the admissibility of any such "new evidence"?

Who makes the decision as to whether "new evidence" has been presented and whether it should be considered?

Is there a right to appeal against such a determination on the admissibility of "new evidence"?

Answer:

No, this possibility does not exist.

NORWAY

A. The General Context of the Labour Courts and Tribunals in your Legal System

1. Where are Labour Law cases/disputes heard and determined within your legal system?

Please elaborate on the legal system context for Labour Law litigation/dispute resolution in your country.

Answer:

The ordinary courts – the District Courts, the Courts of Appeal and the Supreme Court – will hear individual labour law cases, for instance cases concerning unfair dismissal and claim for compensation. Discrimination will also fall within the jurisdiction of the ordinary courts. (However, should the claim be that a collective agreement is invalid because it is in breach of the prohibition on discrimination for instance due to gender, this case will fall within the jurisdiction of the Labour Court.)

The Norwegian Labour Court is a special court. Its jurisdiction is positively limited and confined to disputes concerning collective agreements. This includes disputes concerning the interpretation, validity and existence of collective agreements. It also covers cases of breach of collective agreements, including industrial action and breach of the peace obligation, and claims for damages arising from such breaches.

The Labour Court has territorial jurisdiction over the whole country, and it is the "first and last" instance in cases that fall within the Court's jurisdiction. With very few exceptions, the Court's decisions are final and may not be appealed to the Supreme Court.

2 Do you have a specialised system of "Labour Courts" in your country?

Do you treat Labour Law cases/disputes in common with other cases in general (*e.g.* as part of normal civil law litigation); or do you have some mixture of the two approaches?
Please elaborate on some of the key features of the arrangements in your country.

Answer:
See above no. 1.

3. Do you have specialised "Labour Judges", or are Labour Law cases/disputes litigated in front of judges with general jurisdiction and experience?

Please elaborate on the qualifications, background, experience, and training of judicial officers in your country who deal with Labour Law cases/disputes.

Answer:
The Labour Court:
There are three judges that are permanently employed by the Labour Court. In its

hearings, the court is composed of seven judges: three judicial judges and four judges nominated by the labour market parties.

The Ordinary Courts:
There are not specialised "labour judges" in the ordinary courts. However, in for instance dismissal cases, the court shall sit with two lay judges with a broad knowledge of industrial life for the main hearing.

4. Do you have any specialised institutions which operate alongside or in conjunction with courts to deal with Labour Law cases/disputes?

If so, please outline what these are and what role they undertake in the process of litigation/dispute resolution.

Answer:
Yes.

Certain disputes and cases fall within the jurisdiction of the **Dispute Resolution Board**. This includes inter alia some cases related working time (for instance right to reduced working hours) and cases relating to preferential rights of part-time employees to extended post and part-time workers' right to a post equivalent to actual working hours. A dispute may not be brought before the courts until it has been reviewed by the Board and a decision has been made by the Board. The process is – as a general rule – based on a written procedure.
In practice, many cases will be settled by the Board. The process has proven to be swift, inexpensive and accessible.

Claims for money shall – as a general rule – be considered by the **Conciliation Board** before legal proceedings before the ordinary courts may be instituted. However, a high number of labour disputes are exempt from the jurisdiction of the Conciliation Board, such as dismissal cases, unlawful temporary employment etc., cf. section 17-1 of the Working Environment Act 2005 (WEA). In connection with legal proceedings according to the WEA, the court may also consider claims concerning settlement of pay and holiday pay. Thus, in practice, it is only "minor" claims for pay etc. that will be considered by the Conciliation Board.

5. Does a generalised framework for conducting civil litigation (*e.g*. a Civil Procedure Code, or the like) operate in relation to Labour Law cases/disputes in your country, or are there special rules/procedures which have been developed for Labour Law litigation/dispute resolution?

Please elaborate on what the relevant procedural framework might be.

Answer:
The ordinary Courts:
The Courts of Justice Act (1915) and the Dispute Act (2015) apply in addition to special provisions laid down in the WEA.
In case of legal proceedings concerning for instance unfair dismissal, the court shall expedite the case as much as possible and if necessary fix a time for sitting out of turn. As mentioned above, the court shall sit with lay judges for the main hearing.

The Labour Court:
The Labour Disputes Act (2012) applies to the Labour Court. However, the general rules of the Courts of Justice Act and Disputes Act will apply additionally provided that this is not in contravention of the rules of the Labour Disputes Act.

6. Do special arrangements operate in your national legal system for situations in which regulatory provisions under consideration are derived from supra-national sources – (*e.g*. within the framework of the European Union; by reference to the regulatory ambit of the Council of Europe; or by reference to the regulatory framework established at the level of the ILO)?

If so, having regard specifically to Labour Law cases, please elaborate on how these differ from the "normal" situation governing the treatment of non-Labour Law cases/litigation in your legal system.

Answer:
The EEA-Agreement implies that a large number of EU-legislation is implemented into Norwegian law.

The European Convention on Human Rights and certain UN-Conventions have the force of Norwegian law and take precedence over any other legislative provision that conflict with them.

Other conventions, such as various ILO-conventions and the European Social Charter, do not apply directly as Norwegian law unless it has been incorporated into Norwegian law, in which it applies as Norwegian law. Otherwise, the courts take into consideration the obligations Norway has undertaken thorough ratification.

7. Are the hearings of trials (and, where these are available, appeals) in your country's legal system normally heard in public?

Answer:
Yes.
The general rule is that hearings are open to the public. Proceedings and judicial decisions may be reported publicly unless otherwise decided by law, or by the court pursuant to the law, cf. section 124 of the Courts of Justice Act.

However, both the Disputes Act and the Labour Disputes Act have rules on when the doors may be closed (for instance if the negotiations include trade or business secrets or other information which should not be disclosed to unauthorised personnel).
(The court may prohibit public disclosure, in whole or in part, of the judicial decision where certain specific and strict conditions are fulfilled.)

In section 1-1 of the Disputes Act, the purpose of the Act is stated, inter alia, to provide a basis for hearing civil disputes in a "far, swift, efficient and confidence inspiring manner through public proceedings…".

More detailed rules are laid down in Regulations concerning publicity in legal

proceedings.

8. Is the press, TV, radio, and other media entitled to attend and report proceedings in trials in your country?

Answer:
Yes, see above.

9 Is it permitted to show film/video (*e.g*. TV footage) of court proceedings in your country?

Answer:
Photo, filming and recording for radio and television:
In civil proceedings, the presiding judge may to a *certain extent* deny and/or regulate photos and filming.

In the Labour Court, there are from time to time requests about filming, and this has to a large extent been accepted.

10. Is it permitted to play sound recordings of court proceedings in your country?

Answer:
Yes. See above.

11. Having regard to this first set of questions, please summarise briefly any situations in which the "normal" arrangements are not applied in relation to Labour Law cases/litigation.

Answer:
Judgements are made public on Lovdata (and in some cases, on the homepage of the court.) However, in dismissal (and discrimination) cases, the name of the employee is not published.

The Labour Court has had a few cases involving individual employees relating to for instance dismissal of shop stewards and right to benefits in connection with illness etc. We have in such cases not disclosed the names of the employees when making the judgement public.

B. Evidence gathering for the purposes of First Instance Trial

11. Please describe briefly the process whereby evidence is prepared for a first instance trial.

In particular:

Is there a process of "discovery", through which the parties have to notify each other about what relevant documents or other items are (or have been) in their possession?

Is there a process of "exchange of documents"?

Answer:
Section 5-3 of the Disputes Act has rules on the obligation to provide information about important evidence or important documents of which the party is aware and of which he cannot expect the opposite party to be aware. This applies irrespective of whether such evidence supports his position or the position of the opposite party.

The general rules of the Disputes Act and Courts of Justice Act apply to the Labour Court as far as they are deemed fit and the Labour Dispute Act does not decide otherwise.

Who is given the primary responsibility for compiling the evidence for a trial hearing, and how is this normally done (*e.g*. in a "bundle" of documents, electronically, *etc*.)?

Where are the "rules of the game" for these preparatory procedures set out, and who supervises this pre-trial process?

In particular, is a specified judge allocated to a case, or is oversight of a case "shared" between available judges from time to time?

Answer:
See above**.**
The court shall actively and systematically manage the preparation of the case.

A judge is normally appointed as a preparatory judge. According to the Labour Disputes Act, the Court shall ensure that the case if fully enlightened, cf. section 47.

The Labour Court follows the practice/rule laid down in the Disputes Act and hold a "preparatory meeting" (in most cases arranged as a conference call) immediately after the defendant's written reply has been submitted. In this meeting, a plan for the further proceedings is discussed and agreed upon.

Are there penalties/sanctions if a party fails to discharge any duty at this stage?

Answer:
The Labour Court:
The Court may *order* anyone to submit documents, cf. section 48 (6) of the Labour Disputes Act.
In practice, during the preparatory phase, the court will inquire both parties if there are documents/evidence that may be of relevance.
Section 60 of the Labour Disputes Act has rules on Offensive conduct etc., however, these rules are more theoretical than practical.

12. What is the normal procedure for compiling and presenting “hard copy” (*i.e*. paper or similar) documents for trial?

Answer:
Yes, all documents are sent in presented as “hard copies” to the Labour Court.

(See no. 13 with regard to the ordinary courts.) .

13. Do you have special rules for the presentation of “electronic communications” (*e.g*. records of e-mails, social media communications, or the like)? How are these displayed for the court?

Answer:
The ordinary courts have rules on electric communication.

This does not apply to the Labour Court, see our answer above.

14. How do you deal with video, Closed Circuit Television (CCTV), or other such forms of visual images when these are to be presented before the court?

Answer:
The Labour Court does not have any equipment for visual images. In practice, witnesses are often heard by phone. Since the Court covers the entire country, this is quite common in practice.

15. How do you deal with issues arising in relation to “personal” communications *etc*. (*e.g*. as issues of “privacy”; issues of “confidentiality” (whether said to arise out of private contractual arrangements or otherwise); or issues of “business confidentiality” – including where information may be “market sensitive” and subject to separate rules established by a Stock Exchange, a financial regulator, or the like?

Answer:
The Labour Court:
According to the Labour Disputes Act, the doors may be closed when the negotiations include trade or business secrets, or other information which should not be disclosed to unauthorised personnel (see no. 7 above). The cases that are heard by the Labour Court will normally not give rise to any issues relating to “personal” communication or confidential information. We have had cases where economic information has been disclosed and where the court found that the conditions for closing the doors were satisfied.

16. Do you have special arrangements to deal with issues of "national security" in relation to documentary or other evidence?

Answer:
Yes.

In the Labour Court, this may in particular be relevant for cases involving the Norwegian defence sector and may give reason to "close the doors". We recently had a case concerning maintenance work for the new F-35 aircrafts where this was discussed. However, the Ministry of defence found that neither the documents nor any of the statements by the witnesses disclosed any such information.

(Section 22-1 of the Disputes Act also has rules on prohibition against evidence of importance to national security or relations with a foreign State, see also no. 17 below.)

17. Do you have special arrangements to deal with issues of "legal privilege" (if your country's legal system provides for such protection) if this arises in relation to documentary or other evidence?

Answer:
Yes. Chapter 22 of the Disputes Act has rules on prohibited and exempted evidence.

In labour cases, it is in particular the rules on prohibition against and exemption from evidence for information confined to persons in certain occupations that may arise. There have, for instance, been a few cases where lawyers and psychologists have been appointed to carry of internal inquiries/investigations in cases of conflicts, harassment etc., and where the court has had to decide on whether the information has been confined to the said persons in their professional capacity.

18. Where it is normal to have a public hearing in your country, do you nevertheless have the possibility of hearing or receiving evidence in private in certain circumstances? If so, please indicate in what circumstances that might happen.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to hold a hearing in private?

Answer:
No.

19. Is it possible otherwise to limit the extent of publicity given to court proceedings in your country (*e.g*. by not reporting the names of some or all participants/witnesses; by anonymising the public reports of proceedings and/or the judgments given in the case, *etc*.)?

Please give examples where this might happen and what powers the court has in these circumstances.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to restrict the extent to which proceedings or parts of proceedings can be made public?

If so, what form will such a challenge take?

Answer:
In labour cases, media will report from more hearings that involve companies and/employees of common interest. When the judgments are made public, it is nevertheless common to anonymise the employee. This is rarely relevant in cases heard by the Labour Court.

Section 14-2 of the Disputes Act has rules on the public's right of access. This includes, inter alia, access to court records, records of judicial mediation, judicial rulings and statements of costs. This also applies to certain documents, including the closing submissions. (There are some exceptions to the public's right of access, cf. section 14-3 and 14-4.) When an application for access is made, the court shall decide whether access shall be refused. A ruling to refuse access may be appealed, cf. section 14-6.

As described above under no. 7, hearings are open to the public, and proceedings and judicial decisions may be reported publicly, unless otherwise decided by lar, or by the court pursuant to law, cf. section 124 of the Courts of Justice Act.

C. The Trial Stage and Beyond

1. Is it possible (or helpful) to describe the role of the judge in your country's legal system arrangements for Labour Law cases/litigation as being "inquisitorial" or to oversee "adversarial" proceedings?

Answer:
The Labour Court shall, as mentioned above, ensure that the case if fully enlightened. The court will be active and question the witnesses and the lawyers.

2. Does the judge question witnesses who appear to give oral evidence before the court, or is this task undertaken by lawyers appearing for the parties?

Do witnesses give their evidence on the basis of prepared documents (e.g. a "witness statement")? If so, who (in your experience) generally undertakes the task of preparing such a document?

Answer:

The witness is first examined by the party that has summonsed him, then by other parties and thereafter by the court, cf. section 24-9 of the Disputes Act. The witness may use notes to aid his memory.

A written statement *made for the purpose of the case* may be presented as evidence if the parties agree or they have the opportunity to examine the person who has made the statement.

3. What rules does the judge apply in relation to the admissibility of evidence?

In brief terms, what kinds of evidence may not be admissible before the court?

Answer:
Before the Labour Court, written documents and statements by the parties and witnesses are presented as evidence. There may be cases where real evidence may be relevant and where the court will make an inspection, for instance of the workplace.

The scale and scope of the presentation of evidence shall be reasonably proportionate to the importance of the dispute, cf. section 21-8 of the Disputes Act.

There are rules on the taking of evidence at the preparatory stage, however, this is not very practical in regard to labour disputes, cf. chapter 27 of the Disputes Act.

4. In relation to the litigation of labour disputes in your country, is there a single forum where cases are determined, or are there further instances of appeal or review?

Is the fact-finding exercise in Labour Law litigation/cases something which is confined to the first instance court?
If so, is it possible to appeal against findings of fact made at the first instance level?
In what circumstances might an appeal level court make further or alternative findings of fact?

Answer:
The Labour Court – see no. 1 above.

The ordinary courts:
Labour disputes – for instance concerning unfair dismissals, will first be considered by the district court. The decision may be appealed to the court of appeal. The fact-finding exercise is not limited to the first instance court.

The decision by the court of appeal may be appealed to the Supreme Court. Pursuant to section 30-4 of the Disputes Act, judgements cannot be appealed without leave. Leave can only be granted if the appeal concerns issues whose significant extends beyond the scope of the current case or if it is important for other reasons that the case is determined by the Supreme Court. The hearing is normally oral, but the evidence is presented in writing.

5. In relation to "normal" matters arising in the context of Labour Law litigation/cases, who carries the burden of proof to establish a matter of evidence?

Answer:
The general rule is that the plaintiff carries the burden of proof – the person who asserts a fact must prove it.
According to section 21-2 of the Disputes Act, the court shall establish the facts upon which the case shall be determined based on a free evaluation of evidence. The decision will be based on the facts that seem most likely to have occurred – a principle of preponderance of evidence.

However, depending on the matter/case, this may be modified and shifted.

In dismissal cases, the burden of proof will in practice to a large extent rest on the employer (even if this is not determined explicitly by statue[99]). The employer will thus have to prove that factual circumstances are correct. If the employee is summary dismissed on the ground that he or she is accused of misconduct similar to or close to criminal offence, for instance allegations for theft, a higher standard of proof may be required. In Rt-2014-1161, this is described in the summary of the judgment, which reads:

"An employee was dismissed, cf. Section 15-14 of the Working Environment Act, on the grounds that he had acquired cash from his employer. The Supreme Court, who pointed out that it has been established in case law that a higher standard of proof may be required for actual circumstances that are particularly incriminating for a party, stated that the court's conclusion that the conditions for dismissal have been met, would be very incriminating, even though it could not be concluded that the employee had committed criminal embezzlement. In a dismissal case such as this, it would also have to be generally required to be qualified by the preponderance of evidence that the conditions for dismissal were met. In defamation law, neither the relationship to the standard of proof nor consideration for the presumption of innocence could result in a higher standard of proof so that this was congruent with what applies in criminal law. …"

Discrimination cases etc. – reversed burden of proof:

Rules on burden of proof applies, inter alia, in cases concerning discrimination and whistleblowing:

If the employee submits information that gives reason to believe that discrimination has taken place, the employer must substantiate that such discrimination has not occurred. On example is Rt-2012-424:

"A 61-year old male trained social worker alleged that he was the subject of age discrimination when he was not called in for an interview in connection with the filling of a public position and claimed damages for non-economic loss under section 13-9 of the Working Environment Act. The Supreme Court, which relied on the reversed burden of proof rule in section 13-8 of the Working Environment Act, held that the reason why the applicant was not called in for an interview was in all probability that the employer wanted to recruit people with other skills than social education. This was accordingly not a question of discrimination in violation of section 13-1 subsection 1 of the Working Environment Act. The appeal against the Court of Appeal's judgment in favour of the Defendant was quashed."

Rules on burden of proof also apply in dismissal cases involving employees who are absent due to illness/military service and during pregnancy, cf. section 15-8 to 15-10 of the WEA. Unless other grounds are shown to be "highly probable", pregnancy or absence due to illness/military service shall be deemed to the reason for dismissal. In judgment HR-2018-1189-A, the Supreme Court found that a dismissal was due to pregnancy, and the court discussed the burden of proof: The summary of the judgment reads:

"A pregnant employee was dismissed allegedly due to the undertaking's need to reduce the workforce. Pursuant to the Working Environment Act section 15-9, pregnancy shall be deemed to be reason for dismissal unless other grounds are "highly probable". With reference to unambiguous statements in preparatory works, the Supreme Court held that "highly probable" in this regard must mean that clear preponderance of the evidence is required to establish that the dismissal was due to something other than the

[99] There are a few exceptions where the WEA has rules on burden of proof, for instance in cases of dismissal in the event of sickness, pregnancy, birth, adoption etc.

pregnancy. Based on evidence close in time and lack of discussions pursuant to section 15-1, the undertaking did not meet the standard of proof. Decisive emphasis was placed on the fact that the undertaking prior to the dismissal had made various arrangements indicating that the employee's function would be continued. The judgment by the court of appeal, in favour of the employee, was set aside."

Does this include the burden of proof in relation to, *inter alia* (1) the establishment of the existence of an employment relationship; (2) the validity of a collective agreement; (3) the question of whether there has been a termination of employment; (4) the reason underlying a termination of employment?

Answer:
1 and 2:
The ordinary rules on burden of proof apply in regard to the establishment of the existence of an employment relationship and the validity of a collective agreement.
However, if the dispute for instance relate to whether the employee is employed on a permanent or temporary basis, the employer will have to prove that the conditions for temporary employment are met since the general rule is that the employee shall be employed on a permanent basis, cf. section 14.9.

3 and 4
See answer above.

Does your country's legislation make use of the notion of "presumptions" – *i.e*. where a situation is presumed to exist unless and until a party proves that the situation does not apply?

Answer:
See above, in particular in regard to discrimination cases.

Are there any matters in respect of which the "normal" rule on the burden of proof does not apply (*e.g*. in consequence of implementation of Directive 97/80/EC or otherwise)? If so, what are these and how do they operate in your country's system?

Answer:

Yes, see above.

Does your country's legislation make use of the terminology of "reversed burden of proof"?

Answer:

Yes, see above.

Does the approach in your country recognise any notion of a "neutral burden of proof"?

We are not familiar with the notion of a "neutral burden of proof".

6. Once a judgment has been given by the court, is it possible for that decision to be appealed or otherwise revisited on the basis that "new evidence" has come to light?

If so, are there any time limits placed upon this?
Are conditions placed upon the admissibility of any such "new evidence"?
Who makes the decision as to whether "new evidence" has been presented and whether it should be considered?
Is there a right to appeal against such a determination on the admissibility of "new evidence"?

Answer:
A decision may be appealed – see 23 above.

Reopening
Chapter 31 of the Disputes Act has rules on reopening of cases that have been rule on by a final and enforceable judgement. (A case may be reopened on ground of procedural errors, cf. section 31-3 and on grounds of error in the ruling, cf. section 31-4).

Section 31-6 has rules on time limits. A petition must be submitted within six months after the date upon which the petitioner became aware of, or ought to become aware of, the ground for the petition. A case cannot be reopened after 10 years.

According to section 31-4 a, a petition to reopen a case may be made "if information on the facts in the case that was unknown when the case was ruled on suggests that the ruling would in all likelihood have been different".

General limitations apply on the right to have a case reopened, cf. section 31-5. For instance, a case shall not be reopened on grounds that the petitioner ought to have alleged at the ordinary hearing, by appeal off by an application for reinstatement or if it is reasonably probable that a new hearing of the case would not lead to an amendment of significance to the party.

Section 31-1 has rules on which court shall determine whether to reopen a case. Rulings by the conciliation board (not very common in labour law cases) may be reopened by petition to the district court. Rulings of the district court and court of appeal may be reopened by petition to a court of the same level in a judicial district that borders on to the court that made the original ruling. Rulings of the Supreme Court may be reopened by petition to the Supreme Court.

A decision not to reopen the case may be appealed.

In 2012, the Labour Court considered a petition for reopening on the basis of "new evidence". The Labour Disputes Act does not have rules on reopening, but the Court applied the rules of the Disputes Act. The petitioner – the employers' organisation – had found new evidence (documents) in a box that had been misplaced. Because of the misplacement, the documents were not found during the original hearing. The Labour Court found that the organisation had to bear the responsibility for this. According to section 31-5 (general limitation on the right to have a case reopened), a petition to reopen a case cannot be made on grounds that the petition ought to have alleged at the ordinary hearing, and the petition was therefore dismissed.

SLOVENIA

A. THE GENERAL CONTEXT OF THE LABOUR COURTS AND TRIBUNALS IN YOUR LEGAL SYSTEM

1. Where are Labour Law cases/disputes heard and determined within your legal system?

   Please elaborate on the legal system context for Labour Law litigation/dispute resolution in your country.

Answer: Under the provisions of the legislation, labour courts have jurisdiction to decide on individual and collective labour disputes.

2. Do you have a specialised system of "Labour Courts" in your country?

   Do you treat Labour Law cases/disputes in common with other cases in general (*e.g.* as part of normal civil law litigation); or do you have some mixture of the two approaches?

   Please elaborate on some of the key features of the arrangements in your country.

Answer: Yes, there is a specialised system of labour courts. Labour courts of first instance decide at first instance. The Higher Labour and Social Court decides on appeals against decisions of the labour courts of first instance, while appeals against and reviews of decisions of the Higher Labour and Social Court are heard by the Supreme Court of the Republic of Slovenia. Labour disputes before labour courts are mostly governed by general civil procedural rules, contained in the Civil Procedure Act, however certain issues are governed by special rules contained in the Labour and Social Courts Act.

3. Do you have specialised "Labour Judges", or are Labour Law cases/disputes litigated in front of judges with general jurisdiction and experience?

   Please elaborate on the qualifications, background, experience, and training of judicial officers in your country who deal with Labour Law cases/disputes.

Answer: Labour law cases are litigated in front of labour judges. They are elected by the National Assembly (*the parliament*) on the basis of a proposal from the Judicial Council. The conditions for election are the same for judges of general courts and for judges of specialised courts. In order to be elected as a labour judge in the court of first instance, a person must meet the following general conditions:

1. he/she is a Slovenian citizen and has an active command of the Slovenian

language,
2. he/she must have legal capacity and be in good general health,
3. he/she is at least 30 years old,
4. he/she must have obtained the professional title of a lawyer with a university degree obtained in Slovenia or the professional title of bachelor of law (UN) and master of law or have obtained an equivalent qualification in law abroad that is attested by a foreign qualification certificate with an attached opinion on the qualification or with a decision recognising the qualification for employment purposes or a certificate of nostrification,
5. he/she must have passed the State examination in law,
6. he/she has not been convicted of a criminal offence,
7. he/she is not the subject of a final indictment or, based on a charge, the subject of proceedings relating to a criminal offence prosecuted *ex officio*.
8. he/she has successfully worked as a judge for at least three years in the past or has at least six years of working experience in the legal field after passing the State examination in law.

4. Do you have any specialised institutions which operate alongside or in conjunction with courts to deal with Labour Law cases/disputes?

If so, please outline what these are and what role they undertake in the process of litigation/dispute resolution.

Answer: No.

5. Does a generalised framework for conducting civil litigation (*e.g*. a Civil Procedure Code, or the like) operate in relation to Labour Law cases/disputes in your country, or are there special rules/procedures which have been developed for Labour Law litigation/dispute resolution?

cumentary or other evidence?e relevant procedural framework might be.

Answer: There are some special procedural rules provided in the Labour and Social Courts Act. If this Act does not provide otherwise, general civil procedural rules under the Civil Procedure Act apply.

6. Do special arrangements operate in your national legal system for situations in which regulatory provisions under consideration are derived from supra-national sources – (*e.g*. within the framework of the European Union; by reference to the regulatory ambit of the Council of Europe; or by reference to the regulatory framework established at the level of the ILO)?

If so, having regard specifically to Labour Law cases, please elaborate on how these differ from the "normal" situation governing the treatment of non-Labour Law cases/litigation in your legal system.

Answer: The decision to make a reference to the Court of Justice for a preliminary ruling cannot be challenged. The proceeding in the case is suspended (stayed) and no legal remedy is allowed against the decision of suspension. The arrangement is the same for all types of cases (labour or non-labour).

7. Are the hearings of trials (and, where these are available, appeals) in your country's legal system normally heard in public?

Answer: Yes, with certain exceptions specifically laid down by law.

8. Is the press, TV, radio, and other media entitled to attend and report proceedings in trials in your country?

Answer: Yes, unless the public is excluded in exceptional cases.

9. Is it permitted to show film/video (*e.g*. TV footage) of court proceedings in your country?

Answer: Yes, unless the public is excluded in exceptional cases.

10. Is it permitted to play sound recordings of court proceedings in your country?

Answer: Yes, unless the public is excluded in exceptional cases.

11. Having regard to this first set of questions, please summarise briefly any situations in which the "normal" arrangements are not applied in relation to Labour Law cases/litigation.

Answer:
Urgency - The procedure before labour courts is more urgent and it cannot be stayed.

Court jurisdiction - If the applicant is a worker, not only the court with general territorial jurisdiction for the defendant, but also the court on the territory of which the work is or was or should have been performed, and the court on the territory of which the employment relationship was concluded, have jurisdiction.

Cooperation of lay judges - In labour and social disputes, a court of first instance decides in a panel composed of a judge as president of the panel and two lay judges as members, one of which must be elected from a list of candidates of workers, and the other from a list of candidates of employers.

Costs - In disputes regarding termination of the employment contract, the employer bears all costs of the procedure regardless of the outcome.

Etc.

B. EVIDENCE GATHERING FOR THE PURPOSES OF FIRST INSTANCE TRIAL

12. Please describe briefly the process whereby evidence is prepared for a first instance trial.

In particular:

Is there a process of "discovery", through which the parties have to notify each other about what relevant documents or other items are (or have been) in their possession?

Is there a process of "exchange of documents"?

Answer:
A party shall submit to the court a document adduced as evidence to support their statements. Submissions to be served on the opposing party shall be furnished to the court in a sufficient number of copies for the court and the opposing party. The same shall be done when the submission is accompanied by attachments. If a party adduces a document as evidence to support their statements, asserting that such document is kept with the opposing party, the court shall order the latter to submit such document within a specified period of time. A party may not withhold a document which they have adduced as evidence, or which is to be submitted or produced under the statute, or whose contents relate to both parties to the litigation.

The court holds all documents submitted by the parties as evidence. Both parties may view and copy this evidence at the court.

Who is given the primary responsibility for compiling the evidence for a trial hearing, and how is this normally done (*e.g*. in a "bundle" of documents, electronically, *etc*.)?

Where are the “rules of the game” for these preparatory procedures set out, and who supervises this pre-trial process?

In particular, is a specified judge allocated to a case, or is oversight of a case “shared” between available judges from time to time?

Answer: The parties must submit their evidence. They must state all facts giving rise to their cause of action and produce evidence proving these facts. They can do so in different ways, also electronically. The court compiles the evidence submitted by both parties and puts it it together into a case file. The case file is kept in physical form. Each party may request to see and copy the case file at the court.
The rules of the preparatory procedure are set out in the Civil Procedure Act. A specified judge is allocated to a case, who also supervises the pre-trial process.

Are there penalties/sanctions if a party fails to discharge any duty at this stage?

Answer:

Parties are bound to state all facts upon which their motions are based, produce evidence required to establish the truth of their statements, declarations regarding the statements and evidence produced by the opposing party, by the time of the opening hearing session at the latest. At later hearing sessions, the parties are allowed to present new facts and new evidence only if at the opening session they were prevented from presenting them by reasons beyond their control. The facts stated and evidence produced contrary to that are ignored by the court.

If the defendant fails to file a defence plea within the time period provided by the law, the court renders a judgement satisfying the claim (default judgement) if specific conditions prescribed by law are met.

13. What is the normal procedure for compiling and presenting “hard copy” (*i.e*. paper or similar) documents for trial?

Answer:

Submissions to be served on the opposing party shall be furnished to the court in a sufficient number of copies for the court and the opposing party. The same shall be done when the submission is accompanied by attachments. The hard copy submissions are sent by mail or by the use of communication technology, handed over directly to the competent body or delivered via a person registered for delivery services.

14. Do you have special rules for the presentation of “electronic communications” (*e.g*. records of e-mails, social media communications, or the like)? How are these displayed for the court?

Answer: An electronic copy transformed into a form suitable for reading and printing is deemed as a transcript of an electronic document.

15. How do you deal with video, Closed Circuit Television (CCTV), or other such forms of visual images when these are to be presented before the court?

Answer: The parties may present evidence in different forms, which are included into the case file. Visual images are presented before the court by using appropriate electronic devices for viewing them.

16. How do you deal with issues arising in relation to “personal” communications *etc*. (*e.g*. as issues of “privacy”; issues of “confidentiality” (whether said to arise out of private contractual arrangements or otherwise); or issues of “business confidentiality” – including where information may be “market sensitive” and subject to separate rules established by a Stock Exchange, a financial regulator, or the like?

Answer: The court may order the opposing party to disclose information that are deemed as professional secret if it believes that disclosure of these information outweighs the opposing party's interest to protect them.

The court may exclude the public from all or part of the main hearing, where so required by the interest of official, business or personal secrets, or for moral considerations. Those attending the hearing of the case from which the public is excluded are warned by the presiding judge of their obligation to keep secret information learned at the trial, and of the consequences of disclosing of such secret information. The decree on exclusion of the public is substantiated and publicly announced. No special appeal is allowed against the decree on exclusion of the public.

17. Do you have special arrangements to deal with issues of “national security” in relation to documentary or other evidence?

Answer: Yes. In case of information that are deemed to be classified, the Court must act under the Classified Information Act. If, by giving a testimony, a person might violate his duty to keep official or military secret, he may not be examined as a witness as long as the competent authority releases him from such duty.

18. Do you have special arrangements to deal with issues of “legal privilege” (if your country’s legal system provides for such protection) if this arises in relation to documentary or other evidence?

Answer:

A witness may refuse testimony on what the party has confessed to him as their attorney; on what the party or other person has confessed to him as their confessor; on facts of which he has learnt as a lawyer or a doctor or in pursuance of other activity, if he is bound to protect the secrecy of what he learns in the practice of legal or medical profession or pursuing such other activity.

A witness may not refuse to testify on the grounds of protection of a business secret if the disclosure of certain facts is to the benefit of the public or some other person, provided that such benefit outweighs the damage caused by disclosure of the secret.

A witness may refuse to answer a particular question for justified reasons, especially if, by answering, he might expose himself, his relatives in direct line, irrespective of removals, or in lateral line up to three removals, or his spouse or extra-marital partner or an in-law up to two removals, regardless of whether the marriage has terminated or not, or his guardian or person under guardianship, or adoptor or adoptee, to a serious disgrace, considerable financial loss or criminal proceedings.

19. Where it is normal to have a public hearing in your country, do you nevertheless have the possibility of hearing or receiving evidence in private in certain circumstances? If so, please indicate in what circumstances that might happen.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to hold a hearing in private?

Answer: See previous answers. No, the media cannot challenge such a decision.

20. Is it possible otherwise to limit the extent of publicity given to court proceedings in your country (*e.g*. by not reporting the names of some or all participants/witnesses; by anonymising the public reports of proceedings and/or the judgments given in the case, *etc*.)?

Please give examples where this might happen and what powers the court has in these circumstances.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to restrict the extent to which proceedings or parts of proceedings can be made public?

If so, what form will such a challenge take?

Answer: See previous answers. All the names in published judgements of the court are anonymised.

C. THE TRIAL STAGE AND BEYOND

21. Is it possible (or helpful) to describe the role of the judge in your country's legal system arrangements for Labour Law cases/litigation as being "inquisitorial" or to oversee "adversarial" proceedings?

Answer: It is somewhere in between.

22. Does the judge question witnesses who appear to give oral evidence before the court, or is this task undertaken by lawyers appearing for the parties?

Do witnesses give their evidence on the basis of prepared documents (e.g. a "witness statement")? If so, who (in your experience) generally undertakes the task of preparing such a document?

Answer: The witnesses are first questioned by the judge and after by the parties and their lawyers. Normally the witnesses are questioned orally but it is possible for the parties to provide written witness statements to the court (upon a prior agreement of the court). In the latter case the judge may decide to also directly call the witness, who gave written statements, to the stand for questioning.

23. What rules does the judge apply in relation to the admissibility of evidence?

In brief terms, what kinds of evidence may not be admissible before the court?

Answer: Evidence is proposed in respect of all facts relevant for adjudication of the case in dispute. The court shall decide which evidence will be produced for determination of the ultimate facts. The court shall not permit the parties to perform any dispositive act which is not in conformity with peremptory norms or which is not in conformity with moral principles.

24. In relation to the litigation of labour disputes in your country, is there a single forum where cases are determined, or are there further instances of appeal or review?

Is the fact-finding exercise in Labour Law litigation/cases something which is confined to the first instance court?

If so, is it possible to appeal against findings of fact made at the first instance level?

In what circumstances might an appeal level court make further or alternative findings of fact?

Answer: Labour courts of first instance decide at first instance. The Higher Labour and Social Court decides on appeals against decisions of the labour courts of first instance, while appeals against and reviews of decisions of the Higher Labour and Social Court are heard by the Supreme Court of the Republic of Slovenia.
The court of second instance can make further or alternative finding only upon a hearing session. At the hearing before the court of second instance, the parties may not assert new facts nor adduce new evidence that has not been raised in the proceedings of first instance. The parties may allege new facts and adduce new evidence if they were unable to present them in the incumbent proceedings for reasons beyond their control.

25. In relation to "normal" matters arising in the context of Labour Law litigation/cases, who carries the burden of proof to establish a matter of evidence?

Answer:
A general rule is that the burden of proof lies with the party making a certain claim.

Does this include the burden of proof in relation to, *inter alia* (1) the establishment of the existence of an employment relationship; (2) the validity of a collective agreement; (3) the question of whether there has been a termination of employment; (4) the reason underlying a termination of employment?

Answer: 1. general rule applies, 2. general rule applies, 3. and 4. the employer carries the burden of proof if he is the one who terminated the employment.

Does your country's legislation make use of the notion of "presumptions" – *i.e*. where a situation is presumed to exist unless and until a party proves that the situation does not apply?

Answer: Yes.

Are there any matters in respect of which the "normal" rule on the burden of proof does not apply (*e.g*. in consequence of implementation of Directive 97/80/EC or otherwise)? If so, what are these and how do they operate in your country's system?

Answer: The employer carries the burden of proof if he is the one who terminated the employment. The burden of proof is reversed also when claiming discrimination, mobbing, sexual harassment, protection against termination for reason of pregnancy.

Does your country's legislation make use of the terminology of "reversed burden of proof"?

Answer: Yes.

Does the approach in your country recognise any notion of a "neutral burden of proof"?

Answer: No.

26. Once a judgment has been given by the court, is it possible for that decision to be appealed or otherwise revisited on the basis that "new evidence" has come to light?

If so, are there any time limits placed upon this?

Are conditions placed upon the admissibility of any such "new evidence"?

Who makes the decision as to whether "new evidence" has been presented and whether it should be considered?

Is there a right to appeal against such a determination on the admissibility of "new evidence"?

Answer:
At the hearing before the court of second instance, the parties may not assert new facts nor adduce new evidence that has not been raised in the proceedings of first instance. The parties may allege new facts and adduce new evidence if they were unable to present them in the incumbent proceedings for reasons beyond their control. In the process of extraordinary judicial review the proceedings finally concluded by a judicial decision may be reopened upon a motion by a party if a party has come to know about new facts or has obtained new evidence which, when presented, in the earlier proceedings, might have lead to a more favourable decision, only in the event that, without their own fault, a party had not been able to allege such reasons until the earlier proceeding was concluded by a final judicial decision. The motion to reopen the proceedings shall be filed within a period of thirty days which shall start running from the day the day when the party is rendered the opportunity to asset new facts and/or adduce new evidence. After five years have lapsed since the finality of the decision, the motion to reopen the proceedings may no longer be brought.

SPAIN

A. THE GENERAL CONTEXT OF THE LABOUR COURTS AND TRIBUNALS IN YOUR LEGAL SYSTEM

1. Where are Labour Law cases/disputes heard and determined within your legal system?

Please elaborate on the legal system context for Labour Law litigation/dispute resolution in your country.

Answer: In different degrees.

1ºSocial Court (only one Judge)
2º Social Appeal Court (three Judges)
3ºSocial Supreme Court (five judges)

2. Do you have a specialised system of "Labour Courts" in your country?

Do you treat Labour Law cases/disputes in common with other cases in general (*e.g.* as part of normal civil law litigation); or do you have some mixture of the two approaches?

Please elaborate on some of the key features of the arrangements in your country.

Answer: yes, we have it
As consequence we do not treat Labour Law cases in common with other cases in general but one exception: The named Nº 61 Court , as one of the Supreme Courts that treat cases of any nature at a special level .
There are since the first level different courts for civil, criminal , administrative and social cases

3. Do you have specialised "Labour Judges", or are Labour Law cases/disputes litigated in front of judges with general jurisdiction and experience?

Please elaborate on the qualifications, background, experience, and training of judicial officers in your country who deal with Labour Law cases/disputes.

Answer: By their background , as a general rule , the judges before whom are treated labour Law cases are Judges with general training and experience but for those coming into de judiciary career from any professional field have not passed through the traditional test needed for the Judiciary school because they can only perform their duties in one of the different jurisdictions.
Beside this setting the judges with a general background can also became specialized

in labour Law cases through experience or studies and tests **.**

4. Do you have any specialised institutions which operate alongside or in conjunction with courts to deal with Labour Law cases/disputes?

If so, please outline what these are and what role they undertake in the process of litigation/dispute resolution.

Answer: Yes, we have. There are institutions with different aims as mediation in every single conflict and also in the collective ones .They make part of the autonomic administrations .
Asking for their mediation is a previous requirement before any sue.
When an agreement is got it can only be fought before a judge only for the same causes as contracts can be, either for damages to a third person or for being illegal
It is executed as a judgement.
They also open the way to get payment for benefit unemployment

5. Does a generalised framework for conducting civil litigation (*e.g*. a Civil Procedure Code, or the like) operate in relation to Labour Law cases/disputes in your country, or are there special rules/procedures which have been developed for Labour Law litigation/dispute resolution?

Please elaborate on what the relevant procedural framework might be.

Answer: Yes, there is , since 23/9/1939, there has been a procedure Code for labour Law, modified in 24/4/1958, 17/1/1963, 21/4/1966, 17/8/1973, 30/6/1980, 7/4/1995 and 10/10/ 2011.
For matters in common with civil procedure there are the references to de Civil Procedure Code

6. Do special arrangements operate in your national legal system for situations in which regulatory provisions under consideration are derived from supra-national sources – (*e.g*. within the framework of the European Union; by reference to the regulatory ambit of the Council of Europe; or by reference to the regulatory framework established at the level of the ILO)?

If so, having regard specifically to Labour Law cases, please elaborate on how these differ from the "normal" situation governing the treatment of non-Labour Law cases/litigation in your legal system.

Answer: No, whatever any of those supra national sources rules must be enforced , the Procedure Code is going to be the same but for special provisions made by the ILO or the judgements of the European Courts about rules interpretation about the Procedure Code are the Spanish Constitution and the Treaties

7. Are the hearings of trials (and, where these are available, appeals) in your country's legal system normally heard in public?

Answer: Yes, they are when they take place in the first instance and in the supreme court since there are not hearings , orally , in appeals .

8. Is the press, TV, radio, and other media entitled to attend and report proceedings in trials in your country?

Answer: Yes they are, having obtained permission from the **court**

9. Is it permitted to show film/video (*e.g*. TV footage) of court proceedings in your country?

Answer: Yes, it is

10. Is it permitted to play sound recordings of court proceedings in your country?

Answer: In the same way as before , just a piece .

11. Having regard to this first set of questions, please summarise briefly any situations in which the "normal" arrangements are not applied in relation to Labour Law cases/litigation.

Answer: There is not special rule for L and 20.1.d)) , the Judiciary Power Organization Law, (article 232) that makes a principle of publicity sees restrictions for public order reasons and to prevent damages on fundamental rights . There are also special rules in the Criminal Code law , (articles 680 , 301)

B. EVIDENCE GATHERING FOR THE PURPOSES OF FIRST INSTANCE TRIAL

12. Please describe briefly the process whereby evidence is prepared for a first instance trial.

In particular:

Is there a process of "discovery", through which the parties have to notify each other about what relevant documents or other items are (or have been) in their possession?

Is there a process of "exchange of documents"?

Answer: Even before the beginning of the proceedings , when it is supposed there is going to be used a big amount of documents or these are documents related to accounts either they are complex , the claimant and also the defendant have the right to ask for being shown the documents and also to do it accompanied by an expert .
When there is not such a complexity, the claimant is to enclose whit the first writing of claim the copies of the documents which essentially the foundation of his petition. There is not a similar requirement for the defendant before the hearing . At the hearing documents are exchanged .

Who is given the primary responsibility for compiling the evidence for a trial hearing, and how is this normally done (*e.g*. in a "bundle" of documents, electronically, *etc*.)?

Where are the "rules of the game" for these preparatory procedures set out, and who supervises this pre-trial process?

In particular, is a specified judge allocated to a case, or is oversight of a case "shared" between available judges from time to time?

Answer: The Chief Clerk is in charge of keeping the evidence and can be hold responsible for its lose . Usually it is in a bundle but electronic sources are recommended in the Civil Procedure Code when in the case of being too complex
The rules of the game are in the Labour Law Procedure Code and it is the Judge who supervises the pre trial –process.
The Chief Clerk takes notice of the petition and the Judge decides.
An specific Judge is allocated for a claim from the beginning and every incidence that takes place in it . there is the exception when a judges is in charge of the admission of evidence before the beginning of the lawsuit because the jurisdiction for tit could be another court .

Are there penalties/sanctions if a party fails to discharge any duty at this stage?

Answer: There are not any penalties set at this stage in the labour Law procedure Code . The consequences will come when giving the judgement and being of

decisive importance any of the documents asked for it has not been brought to the proceedings because then the burden of proof will be against this party .
The Civil Procedure Code sets a fine (art. 288) rising from 60€ to 600€

13. What is the normal procedure for compiling and presenting "hard copy" (*i.e*. paper or similar) documents for trial?

Answer: They must be presented original and copies for the Chief Clerk to test them . The original are given back and the copies are kept .

14. Do you have special rules for the presentation of "electronic communications" (*e.g*. records of e-mails, social media communications, or the like)? How are these displayed for the court?

Answer: There are no special rules .The can be accompanied by written transliteration (Art. 382 Civil procedure Code). They must be displayed for the court either with the devices provided by the party or with the devices the Court provides because these ones are also of compulsory use to perform the hearings that must be kept electronically (art. 89 LLPC)

15. How do you deal with video, Closed Circuit Television (CCTV), or other such forms of visual images when these are to be presented before the court?

Answer: the same

16. How do you deal with issues arising in relation to "personal" communications *etc*. (*e.g*. as issues of "privacy"; issues of "confidentiality" (whether said to arise out of private contractual arrangements or otherwise); or issues of "business confidentiality" – including where information may be "market sensitive" and subject to separate rules established by a Stock Exchange, a financial regulator, or the like?

Answer: those could be examples of the limits stablished in the Spanish Constitution and the Judiciary Power Organization Code to the public hearings, and with the courts ´criteria

17. Do you have special arrangements to deal with issues of “national security” in relation to documentary or other evidence?

Answer: The same as before

18. Do you have special arrangements to deal with issues of “legal privilege” (if your country’s legal system provides for such protection) if this arises in relation to documentary or other evidence?

Answer: when one of the parties is one of the public Administrations , State, Autonomic or Local for interrogation as evidence , a written one will be sent before the hearing with the questions proposed by the interested party and the written answer will be sent to the Court before the hearing .

19. Where it is normal to have a public hearing in your country, do you nevertheless have the possibility of hearing or receiving evidence in private in certain circumstances? If so, please indicate in what circumstances that might happen.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to hold a hearing in private?

Answer: The idea of “public hearing “ is first of all referred to the people who are not the parties , once the Court has decided it is going to be public it will be for everybody , although representatives of the media will need accreditation . When the Court decided there will be not public hearing it means there will be not any one at the hearing being it restricted to the parties , thus, the representatives of the media can not challenge this decision

20. Is it possible otherwise to limit the extent of publicity given to court proceedings in your country (*e.g*. by not reporting the names of some or all participants/witnesses; by anonymising the public reports of proceedings and/or the judgments given in the case, *etc*.)?

Please give examples where this might happen and what powers the court has in these circumstances.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to restrict the extent to which proceedings or parts of proceedings can be made public?

If so, what form will such a challenge take?

Answer: It is a common practice anonymising the parties and so appear the judgements in the repertories

C. THE TRIAL STAGE AND BEYOND

21. Is it possible (or helpful) to describe the role of the judge in your country's legal system arrangements for Labour Law cases/litigation as being "inquisitorial" or to oversee "adversarial" proceedings?

Answer: Basically he "oversees" the adversary proceedings , but the Labour Judge has a privilege that the civil Judge does not have , he can decide of his own, without any petition from the parties to get any evidence when he estimates it necessary (art. 88 LLPC)

22. Does the judge question witnesses who appear to give oral evidence before the court, or is this task undertaken by lawyers appearing for the parties?

Do witnesses give their evidence on the basis of prepared documents (e.g. a "witness statement")? If so, who (in your experience) generally undertakes the task of preparing such a document?

Answer: The Judge may question the witnesses although this a task for the parties but he can also ask any question to make things clearer from his point of view.
No they do not give their evidence on the basis of prepared documents

23. What rules does the judge apply in relation to the admissibility of evidence?

In brief terms, what kinds of evidence may not be admissible before the court?

Answer: The Court may refuse kind of evidence that in not relevant .
In witness evidence when the number of witnesses heard is seen as enough by the Judge and then refuses hearing any more of them .
Documents are usually admitted as a whole an then is in the sentence when the court gives the reason why they are seen as not relevant or missing any value

24. In relation to the litigation of labour disputes in your country, is there a single forum where cases are determined, or are there further instances of appeal or review?

Is the fact-finding exercise in Labour Law litigation/cases something which is confined to the first instance court?

If so, is it possible to appeal against findings of fact made at the first instance level?

In what circumstances might an appeal level court make further or alternative findings of fact?

Answer:1) As I have said in number one question - there can be till three different degree or "fora" although not for every cases because a minimum amount of the claim is needed for appealing .
2)No as a general rule, as an exception it can be possible in the case of certain documents, (art. 233. LLPC)
3) When these documents , being a judgement or an administrative decision had not been able the party for bringing them at the process at the right time, not being his fault

25. In relation to "normal" matters arising in the context of Labour Law litigation/cases, who carries the burden of proof to establish a matter of evidence?

Answer: It is a burden for the employee claimant the basis of the relationship. Its existence, date of beginning , salary and duties to be performed and in the case of dismissal the very fact of dismissing .
It is the burden for the employer : the proof of being wrong the date of initial services , the salary, the duties and the proof of being true the causes for dismissal

Does this include the burden of proof in relation to, *inter alia* (1) the establishment of the existence of an employment relationship; (2) the validity of a collective agreement; (3) the question of whether there has been a termination of employment; (4) the reason underlying a termination of employment?

Answer:1) this is for the employee to proof .
2)about collective agreement , as they are published , there is not any need to proof validity , a different question is when one of the parties pleads non legal because then it is this party the one who has to proof although it not as much a question of proof as to find the rule to be enforced .
3)It is the burden for the employee
4)When there is a " reason underlying" then we are talking of an unreal cause and that means usually damage on fundamental right , thus the burden for the employee is

just the proof of the termination and any other fact as a claiming being made before the current one and if there is not any effort on the side of the employer about the proof , then the punishment for the dismissal increases its importance , changing from unfair into nullity

Does your country's legislation make use of the notion of "presumptions" – *i.e*. where a situation is presumed to exist unless and until a party proves that the situation does not apply?

Answer: The Civil Code Procedure make use of the notion "presumption" under two possibilities, the legal one that may admit evidence against it or may not and the judiciary one .

Are there any matters in respect of which the "normal" rule on the burden of proof does not apply (*e.g*. in consequence of implementation of Directive 97/80/EC or otherwise)? If so, what are these and how do they operate in your country's system?

Answer: fundamental rights and employer´s responsibilities in professional sickness and accidents at work

Does your country's legislation make use of the terminology of "reversed burden of proof"?

Answer: it does not make use of the terminology but explains its effects in article 96 LLPC for fundamental rights and employer´s responsibilities in accidents at work and professional sickness

Does the approach in your country recognise any notion of a "neutral burden of proof"?

Answer:

26. Once a judgment has been given by the court, is it possible for that decision to be appealed or otherwise revisited on the basis that "new evidence" has come to light?

If so, are there any time limits placed upon this?

Are conditions placed upon the admissibility of any such "new evidence"?

Who makes the decision as to whether "new evidence" has been presented and whether it should be considered?

Is there a right to appeal against such a determination on the admissibility of "new evidence"?

No as a general rule , Yes, as an exception , it can be appealed.
The limit is the time for appealing
The condition is to bring to the appeal a judgement or an administrative decision pronounced before the trial but that the party could not get before and in any case , when it could justify a Revision (that is an exception to the rules of procedure) and always there is any risk of damage for fundamental rights .
The decision is to be made by the Court.
There is no right to appeal against that decision.
There are another possibility : that one of revision

SWEDEN

A. THE GENERAL CONTEXT OF THE LABOUR COURTS AND TRIBUNALS IN YOUR LEGAL SYSTEM

1. Where are Labour Law cases/disputes heard and determined within your legal system?

Please elaborate on the legal system context for Labour Law litigation/dispute resolution in your country.

Labour disputes are in Sweden defined as "disputes concerning collective bargaining agreements and other disputes relating to the relationship between employers and employees". Labour disputes are heard and determined either by the Labour Court (*Arbetsdomstolen*) as first and last court, or by ordinary district court (*tingsrätt*) as first court with the possibility to appeal to the Labour Court as last court.

The dividing line between which starts in the Labour Court and cases starting in district courts is quit complicated. With a harsh simplification cases brought on by the labour market organisations will go to the Labour Court as first court, while case brought on by individuals will go to the district court.

2. Do you have a specialised system of "Labour Courts" in your country?

Do you treat Labour Law cases/disputes in common with other cases in general (*e.g*. as part of normal civil law litigation); or do you have some mixture of the two approaches?

Please elaborate on some of the key features of the arrangements in your country.

Yes.

Labour disputes are usually not treated in common with other cases. However, other dispute between the same or different parties may be consolidated with a labour dispute, provided the court considers it appropriate to so do having regard to the material presented and other circumstances.

There is only one Labour Court in Sweden, with the whole country as jurisdiction.

One key feature of the dispute resolution in Sweden is the importance of grievance procedures between the labour market organisations. About 70 percent of the work force members of a trade union. The coverage of collective agreements are about 90 percent.

Collective agreements regularly contains rules on grievance procedures, which usually prescribes that disputes of rights shall be subject *tvisteförhandlingar* (grievance

negotiations) at both local and central level before a claim is brought to the Labour Court. A case may not may not be considered by the Labour Court, as fist court, if grievance negotiations have not taken place.

3. Do you have specialised “Labour Judges”, or are Labour Law cases/disputes litigated in front of judges with general jurisdiction and experience?

Please elaborate on the qualifications, background, experience, and training of judicial officers in your country who deal with Labour Law cases/disputes.

The Labour Court usually consist of seven judges, three “neutrals”, two appointed by the government on the proposal of employers organisations, and of the trade unions.
The three neutrals consist of a chairman, a vice chairman and a person with “specialised knowledge of conditions on the labour market.”
The chairman and the vice-chairman shall have legal qualifications and judicial experience, and are in practice experts in labour law.

The judges in the districts courts are not trained specially for labour disputes

4. Do you have any specialised institutions which operate alongside or in conjunction with courts to deal with Labour Law cases/disputes.

If so, please outline what these are and what role they undertake in the process of litigation/dispute resolution.

No, in Sweden there is no institutions like the ACAS in UK. Se however above on the grievance procedures.

5. Does a generalised framework for conducting civil litigation (*e.g*. a Civil Procedure Code, or the like) operate in relation to Labour Law cases/disputes in your country, or are there special rules/procedures which have been developed for Labour Law litigation/dispute resolution?

Please elaborate on what the relevant procedural framework might be.

The is a specific act – the Labour Dispute Act – which regulates inter alia the procedure in the Labour Court. This act contains in certain ways important procedural rules which apply only in labour disputes. One example is that employers organisations and trade union has locus standi on behalf of their members. All matters for which no special provision is made in the Labour Dispute Act is be subject to the relevant provisions of the Code of Judicial Procedure.

6. Do special arrangements operate in your national legal system for situations in which regulatory provisions under consideration are derived from supra-national sources – (*e.g*. within the framework of the European Union; by reference to the regulatory ambit of the Council of Europe; or by reference to the regulatory framework established at the level of the ILO)?

If so, having regard specifically to Labour Law cases, please elaborate on how these differ from the "normal" situation governing the treatment of non-Labour Law cases/litigation in your legal system.

The competence of the Labour Court is (mainly) related to "disputes concerning collective bargaining agreements and other disputes relating to the relationship between employers and employees". It is not limited to disputes concerning certain acts (as we believe is the case concerning for instance the employment tribunals in the UK). If there in a dispute "relating to the relationship between employers and employees", arises a question on applying for instance EU-law, this issue will dealt with by the Labour Court.

7. Are the hearings of trials (and, where these are available, appeals) in your country's legal system normally heard in public?

Yes

8. Is the press, TV, radio, and other media entitled to attend and report proceedings in trials in your country?

Yes

9. Is it permitted to show film/video (*e.g*. TV footage) of court proceedings in your country?

No

10. Is it permitted to play sound recordings of court proceedings in your country?

Yes

11. Having regard to this first set of questions, please summarise briefly any situations in which the "normal" arrangements are not applied in relation to Labour Law cases/litigation.

The composition of the court, with lay members appointed by the government on proposals from the established labour market organisations, and the fact that the Labour Court (in most cases) is both the first and last instance.

B. EVIDENCE GATHERING FOR THE PURPOSES OF FIRST INSTANCE TRIAL

12. Please describe briefly the process whereby evidence is prepared for a first instance trial.

In particular:

Is there a process of "discovery", through which the parties have to notify each other about what relevant documents or other items are (or have been) in their possession?

Is there a process of "exchange of documents"?

Who is given the primary responsibility for compiling the evidence for a trial hearing, and how is this normally done (*e.g*. in a "bundle" of documents, electronically, *etc*.)?

Where are the "rules of the game" for these preparatory procedures set out, and who supervises this pre-trial process?

In particular, is a specified judge allocated to a case, or is oversight of a case "shared" between available judges from time to time?

Are there penalties/sanctions if a party fails to discharge any duty at this stage?

Presentation of evidence is the responsibility of the parties. Written documents invoked as evidence should be produced in the original. A certified copy may be produced if this is found sufficient or if the original is not obtainable.

The Court is responsible preparation of the case. The object of the preparation is, inter alia, to elucidate which evidence shall be brought forward by the parties and what will be proved by each evidence.

A party may ask the court to decide that anybody (the other party or a third party) holding a written document that can be assumed to be of
importance as evidence shall give the document to the court.
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13. What is the normal procedure for compiling and presenting "hard copy" (*i.e*. paper or similar) documents for trial?

There are no rules on this. Sometimes a party's representative has prepared a bundle with previously submitted documents and submits that at the final hearing. The material submitted must be in a format that the court has technical means to handle.

14. Do you have special rules for the presentation of "electronic communications" (*e.g*. records of e-mails, social media communications, or the like)? How are these displayed for the court?

There are no special rules for the presentation of "electronic communications". E-mails, social media communications are usually presented printed om paper. This is considered sufficient, as long as the authenticity is not questioned by the other party.

15. How do you deal with video, CCTV, or other such forms of visual images when these are to be presented before the court?

These are usually shown on screen during the hearing and an electronic copy is kept in the Courts file.

16. How do you deal with issues arising in relation to "personal" communications *etc*. (*e.g*. as issues of "privacy"; issues of "confidentiality" (whether said to arise out of private contractual arrangements or otherwise); or issues of "business confidentiality" – including where information may be "market sensitive" and subject to separate rules established by a Stock Exchange, a financial regulator, or the like?

There are rather specific rules on what issues a witness my not be heard. For instance advocates, physicians, dentists, midwives, trained nurses, psychologists, and psychotherapists may not testify concerning matters entrusted to, or found out by, them in their professional capacity unless the examination is authorized by law or is consented to by the person for whose benefit the duty of secrecy is imposed. Further, a witness may refuse to give testimony that should involve disclosure of a trade secret unless there is extraordinary reason for examining the witness on the matter.

Further there are specific rules on when hearings and presentations of documents shall take place behand "closed doors", that is when the information shall not be available to the others than the court, the parties and their counsellor.

17. Do you have special arrangements to deal with issues of "national security" in relation to documentary or other evidence?

?

18. Do you have special arrangements to deal with issues of "legal privilege" (if your country's legal system provides for such protection) if this arises in relation to documentary or other evidence?

No

19. Where it is normal to have a public hearing in your country, do you nevertheless have the possibility of hearing or receiving evidence in private in certain circumstances? If so, please indicate in what circumstances that might happen.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to hold a hearing in private?

The Public Access to Information and Secrecy Act contains a comprehensive on which documents are accessible for the public, but few provisions on secrecy applies to

courts. When a court hearing shall take place behand closed door is regulated in the general procedural code. Minors (under the age of 15) and psychically challenged persons may, for instance, be heard in private.

There is no appeal to the decisions of the Labour Court.

20. Is it possible otherwise to limit the extent of publicity given to court proceedings in your country (*e.g*. by not reporting the names of some or all participants/witnesses; by anonymising the public reports of proceedings and/or the judgments given in the case, *etc*.)?

Please give examples where this might happen and what powers the court has in these circumstances.

Is it possible for anybody (*e.g*. representatives of the media) to challenge a decision to restrict the extent to which proceedings or parts of proceedings can be made public?

If so, what form will such a challenge take?

No, not regarding the identity of persons. The version of the judgement published on the courts' website and in the official legal information system is anonymised. The court is not obliged to mention the names of witnesses in the judgement, but this information will be documented in the file and is therefore publicly accessible (but not disseminated as widely as the judgement).

C. THE TRIAL STAGE AND BEYOND

21. Is it possible (or helpful) to describe the role of the judge in your country's legal system arrangements for Labour Law cases/litigation as being "inquisitorial" or to oversee "adversarial" proceedings?

The judge role in Labour disputes to oversee "adversarial" proceedings.

22. Does the judge question witnesses who appear to give oral evidence before the court, or is this task undertaken by lawyers appearing for the parties?

Do witnesses give their evidence on the basis of prepared documents (e.g. a "witness statement")? If so, who (in your experience) generally undertakes the task of preparing such a document?

The judge usually only ask questions after the lawyer from both side have asked their questions and with the purpose of clarifying answers already given.

23. What rules does the judge apply in relation to the admissibility of evidence?

In brief terms, what kinds of evidence may not be admissible before the court?

If the court finds that an evidence that a party offers prove is without importance in the case, or that an item of evidence offered is unnecessary or evidently should be of no effect, the court shall reject that proof. The court may also reject an item of evidence offered if the evidence can be presented in another way with considerably less trouble or costs. Illegally obtained evidence is allowed.

24. In relation to the litigation of labour disputes in your country, is there a single forum where cases are determined, or are there further instances of appeal or review?

Is the fact-finding exercise in Labour Law litigation/cases something which is confined to the first instance court?

If so, is it possible to appeal against findings of fact made at the first instance level?

In what circumstances might an appeal level court make further or alternative findings of fact?

The courts of first instance records video and audio of the oral evidence presented. If these recordings are presented to the appeal court, i.e. the National Labour Court, that court may re-evaluate the evidence. New evidence may be presented for the appeal court if there are special circumstances, for example if it was not possibly to present the evidence to the court of first instance or if there was a valid reason not doing so.

25. In relation to “normal” matters arising in the context of Labour Law litigation/cases, who carries the burden of proof to establish a matter of evidence?

Does this include the burden of proof in relation to, *inter alia* (1) the establishment of the existence of an employment relationship; (2) the validity of a collective agreement; (3) the question of whether there has been a termination of employment; (4) the reason underlying a termination of employment?

Does your country’s legislation make use of the notion of “presumptions” – *i.e*. where a situation is presumed to exist unless and until a party proves that the situation does not apply?

Are there any matters in respect of which the “normal” rule on the burden of proof does not apply (*e.g*. in consequence of implementation of Directive 97/80/EC or otherwise)? If so, what are these and how do they operate in your country’s system?

Does your country's legislation make use of the terminology of "reversed burden of proof"?

Does the approach in your country recognise any notion of a "neutral burden of proof"?

This is a difficult question to give a general answer to. Apart from EU based, or influenced, statutes there are no rules on the burden of proof. The Labour Court has in its judgements "invented"/declared some principles to use in various situations. The general rule would be that if someone claims something has occurred, he or she has the burden of proof for that (because it is easier to prove that something did occur at a specific time and in a specific manner than it is to prove that something never ever has occurred). Where the burden of proof lies (or how to evaluate evidence) is often something that is dealt with within the "black box" of adjudication.

26. Once a judgment has been given by the court, is it possible for that decision to be appealed or otherwise revisited on the basis that "new evidence" has come to light?

If so, are there any time limits placed upon this?

Are conditions placed upon the admissibility of any such "new evidence"?

Who makes the decision as to whether "new evidence" has been presented and whether it should be considered?

Is there a right to appeal against such a determination on the admissibility of "new evidence"?

There is an extraordinary way to have a judgement revoked based on new evidence and the case reopened. There is no time limit and you may repeat the application for this remedy. It is the (general) Supreme Court that handles such applications in labour law cases. The Supreme Court has once revoked a judgement by the Labour Court because of new evidence.

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