Military Service and Contracts of Employment

Introduction

One of the outstanding features of social policy in the present war is the guarantee of reinstatement in employment on the termination of military service, which is extended to mobilised workers in one form or another by all the principal countries affected by the war. Details are given below of the regulations on this subject adopted in France, Germany, Great Britain, and Poland.

Some of these regulations date from before the war and refer primarily to peace-time military service, while others were issued at the time of the outbreak of hostilities and relate directly to the present mobilisation.

It will be seen, however, that in all the four countries mentioned mobilised workers are given a legal right to reinstatement in their previous employment on completion of their military duties.

France

In France, the right of reinstatement in employment of workers who are called up for military service is dealt with in Sections 25-28 of Book I of the Labour Code as regards Reservists and Territorials who are required to undergo a period of compulsory military training under the Act of 22 November 1918, which guaranteed to all workers mobilised during the war of 1914-1918 that their posts would be kept open for them ; it is regulated also by the Act of 22 July 1921 guaranteeing their posts to all who are recalled for service with the Colours, and by the Legislative Decree of 21 April 1939 guaranteeing the continuation of their contracts to all men recalled to the Colours.

This last text supplemented the earlier legislation on certain important points, while at the same time repealing other provisions. As it is the basis of the present regulations, it will be analysed below.

Persons Covered

Section 1 of the Legislative Decree guarantees that any member of the staff of an undertaking having a contract of service who is called up individually or by the recall of his class, or by general mobilisation, will have his post kept open for him.

According to a circular of the Ministry of Labour of 29 June 1939, the term " recall of a class " excludes from the regulations young soldiers who are called up for their compulsory military service. The distinction made in the Decree between persons called up for the first time and men recalled to the Colours disappears in the case of general mobilisation. The Decree itself states that it applies to all men called to the Colours because of mobilisation.

The Legislative Decree also extends the scope of the regulations to persons whose services are requisitioned.

The Decree applies to all persons who, under Sections 14 *et seq.* of Part II of the Act of 11 July 1938 relating to the general organisation of the nation in time of war [1], may be required to fill posts in public administrations or services or in establishments or services working for national requirements.

According to the circular of the Ministry of Labour this provision is justified by the fact that the services of very large numbers of persons might be requisitioned in time of war in order to ensure a supply of labour in undertakings working for national defence.

The Decree, it should be noted, does not apply to all persons who are mobilised, but only to " members of the staff who, at the time of being called up, are bound by a contract of service to some public administration or to a private undertaking ".

According to Section 7 (1) the guarantee of the right of reinstatement remains effective " irrespective of the length of service prior to being called up and interrupted by this event ".

The term " public administrations " includes not only Government departments, but also Government industrial and commercial establishments, establishments belonging to the departments and communes, and other public establishments.

The term " private undertaking " includes not only industrial and commercial establishments but also agricultural holdings, insurance companies, notaries' offices, etc.

The Decree, although it does not enumerate all the classes of persons to whom it applies, may be said in short to cover all persons who at the moment of being called up are bound in any way and to any extent by a contract of service to any public or private employer.

On the other hand, the regulations do not cover civil servants and other public servants who hold office under a contract governed by administrative regulations and not under a private contract. The position of these persons in time of war is governed by a Decree of 1 September 1939 [2].

Guarantee of Reinstatement

The purpose of the regulations is to guarantee that every member of the staff of an undertaking can return to the post held before being called to the Colours, provided this is possible.

In the case of contracts for an unspecified period this guarantee operates only for the benefit of the employee, who is free to take advantage of it or not as he wishes. No claim can be made against him for damages for breach of contract if he does not resume his work.

The guarantee is, on the other hand, reciprocal in the case of contracts for a specified period. Section 3 of the Decree provides that " the operation of contracts of employment for a specified period,

[1] *Journal Officiel*, 13 July 1938.

[2] *Journal Officiel*, 6 Sept. 1939.

whether drawn up in writing or concluded in accordance with local custom, shall, unless this is impossible for reasons prescribed in the Legislative Decree, be continued for the period which was unexpired when the individual in question was called to the Colours ".

The second paragraph of this section makes certain concessions in favour of the worker. It states that " the contract may be terminated by the individual concerned if its conditions have become less favourable than the normal conditions current in the employment in question or if, on being released from service, he is obliged to seek employment in another undertaking because the employer is unable to continue to fulfil the contracts ".

Notice of such termination of contract must be given by registered letter within 15 days of being released from service.

The Decree guarantees that the worker will return to the actual post he held at the time of his departure ; the offer of a lower post of the same kind or of cash compensation in place of employment does not release the employer from his legal obligation.

The right of a worker to return to his post is not affected by any change in the legal situation of the employer, such as the inheritance, sale, cession, amalgamation, or transformation, of the business, or its change into a joint stock company ; for, according to the Act of 19 July 1928 which was incorporated in Section 23 of Book I of the Labour Code, all contracts of employment, whether for a specified or for an unspecified period, which are in existence at the date of the change continue in force between the new owner and the staff of the undertaking.

A worker who has been called up must be taken back, according to Section 2 (2), " at the normal current rate of remuneration for his post in the establishment, reference being made if necessary to the collective agreements in force at the time of his return ".

In establishments in which the internal rules or a collective agreement makes provision for promotion or for a salary or wage increment or the payment of bonuses this fact must be taken intc account for the benefit of those who might have been affected during their absence.

With regard to the procedure for reinstatement, Section 7 of the Decree stipulates that " application for reinstatement must be made to the employer by registered letter within 15 days of the demobilisation of the worker in question or of the conclusion of his period of hospital treatment or convalescence or of the resumption of normal work in the establishment ".

When workers who return home must of necessity be taken on again gradually, their reinstatement must be arranged according to their special qualifications and, within each group of specialists, by seniority in the establishment, preference being given among the older workers to those with family responsibilities.

The guarantee of reinstatement in his former post to a worker called up for service necessarily implies the cancellation of any contract concluded with a worker engaged to take his place. Section 5 provides that " any contract of employment, irrespective of its nature or

duration, entered into with a substitute for a person covered by the present Decree shall expire automatically when the latter returns to his post ".

Section 3 (4) applies the same rule to contracts for a specified period. It states that " the existence of a contract of employment with a substitute engaged to take the place of a worker called up in accordance with the provisions of Section 1 of this Decree shall in no circumstances be used to the detriment of the latter and shall not be advanced by the employer as a reason making the resumption of the original contract impossible ".

Where Reinstatement is Impossible

One final problem which this legislation attempts to solve is that of the material conditions under which it is possible for mobilised workers to be reinstated.

Section 1 of the Decree makes the guarantee of reinstatement dependent on its being possible. Section 2 defines what is meant by " impossibility " and gives a restrictive enumeration of the reasons which may validly be advanced by the employer in refusing reinstatement.

These reasons are of two kinds : the first concerns impossibility for the undertaking to continue the contract and the second concerns inability of the worker to resume his work.

As regards the first group, Section 2 of the Decree states that " in deciding whether the reinstatement of the worker is possible account shall be taken only of far-reaching changes that have occurred since his departure in the working of the administration or undertaking as a result of the destruction of premises, extensive changes in working processes, or the loss of custom ".

The second group of reasons refers to the inability of the worker, as a result of illness, injuries, or infirmities, to return to the employment in which he engaged before being called up or mobilised.

It should be mentioned in this connection that the Act of 30 January 1923 concerning posts reserved in the Civil Service and other public administrations for disabled men and the Act of 26 April 1924 concerning the compulsory employment of war pensioners in private undertakings have done much to mitigate the stringency of this provision.

The burden of proof that the reinstatement of the worker is impossible rests on the employer.

Penalties and Supervision

The Legislative Decree makes provision for two types of penalties : civil and criminal.

According to Section 6, an employer who refuses to reinstate a mobilised worker and who cannot prove that the resumption of the contract is impossible is liable for damages under Section 23 of Book I of the Labour Code (concerning wrongful termination of contract).

With regard to penalties under criminal law, Section 8 provides that an employer who does not fulfil his obligations under the Decree

will be liable to a fine of from 16 to 100 francs and that the court may not take into account any extenuating circumstances.

The mere fact of the existence of penalties under criminal law means that all the provisions of the Legislative Decree are considered a matter of public policy. It follows that any agreement between the parties to depart from those provisions is automatically deemed null and void.

The fact that these provisions are a matter of public policy is confirmed by Section 9 of the Decree, which states that, in industrial and commercial undertakings, the labour inspectors will co-operate with the police officials in securing the enforcement of the Decree in accordance with the provisions of Chapter II of Part III of Book II of the Labour Code (concerning labour inspection).

Germany

During the war of 1914-1918, workers called to the Colours in Germany left their employment without having any right to be taken back by their former employers when demobilised. Consequently when the general demobilisation took place, temporary measures had to be adopted for the purpose of giving the demobilised men the right to claim reinstatement and finding places for them by requiring employers to discharge part of their staffs. These provisions, complicated enough in themselves, had frequently to be amended, since their administration met with numerous practical and legal difficulties.

Now an effort is being made to prevent the recurrence of such a situation by adopting in advance certain measures on behalf of workers called to the Colours. Among these provisions, a distinction should be made between those governing the rights and obligations of men called up for active service—that is to say, measures adopted for peace-time but applicable also in wartime to men on active service; those concerning men called up for military training, which apply only in peace-time; and the exceptional measures taken in consequence of the war and applicable to persons now called to the Colours. Lastly, there are special rules for workers called up for air-raid precaution services.

Workers Called up for Active Service

The National Defence Act of 21 May 1935 laid down the principle that a soldier who returns to his civilian activity at the end of his active service must not suffer injury on account of his absence on military service. The application of this principle is governed by the Order of 21 December 1937 concerning the protection of servicemen and persons liable to compulsory labour service.

As the title of the Order indicates, this measure relates not only to military service proper, but also to compulsory labour service — that is to say, the pre-military service to which every German of 18 to 25 years of age is liable under the Act of 26 June 1935.

In both cases the Order deals with the question of contracts of employment, and provides certain guarantees for the workers as regards their future.

Termination of Contract.

Any contract of employment or apprenticeship is automatically terminated when the worker is called up or volunteers for compulsory labour service or active military service.

The worker has no claim to be taken back by his former employer.

Safeguarding of Rights in Course of Acquisition.

Although the contract of employment is terminated, the period of military service or compulsory labour service must be taken into account, subject to certain conditions, if the worker's rights under his contract depend on his length of service either in the trade or in a particular undertaking.

In the former case, the whole period of active military service, including any voluntary extension thereof, is reckoned as employment in the trade. If, for instance, wage rates are graduated according to the period of employment in the trade, the worker will be paid at rates which take his period of military service into account.

In the latter case, too, the period of military service and of labour service must be taken into account in full, irrespective of whether the worker returns to his former undertaking or finds employment in another. Thus, the period of military service is treated as a period of service spent in the undertaking for the purpose of calculating the annual paid holiday when this is proportionate to length of service. The Order makes the reservation, however, that after leaving the service the worker must have been employed for not less than three months in the undertaking before he can benefit by this privilege.

As regards the worker's legal protection in the event of dismissal after having spent not less than one year in the same undertaking, the period of military service is taken into account under similar conditions. In other words, after a period of three months, the worker may lodge a claim with the labour court for reinstatement or the payment of compensation if he considers that his dismissal by the employer is unjustified.

For obvious reasons, apprentices do not benefit by these guarantees until the end of their apprenticeship, and persons entering a trade for the first time must complete a waiting period of six months. In the case of apprentices, however, active military service or compulsory labour service counts as a period of technical training if the apprentice continues his apprenticeship in the same undertaking — or at least in the same trade.

Workers called up for Military Training

The calling up of workers for military training or a short period of military service is governed by an Order of 15 March 1939. In the cases for which this Order provides, the worker is deemed to be on leave. Consequently his contract is not terminated, and so cannot even be cancelled by the employer. On the other hand, the employer is not required to pay wages during the worker's leave of absence.

This special leave may not be deducted from the normal holiday with pay, unless the employer voluntarily continues to pay the worker's

wages. In that case the annual holiday is reduced by not more than one-third, or by two-thirds in the case of more than one period of training in the year. In any case, however, the worker must be certain of six full days' holiday.

Workers and salaried employees in public undertakings or administrative services are treated on the same footing as public officials, and receive their wages or salaries during a period of not more than 28 weeks.

The same provisions apply to the ambulance training organised by the army, but workers in public undertakings receive their wages during a period of not more than six weeks.

Workers called to the Colours

For persons called to the Colours in consequence of the war, special measures have been adopted in pursuance of an Order of 1 September 1939 amending the existing labour legislation. Unlike the provisions concerning active service, this Order lays down the principle that the contract of employment shall be maintained. It states that existing contracts of employment or apprenticeship shall not be terminated because the person concerned is required to carry out service for the purposes of national defence.

The employer may not terminate the contract unless the Labour Trustee (the authority responsible for fixing conditions of employment) authorises him to do so by way of exception—for instance, should the undertaking stop working. The worker, on the other hand, retains the right to terminate the contract.

A contract concluded for a specified period, however, is automatically terminated on the expiry of the agreed period.

The rights and obligations of both parties are suspended as long as the worker is on service. Thus, the employer cannot claim the performance of work, and the worker cannot claim the payment of wages.

A single exception is made as regards the service dwelling, if any, occupied by the worker. The regulations concerning the provision of such accommodation remain in force if the dwelling continues to be necessary to the worker or his family.

Workers called up for Air-Raid Precaution Services

Air-raid precautions are the subject of an Act of 26 June 1935. The rights and obligations of workers engaged in these services are governed by a first Administrative Regulation of 4 May 1937, which was amended in consequence of the war and reissued on 1 September 1939.

Service is compulsory for every citizen, and, subject to certain conditions, for every person resident in Germany.

If the service cannot be performed outside normal working hours, workers and salaried employees must be given leave for the purpose, and the employer may not discharge them on account of this leave.

The worker retains his right to wages if the leave does not exceed two working days, but the employer may require him to make up lost time, up to one working day.

If the leave is longer, the employer is not required to make any payment to the worker, even for the first two days.

The special leave may not be deducted from the annual leave, but if the employer continues to pay wages to a worker on special leave for more than two days the annual leave may be reduced by not more than ten days, or one-third.

It should be observed, however, that under the War Economy Order of 4 September 1939 the regulations and agreements concerning annual holidays have provisionally been suspended.

Great Britain

In Great Britain this matter is dealt with by the Reserve and Auxiliary Forces Act 1939 (dealing with the calling out for service of the reserve and auxiliary forces), the Military Training Act 1939 (rendering persons between 20 and 21 years liable to 6 months' compulsory military training), the National Service (Armed Forces) Act 1939[1] (instituting compulsory military service for persons between 18 and 40 years of age inclusive), and the Regulations issued in pursuance of these Acts.

Prevention of Dismissal

The Regulations lay down that the employer shall not terminate the employment of any person employed by him (*a*) by reason of any duties or liabilities which that person is or may become liable to perform or discharge by virtue of the provisions of the Acts, or (*b*) in order to evade the obligations imposed by the Acts in respect of the reinstatement in employment of persons called up for military service, under penalty of a fine not exceeding £50. The onus of proving that a dismissal was not motivated by an employee's liabilities under the Act is placed upon the employer.

Where an employer is found guilty of an offence under the Regulations the court may order him to pay to the person whose employment has been terminated a sum not exceeding an amount equal to twelve weeks' remuneration at the rate at which his remuneration was last payable to him by the employer.

Guarantee of Reinstatement

The Acts lay down that it shall be the duty of any employer by whom a person called up for military training or service was employed at the time when he was so called up to reinstate him in his employment at the termination of training or service in an occupation and under conditions not less favourable to him than those which would have been applicable to him had he not been called up, under penalty of a fine not exceeding £50. Further, the court may order the employer to pay to the person concerned a sum not exceeding an amount equal to twelve weeks' remuneration at the rate at which his remuneration was last payable to him.

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[1] The National Service (Armed Forces) Act suspends and replaces for the duration of the war the Military Training Act.

It is a valid defence for the employer to prove that the person formerly employed by him did not before the expiration of one month after the termination of his training or service apply to the employer for reinstatement, or that having been offered reinstatement he failed without reasonable excuse to present himself for employment at the time and place notified to him by the employer, or that by reason of a change of circumstances, other than the engagement of a different person to replace him, (*a*) it was not reasonably practicable to reinstate him or (*b*) his reinstatement in an occupation and under conditions not less favourable to him than those which would have been applicable to him had he not been called up was impracticable and that the employer has offered to reinstate him in the most favourable occupation and under the most favourable conditions reasonably practicable.

Adjustment of Contracts

The Acts lay down that for the purpose of securing the fair adjustment of contracts of service or apprenticeship in force between employers and employees when the employees are called up for training or service the Minister of Labour may make Regulations relieving the parties to such contracts of all or any of their obligations thereunder in respect of the period of training or service, and may also make Regulations modifying such contracts by extending the period of service or apprenticeship thereunder by a period not exceeding the period of training or service and adapting the terms of the contracts in relation to any such extension.

In pursuance of these provisions Regulations have been issued laying down that (*i*) the parties to the contract shall in respect of the period of military service or training be relieved of all their obligations under the contract which relate to payment of remuneration, the performance of work, or the provision of work, maintenance (including medical or surgical treatment), or instruction ; (*ii*) the said obligations shall be of full effect as from the date when the employee resumes his work, and where the contract is for a specific period the period of service or apprenticeship thereunder shall be extended by a period equal to the period of military service or training or by a period equal to the period of the contract unexpired at the date of calling up, if that period be less than the period of service or training ; and (*iii*) the period of service or apprenticeship remaining to be served under the contract apart from any period of extension shall be treated as beginning immediately on the resumption of work, and any period of extension shall be treated as the concluding period of the contract, and the terms of the contract shall apply to that period of extension accordingly.

POLAND

Two questions connected with the military service of workers have been dealt with by Polish legislation, namely the maintenance of contracts of employment and the payment of wages.

Maintenance of Contracts

The Compulsory Military Service Act of 9 April 1938 lays down the principle that contracts of employment may not be terminated or denounced by the employer in the three following cases : (1) when the worker is called up for active service, provided, however, that he has been employed for not less than six consecutive months in the undertaking ; (2) when the worker is called up for military training ; (3) when the worker belongs to a Reserve or Territorial unit, and is called to the Colours in case of national necessity.

In none of these cases may the employer terminate the contract of employment, whether on account of the calling up of the worker or for any other reason, between the date the worker is called up and the completion of his military service. Any agreement contrary to this provision is automatically null and void. In certain circumstances, however, the principle does not apply, either because of the nature of the contract or because of the situation of the employer or the attitude of the worker.

Nature of the Contract.

If the contract was concluded for a specified period or undertaking, the provisions of the Act do not apply if, owing to the expiry of the agreed period or the completion of the agreed work, the contract terminates during the period between the date the worker is called up and the end of his military service.

Situation of the Employer.

An employer cannot be required to reinstate a worker if he is not in a position to give him employment. The Act provides for two cases in which the principle of maintenance of the contract of employment does not apply. The first case is when the undertaking, or part of the undertaking, to which the worker is due to return on release from military service has ceased to exist, and the second is when the technical methods of production have changed in such a way that the kind of work on which the worker was employed is no longer carried on.

Attitude of the Worker.

The worker himself may lose his rights under the Act by his action or inaction. Provision is made for two different cases : that of certain offences committed by the worker and that of his failure to observe certain formal rules.

The reason for this provision is that the worker should no longer be protected if the contract is terminated owing to misconduct on his part. Moreover, the worker's conduct while on military service may also free the employer from all his obligations. The general principle does not apply if the worker, while on service, incurs a judicial penalty for an offence committed with a view to material gain, or imprisonment for a period of three months or more.

Lastly, in order to be reinstated, the worker must report for employment within two weeks of his release from service on pain of losing his rights, unless he can show serious reasons for not doing so.

Payment of Wages

The question whether, and if so to what extent, employers are required to pay wages to workers called to the Colours has not been dealt with in military legislation, but is governed by the laws concerning contracts of employment. Consequently the provisions vary according to whether the contract is governed by the Decree concerning the contracts of employment of workers or the Decree concerning the contracts of employment of salaried employees (" intellectual workers ") or the Code of Obligations.

Workers.

The Decree of 16 March 1928 concerning the contracts of employment of workers contains no special provisions concerning the employer's obligation to pay wages during the worker's military service. Consequently the matter is dealt with in accordance with the principles of civil law. The mutual obligations of the two parties to the contract being suspended, the worker has no right to wages.

Salaried Employees (" Intellectual Workers ").

The Decree of 16 March 1928 concerning the contracts of employment of intellectual workers guarantees the payment of salaries in the following circumstances :

(*a*) For a period of three months, when the employee is unable to perform his duties owing to his being called up for military training in the reserve ; (The employer may, however, deduct from the salary the sums received by the employee from the State Treasury.

These provisions do not apply if in the course of the three months the contract of employment is terminated in consequence of the expiration of the agreed period or of the period for the carrying out of the stipulated work, or in consequence of notice to leave given before the worker was called to the Colours.)

(*b*) When the worker is temporarily unable to perform his duties for a sufficient reason, for example owing to a short period of military training.

These provisions suggest that the payment of salary is guaranteed only during a comparatively short period. In the case of active service (a long period) or of mobilisation (an indeterminate period) the payment of salary depends on civil law ; in other words a salaried employee cannot claim payment.

Workers covered by the Code of Obligations.

The Code of Obligations, dated 27 October 1933, applies to persons who are not covered by the two above-mentioned Decrees, such as seamen, dockers, agricultural workers, domestic servants, etc.

According to the Code an employee whose employment is his sole or principal means of livelihood retains his right to remuneration even if he is prevented from performing his work for reasons which are not attributable to his fault in consequence of being called up for military training or other similar serious grounds.

Except where more favourable provision is made for the employee, he is not entitled to this right for a period of more than a fortnight, and then only if he was employed for not less than six months before the occurrence of the hindrance in question.

The employee is entitled to this remuneration even if the employment ends before the expiry of the above-mentioned period of a fortnight by the employer's giving notice during the period of hindrance or by the employer's rescinding the contract prematurely through no fault of the employee. It should be noted, however, that the provisions of military legislation discussed above which prohibit the dismissal of the worker appear to have rendered the above provision superfluous.

If the employment lasts for less than six months, the employee retains his right to remuneration if for a sufficient reason he is unable to perform his work during a short period.

The employee may not renounce his rights in advance. The employer is entitled to deduct from the remuneration due to the employee any amount received by the latter during the period in question from public moneys, with the exception of sums received during a period of military training.

It follows from these provisions that a worker who has been employed for not less than six months may claim two weeks' remuneration if he is called up for military training or is prevented from carrying out his work for some other similar serious reason. Calling to the Colours in the event of war may certainly be regarded as a serious reason giving the right to payment of wages. On the other hand, if the worker has had less than six months' employment with the employer, his remuneration is due only if he is unable to perform his work during a short period for a sufficient reason. It does not seem that this provision can be applied to mobilised workers.

Wartime Measures Affecting Hours of Work and Rest Periods

Introduction

This survey of the regulation of hours of work and allied questions relates to measures adopted in anticipation or in consequence of the war in belligerent countries and in neutral countries which have mobilised. Particulars are given with regard to the action taken in Belgium, France, Germany, Great Britain, and Hungary.

It should be noted that this survey makes no claim to present a complete picture of the wartime system of hours of work in these countries. The measures themselves are not complete. In the first place, some of them apply only to certain categories of employment. In the second place, many of the measures do not themselves constitute