Judicial Decisions in the Field of Labour Law

In the March 1963 issue of this Review *appeared, for the first time, a selection of factual summaries of judicial decisions in labour matters. It was then indicated that it was intended to publish similar summaries of what appeared to be significant decisions, grouped under main subject headings, at periodic intervals.*

The decisions summarised below were amongst those which came to the attention of the International Labour Office during the period from October 1962 to September 1963.

Application of General Legal Principles to Labour Law

Liability of Employers and Workers

A. *Employer's Liability for Injury Caused by Employee on Way to and from Work: France, Court of Cassation (Plenary Sitting), 27 June 1962* [1]

IN the last selection of summaries [2] a decision by the Court of Appeal of Paris, on 19 January 1961, was reported, according to which it was possible for a worker injured on the way to or from work owing to the negligence of a fellow worker to recover damages in a tort action from the latter even though he had been compensated by the competent social security institution—accidents on the way to or from work being assimilated to employment injuries—and even though the Code of Social Security provides that a person covered by workmen's compensation legislation cannot bring a tort action in respect of an accident caused by a servant or agent of his employer. The Court arrived at this conclusion by reference to the argument that the provision of the Code was designed to protect the employer, who contributed to the workmen's compensation scheme, where he was vicariously responsible for the acts of his employee, and that he was not so responsible for the acts of an employee returning home after work.

[1] *Dalloz hebdomadaire* (Paris), 5 Dec. 1962.

[2] *International Labour Review*, Vol. LXXXVII, No. 3, Mar. 1963, pp. 208-209.

The Court of Cassation, in plenary sitting, heard an appeal from a similar decision of the Court of Appeal of Orléans. It decided that accidents on the way to and from work are fully assimilated to employment injuries, and that the relevant provision of the Code of Social Security is applicable to such accidents also.

B. *Employer's Liability for Injury Caused by Employee in Brawl : Senegal, Supreme Court, 16 June 1962* [1]

During a quarrel between two employees of an undertaking, in working hours, at the place of work, and on a subject concerning the work, one was injured. He received employment injury compensation. However, in order to obtain full reparation he sued the person who caused the injury : this he did in reliance on article 35 of the Decree of 24 February 1957, concerning employment injuries, which admits such actions—normally excluded in case of employment injuries—where the injury is caused by the wilful misconduct of the employer or one of his agents. He also sued the employer, as being vicariously liable for injuries caused by his agent. The question at issue was whether article 35 allowed him to sue only the person guilty of the misconduct or also the employer.

The Court held that the employer could be sued. In cases to which article 35 applied all rights under civil law remained available. The employer was liable even though the employee guilty of the misconduct was not, at the time, acting for him, since the risk was not unrelated to the employment and hence was not one which the victim could be said to have accepted.

C. *Liability of Worker for Injury or Damage Caused in Employment*

German Democratic Republic, Supreme Court (Plenary Sitting), 19 September 1962.[2]

Article 112 of the Labour Code provides that a worker is liable to make compensation for damage caused by a culpable breach of his obligations. There having been some divergencies in the interpretation and application of this provision by courts of lower instance, the Supreme Court in plenary sitting laid down the following guiding principles :

1. The obligations of a worker are derived from laws or regulations, collective agreements, works rules, employment contracts and particular work instructions given by the manager of the undertaking. Only the violation of such an obligation can give rise to

[1] *Penant—Revue de droit des pays d'Afrique* (Paris), June-Sep. 1963, pp. 377-384.

[2] *Arbeit und Sozialfürsorge* (Berlin), 1962, No. 20.

liability under the Labour Code, although other unlawful acts—for instance unauthorised use of vehicles belonging to the undertaking—may be governed by the Civil Code.

2. The causal relationship between the breach of the obligations of the worker and the damage[1] caused must be established.

3. The Courts must determine whether the breach of the worker's obligation which produced the damage was culpable. They must distinguish between wilful breaches and negligence, and must further determine the exact degree of fault, since this, under the relevant provisions of the Labour Code, affects the amount of damages payable. Grounds for mitigation of damages are the fact that the worker has always been conscientious and the fault appears to be an isolated one, or that the worker's behaviour since the act complained of has shown that he has learnt his lesson.

Austria, Supreme Court, 23 October 1962.[2]

An apprentice in a hairdressing establishment allowed a hair-dryer to fall over when moving it. He had been warned to be careful in handling such machinery. The employer claimed from the apprentice the cost of repair.

The Court held that an employer was not entitled to expect of a 15-year-old apprentice, who had been working for only some three months, the degree of care, attention and experience which could be expected of a trained assistant. If he nevertheless allowed the apprentice to handle delicate machinery, he accepted the risk of damage which might result from the inadequacy of the apprentice's capacities. In relation to what could be expected of an apprentice, there had not been serious or even slight fault in this case ; there was an excusable malfeasance for which there was no liability in law.

PRESCRIPTION IN LABOUR MATTERS

A. *Accruing of Cause of Action in Employment Injury Claims : England, House of Lords, 17 January 1963*[3]

Seven steel-dressers, and the widows of two others, sued their former employer for damages for negligence or breaches of statutory duty which they alleged had been the cause of contraction of

[1] In a decision of 10 May 1963 the Court further elaborated that "damage" was a diminution of the assets of the employing undertaking. *Arbeit und Arbeitsrecht* (Berlin), 1963, No. 15.

[2] *Sozialrechtliche Mitteilungen der Kammer für Arbeiter und Angestellte für Wien* (Vienna), Vol. 14, No. 6, 16 Mar. 1963, pp. 487-488.

[3] Cartledge and Others *v.* E. Jopling & Sons, Ltd., in *The Times* (London), 18 Jan. 1963.

pneumoconiosis. The court of first instance found that there had been a breach of the statutory duty of the employer and that this was the cause of the disease, but held that the claim must be denied under the Limitation Act, 1939, because that breach had occurred more than six years before the action was started. The question before the House of Lords was whether time, for purposes of the Act, could be considered to run from the moment of the discovery of the injury. Evidence was brought to show that a person who was susceptible to pneumoconiosis might have been the victim of substantial injury to his lungs long before such injury could be detected by any means known to medical science.

It was held that, while it was unreasonable in principle that a cause of action should be held to accrue before it was possible to discover the injury, the necessary implication of section 26 of the Limitation Act was that, short of fraud or mistake, time begins to run from the date of the commission of the wrongful act. If the matter were governed by common law, their Lordships would have been inclined to hold otherwise. In the circumstances, the mischief in the case could be prevented only by an urgently needed amendment of the statute.

B. *Date of Commission of Continuing Offence: India, Madhya Pradesh High Court, 28 February 1962* [1]

The Indian Factories Act, 1948, provides, in section 106, that " no court shall take cognisance of any offence punishable under this Act unless complaint thereof is made within three months of the date on which the alleged commission of the offence came to the knowledge of an inspector ". The question before the Court was whether a prosecution for insufficient fencing of fermentation vats in a distillery was barred by that section in a case in which the inspection which gave rise to the prosecution was not the first during which the inadequacy of the fencing was noted by a factory inspector.

The Court held that the prosecution was not barred. Failure to fence fermenting vats securely was a continuing offence, i.e. each day that the contravention was continued while the factory was working a fresh offence was committed, for which the owner and occupier were liable. Section 106 of the Factories Act did not mean that complaint must be made within three months of the first contravention or of the date when the contravention first comes to the knowledge of the inspector. So long as the complaint

[1] State *v.* Umashankat Loxminarayan Jaiswal, in *Factories Journal Reports*, Vol. XXIII, pp. 161-171.

was filed within three months of a date on which the offence was alleged to have been committed and to have come to the knowledge of an inspector it would be within time.

Retroactivity of Legislation

Qualifying Conditions for Social Benefits : Argentina, Supreme Court, 28 March 1962 [1]

A law (No. 15785) increased the rate of severance allowance and provided for the taking into account, in calculating its amount, of service prior to the coming into force of the law. The constitutionality of that law was contested on the ground that it had retroactive effect and violated acquired rights.

The Court held that the law did not deprive employers of any right which had become part of their estate. A law was not retroactive by reason alone of drawing certain conditions on which subsequent action was dependent from a period prior to its coming into force. Acquired rights must be respected, but not to the extent of circumscribing the legal consequences of future acts. The essential test was one of reasonability ; it could not be said that the law in question was unreasonable or spoliatory.

Contracts of Employment

Nature of Contracts of Employment

A. *Employment of Wife by Husband : Federal Republic of Germany, Federal Social Court, 25 April 1962* [2]

The coverage under sickness, pension and unemployment insurance of a woman employed as office worker in her husband's office was refused by reference to section 175 of the Federal Insurance Code according to which the employment of one spouse by the other does not constitute insurable employment. She now contested the constitutional validity of that provision on the ground that it violated the equal rights provision of article 3 of the Basic Law.

The Federal Social Court supported that view. The legal notion underlying section 175 was that an insurable, dependent employment relationship cannot exist between husband and wife ; that view was out of date. That being so, the section created an exception to compulsory insurance which was detrimental to one particular category of employee. There was no objective reason for

[1] *Derecho del Trabajo* (Buenos Aires), June 1962.

[2] *Die Sozialgerichtsbarkeit* (Wiesbaden), Vol. 10, No. 4, Apr. 1963.

treating persons employed by their spouse differently from other employees : the risk of abuse by means of fictitious employment contracts could, as in the case of other personal relationships, be limited by careful supervision ; and as regards the argument that the spouse in any case had an obligation to maintain the other spouse, it was to be noted that compulsory insurance schemes did not take account of entitlement to maintenance from other sources.

The matter was referred to the Federal Constitutional Court for formal decision.

B. *Fixed-term Contract Contrasted with Indeterminate Contract : Italy, Court of Cassation, 26 November 1962* [1]

A person was employed as croupier in a casino during the years 1949-52 for specific periods each year, i.e. for four months in winter and two months in summer. The question at issue before the Court was whether he had had a contract of indeterminate duration covering the entire period, or a series of fixed-term contracts.

The Court pointed out that the essential difference between a contract of indeterminate duration and a fixed-term contract lies in the permanence of the contractual relationship. If a person is engaged for the particular requirements of a seasonal job, he holds a fixed-term contract. The same is true of a person employed on such work for several seasons if no contractual relationship subsists between the parties between seasons. On the other hand, where a person is employed on seasonal work for several seasons and a contractual relationship subsists between the parties between seasons, so that there is one single employment relationship comporting the recurring rendering of services at regular, certain and clearly defined intervals, the contract is one of indeterminate duration. This latter was the case on the facts before the Court.

Changes in Terms of Employment

Transfer of Worker or Imposition of Duties Inconsistent with Contract : Spain, Supreme Court, 9 July 1962 [2]

An employee of a commercial undertaking was dismissed, but reinstated as a result of the finding of a labour court that the dismissal was unjustified. A short time later he was transferred to another town. He asked the Court to rescind the contract of employment, and to award him damages for its breach by the employer.

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[1] *Rivista Giuridica del Lavoro e della Previdenza Sociale* (Rome), Jan.-Apr. 1963, part II, p. 17.

[2] *Revista de Derecho Privado* (Madrid), Nov. 1962.

The Court found in his favour. It held that, while it was the function of management to regulate the work of the employees of the undertaking, transfer to a different town after a decision of a labour court that the employee should be reinstated in the functions formerly exercised by him constituted a modification of his terms of employment which entitled him to ask for the rescission of his contract, with damages.

TERMINATION OF EMPLOYMENT RELATIONSHIP

A. *Termination at Will : Italy, Court of Cassation, 25 May 1962* [1]

The employment contract of a worker was terminated before he had taken up his duties. He was paid salary in lieu of notice. However, he claimed, in addition, damages for breach of contract.

The Court held that he was not entitled to such damages. Contracts of indeterminate duration could, within prescribed limits, be terminated at will by either party, as long as the proper notice was given, and any severance allowance which might be due was paid. That power of unilateral termination was due, *inter alia,* to the fact that the contract of employment implied a relationship of trust which required the constant support of both parties. Since there was such a power, no damages were payable in respect of its exercise. The contract of employment was in existence from the time of its conclusion ; the power of termination could accordingly be exercised from that time, irrespective of whether the duties provided for therein had been taken up or not.

B. *Suspension of Activities of Undertaking : Mexico, Supreme Court, 27 July 1960* [2]

In two cases the Court was faced with the question whether the suspension of the activities of an undertaking entitled the workers to compensation for unjustified dismissal.

It held, firstly, that where an undertaking was closed because it was, for economic reasons, unable to operate as heretofore, and where the legal requirements for such an eventuality were not fulfilled—where in particular the authorisation of the Conciliation and Arbitration Board was not obtained for the closure—the suspension of activities was tantamount to discharge without proper cause, and the workers could sue, in conformity with article 123,

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[1] Cagnoni *v.* Società Magazzini Standa, in *Rivista Giuridica del Lavoro e della Previdenza Sociale* (Rome), Nov.-Dec. 1962, p. 648 (with a critical note by Professor Ugo Natoli, of the University of Pisa).

[2] *Revista Mexicana del Trabajo* (Mexico), July-Aug. 1962.

section XXII, of the Constitution, for the payment of their wages or for an indemnity of three months' wages.

It held, secondly, that where the suspension of activities was due to reasons beyond the control of the employer (*force majeure* or act of God), the employer was relieved of any liability in respect of the suspension of the contracts of his workers, even though he had omitted to give the notice provided for by law.

C. *Severance Allowance : Israel, Supreme Court, 13 June 1963* [1]

Having lost his employment when the carpentry establishment where he had been employed was closed after the death of his employer, a worker claimed severance allowance. It was not disputed that it was the custom in the trade to pay severance allowances. The only question at issue was whether the allowance was payable only in case of dismissal or whether it was due in the case of termination of employment by reason of the death of the employer.

The Court pointed out that the death of either master or servant puts an end to the relation between them. The right to receive severance allowance had been recognised as an important social right which was designed, not to compensate the employee for unjustified dismissal, but to reward him for the years of labour which he had dedicated to his employer and to help him to bear the burden of unemployment for a transitional period. In the circumstances the Court held that there was no reason to differentiate between different causes of the termination of employment as regards the payment of severance allowance.

Discrimination in Employment

Celibacy Clauses in Contracts of Employment : France, Court of Appeal of Paris, 30 April 1963 [2]

The employment of an air-hostess was terminated on her marriage, by reference to a provision of the rules applicable to commercial flying personnel of the employing company that required air-hostesses to be single. The question before the Court was whether the termination was valid.

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[1] *Jerusalem Post*, 14 July 1963.

[2] *Dalloz hebdomadaire* (Paris), 19 June 1963, with a doctrinal note by Professor André Rouast ; *Droit Social* (Paris), 26th year, Nos. 9-10, Sep.-Oct. 1963, with a doctrinal note by Jean Morellet. The Termination of Employment Recommendation adopted by the International Labour Conference in June 1963, provides that " the following, *inter alia*, should not constitute valid reasons for termination of employment : . . . *(d)* . . . marital status " (Paragraph 3).

The Court held that it was not valid. Firstly, the rule on which termination was based was introduced after the appointment of the plaintiff, and her conditions of service could not be changed thereby. Secondly, even if her contract had included an implied celibacy clause, such a clause was null and void. Every individual had a right to marriage. Private contracts had to respect that right in the absence of overriding considerations to the contrary. It was not for the employer to judge whether continuation of the employment was in the best interests of the family of the employee. The allegation that marriage would affect the satisfactory performance of the functions of air-hostess had not been demonstrated as a fact, particularly as other airlines employed married hostesses. As regards the risk of pregnancy, which would be incompatible with flying duties, it was not necessarily inherent in the state of marriage; provision was in fact made for cases of pregnancy of single air-hostesses; and, while the employment of married air-hostesses, with a greater risk of pregnancy, was no doubt potentially burdensome to the employer, this was a situation which existed in other types of employment and did not itself justify the celibacy clause.

Employment Service

Prohibition of Fee-charging Employment Agencies: Federal Republic of Germany, Federal Court, Criminal Division, 13 December 1961 [1]

Under article 35 of the federal law concerning the employment service and unemployment insurance, vocational guidance and placement are the monopoly of the Federal Institution for Placement and Unemployment Insurance, although article 54 of the law makes it possible for the Federal Institution to delegate, where appropriate, placement for particular occupations or groups of persons to other bodies. The appellant had been convicted of operating a fee-charging employment agency contrary to these provisions. He appealed on the ground that the monopoly of the Federal Institution was contrary to article 2 (1) of the Basic Law [2] ("Everyone has the right to develop his personality freely") and article 12 (1) thereof ("All Germans have the right of free choice of occupation, place of employment and place of training").

The Federal Court rejected the appeal. It pointed out that the public monopoly of the employment service was the result of a development which had started as early as 1910. This development corresponded to developments in other countries, all of which led on the international plane to the adoption by the International

[1] *Arbeitsrechtliche Praxis* (Munich), Case No. 1 relating to para. 35 AVAVG.

[2] Which is the basis of constitutional law.

Labour Organisation of the Employment Service Convention, 1948 (No. 88), and the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96). The Federal Republic of Germany was a party to both these Conventions. Neither the past development of the law nor the existence of international obligations overrode constitutional law. There were, however, other circumstances to be considered. It corresponded to current notions of organised society that the employment service should be a public institution : the maintenance and provision of employment was a function of the modern State; placement by an employment service was the most important means to these ends. Moreover, limitations on the free choice of occupation were recognised as not being contrary to constitutional law if they were essential to meeting existing or probable serious dangers to something of overriding importance to the community; the experience of the past showed that the existence of private employment agencies could lead to serious abuses and dangers to the economic existence of persons and that these abuses and dangers could not be sufficiently met merely by measures of control.

Conditions of Employment

WAGES

A. *Principles for Determination of Production Bonus*

India, Supreme Court, 21 August 1962.[1]

This was an appeal against an award by the third industrial tribunal, West Bengal, raising a number of questions of principle concerning the determination of production bonus. Firstly, where production bonus was fixed by the management in consultation with the workmen concerned, did the industrial tribunal have jurisdiction to vary the scheme? Secondly, were workmen in " non-productive " departments (accounts, establishment, time office) and piece-rate workmen entitled to bonus?

The Court held that, while it is the function of management to decide whether to introduce a scheme of incentive bonus, once such a scheme is introduced the right to claim bonus becomes a condition of employment and an industrial tribunal will have jurisdiction to vary the scheme, including the rates of bonus. Primarily it is the function of management to fix and revise the targets. In the exercise of this function it must consult the workmen concerned, and where the targets are the result of agreement between management and workmen they must not be revised

[1] National Iron and Steel Co., Ltd., Belur *v.* Their Workmen, in *Factories Journal Reports*, Vol. XXIII, pp. 271-283.

without good reason. They should not be interfered with by the tribunal unless it comes to the definite conclusion that they are fixed so high that an average workman, working with ordinary efficiency, can earn only the daily wage and nothing more. When refixing targets which are found to be high, the tribunal should take care to see that they are not brought down so low that the major portion of the total earnings of most employees will consist of incentive bonus.

Whether a scheme of incentive bonus should be extended to employees in non-productive departments would depend on whether the increased production had involved a rise in the workload of such employees. Piece-rate workmen exceeding the norm should be entitled to be paid for the excess at a higher rate, but the result of fixing that higher rate should not be a glaring disparity between the total actual earnings of a piece-rate workman and those of a time-rate workman over the same period of time.

Czechoslovakia, Supreme Court, 30 May 1962.[1]

An employee sued the undertaking employing him for the payment of bonus in respect of 1959 on the ground that the undertaking had fulfilled all conditions required for payment of production bonuses—i.e. had fulfilled the plan—and that he belonged to a category of employees who were normally entitled to bonus in such circumstances. The court of first instance rejected the claim on the ground that the general instructions for the payment of bonus left it to the director of each undertaking to determine the categories of persons entitled to bonus and the amount of bonus. This decision was revised on appeal.

The Supreme Court upheld the judgment of the court of first instance. A legal right to bonus arose, on fulfilment of the plan, only for employees remunerated on the bonus system and where the amount of bonus was determined in advance as a fixed percentage of the salary related to the statistical indices of the plan. Where, on the basis of a general instruction laying down the conditions for payment of bonus, the director of an undertaking was to determine its amount, the employee became eligible only if the director had determined the conditions for payment.

B. *Acquired Right to Salary Level: United Arab Republic, Arbitration Board* [2]

The wage of a worker who had been working on three looms for eight hours a day was reduced by some 7 per cent. when,

[1] *Sbírka rozhodnutí a sdělení soudů Č.S.S.R.* (Prague), 1963, No. 10, p. 183.

[2] *Compiled Summary of Rulings of the Conseil d'Etat concerning the application of the Labour and Social Insurance Codes and Principles contained in the Decisions of Arbitration Boards (Cairo), 1962, Part I, p. 190* (in Arabic).

as a result of the reorganisation of operations in the undertaking, he worked on four looms for nine hours a day.

The Board held that an employer was entitled to make changes in operations in his factory, including the increase or decrease in the number of looms worked and the change of working hours within the limits laid down by law, on condition that he did not reduce the wages of workers. In this case the worker was entitled to payment of the average of his wages prior to the introduction of the changes.

Holidays with Pay

A. *Freedom of Contract concerning Holiday Entitlement Additional to Statutory Minimum : India, Supreme Court, 7 September 1962*[1]

On 1 July 1956 a newspaper introduced a rule according to which the workmen in the press section who were in service on that date would be entitled to 30 days' leave with pay per year, while workmen engaged subsequently would be entitled to 21 days' leave, which was the statutory minimum provided for in the Indian Factories Act. In 1960 the employees' union obtained an award from the industrial tribunal, Punjab, providing that all workers were to be entitled to 30 days' leave. The validity of that award was contested on the ground that it contravened the principle of freedom of contract.

The Supreme Court refused to set the award aside. It found that there were many circumstances in which freedom of contract had to yield to higher claims for social justice, and that awards of an industrial tribunal might create new rights and obligations which the tribunal considered essential for keeping industrial peace. On the facts of the particular case it was likely that the existence of different leave provisions for employees otherwise enjoying the same conditions of service would lead to dissatisfaction.

B. *Free Days for Women Workers with Household Responsibilities : Federal Republic of Germany, Federal Labour Court (Plenary Sitting), 16 March 1962*[2]

Under a law of the Land North Rhine-Westphalia, of 27 July 1948, all women workers who work an average of 40 hours per week are entitled to a holiday of one paid working day a month, for the purpose of dealing with major household tasks. Two questions of principle relating to that law were referred to a plenary

[1] Rai Bahadur Diwan Badir Das and Others *v.* Industrial Tribunal, Punjab, and Others, in *Labour Law Cases* (Karachi), Dec. 1962, pp. 938-954.

[2] *Informationen für die Frau* (Bonn), July-Aug. 1962.

sitting of the Federal Labour Court : firstly, did the entitlement subsist where one or more Saturdays per month were free ; and, secondly, was the entitlement affected by the family responsibilities, the age, and nature of the living quarters of the woman ?

The Court considered the aim of the law to be to provide a measure of protection made necessary by the functional peculiarities of women and designed to make their equal rights a reality. Questions relating to the law had to be examined in the light of that aim.

As far as the first question was concerned, the Court pointed out that there had been fundamental changes in working hours since the enactment of the law. It took the view that where working hours had been reduced by the equivalent of one working day a fortnight (i.e. by eight hours or more out of 96) and were regularly spread over five days a week, the grant of the free day would no longer be justified by the spirit of the law. However, where the five-day week was being worked after a reduction in working hours of less than eight hours a fortnight, or where only every other Saturday was free, the free day remained due ; in such cases it could not be said that the line where the protective measure was no longer justified had been reached, given the growing intensity of modern work life.

With respect to the second question, the Court pointed out that the law was not intended to meet the general problem of the double burden of women with families, but only the specific difficulty of major household tasks—big laundry, etc.—which could not be done day by day. That difficulty existed generally for any woman who had her own household. As " household " was to be regarded even a single room, if it was wholly or largely furnished by the woman and she made it the " home " in which she spent her time, but not a room entirely or largely furnished by the landlord.

Particular Categories of Workers

Young Workers

Child Labour in Violation of Prohibition : Argentina, Supreme Court of Buenos Aires, 29 May 1962 [1]

A child of 12 claimed wages for work performed by him for an undertaking both during normal working hours and during overtime. The claim was resisted on the ground that his work had been performed illegally : although at law a child of 12 was allowed to work, the applicable collective agreement fixed the

[1] *Derecho del Trabajo* (Buenos Aires), Aug. 1962.

minimum age at 14, and overtime work by children was prohibited by law. The court of first instance allowed the claim as regards normal hours, on the ground that legislation overrode collective agreements, but disallowed that for overtime on the ground that no right could be derived from a violation of the law.

The Supreme Court allowed the claim for overtime also. It held that the sanction for the violation of the law must fall on the employer, that the basis of the obligation to pay wages was not contrary to public morality, and that the fact that the work had been performed in violation of the law was thus not a reason for diminishing the remuneration fixed by law in favour of the worker.

Women Workers

A. *Dismissal during Pregnancy or during Maternity Leave*

Israel, Supreme Court, 28 December 1962.[1]

Section 9 (b) of the Employment of Women Law, 1954, provides that an employer shall not dismiss a pregnant worker without a permit from the Minister of Labour, which permit shall not be given if, in the opinion of the Minister, the dismissal is in connection with her pregnancy. A seamstress was dismissed by her employer in July 1958. Some days later the employer was informed of her pregnancy, but refused to reinstate her ; he applied for a permit to dismiss her after receiving a formal demand for her reinstatement. The necessary permit was granted in March 1960 with effect from August 1958. The questions before the Supreme Court, following on proceedings in two lower instances, were : firstly, whether the original dismissal was lawful in view of the employer's ignorance of the worker's pregnancy, and, secondly, whether a permit to dismiss could be given retroactively.

The Court held that dismissal of a pregnant worker in ignorance of her condition, *ipso facto* made without ministerial permit, was unlawful. However, once the permit was obtained it validated the original dismissal ; it could not be disqualified for retroactivity. The law gave the Minister discretion to sanction a dismissal which was unconnected with pregnancy.

Federal Republic of Germany, Federal Labour Court, 25 January 1963.[2]

The plaintiff was a woman worker in the employment of the defendant company. In the winter of 1961, while she was on

[1] Chana Cohen *v.* Yedidiya Zarzewski, in *Jerusalem Post*, 13 Feb. 1963.

[2] *Westdeutsche Arbeitsrechtsprechung* (Frankfurt and Bad Homburg), 15 June 1963, pp. 97-98.

maternity leave, some 450 workers struck ; she did not herself participate in the strike. The strike was immediately followed by the lockout of the striking workers. A month later the plaintiff was notified that the measure of lockout was being applied to her. She sued to obtain a declaration that her employment relationship had not been brought to an end by the lockout, or, alternatively, to obtain her reinstatement.

The Court held that the notification of lockout to the plaintiff validly brought her employment relationship to an end. Lockout could be applied at successive dates to different categories of workers, if this was done on the basis of one single plan of action. It could be applied to workers not themselves engaged in the strike. Lockout was not a dismissal, but a termination of employment not subject to the rules concerning dismissal or employment security. This meant that the provisions protecting women on maternity leave against dismissal were not applicable to lockout. Any other view would lead to confusion between the individual legal position of the woman, protected against dismissal, and her position as a member of the staff of the undertaking, against which the employer was able to take collective measures in a labour dispute.

However, with regard to reinstatement, the discretion of the employer was considerably limited ; he was obliged to reinstate pregnant women or women on maternity leave immediately on termination of the labour dispute.

B. *Social Security Rights of Family of Working Woman: Spain, Supreme Court, 9 June 1962* [1]

The question before the Court was whether the rules governing compensation to minor children in case of the death of the father as the result of an employment injury, irrespective of whether or not the mother was also working, applied also with regard to the death of the mother as the result of an employment injury in a case where the father was working.

The Court held that the same rules applied. At civil law children had the same right of support from their mother as from their father. Employment injury benefits were payable to persons entitled to such support. The purpose of such benefits was to restore the economic stability of the family. Not to take account of that purpose in the case of the death of a working mother would be to run counter to current realities, where wives contributed with their wages to the maintenance, education and well-being of their children.

[1] *Revista de Derecho Privado* (Madrid), Oct. 1962.

SEAFARERS

A. *Application of Labour Legislation to Vessels under a Foreign Flag: United States, Supreme Court, 18 February 1963* [1]

A United States maritime union sought certification as representative of the seamen employed in certain vessels under Honduran flag owned by a Honduran corporation which, in turn, was entirely owned and controlled by a United States company. The seamen were recruited in Honduras, were Honduran nationals, and were required to sign Honduran shipping articles. Their terms of service were governed by a collective agreement between the Honduran corporation owning the vessels and a Honduran trade union. Under the Honduran Labour Code only a union that was recognised by Honduras, and 90 per cent. of whose membership was of Honduran nationality, could represent the seamen on Honduran ships ; neither requirement was met by the United States union.

The Supreme Court, reversing a decision of the National Labour Relations Board, held that the National Labour Relations Act applied only to the working men of the United States. It was not intended, as written, to apply to foreign-registered vessels manned by alien seamen. The Court noted that it was a well-established rule of international law that the internal affairs of a ship were governed by the law of the State whose flag she flew. Honduran law debarred the United States union from representing the seamen ; if the union was recognised as bargaining agent this would precipitate an international discord. In the absence of an affirmative intention of Congress to exercise local sovereignty in this delicate field of international relations, the Court was bound to hold that the National Labour Relations Board was without jurisdiction to order an election for bargaining representatives. This did not, however, limit the powers of Congress to act if it so wished.

B. *Right to Strike of Seafarers : Italy, Constitutional Court, 13 December 1962* [2]

The Constitutional Court had before it the question of the constitutional legitimacy of a strike by the crew of a vessel at sea.

It noted that the right to strike was guaranteed by the Constitution for economic strikes, and that that right had limits derived from the nature and purpose of the strike. While strikes

[1] National Labor Relations Board *v.* Sociedad Nacional de Marineros de Honduras (and three other cases), in *The Supreme Court of the United States Reports*, October Term, 1962.

[2] Fornasari and Others *v.* Lloyd Triestino and Italia, in *Rivista Giuridica del Lavoro e della Previdenza Sociale*, Nov.-Dec. 1962, p. 621.

were designed to bring pressure to bear on the employer, the prejudice thereby caused to him could not exceed that following from the mere suspension of work. The workers were required to take all precautions to avoid damage to installations or to the person or property of the employer and, *a fortiori*, of third parties. Suspension of work on a ship at sea entailed risk of such damage. Strikes were accordingly illegal from the moment a ship sailed until its voyage was terminated.

Social Security

EMPLOYMENT INJURY

A. *Types of Injury Covered*

Gradual Injuries : France, Court of Cassation, 29 March 1962.[1]

A worker had become deaf as a result of a long series of injuries, each insignificant in itself, due to his work on a pneumatic drill. The question before the Court was whether the deafness could be regarded as a compensable employment injury.

The Court held that it could not. The concept of employment injury did not comprise pathological conditions which, although contracted in the exercise of the employment, were not the result of a sudden and violent external event, but the outcome of the slow development of a series of events which could not be given a specific date and the origin of which could not be established with certainty.

Aggravation of Pre-existing Condition: Spain, Supreme Court, 14 June 1962.[2]

A worker in a sugar factory was injured when one of the vats overflowed. He died of the injuries, not because of their intrinsic gravity, but because he was suffering from kidney troubles which did not allow of a normal recovery. In these circumstances the Social Security Institution took the view that the death was not an employment injury.

The Supreme Court held that there was employment injury. Compensation was granted, not for the injuries, but for their " consequences " on the working capacity of the injured person. Employment injuries were not merely injuries in the strict sense of the word, and occupational diseases, but any organic or functional

[1] *Dalloz hebdomadaire* (Paris), 24 Oct. 1962, p. 112.

[2] *Boletín Oficial del Ministero de Trabajo* (Madrid), 1962, No. 7. An analogous decision of the same Court, of 7 July 1962, dealt with the loss of an eye, as a result of employment, of a one-eyed worker. *Revista de Derecho Privado* (Madrid), Nov. 1962.

disorder, whatever its origin, where the health deficiency which led to a diminution of working capacity was derived from the " aggravation " of an ill as a result of employment, as distinct from the natural and continuous wear and tear of the organism. Where a worker had an illness which did not interfere with his working capacity and would not have resulted in death without the injuries suffered as a result of the employment, the aggravation could be described as an employment injury.

B. *Accidents on the Way to and from Work : Spain, Supreme Court, 8 June 1962 and 27 February 1963* [1]

In a series of cases the Spanish Supreme Court has had to deal with the contention that, where an accident on the way to or from work was caused or partly caused by the violation of traffic rules on the part of the victim of the accident, such accident could not be regarded as an employment injury.

The Court has held that, where the conduct of the victim was not reckless, the accident was an employment injury.

Negligence deprived a worker of compensation only if it was unrelated to his work. Negligence related to work was considered to be that which arose from the habitual exercise of certain duties and the self-confidence inspired by experience. Since the concept of employment injury had been extended to cover injuries on the way to and from work, the concept of negligence related to work had to be similarly extended, i.e. to include negligence arising from regularly covering a certain route by a certain means of transport and the self-confidence born of that experience. This was particularly so where the undertaking knew that the employee used a motor vehicle and recognised its necessity, given the distance of the workplace.

C. *Amount of Compensation : Venezuela, Supreme Court, 4 April 1962* [2]

This case raised the question of the principles to be applied where permanent physical loss resulting from employment injury includes the loss of one or both of certain paired organs (such as the eyes, etc.). Article 253 of the Reglamento de la Ley del Trabajo, which expressly sets out the compensation payable in respect of certain enumerated physical losses, specifies in respect of one such pair of organs that its loss is compensated with 360 days' salary. Article 256 provides that the compensation for losses not expressly listed shall be determined by experts in conformity with appli-

[1] *Boletín Oficial del Ministerio de Trabajo* (Madrid), 1962, No. 7, and *Revista de Derecho Privado* (Madrid), May 1963.

[2] *Revista del Ministerio de Justicia* (Caracas), Apr.-June 1962.

cable legal provisions and the rules of medical science. The question at issue before the Court was whether, in the case of the loss of only one of the pair of organs, the compensation provided for in article 253 should be halved or whether article 256 should be applied.

The Court held that article 256 applied. It pointed out that there were cases of paired organs for which article 253 laid down the rates of compensation both for the loss of one and for the loss of both and that the compensation payable for the loss of one was not half that for the loss of both. The reasons for this were clear : the loss of functional capacity resulting from the loss of one was not necessarily proportional to that resulting from the loss of both.

D. *Relationship of Employment Injury Benefits to Damages Due from Third Parties*

Japan, Supreme Court, 4 June 1963.[1]

A worker was injured in the course of his work by a truck driven by an employee of another company. The company in question paid him certain amounts through an automobile insurance, and further paid a lump sum agreed with him in a compromise settlement. Subsequently, he was paid statutory benefits for loss of earnings and invalidity from the national employment insurance scheme. The Government, as the insurance carrier of the employment injury scheme, then sought to recover the amount of benefits paid by it from the third party.

Recovery was denied. The Court held that a victim of an accident was free to release from liability the person responsible for the injury, in whole or in part, irrespective of whether the accident could also be regarded as an employment injury. It pointed out that article 20 of the Workman's Accident Compensation Insurance Law, 1947, provided, firstly, that when the Government paid benefit it acquired " the right of the victim who received the compensation to claim damages against the third party ", and, secondly, that where the victim had already received damages from the third party, " the Government shall be exempted from the accident compensation within the limit of the amount of the damages ". In the view of the Court the exemption of the Government held good even if the victim had released the third party from liability wholly or in part. This meant that there was no room for the Government to exercise its right in subrogation, which presupposed the existence of the victim's right to claim damages, even if the Government had paid benefits.

The Court suggested, in order to obviate possible adverse effects of the judgment on beneficiaries, that the Government should

[1] *Rosei-Jiho*, 18 June 1963, No. 1710.

increase its educational activity to make workers understand the employment injury scheme; should pay benefits promptly; and should scrutinise compromise settlements accepted by workers to ensure that they had been freely entered into.

Israel, Supreme Court (Full Session), 30 November 1962.[1]

An employee of one undertaking was killed in a work accident on the premises of another undertaking. His dependants received employment injury benefit, but also sued his employer and the other undertaking for additional damages. The trial court found both the employer and the undertaking to blame. It apportioned the additional damages between them proportionally to their responsibility, but, in view of a provision of the Civil Wrongs Ordinance according to which an employer is not obliged to recompense the National Insurance Institute to which he pays a regular premium, it ordered the undertaking to reimburse the Institute in full. That undertaking sued the employer for a proportional contribution.

A full session of the Supreme Court held that the employer was required to make such a contribution. The basic principle was that each, the employer and the undertaking, was liable to the deceased's dependants for the full amount of damage. The division of liability only influenced the apportionment amongst themselves. Since the National Insurance Institute was subrogated to the deceased, it was entitled to full compensation from either wrongdoer. Moreover each wrongdoer was entitled to a contribution from the other. This led to the anomalous result, which needed to be corrected by law, that the Insurance Institute could recover fully from the undertaking, and that the undertaking could then recover a contribution from the employer.

Freedom of Association and Right to Organise

Organisation of Professional Organisations and Relation to Their Members

A. *Right to Organise*

Pakistan, Central Industrial Court, 27 April 1962.[2]

The authority of an employees' union to raise an industrial dispute was questioned on two grounds: firstly, that the union comprised supervisory staff; and, secondly, that there was another union representing the workmen of the undertaking.

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[1] Kamar *v.* Rivka, Shariki and Others, in *Jerusalem Post*, 30 Dec. 1962.

[2] Brooke Bond Employees' Union *v.* Brooke Bond Pakistan Ltd., in *Labour Law Cases* (Karachi), 15 May 1962, p. 251.

The Court held that neither ground disqualified the union from acting. Firstly, under the Trade Unions Act, 1926, the essential characteristic of a union was that its purpose was to regulate the relations between workmen and employers, and "combinations" to that end were not limited to any particular class or classes of employees. Moreover, while under the Industrial Disputes Ordinance, 1959, workmen alone had the right to raise an industrial dispute, they ought to act through a trade union where there was one competent to represent them. Secondly, no law made it obligatory for the whole body of workmen in one undertaking to be represented by one union. It was true that the Trade Unions Act, 1926, conferred a right on trade unions to apply for recognition. That right was created to compel the employer to negotiate with the recognised union. There was nothing, however, which prevented the employer from negotiating with an unrecognised union. There were a number of industries in which two unions operated.

Federation of Malaya, Court of Appeal, 20 October 1960.[1]

The Registrar of Trade Unions cancelled the certificate of registration of a union and the order of cancellation was confirmed by the Minister of Labour. The president of the union sought to have the order quashed on the ground that he had not been given an oral hearing, that the Registrar and the Minister were motivated by bias, and that the order of cancellation was unreasonable. The Minister and the Registrar swore affidavits denying that they were motivated by bias, and stating that they had had detailed written statements from the president of the union.

The Court held that bias was not proved and that the Minister was not bound, in law, to hear witnesses orally; his duty was to afford each party the opportunity of adequately presenting its case, but it did not follow that there should be a uniform procedure in each case or that it need conform to that of a court of law. With regard to the allegation of unreasonableness, the Court might intervene only if it satisfied itself that the decision complained against was manifestly unreasonable so as to lead to the irresistible conclusion that the instance of appeal was either biased or perverse or did not bother to consider the matter judicially at all.

Argentina, Supreme Court, 11 June 1962.[2]

Under article 19 of Law No. 14455 a new trade union may be granted legal personality in a branch of activity already covered by another trade union enjoying legal personality only if the number

[1] *Malayan Law Journal* (Singapore), Vol. XXVI, 1960, p. 275.

[2] Unión Obrera Metalúrgica *v.* Asociaciones de Supervisores de la Industria Metalúrgica R. A., with an explanatory note by Mario L. DEVEALI, in *Derecho del Trabajo* (Buenos Aires), Oct. 1962.

of its due-paying members for at least six months preceding the application exceeds that of the existing union. A union in the metal trades split, and the new union was granted legal personality. The court of first instance upheld that decision, on the ground that the new union had proved the number of its members and that the old union had not shown that it had a larger number. An appeal was made to the Supreme Court, essentially on the question whether the new union needed to bring affirmative proof that it had more members than the old union.

The appeal was not allowed. The Court considered that the splitting of unions had not been expressly provided for in the Law. A literal application might require a burden of proof impossible to discharge. In these circumstances it could not be said that the decision appealed against violated any constitutional provision or principle so as to require to be set aside.

England, Court of Appeal, 24 January 1963.[1]

A union expelled a member on discovering that he had had two convictions punished by imprisonment in his youth, by reference to a rule of the association to the effect that " no person who has been convicted in a court of law of a criminal offence . . . shall be eligible for or retain membership of the association ". Since the union had a closed shop, the expelled member lost his livelihood. He sought to obtain a declaration that he was still a member.

The Court refused to make such a declaration. It held that the rule under which the exclusion was made was not void on the ground that it was in unreasonable restraint of trade. While this might be so at common law, section 3 of the Trade Union Act, 1871, provided that the purposes of a trade union were not unlawful merely on the ground of being in restraint of trade. Members of the union could legitimately narrow the class of persons eligible for admission in such manner—however stupid or arbitrary—as they might agree and think conducive to further their own personal interests as members engaged in a craft.[2]

One member of the Court, dissenting, took the view that section 3 of the Trade Union Act, 1871, did not give the union complete liberty to make any rules, however unreasonable they might be.

B. *Union Shop and Agency Shop : United States, Supreme Court, 3 June 1963* [3]

The collective agreement between a company with plants all over the United States and the union representing its employees

[1] Faramus *v.* Film Artistes' Association [1963] 1 All E.R. 636.

[2] The House of Lords affirmed this decision on 18 December 1963.

[3] NLRB *v.* General Motors Co., in *Labor Relations Reporter*, Vol. 53, No. 9 (3 June 1963), pp. 2313-2317. In a further decision of the same day, the

provided for a " union shop " ; that provision was not, however, operative in states in which it was unlawful to make union membership a condition of employment. For plants in those states the union proposed to the company the negotiation of a contractual provision for an " agency shop ", i.e. an agreement under which a worker would be free to decide whether or not to become a member of the union, but would be required to pay union dues and would, in return, share in union expenditures for strike benefits, educational and retired member benefits, etc. The company refused to negotiate on this proposal on the ground that it would violate the National Labour Relations Act, which prohibited the encouraging or discouraging of membership in any labour organisation by discrimination in regard to hire or tenure of employment and tolerated only agreements stipulating membership in a labour organisation as a condition of employment (when not in violation of state law).

The Court held that the " agency shop " was a lawful form of union security under the Act. Nothing in the Act's legislative history suggested that Congress intended to validate only the union shop and simultaneously to abolish, in addition to the closed shop, all other forms of union security. The meaning of " membership " for purposes of union security contracts was whittled down by Congress to its financial core, i.e. the payment of initiation fees and monthly dues. The proposal made by the union in this case was " the practical equivalent of union membership ".

Activities of Trade Unions

Quorum Requirements of Trade Unions : U.S.S.R., Supreme Court, 1 February 1962 [1]

A woman who worked as a translator and sub-editor in a newspaper office was dismissed, after consultation of the local trade union committee, on the ground that the performance of her duties was unsatisfactory. The court of first instance upheld the dismissal. She appealed to the Supreme Court on the ground, firstly, that the dismissal was not justified ; and, secondly, that the consent of the local trade union committee had not been validly given since only three out of a full membership of seven were present, and article 19 of the Rules of Trade Unions of the U.S.S.R.

Court, following the same reasoning, held that agency shop agreements were subject to prohibition by state law under the provision of the National Labour Relations Act allowing such prohibition of " Agreements requiring membership in a labour organisation as a condition of employment ".

[1] *Bulletin of the Supreme Court of the U.S.S.R.*, 1962, No. 6 (in Russian).

required a quorum of two-thirds of the membership for the validity of decisions. In reply it was argued that there were vacancies on the committee as a result of resignations and that these could not be taken into account.

The Supreme Court upheld the appeal on both grounds and ordered reinstatement with payment of back wages. It found that the criticism of the appellant's work related in particular to one article which was prepared at a time when her child was ill ; this fact had to be taken into account. It held further that the dismissal was illegal on the ground that the consent of the trade union committee had been given in violation of article 19 of the Rules of Trade Unions. The fact that there had been vacancies on the committee was irrelevant, since these could have been filled by new elections.

Collective Agreements

A. *Binding Force of Collective Agreements*

Switzerland, Federal Tribunal, 19 September 1962.[1]

A foreman of a construction undertaking, with three workers of the same undertaking, worked on a Saturday on the construction of his own house. He was fined by a joint committee established under the collective agreement for the construction industry for violation of that agreement. The foreman, who was not a member of the union which was a party to the collective agreement, contested the fine.

The Federal Tribunal noted that the collective agreement had not been given force of law and was thus binding only on the parties to it. It held that the fine was a sanction on the foreman for the violation of obligations which he had not assumed. Moreover, the joint committee had no jurisdiction over third parties. The fine was accordingly arbitrary and contrary to the basic rules of the law of contract.

Canada, High Court, Ontario, 31 October 1961.[2]

Under an agreement between an undertaking and a union certified as the bargaining agent of its employees preference of employment was given to persons who paid monthly dues to that union. One of its members joined another union and ceased to pay dues to the former union in order to test the validity of that agreement.

[1] *Neue Zürcher Zeitung* (Zurich), 7 Apr. 1963.

[2] *Canadian Labour Law Reports* (Montreal), No. 255, of 22 Aug. 1962.

The Court noted that under section 10 of the Industrial Relations and Disputes Investigation Act a certified bargaining agent could, by collective agreement, bind every employee in the unit for which it was certified. Further, under section 2 (1) (d) of the Act any written agreement containing terms or conditions of employment between the employer and the bargaining agent was a collective agreement. Hence the impugned agreement was valid in relation to the defaulting member.

B. *Retroactivity of Collective Agreement: Federal Republic of Germany, Federal Labour Court, 17 June 1962* [1]

The facts of this case were somewhat unusual, since they arose out of the situation obtaining in Germany at the end of the war. However, they raised a question of principle: was it possible, by means of a collective agreement concluded in 1952, to confirm formally reductions in rank and salary of employees which had been effected unilaterally and probably in breach of contract in 1945 ?

The Court held that a new collective agreement superseded, for the specified period of its validity, any earlier collective agreement, even if the application of this principle was unfavourable to the workers concerned. Admittedly, there were limits to the authority of the two parties to take away acquired rights of persons covered by the agreement. The line between licit and illicit would be hard to draw in practice. Certainly rights which had already been exercised could not be affected. The two main conditions of lawfulness appeared to be, firstly, that there was a real need for any general regulation in which the interest of the individual had to give way to the interest of the community ; and, secondly, that the individual deprived of his rights was given some *quid pro quo*.

Strikes and Lockouts

A. *Legitimacy of Strike : Argentina, Supreme Court, 15 October 1962* [2]

Following the decision, summarised in the March 1963 issue of this *Review* [3], that a worker could not be dismissed merely on the basis of an administrative decision concerning the illegality of a strike, but that the judiciary was the only authority competent to determine whether dismissal was justified, a series of proposed dismissals have come before the Supreme Court.

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[1] *Arbeitsrechtliche Praxis* (Munich), Case No. 4 relating to para. 1 T.V.G.

[2] *Derecho del Trabajo* (Buenos Aires), Nov. 1962.

[3] Vol. LXXXVII, No. 3, Mar. 1963, op. cit., p. 230.

The Court has held that dismissals will be held unjustified only after a judicial finding that there was a licit strike. In arriving at such decision the courts will take account of any prior administrative finding that a strike was illegal, and will overrule it, in the interest of legal certainty, only if it is clearly unreasonable or vitiated by serious error.

B. *Effect of Strike on Worker's Entitlements*

India, Supreme Court, 3 April 1961.[1]

A gratuity scheme in an undertaking stipulated that the qualifying service must be " continuous ". The question arose whether periods of unauthorised leave of absence or periods of illegal strikes broke the continuity of service.

The Court held that, unless the absence was so prolonged as to lead to an inference of abandonment of service, continuity of service was not broken. Continuous service in the context of the gratuity scheme postulated the continuance of the relationship of master and servant between the employer and his employees. It was difficult to hold that merely because the employee absented himself without leave, this would bring to an end the continuity of his service. Similarly, participation in an illegal strike, notwithstanding that it might entail the sanction of dismissal, could not by itself bring the relationship of master and servant to an end, nor disrupt continuity of service as understood for the purpose of entitlement to gratuity.

France, Court of Cassation, 8 November 1962.[2]

A chemical undertaking granted a fixed bonus to its staff which was related to the amount of output. By circular the staff was informed that the bonus would be reduced in case of unjustified or unauthorised absence. Following a lawful strike, the bonus was reduced. The staff contested the reduction on the ground that the amount of output justifying the bonus had been attained.

The full bonus was awarded. The bonus was based on " results " and not on the productivity or assiduity of the workers : it could not be reduced by reason of a strike, particularly as a lawful strike was not an " unjustified absence " ; and the employer could not establish conditions which interfered with the right to strike, recognised by the Constitution.

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[1] *Labour Decisions* (Uttar Pradesh), Vol. VI, No. 1 Jan.-Mar. 1962, p. 23.
[2] *Droit Social* (Paris), Mar. 1963.