Judicial Decisions in the Field of Labour Law

THE DECISIONS summarised below were amongst those which came to the attention of the International Labour Office during the period from October 1964 to September 1965. As before [1] they cover the application of general legal principles to labour law (custom as a source of law; liability of employers and workers); contracts of employment (nature of contracts of employment; changes in terms of employment; termination of employment relationship; discrimination in employment; employment service); conditions of employment (wages; hours of work; holidays with pay; workers' housing); occupational safety and health (guarding of machinery); social security (workmen's compensation); and freedom of association and right to organise (professional organisations; collective bargaining; strikes and lockouts).

Custom as a source of law

1. ARGENTINA [2]

Under the collective agreement applicable to an undertaking a special bonus was payable to employees who were called upon to work in high temperatures; a list of eligible occupations was given, all of which involved direct exposure to heat. The undertaking nevertheless for some years paid the bonus to employees who worked in high temperatures, irrespective of whether they were directly exposed to heat or not. In 1960 it altered this practice and applied the agreement more literally. The employees who were prejudiced by the change claimed that, in virtue of its payment over a considerable period, the bonus had become part of their wages; the undertaking argued that its action was in accordance with the collective agreement and that the employees had been unjustifiably enriched over a certain period of time.

[1] For previous summaries of judicial decisions see *International Labour Review*, Vol. LXXXVII, No. 3, Mar. 1963, pp. 206-232; Vol. LXXXIX, No. 1, Jan. 1964, pp. 43-68; and Vol. 91, No. 3, Mar. 1965, pp. 210-231.

[2] National Labour Appeals Court, 30 October 1963. *Derecho del Trabajo* (Buenos Aires), Year XXIV, June 1964, p. 318.

The Court found in favour of the employees. The regular and continuous payment of the bonus had made them certain of their entitlement to the bonus as part of their regular remuneration. It thus constituted a valid basis for a claim that such payment be continued. Use, custom or practice could create entitlements without express provision to that effect in statutory law.

2. AUSTRIA [1]

In a mining undertaking, working shifts included Sundays at regular intervals; work on such Sundays was paid as double time. From 1948 to 1962 holiday pay and Christmas bonus were so calculated as to take account of these special Sunday earnings. In 1962 this practice, which was not required by the relevant collective agreement, was changed. The question submitted for judicial decision was whether the employees had acquired a right to holiday pay and Christmas bonus at the higher rate even if, as the undertaking contended, past payments had been the result of an error.

The Court held that the employees had acquired such a right. The amount of wages was not settled anew every time a payment became due; wages were regularly due. Where an employer paid his employees a certain amount over a number of years, or allowed it to be paid, this created an assumption that the sum in question corresponded to the wage which the employer intended to pay. It was not the intention of the employer that was determining, but the meaning to be deduced from his conduct.

Liability of employers and workers

A. Employer's liability for failure to cover employee for old-age benefit

AUSTRIA [2]

A public authority employed an elderly man as casual messenger. Being doubtful whether his employment was subject to compulsory insurance, it did not initially register him with the Social Security Institution. Subsequently the employee requested that he be covered by sickness insurance; following a favourable decision on that request, the employer also insured him in respect of old age, and paid contributions retroactively for the period which was not yet statutorily barred. However, when the employee reached retirement age, he was unable to draw a pension owing to the fact that the period of contributions so covered was

[1] Supreme Court, 29 January 1965. *Sozialrechtliche Mitteilungen der Kammer für Arbeiter und Angestellte für Wien* (Vienna), 16th Year, No. 16, 16 Aug. 1965.

[2] Supreme Court, 30 July 1963. Ibid., 15th Year, No. 22, 16 Nov. 1964, p. 531.

not equivalent to the minimum qualifying period for a pension; had contributions been paid for the entire period of service, the qualifying requirements would have been met.

The Court held that the failure of the employer to clarify the legal situation concerning the subjection of the employee to compulsory insurance was a fault; the employer had not shown the care and attention which could be expected of him in the matter. On the other hand, it could not be said that the employee was to a large extent jointly responsible in that he did not himself register for insurance. In these circumstances the employer was liable for the damage caused to the employee as a result of his failure to obtain an old-age pension.

B. Worker's liability for damage to employer's property

FRANCE [1]

A staff delegate took part in a workers' meeting on the premises of the employing shipyard, although the gates were closed and access prohibited. A provision of the works rules of the undertaking moreover expressly prohibited meetings on the premises.

In these circumstances, the Court held that the use of the premises without the authorisation of the employer constituted a fault for which the staff delegate was liable to pay compensation in the amount of any damage suffered.

Nature of contracts of employment

Fixed-term contracts for continuing duties

1. SPAIN [2]

A doctor was engaged by a hospital for six months. On the expiration of that period he continued to render the same services for a further period of nearly six months. He was then informed of the termination of his appointment.

The Court held that the continuation of services, despite the expiry of the fixed-term contract, transformed that contract into one for an indeterminate period. Such a contract could be terminated only for the reasons set out in articles 76 and 77 of the Law on the Contract of Employment; no such reason had been given in the present case.

---

[1] Court of Cassation, 24 February 1965, *Sandral* v. *Chantiers navals de La Ciotat*, in *Recueil Dalloz-Sirey* (Paris), 22 Sep. 1965, Jurisprudence, p. 584.

[2] Supreme Court, 12 June 1964. *Revista de Derecho Privado* (Madrid), Feb. 1965. An almost identical decision was given by the Labour Court of Dakar, Senegal, on 30 June 1964 (*Travail et profession d'outre-mer*, No. 156, 2 Jan. 1965, p. 3457).

2. AUSTRIA [1]

A film company employed a production manager for four years on five successive fixed-term contracts; it then informed him that his contract would not be further renewed. He claimed that successive fixed-term contracts for continuing duties constituted in fact an indeterminate employment relationship and that he should have been given the statutory period of notice appropriate to such a relationship. The film company argued in defence that it was the custom of the film industry to conclude contracts for a fixed period.

The Court held that the only point which was determining was that in an individual case a fixed-term employment relationship was required by the nature of the duties. Where it was not so required, the custom of the industry was irrelevant. In this case there was no evidence that the contracts of the manager had been related to the production of particular films. The successive fixed-term contracts accordingly had to be regarded as a single employment relationship and the nature of that relationship had to be judged as if it had from the beginning been concluded for an indeterminate period.

Changes in terms of employment

A. Transfer of worker

U.S.S.R.[2]

A senior inspector in a department of a Ministry in the Azerbaijan Republic was transferred to a post of personnel inspector in a group of agricultural undertakings. She objected to the transfer and asked for reinstatement in her former post. The Supreme Court of the Azerbaijan Republic found that the transfer had been illegal in that it had been ordered without the consent of the employee. However, the Court did not order reinstatement; it noted that she had in fact been working in the new job, and took the view that her interests had not been prejudiced by the transfer. The Deputy Prosecutor-General of the U.S.S.R. lodged an appeal against that decision in the interest of the law.

The Supreme Court of the U.S.S.R. set aside the decision of the Azerbaijan Supreme Court. According to section 36 of the Labour Code an employer was not entitled to assign an employee to duties which were not provided for in the contract of employment. The transfer of an employee to a permanent job not provided for in the contract therefore required the consent of the employee. Since in this case the consent of the

[1] Supreme Court, 6 October 1964. *Sozialrechtliche Mitteilungen der Kammer für Arbeiter und Angestellte für Wien* (Vienna), 16th Year, No. 14, 16 July 1965.

[2] Supreme Court, Civil Collegium, 16 March 1965. *Bulletin of the Supreme Court of the U.S.S.R.*, 1965, No. 3 (in Russian).

employee had not been obtained, and the transfer was accordingly unlawful, the lower Court, in accordance with the guiding principles laid down by the Plenum of the Supreme Court of the U.S.S.R. on 13 September 1957, should have ordered her reinstatement. The argument to the effect that the transfer did not prejudice her interests was not valid; since she objected to the transfer her claim to reinstatement had to be satisfied irrespective of the nature of her new duties and of the remuneration relating thereto. The remuneration in the new post was, in fact, lower than that in the original post. In all these circumstances, the Court ordered reinstatement and the payment of the difference between the remuneration for the original post and for the new post for three months.

B. Changes in conditions of employment

1. ECUADOR [1]

A teacher who was, in accordance with the law on the remuneration of teachers, classified in the tenth salary grade and thus entitled to a monthly salary of 1,410 sucres, taught for 13 hours a week in a school attached to the Central University. At the end of 1959 the Faculty responsible for the organisation of the school reduced his teaching hours to four a week and his monthly salary to 500 sucres. He regarded this as a change in his terms of employment which could be deemed to constitute unjustified dismissal and sued for all appropriate dues and indemnities.

The Court held that a change in the teaching hours was within the legal authority of the employer and did not constitute a change in the terms of employment. On the other hand, salary could not be based on the hours actually taught; it was subject to the provisions of the law on the remuneration of teachers, which only took account, for the purpose of the classification of teachers in salary grades, of qualifications and of experience. The Court accordingly concluded that back pay was due at the higher rate, but that there had been no unjustified dismissal and that indemnities for such dismissal were not payable.

2. NORWAY [2]

Following a rationalisation study, a spinning factory decided to introduce a new work schedule and to lay off four workers. Both the Employers' Confederation and the national Federation of Workers in the Chemical Industry had agreed that this decision fell within the rights of the management of the undertaking. However, the workers in the under-

[1] Supreme Court, 20 April 1964. *Gaceta Judicial* (Quito), 67th Year, Jan.-June 1964, Series 10.a, No. 4, p. 2278.

[2] Labour Court, 25 November 1964. *Norwegian Employers' Confederation and Kunstsilkefabrikken AS* v. *Norwegian Federation of Workers in the Chemical Industry, Union of Workers in the Chemical Textile Industry and 40 Workers*, in *Arbeidsgiveren* (Oslo), 1965, No. 4.

taking objected to the change on the ground that their work would become more strenuous, as well as more dangerous and unhealthy; thus each worker would in future be responsible for 16 machines instead of 12, and there would be an increased exposure to inhalation of gas. The local union accordingly pressed the matter as a labour dispute, and threatened strike action.

The Court held that the introduction of a new work schedule was within the prerogative of the undertaking. It did not exclude the possibility that workers might refuse a work schedule which involved an increased health risk, but found, on the evidence before it (which included reports from the labour inspectorate) that in this case there were no health or security dangers connected with the new schedule.

Termination of employment relationship

A. Right to work

ITALY [1]

Article 4 of the Constitution of Italy provides that every citizen has a right to work. In this case, the Constitutional Court was called upon to decide whether statutory provisions relating to the termination of the employment relationship were inconsistent with that article.

The Court held that they were not. The right to work, which was one of the fundamental human rights, consisted in the right to choose and exercise a particular activity. It obliged the State to prohibit legal rules which were discriminatory or otherwise contrary to that right, and to create economic, social and legal conditions making it possible for every citizen who wished to do so to find employment. The right to work did not guarantee the retention of a particular job. At the same time, the constitutional provisions implied that the conditions in which indeterminate employment relationships could be terminated should become increasingly strict, in harmony, *inter alia*, with the Termination of Employment Recommendation, 1963, of the I.L.O.

B. Termination " at will "

INDIA [2]

The standing orders of a mill authorised the termination of employment on the sole condition that 14 days' notice was given. The services of a workman were so terminated; no reason was given for the termination. However, when the workman appealed to the Industrial Tribunal,

[1] Constitutional Court, 26 May 1965. *Dito Francesco.*

[2] Supreme Court, 11 November 1964. *Murugan Mills Ltd.* v. *Industrial Tribunal, Madras*, in *Labour Law Journal* (Madras), Apr. 1965, p. 422.

the employers indicated that the reason was that the workman had been " going slow " for some months. The Industrial Tribunal found that this charge was not proved, and ordered reinstatement. The case was taken to the Supreme Court for determination of the question whether an Industrial Tribunal had authority to intervene in cases in which the services of a workman were terminated in conformity with a legal provision merely requiring notice.

The Supreme Court held that even in such a case there was a requirement of bona fides. If the termination of employment was a colourable exercise of the employer's power, or the result of victimisation or unfair labour practice, the Industrial Tribunal would have jurisdiction to set it aside.

Discrimination in employment

A. Anti-union discrimination

UNITED STATES [1]

A South Carolina corporation operating one textile mill went out of business following the success of a textile union in organising the workers in the mill. The majority of the corporation's stock was held by a New York marketing house which operated a number of other textile manufactures. Litigation initiated by the union turned on the questions whether the closure of the Darlington mill was contrary to article 8*(c)* (3) of the National Labour Relations Act, making it an unfair labour practice for an employer " by discrimination in regard to hire or terms of employment or any term or condition of employment to encourage or discourage membership in any labour organisation ", and whether the New York marketing house was responsible for that violation.

The Supreme Court held that an employer had the absolute right to terminate his entire business for any reason he pleased, but that he was not able to close part of the business no matter what the reason. One of the purposes of the National Labour Relations Act was to prohibit the discriminatory use of economic weapons in an effort to obtain future benefit. A complete liquidation of a business yielded no such future benefit, if the termination was bona fide, even if it was motivated by vindictiveness towards a union. On the other hand, a discriminatory partial closing might have repercussions on what remained of the business, affording the employer leverage for discouraging the right of the remaining employees to freedom of association. There also remained a remedy for the employees of the closed part, namely that of reinstatement elsewhere. A partial closing, if motivated by a purpose to chill unionism in any of

[1] Supreme Court, 29 March 1965. *Textile Workers* v. *Darlington Mfg. Co.*, in *Labor Relations Reporter* (Bureau of National Affairs, Inc., Washington), Vol. 58, No. 27, 29 Mar. 1965 (Extra edition bulletin).

the remaining plants of a single employer, and if the employer might reasonably have foreseen that such closing was likely to have that effect, was accordingly an unfair labour practice in the meaning of article 8 *(c)* (3) of the National Labour Relations Act. A single employer for that purpose was any person who had an interest in another business of sufficient substantiality to give promise of his reaping a benefit from the discouragement of unionisation, and a relationship to that business which made it realistically foreseeable that its employees would fear that such business also would be closed down if they persisted in organisational activities.

B. Personal discrimination in career advancement

1. ISRAEL [1]

A draftsman employed by a municipality was kept in his starting grade for eight years despite the fact that he improved his qualifications and work performance, and even performed functions not generally expected of a draftsman. Repeated requests for advancement, supported by the works council, were rejected, although all other comparable employees were promoted at various times. The employee accordingly resigned, and asked for severance pay on the ground that the resignation was caused by a deterioration in his conditions of employment.

The Supreme Court, in a majority decision, held that he was entitled to severance pay. The status of an employee was made up of a complex of conditions, and the unjustified denial of one of them—the right to promotion—detrimentally affected that status. There was also a comparative deterioration in status if all other employees progressed regularly. Since there was no objective reason why the employee had been denied promotion, he had been discriminated against in the past, and there were slender chances of his promotion in the future. Such a denial of a fundamental condition of employment justified his seeking other employment; for purposes of severance pay his resignation had thus been the equivalent of dismissal. Moreover the relevant collective agreement expressly provided for severance pay in the case of resignation following a deterioration in conditions of employment.

2. JAPAN [2]

In 1954 a law authorised local authorities to sever redundant public employees from established posts under special conditions. One township, in establishing standards for selecting persons to be terminated under this

[1] Supreme Court, 29 April 1965. *Petah Tikva Municipal Council* v. *Avraham Friedman*, in *Jerusalem Post*, 18 May 1965, Law Report.

[2] Supreme Court (Plenary Sitting), 27 May 1964. Weekly *Toki-no-Horei*, No. 517, 3 Dec. 1964, pp. 58-63.

procedure, included an age limit of 55 years. A civil servant then discharged mainly (though not exclusively) because he was over 55, claimed that his termination was invalid by reference to the provision of the Constitution prohibiting discrimination.

The Court held that the discharge was valid. The relevant constitutional provision did not guarantee absolute equality, but prohibited acts of discrimination which lacked any valid foundation. It did not deny distinctions between individuals that were reasonable in the light of the requirements of the situation. Generally speaking, in the case of the retrenchment of public servants, the employing authority was empowered to decide the matter fairly on the basis of work performance, length of service, etc. The selection of the appellant by reference to age and work performance did not overstep the discretion of the employing authority. There were no reasons to consider that, as compared with other officials, he had been treated in a discriminatory manner.

Employment service

A. Undertakings hiring out labour

ITALY [1]

Italian law prohibits private intermediaries between employer and worker. The question before the Court was whether undertakings whose sole activities consisted in the hiring out of workers to other undertakings were intermediaries in the meaning of the relevant provisions.

The Court held that they were. Such undertakings did not themselves use labour, but placed workers at the disposal of third parties which used them. The employees of such undertakings, although remaining economically dependent on them, carried out their work within the sphere of activity of a third party, under his technical direction and on his behalf. Such arrangements, by establishing a distinction between the employer and the person who in fact used the worker, made it possible to evade both the standards relating to the placement of labour, and the standards designed to protect the worker in employment. They masked an activity of intermediary and accordingly fell within the prohibition of private intermediaries.

B. Press advertisements for employment

FEDERAL REPUBLIC OF GERMANY [2]

Under article 37 of the Law relating to the Employment Service, the publication of advertisements for employment abroad requires the prior

[1] Court of Cassation, 6 August 1963. *D'Alfonso* v. *Lucia, Currà et Fall. Soc. A.L.S.A.S.*, in *Rivista di Diritto del Lavoro* (Milan), July-Dec. 1964, p. 341.

[2] Federal Social Court, 14 February 1964. *Arbeitsrechtliche Praxis* (Munich and Berlin), Case No. 2 relating to article 37 AVAVG.

agreement of the employment service. A daily newspaper was refused such agreement to the publication of advertisements offering employment to qualified printers abroad; it sought to have that decision set aside on the ground that it was contrary to the constitutional right of free choice of occupation.

The Court dismissed the action, on the following grounds:

Offers of employment, which were vitally important for ensuring the livelihood of the population, had been progressively withdrawn from private influence and had become a public task, in the interest both of social security and of the protection of the dignity of the individual. This had been recognised in international labour standards (the Employment Service Convention, 1948, and the Fee-Charging Employment Agencies Convention (Revised), 1949, of the I.L.O.) and in national legislation. The prerogatives of the employment service deriving from the character of placement as a public task, such as the requirement of prior authorisation for the publication of advertisements for employment abroad, were not in conflict with the Constitution, since the right to the free development of individual personality (article 2) was subject to qualification by reference to the rights of others and to public order.

There was free choice of occupation and no discrimination in admission thereto. However, the exercise of certain occupations could be regulated by law in the interest of the community. In determining the appropriateness of such legislation, the respective burden on the individual and the dangers to the community must be weighed against each other. The distribution of work in a manner that was economically reasonable and socially fair was of overriding importance. The achievement of an objective and humane balance between demand and supply in the labour market was so vital to the community that the freedom of the individual could be infringed in order to ensure it, i.e. in order to enable the employment service to prevent either unemployment or the shortage of labour, and to provide the individual, for the benefit of the community, with work corresponding to his capacities. Were it possible to engage members of occupations in which there was a labour shortage without restriction for employment abroad, the labour market and the entire economy might suffer serious disturbance; the requirement for authorisation which was at issue in this case was thus essential to the welfare of the community.

The decision whether or not to grant the authorisation was required to be made by reference to objective criteria. If, in any particular case, an unfavourable decision could not be justified by reference to the fact that the emigration of workers in the occupation concerned was harmful to the economy, such decision could be challenged in the Courts.

Wages

Methods of determining wage increases

AUSTRALIA [1]

The background of this case is given in an article on " Wage determination in Australia: Basic wage and total wage inquiries, 1964 " in the *International Labour Review*, Vol. 92, No. 2, August 1965.

In 1965, as in 1964, the Commonwealth Conciliation and Arbitration Commission had before it an application by employers' associations bearing on the principles and procedures of wage determination.

Part A of the application proposed, as in 1964, that instead of determining separately the " basic wage " and " margins " for skill, etc., the Commission should fix a " total wage ". As in 1964 that proposal was rejected on the ground that it was undesirable to abolish the distinct concepts of " basic wage " and " margins ".

Part B of the application proposed that in future there should be simultaneous determination, by one Bench of the Commission, of the basic wage and of a test case seeking a variation of margins on general economic grounds (as opposed to variations of margins based on changes in work value, which would continue to be considered as and when appropriate). This proposal was accepted by the Commission by a majority of 3 to 2.

The Commission decided that neither the basic wage nor margins should be altered because of increments in the consumer price index. There should be annual reviews of the economy at which one Bench of the Commission would make a simultaneous determination for the following 12 months of the basic wage and the level of margins so far as the latter was fixed on general economic grounds. At such reviews basic wages and margins should be altered neither by reference to a formula of prices plus productivity, as proposed by the unions, nor by reference to average productivity gain over a period of years, as suggested by the employers; they should be fixed at the highest level which the capacity of the economy was estimated to be able to sustain for the ensuing year. The Commission formally rejected a union submission that wage increases could be considered without regard to their likely economic consequences, including their likely effect on the level of prices; any increases so granted would not serve the interests of wage earners for long and would be likely to cause hardship to many members of the community. In the present state of the economy, only such wage increases should be granted as were judged not to be incompatible with price stability.

[1] Commonwealth Conciliation and Arbitration Commission, 29 June 1965. *Basic Wage Inquiry 1965 and Total Wage Case 1965*, in *Industrial Information Bulletin* (Department of Labour and National Service, Canberra), Vol. 20, No. 6, June 1965, pp. 615-671. See also ibid., Vol. 20, No. 3, Mar. 1965, pp. 227-237, for a summary of the arguments of the parties.

Hours of work

Methods of determining normal hours

INDIA [1]

The hours of work in an undertaking had for many years been 34¼. In 1950 a demand of the workmen to reduce them to 34 was rejected by an industrial tribunal. In 1959 the undertaking proposed to increase the working hours to 37¼, and this was the subject of a further reference for adjudication by an industrial tribunal. The award of the tribunal was that weekly hours of work be fixed at 36. Both parties appealed against this award.

The Supreme Court upheld the award. It stated that it was not the function of industrial adjudication to fix working hours with an eye to enabling workmen to earn overtime wages. Hours of work had to be fixed in consideration of many factors, including the question of fatigue on the health of the workmen, the effect on their efficiency, physical discomfort resulting from long and continuous strain, need for leisure, and the hours of work prevailing for similar activities in the same region and in similar concerns. Once a conclusion about normal working hours had been reached after considering all the relevant factors, industrial adjudication could not hesitate to give effect to it merely because the workmen would have been entitled to more wages at overtimes rates if the hours of work had been fixed at less, though in fixing the proper wage scale the question of workload, and so the matter of working hours, could not be wholly left out of consideration.

The Court added that with the growing realisation of the need for broader distribution of material wealth had also come an understanding of the need for increase in production, as an essential prerequisite of which greater efforts on the part of the labour force were necessary.

Holidays with pay

Periods of convalescence

FEDERAL REPUBLIC OF GERMANY [2]

According to the relevant legislation, medical treatment or cures provided by a social security institution must not be included in the calculation of annual holidays with pay, even where the person concerned is able to work, unless the treatment or cure is such that it does not prejudice normal holiday activities. The case of periods of convalescence is not covered by the legislation. It was therefore necessary to have a

[1] Supreme Court, 3 December 1963. *Associated Cement Staff Union* v. *Associated Companies Ltd., Bombay*, in *Factories Journal Reports* (Madras), Vol. XXV, pp. 305-311.

[2] Federal Labour Court, 26 November 1964. *Arbeitsrechtliche Praxis* (Munich and Berlin), Case No. 1 relating to art. 10 BUrlg (Schonzeit).

judicial determination of the question whether such periods may be included in annual holidays.

The Court's reasoning was as follows:

(1) Periods of convalescence are periods during which a worker is entitled to stay away from work although he is capable of working; that situation is analogous to the situation in respect of medical treatment and cures covered by the relevant legislation.

(2) The legislative provisions concerning cures were based on judicial decisions that had established the balance of consideration which employer and worker owed each other. For periods of convalescence a similar balance had to be struck; it would be somewhat different from that established for the case of cures, since the degree to which the worker was handicapped was likely to be less.

(3) Periods of convalescence could be made into real holidays, except where the health of the worker or the season did not permit it, and could accordingly, except in these cases, be treated as such. Moreover, while in the case of cures the employer had to show that a cure was consistent with the taking of annual holidays, in respect of periods of convalescence it was the worker who had to show that a particular period could not be regarded as a holiday.

Workers' housing

Legal title to housing provided by employer

PERU [1]

A construction undertaking provided an employee with an apartment in virtue of the terms of his contract of employment. On the termination of the employment relationship it sought to obtain possession of the apartment.

The Court found in its favour. The employee had ceased to render services to the undertaking and thus enjoyed no legal title to continued occupancy of the apartment. There was thus a tenancy-at-will (precarious tenure), which could be terminated at the request of the undertaking.

Guarding of machinery

A. Circumstances in which employer is obliged to fence

SWITZERLAND [2]

A laundry establishment used an old-fashioned spin drier which was not protected by a cover. Employees were merely warned to keep away

[1] Supreme Court, 17 July 1963. *Informativo del Trabajo* (Lima), 20 Mar. 1965. The Court of Appeal of England gave an identical decision on 25 May 1965: *Crane* v. *Morris*, in *The Times* (London), 26 May 1965, Law Report.

[2] Federal Tribunal, 26 May 1964. *Camisa* v. *Hoirs Droux*, in *La semaine judiciaire* (Geneva), 30 Mar. 1965, p. 193.

from the machine when in operation. A cover was not yet statutorily required, contrary to the practice in a number of other countries, but was being progressively introduced in similar establishments. One employee had his arm torn off by the drier in an accident the circumstances of which were never fully elucidated. The question before the Court was whether the employer was liable on the ground that he had not taken all the safety measures which could be expected of him.

The Court found that there was considerable risk of accident in that persons who, like the injured employee, were required to pick up and carry heavy loads of laundry near the machine might, as a result of slipping on the wet floor or as a result of a false movement, come into contact with the rotating machinery; a cover gave protection against such risk. An employer was not required to protect against any risk: he was required to prevent risks arising from the nature and normal usage of his machinery; he was not required to protect against risks the occurrence of which was unlikely or which could be avoided by a minimum of prudence. Where the risk was high and where it would be prevented by means which were well within the economic capacity of a small business, his obligation would be more strictly evaluated. In this case, given the nature of the risk, the fact that there was no evidence that the accident was the result of anything other than an involuntary movement, and the relatively limited cost of an ordinary cover, the employer was liable.

B. Removal of guards

INDIA [1]

A workman in an oil mill was injured when greasing the spur gear wheel of the mill. There had been a guard over the wheel in question, but at the time the injury was suffered it was not in place. It proved impossible to determine who had removed the guard, and in particular whether it had been removed with the knowledge of the manager. In these circumstances, the question at issue was whether the manager could be fined for failure to comply with the obligation under the Factory Act to keep the machinery securely fenced.

The Court held that he could be fined. The possibility that the guard had been removed without the knowledge or consent of the manager did not provide a defence. While the person responsible for the fencing of machinery was not necessarily liable in every case in which the guard had been removed; it was necessary for such person to show that he had done everything to carry out his duty to see that the guard was kept in position while the machine was working.

[1] Supreme Court, 6 December 1963. *State of Guijarat* v. *Jethalal Ghelabhai Patel*, in *Labour Law Cases* (Karachi), Vol. VIII, No. 7, July 1965, pp. 381-385.

C. Protection of persons acting outside the scope of employment

ENGLAND [1]

Section 14 (1) of the Factories Act, 1937, provides that every dangerous part of machinery shall be securely fenced " unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced ". In a cement factory, the dust-extracting plant was in the roof of the workshop, and could be reached only by a vertical ladder and a high metal casing; its dangerous parts were not fenced. A workman was injured when he climbed up in order to catch one of the pigeons which were wont to fly around in the roof.

The Court of First Instance found that the employer was in breach of the Factories Act in not fencing the machinery, despite its inaccessible position. For example, although certain procedures were followed to stop the machine during greasing operations, there was no safeguard if the machine was erroneously started or kept running. However, the question submitted to the Court of Appeal was whether the Act gave any protection to an employee injured through a " frolic " which had nothing to do with his employment.

The Court held that it did. The words " every person employed . . . on the premises " had no express limitation and it was not possible to import into them any implied exclusion of acts done on a frolic or not within the scope of employment. It was true that the employer might exculpate himself from failure to fence by showing that only a piece of unforeseeable folly could create danger in some piece of machinery, and that therefore it could not be called dangerous. But once it had been shown to be dangerous and to have needed fencing, he should be potentially liable to all employees who suffered from that failure. At the same time, the folly of the employee could constitute contributory negligence; in this case such contributory negligence was evaluated at 80 per cent. of the damage.

Workmen's compensation

A. Accident in unknown circumstances

INDIA [2]

A seaman disappeared from his ship while it was in deep waters. The trial authority ruled out the possibility of death by suicide, found that the physical condition of the seaman was such that he could not have swum to safety; and held that the possibility of death by murder should

[1] Court of Appeal, 23 March 1965. *Uddin* v. *Associated Portland Cement Manufacturers*, in *The Times* (London), 27 Mar. 1965, Law Report.

[2] Bombay High Court, 5 March 1965. *Ibrahim Mohammed Issak* v. *Mackinnon MacKenzie*, in *Labour Law Journal* (Madras), June 1965, p. 554.

be ruled out unless there was proof to support it. The inference was accordingly that the cause of the disappearance was accidental death. The further question at issue was whether death must be considered to have arisen out of and in the course of employment.

The High Court answered the question in the affirmative. Seamen were deemed under the terms of their employment to be on duty at all times during a voyage. The concept of " out of employment " included all conditions and incidents of employment; if by reason of any of these the workman was brought into special danger, the accident would arise out of employment. If a workman was in a place to which some risk attached, it was legitimate to attribute an accident to the risk even in the absence of evidence as to the circumstances. The entire ship could be regarded as a place of danger, in which a seaman found himself by virtue of his employment. Death by drowning could thus be regarded as arising out of employment unless evidence could be produced that the workman had at or about the time of his death departed from the controlling incidents of his employment, or added to the peril by his independent act.

B. Accident on mission

FRANCE [1]

An employee on mission for his employer in Agadir was in process of going to bed when he was seriously injured by the earthquake which destroyed the city on 29 February 1960. The question before the Court was whether his injuries arose out of and in the course of employment, since he was not at the time engaged in professional activities.

The Court held that they did. The accident was due to the fact that the employee was, for the purpose of his mission, obliged to be present in an area which was devastated. Although he was, at the time of the accident, performing an act of daily life, he had remained within the normal limits of the mission.

C. Presumption of occupational origin

FRANCE [2]

A cutter employed in a shoe factory died of leukemia. His widow claimed employment injury benefit on the ground that leukemia was included in the schedule to the decree of 31 December 1946 as presumed to arise from employment in case of regular employment in work involving a risk of benzole poisoning. The social security institution claimed that the deceased worker had not been regularly employed in such work

[1] Court of Cassation, 29 January 1965. *Breteau* v. *C.P. C.S.S. — R.P.*, in *Recueil Dalloz-Sirey* (Paris), 14 Apr. 1965, Jurisprudence, pp. 280-283. The conclusions of the Avocat général délégué, which review earlier decisions concerning employees on mission, are reproduced *in extenso*.

[2] Court of Cassation, 17 July 1964. *Directeur régional de la sécurité sociale de Limoges* v. *Veuve Durac*, in *Recueil Dalloz-Sirey* (Paris), 30 Sep. 1964, p. 562.

A lower court (Court of Appeal, Limoges, 27 February 1963) nevertheless awarded the benefit, on the ground that the presumption of origin placed on the social security institution the burden of proving that the worker had not been exposed to the risk, and that it had not done so beyond doubt.

The Court of Cassation set aside the decision of the lower Court. The presumption of occupational origin came into play only where proof of exposure to the risk in the meaning of the decree was brought. It was for the victim or his survivors to bring that proof.

Professional organisations

A. Right of admission to works meetings

FEDERAL REPUBLIC OF GERMANY [1]

Under article 45 of the law relating to works meetings, representatives of trade unions having members in the undertaking are entitled to attend such meetings in an advisory capacity. An undertaking gave formal notice that a particular trade union official would not in future be admitted to such meetings, on the ground that he had publicly libelled the undertaking, and that his presence on the premises could only lead to a breach of the peace; the union contested the undertaking's right to refuse him admission.

The Court held that the right of the union under article 45 was independent of permission or invitation by the undertaking. It included the right to send a representative freely chosen by the union to works meetings, and, by implication, the right of the representative to free access to the premises in which the meeting was held. The undertaking could not rely on its ownership of the premises to deny such access; the rights deriving from ownership were inapplicable to a works meeting, which was under the authority of the chairman of the works council, the premises being merely placed at the disposal of the meeting by the employer. However, access could be denied to the representative of a union if it abused its rights, i.e. if it used them for purposes going beyond or not falling within that covered by article 45.

B. Capacity to sue

FEDERAL REPUBLIC OF GERMANY [2]

Two unions conducted rival membership campaigns, in the course of which one distributed material running down the social benefits provided by the other. The second union sought to obtain an injunction

[1] Federal Labour Court, 18 March 1964. *Arbeitsrechtliche Praxis* (Munich and Berlin), Case No. 1 relating to article 45 BetrVG.

[2] Federal Court, 6 October 1964. *Arbeitsrechtliche Praxis* (Munich and Berlin), Case No. 6 relating to article 54 BGB.

to restrain the distribution of such material, as well as damages for its distribution. In the Federal Republic of Germany unions do not enjoy legal personality because they do not choose to register as corporations; the right of the union to sue in a civil court was accordingly contested (the right to sue in the labour courts being expressly recognised by the Labour Code).

The Court, while not deciding the question whether unions enjoyed unlimited powers to sue, held that a union must be able to have recourse to the courts for protection against illicit infringements of its activities by private persons and organisations. The Constitution expressly protected the existence and right to act of associations established for the advancement of labour and social conditions. That protection did not apply only in relation to the State, but also in relation to private persons and organisations. The law of procedure had to find means to make that protection effective. If this meant that trade unions were advantaged in comparison with other charitable organisations, this was justified by reference to the variety of public functions entrusted to trade unions.

C. Liability in case of illegal strikes

1. CANADA [1]

In 1957 there was a strike at some copper mines in which damage to property was committed. The strike was called by a local of the United Steel Workers' Union of America; it was not expressly authorised by the parent union. The undertaking nevertheless sued the parent union.

The Court found in favour of the undertaking and awarded damages with interest and costs, amounting to about two-and-a-half million dollars. It found that the strike had been illegal. A union was liable for damage caused illegally to a third party; in the case of an illegal strike a union was liable for the loss and damage suffered by the employer. There was a distinction between a local union and the parent union to which it was affiliated; the latter could not be held liable for the illegal acts of the former unless it was shown to have connived in them. However, in this case, the president of the parent union could have prevented or stopped the commission of the infraction, and his failure to do so must be regarded as approval.

2. INDIA [2]

Following a strike, claims by the workers for wages for the period of the strike and claims by their employers for compensation for loss of

[1] Superior Court of Quebec, 3 December 1964. *Gaspé Copper Mines Ltd.* v. *United Steel Workers of America*, reported in *Canadian Labour* (Ottawa), Vol. 10, No. 1, Jan. 1965. This decision is not final.

[2] Patna High Court, 2 May 1962. *Rohtas Industries Staff Union* v. *State of Bihar*, in *Factories Journal Reports* (Madras), Vol. XXV, pp. 395-411.

production were referred to arbitration. The arbitrators decided for the employers on all issues. The union sought to have the award set aside on the ground that workmen going on strike could not be condemned to pay damages for loss of production.

The Court set the award aside. It held that the question to be resolved was whether the dominant purpose of the strike was the promotion of the legitimate interest of the union. If it was, the question whether the strike was legal or illegal under the Industrial Disputes Act, 1947, had no bearing on the question of immunity granted by the Trade Union Act, 1926, in favour of trade unions or officers or members thereof from legal proceedings. The Industrial Disputes Acts laid certain duties on workmen in relation to the public, which were enforceable by criminal prosecution; however, the employer had no right of civil action for damages against workmen participating in an illegal strike.

Collective bargaining

A. Applicability of a collective agreement to an employer not party thereto

UNITED KINGDOM [1]

Under section 8 of the Terms and Conditions of Employment Act, 1959, the Minister of Labour may refer to the Industrial Court a claim that a particular employer is not observing the terms and conditions of employment established in the trade and industry in question by an agreement or award the parties to which represent a substantial proportion of the employers and workers in the trade or industry.

In this test case it was accepted on all sides that terms and conditions of employment had been established in the vehicle building industry by organisations of employers and workers representing a substantial proportion of those in the industry. The claim, submitted by the workers' organisation concerned, alleged that a particular employer, who was not a member of the employers' organisation, was not observing certain terms and conditions of employment, namely those relating to provisions for the avoidance of disputes and to shop stewards. The employer took the view that the provisions in question were procedural and did not themselves create terms and conditions; moreover, they were by their express language restricted to employers and workers belonging to the organisations parties to the agreement.

The Court held that the provisions in question were not terms and conditions of employment in the meaning of the Act, and that their terms were such as to make them inapplicable when the workers concerned were employed by an undertaking that was not a member of the employers' organisation party to the agreement.

[1] Industrial Court, 1 March 1965. *Fairview Caravans Ltd. and National Union of Vehicle Builders.*

B. Applicability of a collective agreement to individual workers

CANADA [1]

A clause of a collective agreement applicable to a laundry establishment and its employees provided that employees, for a period of six months after termination of their employment, would not solicit patronage in respect of services rendered by the employer from any customer of the employer with whom the employee dealt in the course of his employment. A driver-salesman violated that provision when he left employment; when sued he argued that he was not a party to the collective agreement and hence not bound by it.

The Court held that collective agreements, under the pertinent legislative enactments and the development of industrial relations practices thereunder, had become and were accepted as agreements creating legally enforceable obligations. Likewise, collective agreements were considered as being entered into by the trade union concerned on behalf, not only of itself, but also of the workers it represented. Since the pertinent terms of the collective agreement were, in the absence of contrary provision, presumed to be incorporated in the individual contract of employment, the relevant provision, which was neither unreasonable nor contrary to public policy, could be invoked directly against the defendant.

C. Lockout in support of bargaining practices

UNITED STATES [2]

A shipbuilding company laid off its workforce after negotiations with eight unions for renewal of a collective agreement had reached an impasse. The National Labour Relations Board held this to be an unfair labour practice, on the ground that it interfered with the employees' right to bargain collectively and to strike and discriminated against them with a view to discouraging union membership in violation of the National Labour Relations Act.

The Supreme Court held that there was no unfair labour practice. There was no evidence that the employer was hostile to the employees banding together for collective bargaining. He merely intended to resist the demands made of him in the negotiations; this was not inconsistent with the employees' right to bargain collectively. There was also no indication that the lockout would necessarily destroy the unions' capacity for effective and responsible representation. The lockout might dissuade employees from adhering to their initial bargaining position, but the

[1] Supreme Court of British Columbia, 5 February 1965. *Nelson Laundries Ltd.* v. *Manning*, in *Canadian Law Reports* (Montreal), 27 July 1965.

[2] Supreme Court, 29 March 1965. *American Shipbuilding Co.* v. *National Labor Relations Board*, in *Labor Relations Reporter* (Bureau of National Affairs, Inc., Washington), Vol. 58, No. 27, 29 Mar. 1965 (Extra edition bulletin).

right to bargain collectively did not entail a right to insist on one's position free from economic disadvantages. As for the argument that the lockout interfered with the right to strike, its effect was indeed that it deprived the unions of exclusive control of the timing and duration of the work stoppage which in fact occurred; however, there was nothing in the National Labour Relations Act which implied that the right to strike carried with it the right exclusively to determine the timing and duration of all work stoppages.

Strikes and lockouts

A. Strikes in essential services

JAPAN [1]

Following a strike in a mental hospital the management dismissed officers of the employees' union on the ground that strike action, which seriously affected the normal functioning of the hospital service (involving the death of one patient), was not admissible. The Central Labour Relations Committee ordered their reinstatement.

The Supreme Court, affirming the Tokyo Regional Higher Court, upheld the decision for reinstatement. Since the Constitution guaranteed the right to strike, special legislation was required to nullify that right. There was no such legislation covering the case of a mental hospital. Even if it was true that a mental hospital was different in nature from an ordinary industrial establishment, strikes in such a hospital could not be prohibited by analogy to legal provisions expressly prohibiting them in coal mining, electricity supply, local public service and seafaring.

As regards the limits of legitimate strike action in a hospital, the Court held that some disturbance of the medical care would not warrant a judgment that these limits had been passed. However, any act which menaced the life and safety of human beings and affected seriously the morbid condition of patients should not be contemplated. Furthermore, since the condition of patients might be aggravated if the stoppage of medical care lasted for a certain period, hospital employees should endeavour beforehand to safeguard the life and health of the patients and should co-operate with management in case of emergency; refusal of such co-operation could reasonably be regarded as an illegitimate act.

B. Acts of violence during strikes

ARGENTINA [2]

In accordance with the strike plan of their union, workmen of an undertaking occupied its premises and prevented the employer both from

[1] Supreme Court, 4 August 1964. *Hanrei Jiho* (Tokyo), 1 Sep. 1964, pp. 6-12.

[2] Supreme Court, 13 May 1964. *Derecho del Trabajo* (Buenos Aires), Year XXIV. No. 6, June 1964, p. 279.

entering and from attempting to undertake work. They did not comply with a Court order to vacate the premises. For these various acts they were subsequently charged with unlawful seizure and with contempt of court, and were sentenced to fine and imprisonment. They appealed to the Supreme Court on the ground that the new article 14 of the Constitution, which introduced the right to strike, made unconstitutional a conviction for acts related to a strike.

The Supreme Court dismissed the appeal. The article concerning the right to strike was not an obstacle to the punishment of acts which overstepped the limits of a reasonable exercise of that right. Where strike action involved the use of physical violence, it was punishable.

C. Effect of strikes on other undertakings

DENMARK [1]

In certain branches of economic activity, collective agreements do not contain provisions to the effect that no period of notice is required to lay off workers in cases of *force majeure*, e.g. where the production of an undertaking ceases or diminishes owing to a strike among other workers which affects supplies. In 1961 the Labour Court held that where a lay-off in such a sector is the effect of a lawful strike, the normal period of notice would have to be respected. In this case the Court was called upon to consider the effect of an unlawful strike.

The Court held that the provisions of the collective agreement concerning notice of termination of employment could not be considered to have envisaged the exceptional case of an unlawful strike cutting off the production of the undertaking in such a short time that it would be impossible to respect the normal period of notice. Under general principles of law, the workers affected by the lay-off were closer to the responsibility for the situation resulting from the unlawful strike by other workers than the employer, and accordingly had to bear the consequences.

---

[1] Labour Court (Arbitration decisions), 1964. *The Aller Case* in *Arbejdsgiveren* (Copenhagen), No. 20, 1964.