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 1968 to September 1969. As before [1], they cover the application of general legal principles to labour law (custom as a source of law; retroactivity of legislation; limitation of actions; renunciation of rights; liability of employers and workers); contracts of employment (nature of contracts of employment; terms of employment; suspension of employment relationship; termination of employment relationship; discrimination in employment); conditions of employment (wages; holidays with pay; maternity leave; retirement age); occupational safety and health; social security (employment injury benefit; sickness benefit; old-age benefit; bad weather pay); and freedom of association and the right to organise (occupational organisations; collective bargaining; industrial disputes; strikes and lockouts).

Custom as a source of law

FEDERAL REPUBLIC OF GERMANY [2]

An undertaking, as a voluntary benefit, paid the social security contributions of its employees as from the tenth month of their service. In 1958 it stopped the payments, at the instance of the social security institution, in respect of employees engaged thereafter. The question at issue in this case was whether an employee who had been engaged prior to 1958 but had not yet had ten months of service when the practice was changed was entitled to the benefit.

The Court answered the question in the affirmative. Where it was the known practice of an undertaking to grant certain benefits, the new

[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; Vol. 91, No. 3, Mar. 1965, pp. 210-231; Vol. 93, No. 4, Apr. 1966, pp. 414-435; Vol. 95, No. 3, Mar. 1967, pp. 215-238; Vol. 97, No. 3, Mar. 1968, pp. 251-272; and Vol. 99, No. 5, May 1969, pp. 533-557.

[2] Federal Labour Court, 5 July 1968. *Arbeitsrecht in Stichworten* (Bad Homburg), Vol. 23, No. 2, Feb. 1969, pp. 18-19.

employee was entitled to count on receiving them once he met the required conditions. This effect could be excluded only by express action on the part of the employer designed to prevent legal entitlements from coming into being. It was immaterial whether the practice was a long-standing one, as long as the intent was clear and corresponded to what was in fact done.

Retroactivity of legislation

ECUADOR [1]

A worker who had been improperly dismissed claimed a number of indemnities. The issue arose in that connection whether improvements introduced into the Labour Code could have retroactive effect.

The Supreme Court held that they could have such effect. Social reforms could not be based only on a concept of justice which measured the compensation due by the exact extent of the obligation assumed. They had to take account of the principle of social justice, which nearly always implied setting aside the principle of the non-retroactivity of legislation, and which was essential for peace and order in human and economic relations.

Limitation of actions

ENGLAND [2]

Under the ordinary Limitation Acts, an action for personal injuries cannot be brought more than three years after the date when the cause of action accrued. To meet difficulties relating, *inter alia*, to certain dust diseases in which the symptoms do not become immediately apparent, the Limitation Act, 1963, established for such cases a limitation period of twelve months from the date when the person concerned knew, actually or constructively, that he had a cause of action. In this case a former shipyard worker knew several months before his death that he was suffering from a disease caused by asbestos; if the limitation period ran from that date, the action brought by his widow some time after his death was barred. However, it was argued that he did not know whether his illness was attributable to negligence or breach of duties by his employer, and that he therefore did not know all the facts material to a cause of action.

The Court considered that the test of knowledge was subjective: at what date ought a reasonable person to have taken legal advice to ascertain whether he had a cause of action for negligence or breach of

[1] Supreme Court, 16 February 1967. Almeida v. La Internacional SA, in *Gaceta Judicial* (Quito), Series XI, No. 3, Sep.-Dec. 1968, pp. 341-345.

[2] Court of Appeal, 21 January 1969. Newton v. Cammell Laird, in *The Times* (London), 22 Jan. 1969, Law Report.

duty? In this case, the person concerned was seriously ill and growing daily weaker; in applying for a disability pension he had done all that could be expected of him and it was not reasonable to expect him to think about possible causes of action. The widow's action was accordingly not barred.

Renunciation of rights

ECUADOR [1]

An illiterate labourer had worked on an estate as share-cropper for more than sixty years, being paid partly in cash and partly with the proceeds of a small piece of land belonging to the estate. When agrarian reform legislation was due to come into force, he agreed with his employer, before a labour inspector, on two documents under which, on the one hand, he was paid a sum of money in settlement of all his rights, present and future, under labour law, and, on the other, the land of which he took the produce as a share-cropper was leased to him, although the rent due under the lease was to continue to be paid in personal services. Subsequently he sued to obtain the ownership of the land in question, as the entitlement of a share-cropper under the agrarian reform law, and such amounts as might be due to him under labour law.

The Court held that the arrangement arrived at before the labour inspector was invalid because it was tantamount to a renunciation of rights under labour law, and such renunciation was prohibited. No precise calculation had been made to show that the sum of money paid corresponded to the amount of the various entitlements under labour law. Moreover, the main purpose of the arrangement was to give the form of a civil contract to an employment relationship which should have remained subject to and protected by the Labour Code. The plaintiff accordingly retained his status as share-cropper and was entitled to the ownership of the land he worked. Furthermore, he had to be paid his entitlements under labour law in full, the sum previously paid to be deducted from such payment.

Liability of employers and workers

SCOTLAND [2]

There was a violent explosion in a steelworks, following a fire in a hose which brought oxygen to a converter containing large quantities

[1] Supreme Court, 17 July 1968. Benigno Sandovalín v. Augusto Cobo, in *Gaceta Judicial* (Quito), Series XI, No. 3, Sep.-Dec. 1968, pp. 439-446. An analogous decision was handed down by the same Court on 24 June 1968: ibid., Series XI, No. 4, Jan.-Apr. 1969, pp. 571-580.

[2] House of Lords, 11 March 1969. Colvilles Ltd v. Devine, in *Knights Industrial Reports* (London), Aug. 1969, pp. 333-338.

of molten metal. In the panic which ensued a workman jumped off a high platform and was injured. He sued the employer on the ground that the explosion was due to the latter's negligence; in this connection he relied on the maxim *res ipsa loquitur*, i.e. the doctrine that, where a thing is under the management of the defendant and an accident occurs which is such as in the ordinary course of events does not happen if those who have the management use proper care, this affords reasonable evidence of negligence in the absence of explanation.

The House of Lords held that the employer was liable. Violent explosions did not occur in the ordinary course of things in a steelworks if those who had the management used proper care. The employer would be absolved if he could give a reasonable explanation of the accident, and show that this explanation was consistent with no lack of care. In this case the explanation given was that there were particles in the oxygen stream which ignited as a result of friction. It appeared that there were filters for the oxygen, but it was not claimed that they were inspected for effectiveness. In these circumstances, it had not been shown that the explanation was consistent with the absence of negligence.

Nature of contracts of employment

1. SPAIN [1]

A record company concluded a contract with a musician under which the latter was, for a period of five years, to make records exclusively for the company. The musician was to make at least eight records a year, and he was to be paid a royalty on the sales of each record. After more than forty records had been made, but before the expiry of the five years, the musician sought to be released from the contract on the ground that it had been fully performed. The company, on the other hand, argued that there was an employment contract for a period of five years, during which the musician was bound not to make records for another company.

The Court upheld the view of the company. The three main tests of an employment relationship were participation, manual or intellectual, in the production of the undertaking; remuneration for such participation; and dependence on the undertaking. These tests were satisfied here. Participation in production could take the form of an artistic contribution to articles made for sale. Remuneration for such participation could appropriately take the form of royalties. As for dependence on the undertaking, it was sufficiently demonstrated by such elements as the prohibition to work for other companies, the acquisition by the under-

[1] Eighth Labour Court of Madrid, 13 November 1967. Hispavox v. Rafael, in *Derecho del Trabajo* (Buenos Aires), Vol. XXVIII, No. 9, Sep. 1968, pp. 502-508.

taking of the ownership of records made, and the requirements, laid down by the undertaking, which had to be met by the records.

2. GERMAN DEMOCRATIC REPUBLIC [1]

In July 1967 a professional musician agreed with the owner of a bar, in writing, that, if a trio which he intended to form gave satisfaction at an audition, that trio would be engaged to play in the bar during the season beginning October 1967. The musician had some difficulty—of which he kept the bar owner informed—in establishing the trio and finally had to advise the owner that he would only be able to play for the audition on 29 September. The bar owner insisted that the audition take place not later than 28 September, and when this proved impossible engaged another band with which he had been in contact. The musician sued, alleging that the July agreement constituted a contract of employment.

The Court found that the July agreement was not a contract of employment seeing that any such contract presupposed the existence of a trio, and a satisfactory audition. However, legal relations arose in the course of negotiation which could give rise to a claim for damages. For instance, both parties were required by law to keep each other informed of all relevant circumstances, to comply with all legal or agreed conditions pertaining to the proposed contract, and to give notice of disinclination or inability to contract in time for the other party to make alternative arrangements without suffering undue damage. Where these requirements were violated by a prospective employer, he was liable in a manner analogous to his liability for breach of an employment contract. The amount of damages could be fixed in general by reference to the legal period of notice of an employment contract, although the peculiarities of employment in particular occupations or localities might have to be taken into consideration. In the present case, a lower court would have to re-examine all the facts in the light of these indications of principle.

3. CHAD [2]

In 1964 one M. was elected administrative secretary of the executive committee of the Chad Workers' Union by the General Assembly of the union. His functions were mainly to represent the union and its members before the Courts, and in particular the labour courts; and to study and

[1] Supreme Court, 28 February 1969. *Arbeit und Arbeitsrecht* (Berlin), Vol. 24, No. 9, May 1969, pp. 286-288.

[2] Court of Appeal of Fort-Lamy, 12 April 1968. *Travail et profession d'outre-mer* (Paris), 2 Oct. 1969, p. 5859.

make known labour laws and regulations. He was paid a monthly stipend. In 1967 he was removed from these functions; he thereupon sued for various incidents of an employment contract, such as salary in lieu of notice, holiday pay, and termination indemnity.

The Court held that there was no employment contract and that he was accordingly not entitled to these indemnities. In the exercise of his functions M. was not subject to the instructions and control of the executive committee of the union, but was merely required to report on his activities—an obligation laid upon all agents. The fact that he was elected was in itself incompatible with an employment contract. He was therefore a salaried agent, and not an employee.

Terms of employment

1. JAPAN [1]

Prior to 1957 a bus company had no mandatory retirement age for supervisory staff. In that year a provision for retirement of such staff at age 55 was introduced into the works rules, and the employment of staff who had reached that age was terminated. One employee contested the termination on the ground that the works rule was not legally binding in relation to employees who did not consent thereto.

Following divergent decisions by lower courts, the Full Bench of the Supreme Court, in a majority decision, upheld the termination. It was the established custom for terms of employment to be governed by the works rules, and these accordingly had to be regarded as legal norms under the Civil Code. That being so, they were applicable to individual workers regardless of these workers' knowledge of the content of a particular rule, and regardless of their individual consent to it. As a general principle, it was not permissible to deprive workers unilaterally of their acquired rights, or to worsen their working conditions through a change in a works rule. However, as long as the content of a changed rule was reasonable, its application to a particular worker could not be contested on the ground of absence of consent; works rules were intended for collective, standardised regulation of terms of employment, and collective bargaining was the appropriate means of improving them. In this particular case, there was no infringement of acquired rights; the absence of a mandatory retirement age was not a guarantee of life-long employment. Moreover, the introduction of a rule on the subject was not unreasonable, nor was the level of retirement age too low as compared with the prevailing level.

[1] Supreme Court (Full Bench), 25 December 1968. *Rōdō Horei Tsushin*, Vol. 22, No. 2, Jan. 1969.

2. SWITZERLAND [1]

Several factories producing clocks and watches formally agreed not to engage workers who were, immediately prior to such engagement, employed in any of the factories parties to the agreement, even if the workers had already resigned from such employment. One worker who failed to obtain an employment in which he was interested because of the application of this agreement, contested its validity.

The Court held the agreement to be invalid, and awarded damages. In principle, agreements between employers to prevent enticement of workmen were lawful; often they were required by professional ethics. However, the scope of such agreements had to be limited by reference to the legitimate rights of others, and particularly the protection of the worker. Freedom to work implied the right of the worker to leave his employment. Where a group of employers agreed not only not to entice workmen, but also not to engage them, the right of the worker to leave his employment became illusory because he was deprived artificially of the possibility of finding work elsewhere. An agreement to prevent a worker from leaving his work would be unlawful and immoral. It could not be admitted that an agreement between employers should restrict the rights of the workers to a greater extent than was permitted by relevant case law as regards agreements between employers and workers which restricted competition; such agreements could not go so far as to oblige the worker to renounce in advance all possibility of working for a competitor.

Suspension of employment relationship

1. INDIA [2]

A member of the Bombay Medical Service was suspected of corrupt practices and was suspended. During suspension he received pay but not at the full rate. In a court action he raised the question of the authority of the Government to suspend him and to pay him at a rate different from that of his normal full emoluments.

As regards the first point, the Court pointed out that it was well settled that a general power to suspend was not an implied term in contracts of employment, and could result only from a statute governing the contract or from an express term in the contract. There was, however, a distinction between suspension of a contract of service and suspension of an employee from the performance of his duties; suspension in the

[1] Court of Appeal of the Canton of Berne, 29 February 1968. Blanches Fontaines SA v. Alliman, in *Semaine Judiciaire* (Geneva), 1969, p. 20. A similar decision was given by the same Court on 17 May 1968 (ibid., p. 28).

[2] Supreme Court, 12 December 1967. *Indian Factories and Labour Reports* (Allahabad), Vol. 17, Part 12, 15 Dec. 1968, pp. 445-453.

latter sense, pending inquiry into the employee's conduct, was possible even in the absence of express provision.

As regards the second point, the Court took the view that the employee was, during suspension pending inquiry, entitled to his full remuneration unless there was an express term of employment to the contrary. In this particular case there were provisions in the Bombay Civil Service Rules which made it possible for the remuneration to be varied.

2. ITALY [1]

An employee of a bank refused to comply with a transfer to a branch in another town. The bank could, under the rules applicable to its staff, have declared him to have " resigned "; it did not do so, and merely did not pay his salary for the period during which he did not proffer his services. Subsequently the question arose whether that period was to be regarded as a period of employment for purposes such as seniority.

The Court pointed out that, during a suspension of the employment relationship, that relationship continued in the sense that the employee remained at the disposal of the employer, and that entitlements based on the duration and continuity of the relationship therefore also continued. However, suspension was possible only either in cases provided for by law, or where agreed upon by the parties to the employment relationship. Any other interruption of the relationship was tantamount to its termination. In this particular case further consideration would have to be given by the lower courts to the question whether, under the relevant rules, there was automatic termination of employment, whether failure of the employer to act under these rules was tantamount to suspension by agreement, or whether there was not analogy to certain situations provided for by law, such as absence for family reasons.

3. CONGO (BRAZZAVILLE) [2]

The contract of a workman was suspended by the employer when the machine to which the workman was assigned broke down; the reason given for the suspension was that the workman was incapable of operating other machines. The workman claimed that the suspension was a breach of contract, and that he was accordingly entitled to indemnity.

The Court found in favour of the workman. Suspension was possible only for one of the reasons exhaustively enumerated by law. In the

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[1] Court of Cassation, 29 August 1966. Bank of Naples v. Tarallo, in *Rivista di Diritto del Lavoro* (Milan), Jan.-June 1968, Giurisprudenza, p. 157.

[2] Labour Court of Pointe-Noire, 11 November 1966. *Travail et profession d'outre-mer* (Paris), 2 Dec. 1968, p. 5442.

absence of such reason, the employer had to continue to provide work for the employee and to pay him wages.

Termination of employment relationship

A. Closure of undertaking contrasted with lockout

1. CANADA [1]

An iron-ore mine and mill was closed and its employees were laid off in August 1967. The plant had been sustaining heavy financial losses for the preceding nineteen months. Geologists and mining engineers had made studies which indicated no definite possibility of improvement. In July the union representing the employees of the plant had given the notice required to initiate bargaining on a collective agreement to replace the current agreement, due to expire on 1 October. Since the closure followed soon thereafter the union regarded it as an effort to compel renewal of the existing collective agreement without change, and claimed that this constituted an illegal lockout. The employer contended that the mine would have been closed irrespective of the union's demands.

The Court found that independent evidence, in the form of the external auditor's report and of testimony of the consulting engineer, established that the employer was facing an economic crisis before any question arose as to the terms of the next collective agreement. In these circumstances, the closure of the plant was not a means " to compel his employees . . . to agree to conditions of employment ". It was a justifiable closure and not an illegal lockout.

2. INDIA [2]

In an undertaking manufacturing iron pipes there was an industrial dispute concerning the amount of bonus payable to the workers. The dispute led to violence: a substantial number of workers surrounded the administrative building and imprisoned the staff therein throughout one afternoon and one night. Following this incident, the administrative staff refused to work for fear of their safety. The management thereupon closed the undertaking on the ground that it had become impossible to run it. The case was referred to the Industrial Tribunal, Orissa, for determination of the question whether there was a genuine closure or merely a lockout. The Tribunal held that there was lockout, apparently on the ground that closure could only be based on economic considerations, which were not present.

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[1] Supreme Court of British Columbia, 24 August 1967. Port McNeill and District Mine and Mill Workers' Union, Local 1016 v. Engine Development Co. Ltd, in *Canadian Labour Law Reports* (Montreal), No. 379, 23 Oct. 1967, p. 11331.

[2] Supreme Court, 3 May 1968. Kalinga Tubes Ltd v. Their Workmen, in *Indian Factories and Labour Reports* (Allahabad), Vol. 17, Part 9, 1 Nov. 1968, pp. 311-324.

On appeal from that decision, the Supreme Court held that there was closure. There was no principle of industrial law which provided that closure could only be justified by economic considerations. The only requirement was that the closure must be bona fide, i.e. the business must be closed finally and irrevocably. In this case the undertaking was effectively closed. At the same time, it could not be said that the closure was due to " unavoidable circumstances beyond the control of the employer ", and termination indemnities accordingly had to be paid.

B. Reduction of work force

PERU [1]

An undertaking obtained from the competent administrative authority the necessary authorisation to reduce its work force. It then formally agreed with the workers' organisation concerned on the modalities of the reduction. One worker affected by the reduction so agreed contested the validity of the decision on the ground that it did not take account of such matters as length of service and family responsibilities.

A court of first instance rejected his claim on the ground that, while the legislation governing termination of employment referred to such criteria as nationality, length of service and family responsibilities, it provided for their application only " where possible ". Despite argument that reduction of the work force without any regard to the criteria laid down in the law was improper, the Supreme Court upheld that decision.

Discrimination in employment

1. UNITED STATES [2]

Under the collective agreement applicable to an undertaking, the working of overtime was compulsory; disciplinary sanctions were applicable to any employee who refused to work overtime or, in case of substantial reason for not so working, failed to provide a replacement. An employee who was discharged following repeated refusals to work on a Sunday, by reason of his religious beliefs, brought legal action for violation of his rights under the Federal Civil Rights Act of 1964.

The Court ordered the reinstatement of the employee, with back pay. The Civil Rights Act made it unlawful for an employer to discharge an individual because of his religion. The only exception was that of a job in which religion was a bona fide occupational qualification reasonably

[1] Supreme Court, 12 December 1967. Teófilo Saldaña v. Fábrica de Cristal Ferrán, in *Informativo del Trabajo—Arisa* (Lima), No. 542, 11 Jan. 1969. pp. 2-5.

[2] Federal District Court (Michigan), 6 June 1969. Dewey v. Reynolds Metal Co., in *Labor Relations Reference Manual* (Washington, DC), Vol. 71, p. 2406.

necessary to the normal operation of the undertaking; such exception did not apply in this case. The employer had the burden of proving that the undertaking would suffer unduly if the employee's religious needs were accommodated; this had not been shown. The collective agreement was illegal and void in so far as it violated federal law; the argument that it applied to all employees was not determining, for its provisions could have an unequal and discriminatory effect on certain employees.[1]

2. UNITED STATES [2]

A woman applicant for an advertised vacancy in an undertaking was refused employment because she had children under school age. The company did employ men with small children. The rejected woman applicant brought legal action for violation of her rights under the Civil Rights Act of 1964.

The Court dismissed her claim. The Federal Act proscribed discrimination based on race, colour, religion, sex or national origin. Discrimination based solely on one of these elements was necessarily a violation of the law. Where, as here, another criterion was added, the Court had to decide whether a person or group was being denied employment for one of the reasons listed. In this case, the employment was denied essentially because the applicant had small children. While the fact that the undertaking accepted men with such children presented an appearance of discrimination founded upon sex, the intent of the legislation was not to prevent an employer when engaging staff from considering differences in the normal relationship between working fathers and their children, on the one hand, and working mothers and their children, on the other.

3. ITALY [3]

A law of 9 January 1963 prohibits dismissal on the ground of marriage and provides that the employment relationship of a woman worker may be terminated during the year following her marriage only on three grounds: misconduct of the worker justifying dismissal; closure of the undertaking; expiry of the agreed contract period. The constitutionality of that law, in that it limits the grounds of dismissal, was questioned on the ground of conflict with the principles of freedom of trade and of equality before the law.

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[1] In another case, decided by a Federal District Court (Alabama) on 29 May 1969, a union shop agreement was enforced against a worker who, for religious reasons, refused to join the union, on the ground that the agreement was applicable to all employees without discrimination. Gray v. Gulf, Mobile and Ohio RR Co., ibid., p. 2729.

[2] Federal Court of Appeals (Louisiana), 26 May 1969. Phillips v. Martin Marietta Corp., in *Labor Relations Reference Manual* (Washington, DC), Vol. 71, p. 2323.

[3] Constitutional Court, 5 March 1969. Peloia v. Cattaneo, in *Notiziario di Giurisprudenza del Lavoro* (Rome), Vol. IX, No. 2, Mar.-Apr. 1969, pp. 52-56.

The Court held that the law was in conformity with the Constitution. Prior to its enactment, there was a widespread practice of dismissing women workers on marriage because of the burden of the legislation protecting married women. Within the framework of that protection, it was legitimate to seek not to impose on women the choice between the fundamental right to marry, on the one hand, and the pursuit of an occupation, on the other. The restrictions on the right to dismiss were justified by the social phenomenon which the law was designed to meet, and by the need to safeguard the liberty and dignity of the workers concerned. These restrictions, which were applicable only for a limited period, freed the woman worker from the onerous burden of proving that a dismissal was solely due to her marriage or intended marriage; they were essential to avoid fraud and facilitate judicial control of the application of the prohibition of dismissal on grounds of marriage.

Wages

A. Relationship to cost of living

1. PAKISTAN [1]

Under the award of a labour court, the employees of a statutory authority were granted a very substantial increase in " dearness allowance ". The court justified this increase by reference to the cost-of-living index, and did not take account of arguments as to the employers' ability to pay or as to rates applicable in comparable employment.

On appeal by the employer, the award of the labour court was set aside. Dearness allowance was paid as an aid to the employee; it was not meant to compensate increases in prices in their entirety. In evaluating its amount, the courts could not overlook the economic position of the employer. Moreover, the conditions obtaining in comparable employment were also relevant.

2. BELGIUM [2]

The minimum salaries fixed in a national collective agreement for salaried employees were linked to the retail price index according to clearly defined statistical methods. An employee whose salary was higher than the minimum for his category laid down in the collective agreement claimed the application to that salary of an increase applicable to the minimum salary in accordance with these rules. His claim was opposed

[1] High Court of East Pakistan (Dacca), 16 August 1967. Chittagong Port Trust v. Chittagong Port Workers' Union, in *Labour Law Cases* (Karachi), Vol. XII, No. 2, Feb. 1969, pp. 43-46.

[2] Labour Court (Conseil de prud'hommes) of Charleroi, 23 January 1968. *Revue de droit social* (Brussels), 1968, No. 5, p. 213.

by the employer on the ground that the increase only applied to minimum salaries.

The Court, relying *inter alia* on an analogous decision of the Court of Cassation of 12 June 1952, rejected the claim. The collective agreement dealt expressly only with minimum salaries. Although at the time of the negotiation of the agreement the view had been unanimously expressed that employees with higher salaries should not lose their advantages as a result of increases in the cost of living, and such a view was legitimate in equity, there was thus no legal obligation on the employer to increase salaries above the minimum in the light of changes in the retail price index.

B. Equal remuneration

ARGENTINA [1]

A number of women workers, relying on the law on the basis of which Argentina had ratified the Equal Remuneration Convention, 1951, claimed payment of the difference between their wages and the amount paid in the same undertaking to male workers assigned to the same tasks. The women were paid the minimum wages laid down in the relevant collective agreement; the men were paid more.

The Court rejected the claim. An employer was entitled to pay some of his workers at a rate higher than that required by the collective agreement in recognition of the quality of their work. A conclusion that the quality of the work of men employed in the undertaking was higher than that of the women did not violate the principle of equal remuneration for equal work. The question whether there were circumstances justifying such a difference was one to be determined by the employer; the circumstances did not have to be proved in judicial proceedings.

Holidays with pay

FRANCE [2]

An undertaking in the construction industry closed, for general " holidays ", during the period between Christmas and the New Year. The decision to do so had been notified only three days earlier to workers who had not themselves asked for holidays at that time. One such worker, who had apparently exhausted his entitlement to holiday pay from the

[1] Supreme Court of the Province of Buenos Aires, 2 July 1968. Huidobro v. Industrias Algodoneras SA, in *Derecho del Trabajo* (Buenos Aires), Vol. XXVIII, No. 9, Sep. 1968, pp. 475-477.

[2] Court of Cassation, 16 December 1968. Savonitto v. Colella, in *Droit social* (Paris), No. 5, May 1969, pp. 316-317. A decision to the effect that the worker, for his part, cannot take his holiday without the period of such holiday being agreed with the employer, was given by the Supreme Court of Mexico on 10 February 1967 (*Revista Mexicana de Trabajo* (Mexico), Mar. 1968, p. 182).

occupational holiday fund during the summer, claimed that he was available for work and therefore entitled to his salary.

The Court held that he was entitled to compensation in the amount of his salary. The relevant legislation required the employer to give general indications concerning holidays two months earlier, and to notify individual workers at least two weeks before the beginning of their leave. In the absence of sufficient notice the worker could not be regarded as being on holiday during the period when the undertaking was closed. Moreover the undertaking could not rely on the argument that during the summer holiday period, for which he obtained holiday pay, the worker was in fact working, since, in concurring with such an arrangement, it had in violation of the law employed the worker during a holiday period.

Maternity leave

GERMAN DEMOCRATIC REPUBLIC [1]

A book-keeper made use of the possibility, provided for in the Labour Code, of taking unpaid leave from the end of the statutory period of maternity leave until the first birthday of the child. She was replaced in her work by a part-time worker, who first had a fixed-term and later a permanent contract. When she informed the undertaking, at the expiry of the unpaid leave, of the date on which she expected to resume her employment, she was informed that her contract had to be terminated because of changes in staffing, involving reduction in the number of full-time workers. The issue before the Court was the validity of such termination.

The Court held that the termination was not valid. The right of a woman to take special leave to stay with her small child was a statutory measure for the protection of the working mother; it was designed to save the women concerned anxiety regarding their continued employment and reintegration in work. During the leave the employment relationship was suspended since there was no obligation to work or to pay remuneration. However, at the end of the period of leave the woman was entitled to continued employment on the agreed terms. An undertaking was entitled to terminate such employment if changes in production or staffing made this necessary. However, in this case the work performed by the woman concerned continued; there was no reduction of labour on the duties at issue. The termination was the result of the permanent appointment of the replacement; this did not justify the termination of the employment of a working mother returning from special maternity leave.

[1] Regional Court of Leipzig, 5 January 1968. *Arbeit und Arbeitsrecht* (Berlin), Vol. 23, No. 17, Sep. 1968, pp. 492-493.

Retirement age

ITALY [1]

At the instance of a former employee of the Savings Bank of Palermo, the question was submitted to the Constitutional Court whether provision for a lower retirement age for women than for men constituted a violation of the equal rights provision of the Constitution.

The Court held that the principle of equality did not exclude distinctions which were objectively justified. As regards retirement age, regard could be had to such matters as physiological differences, differences in resistance to tiring work and in output, etc. Moreover, reference could be made also to other constitutional principles, such as the safeguarding of the family; for this purpose it was appropriate to authorise women workers after a certain age to devote themselves exclusively to their household tasks.

Occupational safety and health

ENGLAND [2]

A painter who was to paint the top of an oil storage tank was injured when the ladder which he was using fell before he could lash it at the top. The Building (Safety, Health and Welfare) Regulations, 1948, required ladders to be secured before use; in this particular case, the ladder should have been lashed from an outside iron staircase on the oil storage tank. The painter had not done so and had never been instructed by the employers to do so; both the painter and the employers were thus technically in breach of the Regulations. It was, however, argued by the employers that they were entitled to assume that a skilled and experienced man would know and comply with the Regulations, and that they had accordingly done all that could reasonably be required of them.

The Court held that the employers had not proved that they had done all that could reasonably be expected of them. There was a substantial risk that a skilled man would not, from his practical experience, be sufficiently familiar with the Regulations, particularly as these differed according to whether there was an alternative means of access or not. The employers, who were bound to know their statutory duty and take

[1] Constitutional Court, 12 July 1969. *Corriere della Sera* (Rome), 13 July 1969, p. 11. This decision may be contrasted with a decision of the Italian Court of Cassation of 6 November 1968, to the effect that a clause in a collective agreement fixing a lower retirement age for women than for men was invalid because it was not based on any objective distinction. Azienda Communale Centrale del Latte di Roma v. Ruschi Antonina, in *Rivista Giuridica del Lavoro e della Previdenza Sociale* (Rome), Vol. XIX, No. 6, Nov.-Dec. 1968, pp. 679-685.

[2] House of Lords, 29 April 1969. Boyle v. Kodak Ltd, in *The Times* (London), 2 May 1969, Law Report.

all reasonable steps to prevent their men from committing breaches, should have instructed the painter accordingly.

Employment injury benefit

1. FEDERAL REPUBLIC OF GERMANY [1]

During a football match between teams from two undertakings one player broke his leg. The match was held on a sports ground belonging to the employer of the injured player, which was being inaugurated; the inauguration was attended by some 150 of the 1,300 employees of the undertaking. The question for consideration by the Court was whether the injured player was entitled to employment injury benefit on the ground either that he had engaged in a sport covered by the relevant insurance or that he had participated in a social event assimilated to activity in the undertaking.

The Court held that employment injury benefit was not due. As regards the insurance of sport activities in an undertaking, the following were criteria for coverage: the activity was designed to offset work strains; it took place regularly; it was related to the employment both by the character of the participants and the time and duration of the exercise. It could not be said that a match against a team from another undertaking met these criteria. As regards the insurance of social events, the test was whether these were designed to enhance the corporate spirit of staff and management of the undertaking. This implied that the staff as a whole, and not merely a small fraction of it, was involved in the events. In this case it was clear that only a relatively small number were expected; the premises hired for a social gathering after the match would not have admitted more.

2. UNITED KINGDOM [2]

A technician in the engineering department of the Post Office sustained personal injury while attending an evening class at a technical institute. He claimed employment injury benefit. The question at issue was whether at the time of attending the class he was in the course of employment. It was agreed that he had voluntarily enrolled in the class.

The Commissioner held that the fact that attendance was voluntary was not necessarily conclusive. The nature of the activity and its relationship to the employment were of equal or greater relevance. In the tech-

[1] Federal Social Court, 28 August 1968. Judgment No. 2 RU 68/68. In another judgment given on the same day (2 RU 67/67) the Court held that a similar accident suffered by a student at a technical college was covered, the physical development of students being one of the purposes of their education.

[2] Industrial Injuries Commissioner, 19 November 1968. Decision No. CSI 3/68, in *Trade Union Information* (Dublin), Feb. 1969, p. 8.

nical branch of the Post Office further training of this kind was necessary for efficiency; attendance at the class was thus closely associated with the employment. Moreover, in recruiting technicians, it was the practice to ask applicants whether they were willing to attend night classes, and the undisputed evidence was that an applicant who was not willing to do so was not likely to be employed; attendance was therefore voluntary only in a limited sense. In all these circumstances, attendance at the class was sufficiently incidental to the claimant's employment to justify the grant of employment injury benefit.

Sickness benefit

SENEGAL [1]

The employment of a foreman was terminated by retirement, with full pension rights, when it became apparent that he would not recover sufficiently from an illness to resume active work. One of the questions submitted for judicial determination in that connection was whether he was entitled to the full amount of sickness benefit provided for in the relevant collective agreement, i.e. four-and-a-half months' salary.

The Court held that he was entitled to the full amount. According to the Labour Code sickness suspended an employment relationship for six months; no distinction was made in the Code for cases in which it was clear from the outset that the worker would not be able to resume his work at the end of that period. A contract of employment could thus not be terminated for reasons of sickness before the expiry of six months, and during that period the worker was entitled to the benefit fixed by the collective agreement. This did not mean that the contract could not be terminated for other reasons; here retirement supervened. Such retirement did not, however, free the employer from his liability to pay sickness benefit—a liability in respect of which he acted in place of a social security institution. The pension due on retirement was earned by length of service, and was not due for the same contingency as sickness benefit; the receipt of both benefits simultaneously for a short period thus did not constitute unjustified enrichment.

Old-age benefit

1. UNITED STATES [2]

The regulations governing a pension fund for mineworkers, established jointly by an employers' and a workers' organisation, prescribed

[1] Court of Appeal of Dakar, 17 January 1968. *Travail et profession d'outre-mer* (Paris), 2 July 1969, p. 5764.

[2] Federal District Court, District of Columbia, 22 April 1969. Collins v. UMW Welfare Fund, in *Labor Relations Reference Manual* (Washington, DC), Vol. 71, p. 2022.

the following qualifying conditions: at least twenty years' service; at least 55 years of age; employment, during the year preceding retirement, with an employer signatory to the agreement governing the fund. A worker who met the first two conditions, but did not meet the third because scarcity of employment opportunities had compelled him, during the year preceding his retirement, to work in another mine, contested the last requirement as being arbitrary and capricious.

The Court agreed with him and ordered that he be paid a pension. In any trust, the courts could set aside a denial of benefits which was arbitrary and capricious, or not supported by any evidence. While that authority had to be exercised sparingly, the burden was on the trustees to show some rational connection between the purpose of the fund and the challenged requirement. Here all that was necessary to confine benefits of the fund to retired employees whose labours brought about contributions to it was to require that the miners should have worked for a specific minimum period in signatory coal mines. It was patently unfair to require of a person who for many years had worked in a signatory mine, but during the last year was forced by circumstances to accept work elsewhere, to have continued to work in a signatory mine until retirement.

2. PERU [1]

In this case the question submitted to the Court was whether a pension was correctly based only on the salary received by the workman during his years of service, or whether account should have been taken also, in calculating it, of various allowances and bonuses received by him. The allowances and bonuses in question were, *inter alia*, Christmas bonus and the workman's share in annual profits.

The Court held that, according to the law of 1916 concerning social benefits, as amended, pensions had to be calculated on the basis of salary and of any other amount which the worker received regularly. The various bonuses and allowances referred to in this case were so received. There accordingly had to be a recalculation of the pension, taking account of the amount of allowances and bonuses during the last year of employment.

Bad weather pay

FEDERAL REPUBLIC OF GERMANY [2]

A construction undertaking asked for bad weather pay for two workers who had been unable for two days to reach the work site because of snow drifts between their home and the site; work at the site had pro-

[1] Supreme Court, 8 September 1967. F. Reducindo Vázquez v. Almacenes Romero SA, in *Informativo del Trabajo—Arisa* (Lima), No. 527, 28 Sep. 1968, pp. 3-5.

[2] Federal Social Court, 12 July 1968. Judgment 7 RA 45/67.

ceeded normally on both days. Payment was refused by the social security institution on the ground that the relevant legislation made the indemnity payable only where the activities of the undertaking were interrupted. This was an appeal based on the argument that the purpose of the indemnity, namely to encourage construction workers to work in winter with a feeling of security, required it to be payable also in circumstances in which the worker could not reach the site.

The Court rejected the appeal. It pointed out that the indemnity was designed to meet a risk peculiar to the construction industry, namely that work at a particular site would not be possible, with consequent loss of earnings. The risk of not being able to reach the place of employment applied to other industries also, and had to be resolved, not by social security arrangements, but within the employment relationship.

Occupational organisations

A. Right of association of public servants

UNITED STATES [1]

Under the legislation of the state of North Carolina police and firemen were prohibited from joining labour unions. A number of firemen petitioned the federal court for a declaration that the state law was unconstitutional.

The Court made such a declaration. Freedom of association was protected by the First and Fourteenth Amendments to the Constitution. The proposed union membership did not endanger any valid state interests which might justifiably be asserted as requiring protection by such legislation. Although a state might take steps to ensure that public employees be continually available for duty when needed, it could not use that reasoning to deny to public employees the right to participate in concerted union activities. Such denial was an unnecessarily broad invasion into the area of protected freedoms.

B. Relations between unions and their members

1. NORWAY [2]

In connection with a dispute between a union and three of its members which was finally decided by the Supreme Court [3], the members concerned had indulged in widespread criticism of the union and its

[1] Federal District Court, North Carolina, 25 February 1969. Atkins v. City of Charlotte, in *Labor Relations Reference Manual* (Washington, DC), Vol. 70, p. 2732. A similar decision, with respect to teachers, was given by a Federal Court of Appeals, Illinois (Seventh Circuit), on 12 June 1968 (ibid., Vol. 71, p. 2097).

[2] Oslo City Court, 2 November 1968. Th. Hamisch, Finn Finne and Willy Helgesen v. Norwegian Union of Chemical Workers.

[3] See *International Labour Review*, Vol. 99, No. 5, May 1969. pp. 548-549.

leadership, both inside and outside the union. They subjected to similar criticism the tenor of an internal circular by which the union gave effect to the judgment of the Supreme Court; in particular, one of the three published a series of articles in the outside press. The union accordingly expelled them for lack of solidarity. This expulsion was now contested on the grounds, first, that the criticism had been legitimate since it related to a matter on which the Supreme Court had found against the union and, second, that in so far as the articles published in the outside press were a basis for the expulsion, they could justify such action only against the author of the articles and not against all three members concerned.

The Court upheld the expulsions. In its view the essence of the case was the question whether, in raising a point of principle concerning their union membership, the members concerned had used methods inconsistent with such membership. Members of any organisation had to show loyalty; otherwise the organisation would lack the cohesion necessary for effective action. This implied, among other matters, that criticism of the union outside had to be more cautious than inside. In this case, the situation created by the legitimate dispute had been unnecessarily aggravated by the number of outside meetings held and the tone of the articles written in the outside press. As regards the latter, it was true that the case for the expulsion of the author of the articles was stronger than that for the expulsion of the other two members, but in fact the three constituted a group with a spokesman. It could not be said in respect of any of them that expulsion was so unnecessarily severe as to constitute an abuse of discretion.[1]

2. JAPAN [2]

In a municipal election a colliery workers' union nominated six of its members as candidates. A seventh member submitted his candidature, despite a union decision to the contrary, and was elected. The union thereupon threatened him with expulsion, and suspended his membership for one year. The validity of that disciplinary action was contested, on the ground that it was an infringement of the member's civic rights.

The Court held that the union had unduly extended its authority, to the detriment of a citizen's right to run for public office. A trade union could restrict its members' conduct to a reasonable extent to maintain and strengthen the unity and solidarity of the union. As a means of attaining its objectives, a union could participate in political activities such as election campaigns, for instance by the nomination of candidates. Moreover, in an effort to attain its objectives, a union could try to dissuade a member from presenting himself for election contrary to union decision.

[1] The Supreme Court of Norway upheld this decision on 1 November 1969. Its judgment will be summarised in a later issue.

[2] Supreme Court (Full Bench), 4 December 1968. *Rōsei Jihō*, No. 1971, 24 Jan. 1969.

However, the union could not go as far as disciplinary measures; the authority of the union was limited by the importance of the fundamental constitutional freedom of running for public office.

Collective bargaining

ENGLAND [1]

A large motor company sought to obtain injunctions to prevent several unions representing its workmen from continuing an official strike at its factories. It relied on three collective agreements: a 1955 agreement laying down procedures for settling disputes and providing, *inter alia*, that there should be no stoppage of work until these procedures had been completed; a 1957 agreement laying down procedures for negotiating new agreements; and a 1969 text negotiated in conformity with the 1957 agreement and providing for " penal " action against unofficial strikers. The main question at issue was whether these agreements were enforceable at law.

The Court considered that in the absence of express provision on the subject, and seeing that the agreements did not fall clearly either into a category of legally enforceable contracts or into one of non-enforceable social arrangements, the intention of the parties as shown by the circumstances was determining. The climate of opinion—as evidenced, for instance, by submissions to and by the report of the Royal Commission on Trade Unions [2]—was almost unanimous to the effect that no legally enforceable contract resulted from collective agreements; both parties must be credited with knowledge of this. The wording of the agreements also suggested that they were not enforceable at law. The company accordingly was not entitled to an injunction.

Industrial disputes

CANADA [3]

Under a collective bargaining agreement, all the employees of a metal products undertaking were required to authorise a deduction from their pay for union dues. One employee refused to do so, and the union went on strike in protest against his continued employment. The under-

[1] High Court of Justice, Queen's Bench Division, 6 March 1969. Ford Motor Co. Ltd v. Amalgamated Union of Engineering and Foundry Workers, in *The Times* (London), 7 Mar. 1969, Law Report.

[2] Royal Commission on Trade Unions and Employers' Associations, 1965-1968: *Report*, presented to Parliament by command of Her Majesty, June 1968, Cmnd 3623 (London, HM Stationery Office, 1968).

[3] Supreme Court, 27 November 1967. Hoogendoorn v. Greening Metal Products and Screening Equipment Co., in *Canadian Labour Law Reports* (Montreal), No. 383, 18 Dec. 1967, p. 11405. A similar decision was given by the Ontario Court of Appeal on 14 June 1967 (ibid., No. 375, 17 Aug. 1967, p. 11302).

taking and the union then agreed to submit the matter to arbitration. The employee did not receive notice of the hearing, nor was he present or represented at it. He contested the validity of the arbitration order on that basis. The undertaking and the union, on the other hand, claimed that the issue arbitrated was a policy matter of concern exclusively to them.

The Court, by a majority, held that the arbitration order was null. The arbitration proceeding was aimed exclusively at securing the employee's dismissal; it was not a dispute involving interpretation of the collective agreement without reference to an individual. Moreover, in the circumstances of the case, the employee was not represented by the union. He was thus denied " natural justice " in receiving no notice of the hearing and in having no opportunity to be present.

The dissenting judges considered that the arbitration dealt with a disputed clause of a collective agreement, and that an individual employee had no more right to be directly involved in proceedings for its interpretation than in procedures for its conclusion.

Strikes and lockouts

A. Right to strike of public servants

1. JAPAN [1]

Section 37 of the Local Public Servants Law (LPSL) prohibits strikes, slow-downs and other acts of dispute and section 61 of the Law makes instigation or incitement of such acts subject to penal sanctions. The leaders of the Tokyo Metropolitan Teachers' Union were indicted for having " incited " an act of simultaneous leave-taking in a 1958 dispute concerning merit-rating; they had distributed the instructions of the union to its members.

After conflicting decisions of lower courts, all the accused were acquitted by the Supreme Court. The Court recalled its conclusions in an earlier case to the effect that the Constitution guarantees the right to organise and to bargain collectively and that any legal restriction on that right must be considered in the light of its purpose and must be so interpreted as to ensure adequate balance between that right and other interests of the community. Certain restrictions could be imposed on trade union rights of public servants because of, and in accordance with, the public nature of their duties and responsibilities. However, the form of such restrictions had to be decided in the light of the general principles referred to above; in particular, the legal effect of violations of such restrictions should not exceed the necessary minimum and penal sanctions

[1] Supreme Court (Full Bench), 2 April 1969. *Rōdō Horei Tsushin*, Vol. 22, No. 11, Apr.-May 1969. On the same day, in a case relating to national public servants, the Court reiterated the above considerations of principle, but held that penal sanctions had to be imposed on the basis of the facts of that case (acts of dispute for a political purpose, impeding functions of a highly public nature).

should be used only where this was unavoidable. Sections 37 and 61 of the LPSL had to be so interpreted: section 37 was intended to prohibit acts of dispute which caused serious hardship to the public; this was not true of all, and in each case a balance had to be found between the public interest and trade union rights. As regards acts of incitement, the better interpretation was that section 61 was intended only for acts of incitement of a seriously illegal nature and not such acts as usually accompany acts of dispute.

2. UNITED STATES [1]

In February 1968 the employees of the Department of Sanitation of New York City failed to report for work. At the request of the city authorities, a court injunction prohibiting the strike was issued. The strike nevertheless continued for several days. The union and its president were then found guilty of criminal contempt of Court for wilfully disobeying the court order. They appealed on the ground that the state law prohibiting strikes by public employees was contrary to the federal and state Constitutions.

The Court of Appeals affirmed the convictions. Neither the federal nor the state Constitution granted an absolute right to strike. Striking public employees could paralyse the community and demand benefits, at the public expense, wholly disproportionate to the services rendered to the community. This, in turn, would destroy the ability of the legislature, consisting of elected representatives, to establish priorities among government services, and, instead, base the system of priorities on the coercive effect of the strikers. The self-interest of individual organisations could not be permitted to endanger the safety, health or public welfare of the state or any of its subdivisions.

B. Limits to right to strike

TRINIDAD AND TOBAGO [2]

The Constitution of Trinidad and Tobago guarantees freedom of association. The Industrial Stabilisation Act, 1965, lays down mandatory procedures for the settlement of industrial disputes and makes subject

[1] Court of Appeal of New York State, 21 November 1968. City of New York v. de Lury, in *Labor Relations Reference Manual* (Washington, DC), Vol. 69, p. 2865. Another decision affirming inability of public servants (teachers) to strike was given by the Supreme Court of Florida on 18 September 1968 (ibid., p. 2466). As regards liability to conviction for violation of a court injunction prohibiting a strike, the Court of Appeal of British Columbia, Canada, on 21 November 1967, imposed very heavy sentences on a union and its officers in such circumstances on the ground that, were the Court to tolerate disobedience in the field of labour disputes, the rule of law would be progressively supplanted to the detriment, *inter alia*, of the protection of trade union rights (Regina v. United Fishermen Allied Workers' Union, in *Canadian Labour Law Reports* (Montreal), No. 387, 20 Feb. 1968, p. 11451).

[2] Judicial Committee of the Privy Council, 5 May 1969. Collymore and Another v. Attorney-General, in *The Times* (London), 6 May 1969, Law Report.

to penal sanctions strikes called during the currency of such procedures. Two members of the Oilfield Workers Union, which would, but for that Act, have been able to call its members out on strike when negotiations for a revised collective agreement failed in July 1965, contended that the Act infringed the right to freedom of association guaranteed by the Constitution. Their claim failed in the courts of Trinidad and Tobago up to the Supreme Court.[1] There was now an appeal to the highest judicial instance in the Commonwealth, the Judicial Committee of the Privy Council.

The appeal was dismissed, on the basis of the following reasoning: As of the time the Trade Disputes Act, 1906, took effect, trade union law in Trinidad and Tobago was essentially the same as in Great Britain. Under that law, while there was no express enactment relating to the right to strike, there was " freedom to strike " in the sense that employees might withhold their labour in combination free from the restrictions and penalties earlier imposed by the common law. There was no doubt that the Trinidad Act of 1965 abridged both the freedom to bargain collectively and the freedom to strike. However, freedom to pursue without restriction the object of the association could not be equated with freedom of association. It could not be said that abridgement of the freedoms to bargain collectively and to strike emptied freedom of association of worthwhile content; not only did unions often have many other purposes—social, benevolent, political—but all the rights enumerated in the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948, were left untouched by the 1965 Act. It was significant that the right to organise and bargain collectively was the subject of a separate ILO Convention; in fact trade unions needed more than " freedom of association ". It could accordingly not be said that the 1965 Act was an infringement of the constitutional guarantee.

C. Effect of strike on contract of non-striker

BELGIUM [2]

An airline was given notice in February 1966 by the union to which a large number of its flying staff belonged that there would be strikes some time after 15 March. The airline thereupon sent a circular to its flying staff asking each member to indicate whether he would participate in such strikes; the circular indicated that failure to reply would be deemed to show an intention to strike. There were strikes on 21 to 23 May, and again on 29 to 31 May; in connection with the latter series the airline concluded, from the terms of the strike notice, that the strike was

[1] The decision of the Supreme Court, dated 27 January 1967, was reported in *International Labour Review*, Vol. 99, No. 5, May 1969, pp. 555-556.

[2] Labour Court of Appeals of Brussels, 5 November 1968. *Revue de droit social* (Brussels), 1969, p. 19.

to be unlimited, and regarded the contracts of the employees concerned as suspended. The suspension did not end until 25 June. One airline pilot, who had failed to reply to the circular in March, and had been absent on holiday during May, reported for work on 6 June; his services were declined. He now sought payment of salary for the period 6-25 June. The airline contended that he had been on strike and that, even if this was not so, *force majeure* prevented it from giving him work.

The Court ordered payment of the salary. As regards the question whether the pilot had been on strike, it considered that the employer had to show not only an intention to strike, but effective participation in the strike, that failure to reply to the circular did not even establish intention, since it could have been due to a variety of circumstances, and that during the strike the pilot had been away and had thus provided no further evidence of participation. As regards the argument referring to *force majeure*, the Court pointed out that strikes could lead to the suspension of contracts even of persons not involved in the strike if the employer was, as a result of the strike, unable to provide work. However, that inability had to be proved as being absolute, unforeseeable, and due to no fault of the employer. In this case some planes were kept flying, with the use, in some cases, of instructors on the staff of the airline; there would thus have been a possibility of using the services of the plaintiff.

D. Legitimacy of lockout

FRANCE [1]

An engineering firm locked out its workers following a series of short strikes accompanied by noisy and disorderly demonstrations. A tool fitter sued for wages lost, and the Court of Appeal of Aix-en-Provence found in his favour on the ground that the strikes had been lawful, that they did not endanger the safety of persons or property, that the working premises could have been put in order in a matter of hours, and that the lockout was accordingly a strike-breaking measure.

On appeal by the undertaking, the Court of Cassation quashed the decision of the lower Court. A lockout was based on the failure of the workers to carry out their obligations, and did not require that the existence of the undertaking be imperilled. The lower Court had not taken account of the argument that the demonstrations had made the normal organisation and performance of work impossible; if that had been so, they could be regarded as irregular work-performance rather than as a lawful strike, and would justify a temporary lockout. In this connection the finding of the lower Court that it had been necessary to put the premises in order was significant.

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[1] Court of Cassation, 12 February 1969. Sud-Aviation v. Girard, in *Droit Social* (Paris), Nos. 7-8, July-Aug. 1969, p. 456-457.