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Judicial decisions in the field of labour law

The decisions summarised below[1] were among those which came to the attention of the International Labour Office during the period from August 1980 to July 1981. They cover the application of general legal principles to labour law (law applicable to contract of employment; acquired rights; liability of employers; liability of workers); access to employment (discrimination); the employment relationship (nature of employment relationship; discrimination on grounds of age and of nature of employment; termination of employment relationship); conditions of employment (wages; holidays with pay; sick leave); occupational safety and health; social security (old-age benefit; family benefit; unemployment benefit); occupational organisations (freedom of association; liability of organisations and of their members; workers' representatives; industrial disputes; strikes and lockouts).[2]

Law applicable to contract of employment

Yugoslavia[3]

An engineering undertaking (organisation of associated labour) employed workers on a hydro-electric project abroad. It established rules under which the working hours of these workers were those provided for in the country where the work was performed, namely at least 48 hours a week. In this case, the Constitutional Court was asked to rule on the admissibility of proceedings for deciding the constitutionality of these rules.

The Court decided to institute such proceedings. It held that there was reasonable doubt regarding the compatibility of the rules in question with sections 44 and 162 of the Federal Constitution. The former provided that "workers in an organisation of associated labour operating abroad shall have the same rights, duties and responsibilities as the workers of the organisation working in Yugoslavia". The latter provided that "workers shall be entitled to limited working hours" and "shall not work more than 42 hours a week". It was clear therefrom that the 42-hour week related not only to workers within Yugoslavia, but also to workers engaged by an organisation of associated labour to perform work abroad.

Acquired rights

Spain[4]

Under a decree of 20 August 1970, concerning the labour rights of working women, a woman worker who voluntarily left employment on marriage was entitled to an indemnity popularly known as a "dowry". An Act of 8 April 1976, concerning employment relationships, abolished that indemnity; however, it provided that unmarried women workers retained their recognised entitlement for as long as an existing contract of employment remained in force. The Workers' Statute of 10 March 1980–which maintained in effect, as regulations, such parts of the 1976 Act as did not conflict with it–provides, more generally, that any regulation, collective agreement, contract or employer's decision discriminating either in favour of or against a worker in matters of employment, remuneration or other conditions of employment by reason, inter alia, of sex or marital status shall be null and void.

In all these circumstances, a claim by a woman worker who married later in 1980 that she had an acquired right to the indemnity by virtue of employment which had continued unbroken from before 1976 was rejected. The Court found, first, that, while the 1976 legislation had safeguarded situations which had come into existence prior to its enactment, the 1980 law set aside all legal provisions which conflicted with the principle of equality of treatment. It held, second, that there was not, in fact, an acquired right but merely an expectation, since a woman, on marriage, had the option between continuing to work and obtaining the indemnity, and the legal position was thus not certain, as it would have been in the case of marriage prior to the entry into force of the Statute.

Liability of employers

Sierra Leone[5]

A casual labourer was employed through a labour contractor at the mining site of the defendant company when he was seriously injured as a result of a heavy pipe being dropped on him by another labourer with whom he was carrying it uphill. He chose to sue the company at common law for negligence rather than to accept workmen's compensation.

The Court found in his favour and awarded damages. It held, first, that the company had been the employer and the labour contractor its agent when he selected labourers, supervised them on jobs apportioned by the company, and distributed wages paid by the company. It held, second, that a duty rested on the employer to take reasonable care for the safety of his workmen. That duty would have applied even if the labourer was not the employee of the company but was working for it temporarily on loan. It held, third, that the company had been negligent for three reasons. It should have provided a

safe place of work, but the route over which the pipes had to be carried was dangerous; the fact that the workmen knew this did not absolve the employer. It should have provided and maintained a safe system of work; manual transportation of heavy pipes over a dangerous route could not be regarded as such. Finally, it should have employed competent and efficient staff to control and supervise the workmen. In this case the company's supervisor had compelled the workmen to go on working, after the normal day's work was finished and they were tired, under pain of losing their day's wages. He was negligent in not exercising reasonable supervision and the company was vicariously liable.

Liability of workers

German Democratic Republic[6]

Under section 262 of the Labour Code a worker is liable to up to three times his monthly wage for the loss of money or other valuables which are in his sole custody. In this case, an undertaking applied that provision to a woman who was in sole charge of a self-service sales outlet. The question of principle before the Courts was whether the provision could apply to a self-service shop. A lower Court held that it could, in so far as the person in charge had a view of the entire shop.

The Supreme Court held that such a view did not take account of the realities of self-service shops. The person in charge performed a variety of tasks–giving service to clients, operating the cash desk, accepting deliveries, etc. It was not feasible for that person to watch and control at all times the behaviour of clients serving themselves, particularly at busy hours. Accordingly the requirement of the law that the worker alone have access to the goods entrusted to him was not met in this form of sales operation.

Access to employment

England[7]

The owner of a small restaurant refused to hire as a waitress a woman with four children, on the ground that, in his experience, women with small children were unreliable in their attendance. She sought a declaration that he had unlawfully discriminated against her on the grounds both of her sex and of her marital status.

The Court granted the declaration.

As regards discrimination on the ground of sex, it found that there was no evidence that the employer had any policy against employing men with children. Hence his policy directly discriminated against women.

As regards discrimination on the ground of marital status, it accepted that, since fewer married women than unmarried could satisfy the require-

ment of not having children, the relevant legal provision came into play. The employer had argued that his policy was justifiable as being necessary for the conduct of his business. Necessity was not the same thing as convenience. Moreover, a condition excluding all members of a class could not be justified on the ground that some members of the class were undesirable employees. Women with children had to be treated as individuals; the employer could have tested reliability by taking up the applicant's references, or by asking her who would be looking after the children while she was at work (in fact her schoolteacher husband did so).

Nature of employment relationship

Brazil[8]

In a dispute between an undertaking manufacturing clothing and a seamstress making overalls and aprons for it at her home the question had to be settled whether there was an employment relationship. The undertaking claimed that there was not because the work was not performed on its premises, at given hours and under supervision; it was not even required that a given number of finished articles be delivered at fixed intervals.

The Court nevertheless found that there was an employment relationship. It pointed out that section 6 of the Consolidation of Labour Laws made no distinction between work performed on the employer's premises or at the worker's home. The requirements of subordination were attenuated in home work, and instructions concerning the quality and quantity of work to be performed gave the employer sufficient basis for controlling the work when it was delivered. The worker in this case was given raw materials approximately once a month; this periodicity in the conduct of the parties made it possible to conclude that there was a dependent relationship and an intention to create legal rights and obligations. The fact that the finished goods were delivered at irregular intervals did not create any doubt as to the obligation so to deliver them. All essential elements for a contract of employment were thus present.

Discrimination on the ground of age

1. Canada[9]

The pension plan of a university provided for retirement at age 65. The collective agreement covering university staff confirmed that this retirement age was mandatory. A professor challenged that provision on the ground that it conflicted with the Human Rights Act of Manitoba. Under section 6 of that Act, no employer may refuse to continue to employ a person, inter alia because of his age. At the same time, section 7 permits certain distinctions,

inter alia on the ground of age, in employee benefit plans. The university claimed that the present case fell within the exception.

The Court of Appeal, affirming the decision of the Court of first instance, held that it did not. The collective agreement, although binding on the professor, could not derogate from the provisions of the Human Rights Act. The Human Rights Act meant that no employer might refuse to continue to employ a person solely on the basis of his age. Section 7 of the Act would permit discrimination on the basis of age in the pension scheme itself, but did not permit differences of treatment regarding the independent issue of when retirement commenced.

2. United States[10]

The Age Discrimination in Employment Act makes it unlawful for an employer to discharge an individual because of age. In this case, a worker who had been laid off as part of a reduction of workforce claimed that he had been chosen for termination because of his age and the fact that he would shortly be eligible for early retirement benefit.

One question before the Court was whether it was necessary, in order to prove age discrimination, to show that there had been replacement by a person outside the protected group (i.e. under 40). The Court held that it was not. First, in a case of reduction of workforce other forms of evidence had to be relied on. Second, generally in cases concerning age discrimination, a requirement that there be replacement from the non-protected group did not take account of realities at the workplace. Because of the value of experience, the replacement process was more subtle; there tended to be rather a series of movements under which younger persons were appointed, but not directly to the position of the dismissed worker.

As regards the availability of early retirement benefit, the Court pointed out that it provided security for persons discharged upon neutral principles, but held that it could not be a factor or basis for a discharge decision.

Discrimination on the ground of nature of employment

European Communities[11]

An Englishwoman who worked part time claimed under the Equal Pay Act with a view to obtaining the same hourly rate as a man employed on like work who worked full time. The Industrial Tribunal found that the difference in pay was motivated by a desire to encourage full-time work for economic reasons and was thus due to a material difference other than sex. Following an appeal it was accepted that the woman could not succeed under British legislation; however, the Employment Appeal Tribunal referred to the Court of Justice of the European Communities the question whether the principle of equal pay contained in Article 119 of the Rome Treaty required that pay

for work at time rates be the same irrespective of the number of hours worked each week and irrespective of whether it was of commercial benefit to the employer to encourage maximum possible hours of work. Among further questions was one whether the answer to the main question would be different if it were shown that a considerably smaller proportion of female workers than of male workers were able to perform the minimum number of hours required to qualify for the full hourly rate of pay.

The Court of Justice of the European Communities ruled that a difference in pay between full-time workers and part-time workers did not amount to discrimination prohibited by Article 119 of the EEC treaty unless it was in reality an indirect way of reducing the pay of part-time workers on the ground that that group of workers was composed exclusively or predominantly of women. The Court accepted in that connection that an employer might legitimately on economic grounds encourage full-time work irrespective of the sex of the worker by giving lower hourly rates of pay for part-time work. By contrast, it considered that if it were established that a considerably smaller percentage of women than of men performed the minimum number of weekly hours required in order to be able to claim the full-time hourly rate of pay, the inequality would be contrary to Article 119 if, regard being had to the difficulties encountered by women in arranging to work the minimum number of hours, the pay policy could not be explained by factors other than discrimination based on sex.

Termination of employment relationship

1. India[12]

Section 25N of the Industrial Disputes Act provided for certain conditions which had to be met prior to the retrenchment of workers in undertakings employing more than a specified number of workers. The conditions related to notice, to compensation, and to notice to and permission by an appropriate government authority. The director of a mill threatened with prosecution for non-compliance with the relevant provisions sought a writ of *mandamus* on the ground that the section was unconstitutional.

The Court held the provisions unconstitutional. It did so essentially on the grounds that the Act, first, did not provide guidelines as to how applications for permission had to be disposed of and on what grounds permission could be refused and, second, did not provide for any appeal against arbitrary refusal. To compel an employer to continue the employment of surplus labour by refusing permission would be an unreasonable restriction violating the provisions of the Constitution granting citizens the right to acquire, hold and dispose of property and to carry on any occupation, trade or business.

2. Gabon[13]

The termination of the employment of a worker as part of a reduction of staff had been found lawful by a Court of first instance. The worker appealed to the Supreme Court, alleging that other workers had been engaged, that the employer had not made a correct choice among workers to be laid off and that there had been malice against him.

The Supreme Court found that the engagement of workers had taken place prior to the decisions regarding measures of austerity. It held that the employer was entitled to take account of the quality of work in making reductions of staff. It noted that there was no evidence whatever of malice. In all these circumstances, it held the appeal to have been abusive and awarded damages on that ground to the employer.

3. Argentina[14]

The services of a public employee had been "dispensed with" in pursuance of legislation permitting such termination of the employment of persons involved in subversive activities. That action having been found, in Court proceedings, to have been improper, the employee claimed damages, in addition to an indemnity for the termination, on the ground of injury to his reputation.

The Court awarded damages. The link between the termination and presumed subversive activities implied potential injury to the individual's honour, tranquillity and safety. Where the termination was not made in good faith, such injury had to be compensated. The compensation was unrelated to termination indemnity; it was due not by virtue of the employment relationship but under civil law. It was not necessary to show that there had been deliberate publication of the information injurious to the reputation of the employee; the fact that there had been injury because the termination notice had become known to colleagues and others was sufficient.

Wages

1. Australia[15]

It has been the practice in Australia to have a centralised system of wage fixation, including a national minimum wage. Since 1975 that system had been linked, on a half-yearly basis, to rises in consumer prices, with a view to distributing benefits equally among all wage and salary earners.

Early in 1981 the Australian Conciliation and Arbitration Commission concluded that the indexation system had broken down, and that the increases then given on that basis would be the last.

It did so for two main reasons. First, there had been a high level of industrial disputes during the preceding 18 months; this made the system

unworkable in that new standards of pay and other conditions created in this way sooner or later flowed to other workers. Second, there was no longer consensus on the purposes of indexation: the workers expected the system to maintain real wages, whereas the employers, the Federal Government and a number of state governments saw it as inflationary and inconsistent with national economic strategy.

As part of the new wage-fixing principles evolved following that conclusion, the Commission nevertheless decided on a link between wage adjustments and the consumer price index; in the first review each year, this link was to consist of the adjustment of wages by 80 per cent of the movement of the index, unless exceptional and compelling circumstances were shown to call for less. At the same time, the Commission pointed out that restraint on labour cost increases outside national reviews was crucial, and considered that limited productivity bargaining could not be accommodated in a centralised system, particularly against the background of a general campaign for shorter working hours. It envisaged the possibility of a future national productivity review to consider these matters. Since the restraints envisaged did not prove feasible, centralised wage fixing was abandoned in July 1981.

2. Australia[16]

An employee of a bank, while working at his job with the knowledge and consent of the employer, refused to perform certain of his duties in the context of a selective work ban. The employer made deductions from his salary by reference to a principle of "no work as directed, no pay". The employment was governed by an award which prescribed the payment of an annual salary in stated proportions at stated times and permitted deductions from salary only where the employee was "absent from duty without the consent of the bank". The question at issue in this case was whether the deductions were permissible.

The Court held that they were not permissible. The express terms of the award could not be qualified by an implication that the employee was entitled to his salary only while he remained ready to carry out in full the contract of employment between himself and his employer. There was no room under the award for an agreement between an employer and an employee that the employee, even though performing duties of a type covered by the award, would not be entitled to be paid the award salary in the event that there were other duties which he was refusing to perform. The breach by the employee of his contractual obligation to perform his duties could constitute a breach of contract with appropriate legal consequences. However, the remedy would be in damages. The breach did not touch the obligations to make the payments of salary specified in the award.

3. India[17]

A company in 1971 agreed on a settlement with its workers under which wage rates at a level above the statutorily required minimum were payable in return for certain productivity levels. In 1975 it reduced the agreed wage rates on the ground that indiscipline and go-slow tactics were resulting in low production.

The Court held that the reduction was not lawful. In the settlement there was no term entitling the employer to reduce emoluments on the ground that the workers had not fulfilled their part of the bargain. The Payment of Wages Act did not provide for the possibility of deductions in circumstances such as those of the present case. The workers, on time-rated monthly wages, attended during fixed duty hours and worked; they thus earned their wages, particularly as there were no norms spelling out individual responsibility to do a particular quantity of work. If misconduct was alleged, there were remedies such as disciplinary action, claims for damages, and specific procedures for establishing the facts; these procedures had not been applied here.

Holidays with pay

Spain[18]

A worker who had been ill during his annual holiday claimed additional leave in compensation, by reference to a statutory provision to the effect that, for purposes of leave, days of absence by reason of accident or illness were considered to have been worked.

The claim was rejected. The worker had been granted his full holiday entitlement, irrespective of whether he had been ill during the period of service on which that entitlement was based. The relevant legal provision could not be interpreted as requiring also that any days of illness during a holiday be compensated by further leave. The undertaking was not obliged to guarantee full enjoyment of a holiday.

Sick leave

United Kingdom[19]

The written terms of employment of a security guard made no reference to sick pay. He had lengthy absences from work due to illness and neither asked for nor received sick pay at the time. After the termination of employment, he applied to an Industrial Tribunal for a determination of his entitlements in the matter. The Tribunal considered that there was an implied term in a contract of employment that wages would be paid during illness unless the employer could show that the contrary should be implied. This was an appeal from that decision.

The Employment Appeal Tribunal did not agree that there was presumption that wages were payable during an absence due to sickness unless the employer satisfied the burden of showing that some other term was to be implied. It held that the proper approach was to look at all the facts and circumstances to see whether a term was to be implied that wages shall or shall not be paid. Such a term might be implied from custom or practice in the industry, or from the knowledge of the parties at the time when the contract was made, etc. The duration of the contract might also be relevant. In this case it was the practice of the employer not to pay wages during illness. The worker, during his absence for sickness, appeared to have proceeded on the assumption that he would not receive sick pay. In these circumstances the term to be implied into the contract under consideration was that wages would not be paid during periods of absence during sickness.

Occupational safety and health

1. Kenya[20]

A workman was injured when he was feeding an iron sheet by hand through a roller. The machine was guarded, but the rollers were still accessible. There was no evidence that the workman, who was a replacement and was not a skilled worker, had been told not to feed sheets into the machine manually. He sued for damages.

The Court found in his favour. At the time of the accident the rollers were within the reach of an operator, albeit a careless one. It was not enough to say that the machine was safe in the ordinary course of working; the contingency of negligence had to be taken into account. As regards the defence of contributory negligence, the authorities established a more lenient standard than the conduct of a reasonable man as regards a workman injured by inadvertence in relation to unfenced machinery; the fencing of machinery was intended to protect the workman even when he was inadvertent or inattentive.

2. Sweden[21]

Under the Working Environment Act, 1977, safety delegates have the right to order work which involves immediate and serious danger to a worker's life or health to be suspended pending a ruling by the labour inspection service. In an undertaking work was so suspended for three hours, on the basis of a bona fide but erroneous judgment regarding the properties of a glue being used. The question at issue before the Court was whether wages were due for the hours not worked.

The Court held that wages were not due. The principle that the employer was obliged to pay wages only for time actually worked had to be re-examined in the light of developments in the law. Clearly the right to

wages could not be made to depend on an obligation to work in conditions of danger, given the terms of the Working Environment Act. Therefore, the general principle could only be that, when work was interrupted for reasons of safety, the worker should continue to be paid. As regards the safety delegate, all that could be asked of him was that he make a reasonable decision in the light of the circumstances known to him. Interruption of work on the basis of such a decision was lawful. However, in this case, the safety delegate's mistaken decision was not reasonable or excusable. The work stoppage was accordingly unjustified and the workers, whose side had appointed the delegate, had to bear its cost.

3. France[22]

Section L241-10-1 of the Labour Code gives industrial physicians the power to suggest changes of job by reference to a worker's state of health; it requires the employer to consider such suggestions and gives the labour inspector the authority to take a decision in the event of difficulty or disagreement. In this case, an undertaking had been advised by its physician that a worker was no longer fit for his job as metal-shearer. It advised the labour inspector that it would have to terminate his employment, since no alternative work suitable for him was available. The labour inspector asked the undertaking to reconsider its position and, when it failed to do so, instituted penal proceedings against the managing director.

The Court acquitted the managing director. The role of the labour inspector under the provision at issue was to ensure the protection of the safety and health of workers in their employment; it related only to conditions of employment. In this case, there was no disagreement on the incapacity of the worker for his job. There was no legal requirement that the employer find him an alternative job, and there was no legal basis for the intervention of the labour inspector regarding the question whether alternative jobs were available.

Old-age benefit

Federal Republic of Germany[23]

An employee retired in 1975 after 25 years' service in an undertaking. According to the regulations of the pensions scheme of the undertaking as in force prior to 1974 this would have entitled her to a monthly payment of some 530 DM. However, by a collective agreement at the level of the undertaking in November 1974 a ceiling of 250 DM was placed on monthly entitlements in a case such as hers. She contested the applicability of that agreement.

The Court found in her favour. At the time of the entry into force of the agreement, she had acquired an expectancy in respect of pensions which

could not be taken away. Such an expectancy was compensation for past services and was an asset akin to personal property. Collective agreements could regulate pension systems and modify them in some respects for the future, but could not take away such assets. There were circumstances, such as economic difficulty of the undertaking, in which there could be some interference with acquired rights; this was not, however, the case here.

Family benefit

Italy[24]

A Legislative Decree on family allowances of 1955 provided that, where both parents were gainfully employed, only the father was entitled to receive allowances for children and only the husband was entitled to receive benefits for a spouse. In this case, it was alleged that the provisions in question were contrary to the sections of the Constitution providing for the equality of all citizens and, in particular, of husband and wife. The social security institution and the representative of the Government who intervened in the proceedings argued that the role of the father and husband as principal breadwinner had to be recognised for the purpose of family allowances.

The Court held that, given the express terms of the Constitution, pre-eminence in the family for the father or husband could not properly form the basis for any Italian legislation.

Unemployment benefit

Switzerland[25]

A waitress, who was divorced and had two small children, was able to work, because of her family situation, only between 6 p.m. and midnight. Having lost one job, she sought unemployment benefit for the period until (two months later) she found another one. The insurance institution denied her claim on the ground that her availability for work was subject to such limitations that she did not meet the requirement of availability for placement to which benefit was subject. She appealed. All appeal instances found in her favour.

The Federal Insurance Tribunal affirmed that the requirement of availability for placement was not, in principle, met by persons who were unwilling or unable to work on terms normally required by employers. Persons who, because of family responsibilities, were available only for certain hours, could be regarded as placeable only to a very limited extent; that there were good reasons for this was not relevant to unemployment insurance. Their situation could not be compared with that of other jobseekers who proved difficult to place because the conditions set by themselves created a difficulty from the outset.

In this particular case, however, there were openings in the occupation in question (hotels and restaurants in an urban environment) for staff working odd hours. It was accordingly possible to conclude that the claimant was available for placement. This conclusion was not invalidated by the fact that it took longer to place her than might have been the case had there been no limitation on the hours she was able to work.

Freedom of Association

1. Switzerland[26]

At the end of 1976 the employment of a garage worker was terminated with the required notice. Over a year later he sought damages, alleging that the termination was due to his trade union membership and was, accordingly, an abuse of the employer's right to terminate. He relied, inter alia, on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

The Court rejected the claim. The basic principle was that the reason for a termination of employment which complied with the legal requirements regarding notice did not have to be given. Writers had nevertheless taken the view that this did not protect an employer abusing his right, i.e. using it for purposes and for the protection of interests other than those for which it was intended. In particular, the view had been taken that it would be abusive to terminate an employment merely because the worker belonged to a union, on the ground that it caused prejudice to the worker without benefit to the employer. There was divergence of views amongst writers on the effects of an abusive termination. In any case, these matters did not have to be decided in this instance. A plaintiff who alleged abuse of rights by the defendant had himself to act in good faith. This was not the case of a worker who for more than a year did not put the employer on notice that he did not consider the employment to have been lawfully terminated.

2. European Court of Human Rights[27]

Three railway workers from the United Kingdom who had been dismissed in 1976 for refusing to join a union with which their employer had, the previous year, concluded a closed shop arrangement alleged that this constituted a violation of Article 11 of the European Convention on Human Rights, concerning freedom of association.

The Court made it clear that it was not pronouncing on the general question whether freedom of association included the negative right not to join a union, or on the closed shop system as a whole. It found, by a majority, in favour of the workers concerned, in particular by reference to the considerations that coercion to join a specified union took the form of threats of dismissal, that the workers had been in employment prior to the

introduction of the closed shop arrangement and that the detriment to them of their dismissal was not necessary for the achievement of the objectives of the union. At the same time, the Court affirmed both that an individual did not enjoy freedom of association if the choice of union was either non-existent or so reduced as to be of no practical value, and that it was a breach of Article 11 to compel a person to join a union contrary to his convictions.

3. Belgium[28]

A national collective agreement of May 1971, not made binding by royal decree, establishes the principle of the representation of workers affiliated to the signatory unions, in relation to the employer, by trade union representatives *(une délégation syndicale)*. The principle is to be given effect by collective agreements for particular industries, or by arrangements at the level of the undertaking. The legally binding collective agreement of July 1972 for the chemical industries gives effect to the principle, but excludes management staff from the workers to be represented in that manner. In this case, the management staff of a company covered by that agreement sought a declaration that they were entitled to have their own trade union representatives. As a legal basis for their claim they relied, inter alia, on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

The Court rejected the claim. It pointed out that the two Conventions in question dealt with freedom of association and not with trade union representatives. It was possible for a trade union to protect the interests of its members even in the absence of trade union representatives in the undertaking. The right to freedom of association did not necessarily imply the right of workers to have trade union representatives. It could not be said that the refusal of the company to have its management staff represented by trade union representatives was a violation of freedom of association.

Liability of organisations and of their members

1. United States[29]

A unit of 13 clerical workers was represented by the defendant union in relation to the employer, a retail sales corporation. In connection with the renewal of the applicable collective agreement, the workers in the unit asked for a pay increase. On several occasions during the negotiations, the employer made it clear that granting the increase would lead it to eliminate the entire unit; this was not brought to the attention of the workers concerned. Ultimately the wage increase was granted, and a few weeks later all the employees in the unit were permanently laid off. On these facts, the National Labor Relations Board held that the union failed to provide fair representa-

tion, in violation of the National Labor Relations Act, and ordered it to make good the loss of wages to the employees concerned.

On appeal, the decision of the Board was affirmed. The Court found that the union had a duty to inform its members of the employer's position so that they could make an informed reassessment of their wage demand. An award of back pay for failure to do so was within the authority of the Board.

2. France

In a series of recent judgments, Courts have dealt with the civil liability of trade unions, trade union representatives and others in relation to illegal strikes or illegal acts committed in the course of legal strikes.

The Court of Appeal of Angers,[30] having considered that it was illicit for workers in a factory, in full-time attendance, to reduce production to half the normal level, held that the union which organised the go-slow was liable to make good the amount of wages paid by the employer without counterpart.

The Court of Appeal of Rennes[31] held that trade unions and trade union representatives were liable for damage caused in connection with a legal strike called by them only if they themselves committed tortious acts; they were not vicariously liable for the tortious acts of others.

The Court of Cassation[32] held that an employer could not intervene, as a civil claimant, in penal proceedings against organisers of picket lines, on the narrow ground that such intervention is open only to persons directly injured by the unlawful act; the damage suffered by an employer who continued to pay wages to workers prevented by violence from continuing to work was considered to be indirect.

The Court of Appeal of Lyons[33] held that workers' representatives who had organised picket lines preventing access to work were liable, in relation to workers consequently unable to work, to make good wages lost because of this.

Workers' representatives

United States[34]

Authorised representatives of a carpenters' union, which had collective agreements providing for union safety inspections with three subcontractors doing construction work at a worksite, were asked by the owner of the site, during an inspection visit, to leave the site. When they refused, the owner effected a citizen's arrest. The trial Court convicted them, finding that the provisions of the penal code exempting safety inspections from the trespass law applied only to industrial property.

The California Supreme Court directed the discharge of the union representatives. It noted that most work under collective bargaining agreements in the construction industry was carried out on property owned

by third parties; if the landowner were able to prosecute union representatives making safety inspections for trespass, the collective agreement would become a dead letter. This was contrary to the view consistently expressed by the legislature, that general trespass statutes may not be used to frustrate legitimate union activities on private premises, at least where no significant property interest is threatened. The safety inspection here at issue was a lawful union activity; undisputed evidence showed that such inspections were customary in the industry. It was important to allow employees and their representatives to bargain for and police safe and healthful working places; this was particularly true in a hazardous industry such as construction. A union representative who did not confine himself to lawful union activity forfeited protection; this was not, however, the case here.

Industrial disputes

1. United Kingdom[35]

A union having members working for a television network "blacked" the films of a company producing television films. As a result the network stopped showing the films made by that company. The company sought an injunction restraining the union from blacking its films. The Court of first instance refused the injunction; this was an appeal against that decision.

The Court of Appeal allowed the appeal and granted an interim injunction. It found unanimously that the union was not acting in contemplation or furtherance of a trade dispute and, accordingly, did not enjoy immunity in respect of inducement of the breach of contract of employment of its members implied in the "blacking". At the same time, a majority of the Court pointed out that there was also a tort of interference by unlawful means with the business of a party other than the employer. The immunity in respect of this tort, which had been statutorily established where there was a breach of contract in contemplation or furtherance of a trade dispute, had been repealed under the Employment Act 1980. Accordingly, a trade union official who induced a workman to break a contract of employment could be sued by a third party even where his act was not actionable by the employer.

2. Federal Republic of Germany[36]

A series of strikes and lockouts in the steel industry in 1978 led to layoffs in undertakings unable either to obtain sheet metal for production or to sell their products to other undertakings affected by the strike. In two cases brought to the Federal Labour Court, the issue for decision was whether the layoffs were lawful (in which case the workers bore the financial risk, although they were eligible for social security payments) or whether wages were due from the employer.

The Court recalled that the basic principle was that the employer was bound to pay wages even if he could not provide work through no fault of his own. That principle had been somewhat circumscribed by legislation and collective agreements, as regards the general risk of shortages of power or raw materials. Industrial disputes, particularly where there was an identity of interest between those directly involved and those indirectly affected, were in a particular category: placing the financial burden of indirect loss automatically on employers would interfere with the balance of power between the two sides of industry. The approach of Courts should therefore be to determine which party was responsible for the disruption (e.g. in the case of a strike, the workers; in the case of a lockout, the employer) and, normally, decide that that party should bear the loss. The essential aim in such an investigation, which might be complex, was to avoid distortion of the equality of bargaining power of the two sides, on which the system of labour relations was based.

Strikes and lockouts

1. Sweden[37]

In connection with a dock strike, the question arose whether wages earned prior to the strike, but due for payment during the time of the strike, had to be paid then.

A majority of the Court held that they did not have to be paid. It considered that the nature of strike action freed the employer from an obligation which would imply strengthening the capacity of the workers to continue the strike. A minority of the Court considered that there was no clear basis for depriving the workers of sums already earned, and that the contrary view implied strengthening the employer unduly.

2. Federal Republic of Germany[38]

This was a test case regarding the legality of lockout. During a strike affecting about 20 per cent of workers in undertakings governed by a collective agreement between an employers' association and a trade union, a further 25 per cent were locked out by undertakings belonging to the employers' association. One of the workers concerned sued to obtain his wages on the ground that the undertaking had unlawfully refused his offer of services. All instances denied the claim.

The Federal Labour Court held that the basis for the faculty to lock out lay in the constitutional autonomy of parties to collective bargaining. That it was not prohibited as a matter of principle was shown by references to it in ancillary legislation (e.g. on maternity protection, and employment of the disabled).

The question as to the circumstances in which lockout was lawful was originally defined by reference to the formal equality of parties to collective bargaining. More recently Courts had concerned themselves rather with effective equality. Where a strike affected fewer than 25 per cent of the workers in a collective bargaining area, lockout of not more than 25 per cent was not out of proportion. A partial strike–particularly where it affected key undertakings–could paralyse an industry and hence place on the employers a burden inconsistent with effective equality. The employers argued in this connection that a partial strike and its lesser financial burden enabled unions to support strikes longer, and that this had to be set right by lockout; however, the costs to employers could also be equalised by solidarity funds, while, in a genuine difficulty to find work for workers because of a strike, there was no obligation to pay wages. The real problem was that employers were, economically, rivals and hence partial strikes were likely to affect their solidarity. Every case had to be considered on its merits and a graduated response was desirable. Where fewer than 25 per cent of workers were called out on strike, there was pressure on the solidarity of employers and the basis of the dispute had to be enlarged. Where roughly half the workers were out, there was no longer much risk of upsetting the equality of the bargaining partners.

Notes

[1] For previous summaries of judicial decisions see *International Labour Review*, Mar. 1963, pp. 206-232; Jan. 1964, pp. 43-68; Mar. 1965, pp. 210-231; Apr. 1966, pp. 414-435; Mar. 1967, pp. 215-238; Mar. 1968, pp. 251-272; May 1969, pp. 533-557; Feb. 1970, pp. 149-173; Feb. 1971, pp. 157-178; Apr. 1972, pp. 351-377; Jan. 1973, pp. 57-81; Feb. 1974, pp. 153-179; Jan. 1975, pp. 29-50; Jan.-Feb. 1976, pp. 35-51; Jan.-Feb. 1977, pp. 25-39; Jan.-Feb. 1978, pp. 53-68; Jan.-Feb. 1979, pp. 39-57; Jan.-Feb. 1980, pp. 79-97; and Jan.-Feb. 1981, pp. 49-66.

[2] Information concerning a number of other decisions is given in the *Social and Labour Bulletin* (Geneva, ILO). See, in particular, a summary of the decision of the Spanish Constitutional Court, of 8 April 1981, on the constitutionality of the major provisions of the 1977 Legislative Decree respecting labour relations, in issue 3/81. Readers may also wish to refer to the decisions of a number of industrialised market economy countries published, in English, in *International Labour Law Reports* (Alphen aan den Rijn (Netherlands), Sijthoff and Noordhoff).

[3] Constitutional Court, 12 July 1977, *Yugoslav Law* (Belgrade), No. 3, 1979, pp. 67-69.

[4] Labour Court, Seville, 16 May 1980. *Revista Técnico Laboral* (Barcelona), Vol. II, 1980, No. 5, pp. 433-436.

[5] High Court, 8 November 1974. *The African Law Reports* (Oxford), 1974 Commercial (published 1980), pp. 246-256.

[6] Supreme Court, 16 December 1980. *Arbeit und Arbeitsrecht* (Berlin), 5/81, pp. 230-231.

[7] Employment Appeal Tribunal, 13 March 1981. *Industrial Relations Law Reports* (London), May 1981, pp. 208-210; *The Times* (London), 14 Mar. 1981, Law Report.

[8] Regional Labour Court, Pôrto Alegre, 22 May 1978. *Revista Legislação do Trabalho* (São Paulo), Mar. 1979, pp. 349-350.

[9] Manitoba Court of Appeal, 6 January 1981. *Canadian Labour Law Reports* (Don Mills, Ontario), pp. 12491-12497.

[10] US Court of Appeals, Fifth Circuit, 16 July 1980. *Fair Employment Practice Cases* (Washington), Vol. 23, pp. 320-326.

[11] Court of Justice, 31 March 1981. *Industrial Relations Law Reports,* May 1981, pp. 228-235.

[12] Madras High Court, 20 March 1980. *Labour Law Journal* (Madras), Oct. 1980, pp. 275-282.

[13] Supreme Court, 12 May 1980. *Travail et profession d'outre-mer* (Paris), 2 July 1981, pp. 286-287.

[14] National Labour Appeals Court, 10 July 1980. *Derecho Laboral* (Buenos Aires), Sep.-Oct. 1980, pp. 301-303.

[15] Conciliation and Arbitration Commission (Full Bench). 9 January 1981 and 7 April 1981. *The Australian Industrial Law Review* (North Ryde, N.S.W.), 14 Jan. 1981, pp. 1-3, and 24 Apr. 1981, pp. 129-132; *Financial Times* (Frankfurt and London), 13 Aug. 1981.

[16] Federal Court (Full Court), 13 March 1980. *The Australian Industrial Law Review,* 16 Apr. 1980, pp. 89-91. In an analogous decision the Supreme Court of New South Wales held on 20 May 1960 that the pay of a public servant could not be withheld where he refused to perform certain work (ibid., 25 June 1980, pp. 157-178).

[17] Bombay High Court, 18 July 1980. *Indian Factories and Labour Reports* (Allahabad), 15 Sep. 1980, pp. 213-221. Leave to appeal to the Supreme Court was refused.

[18] Central Labour Court, 21 April 1979. *Revista Técnico Laboral,* 1980, Vol. II, No. 5, p. 406.

[19] Employment Appeal Tribunal, 1981. *Legal Information Bulletin* (London), Mar. 1981, pp. 10-12.

[20] High Court, 9 June 1975. *The African Law Reports,* Commercial Law Series, 1975, Vol. I (published 1980), pp. 377-383.

[21] Labour Court, December 1979. Judgment No. 164/79. *Lag och Avtal, Specialtidningen för arbetsrätt* (Stockholm), 1980, No. 1, pp. 15-16.

[22] Court of Appeal, Angers, 4 March 1980. *Recueil Dalloz-Sirey* (Paris), 1981, Jurisprudence, pp. 124-125.

[23] Federal Labour Court, 17 January 1980. *Arbeitsrecht in Stichworten* (Bad Homburg), Oct. 1980, pp. 154-155.

[24] Constitutional Court, 7 July 1980. *L'Assistenza sociale* (Rome), 5/80, pp. 197-199.

[25] Federal Insurance Tribunal, 3 March 1980. *Droit du travail et assurances-chômage* (Berne), 1980, pp. 48-50.

[26] Federal Court, 9 March 1979. *La Semaine judiciaire* (Geneva), 1981, No. 20, pp. 314-320.

[27] *Industrial Relations Law Reports* (London), Sep. 1981.

[28] Labour Court of Appeals, Brussels, 9 December 1980. *Journal des tribunaux du travail* (Brussels), 15 Feb. 1981, pp. 52-54.

[29] US Court of Appeals, District of Columbia, 17 April 1981, *Labor Relations Reporter* (Washington), 107 LRRM 1081-1096.

[30] Decision of 22 October 1980. *Droit social* (Paris), Dec. 1980, pp. 547-548; *Recueil Dalloz-Sirey,* 1981, Jurisprudence, pp. 153-154.

[31] Decision of 30 October 1980. *Recueil Dalloz-Sirey,* 1981, Jurisprudence, pp. 154-156.

[32] Decision of 2 October 1980. *Droit social,* Feb. 1981, pp. 145-146; *Recueil Dalloz-Sirey,* 1981, Jurisprudence, p. 156.

[33] Decision of March 1981. *Le Monde* (Paris), 31 Mar. 1981.

[34] California Supreme Court, 11 February 1981. *Labor Relations Reporter,* 106 LRRM 2565-2573.

[35] Court of Appeal, 9 April 1981. *Industrial Relations Law Reports,* May 1981, pp. 211-217. Leave to appeal to the House of Lords was refused.

[36] Federal Labour Court, 22 December 1980. Judgments Nos. 1 ABR 2/79 and 1 ABR 76/79.

[37] Labour Court, 18 June 1980. Judgment No. 94/80.

[38] Federal Labour Court, 10 June 1980. *Arbeitsrecht in Stichworten*, Aug. 1980, pp. 115-117. In another decision of the same day (ibid., Sep. 1980, pp. 140-141) the Court held that it was unlawful both to lock out only union members and, in case of a general lockout, to continue to pay wages to non-union members.