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Judicial decisions in the field of labour law

The judicial decisions summarised below [1] cover the application of general legal principles to labour law (consideration of labour rights as fundamental rights, contract of employment in writing, unlawful purpose of the contract of employment); the employment relationship (employer's authority, discrimination on grounds of sex, suspension of the contract of employment, termination of the employment relationship); conditions of employment (equal pay, educational leave, maternity protection, compulsory age of retirement); special categories of workers (teachers, illegal immigrants); social security (employment accident benefit, invalidity benefit); and labour relations (registration of trade unions, strikes).[2]

Consideration of labour rights as fundamental rights

India [3]

According to the Supreme Court of India labour laws may constitute "fundamental rights" as that term is employed in the Constitution in connection with the possibility of a writ petition (including "public interest" litigation where a bona fide member of the public may take action on behalf of a disadvantaged person or clan of persons) being lodged with the Court. The laws relating to the minimum wage, equal remuneration and minimum age of employment concern fundamental rights which ensure the basic dignity of workmen or prohibit forced labour. Where a person provides labour or services to another for remuneration which is less than the minimum, the labour or service provided by him clearly falls within the scope and ambit of the words "forced labour".

Contract of employment in writing

Portugal [4]

For some 20 years the plaintiff had been employed by an undertaking as a works doctor in return for a fixed salary.

In February 1975 a meeting of the undertaking's workers voted by show of hands for his dismissal on political and ideological grounds. Subsequently, workers' pickets prevented him from entering the undertaking. In May 1975 the plaintiff received an official notice from the management stating that in these circumstances it considered him relieved of his duties as of April 1975.

Two years later, Legislative Decree No. 40 of 29 January 1977 declared that dismissals of workers effected between 25 April 1974 and 25 April 1976, which had not complied with the provisions governing the termination of contracts of employment in force on the date of dismissal or which had been politically or ideologically motivated, were legally invalid.

In response to the request of the plaintiff to have his dismissal declared invalid, the undertaking claimed that there could be no question of unfair dismissal since, in view of the fact that no written contract had been drawn up, as required by the law, the doctor was not engaged under a true contract of employment but was merely rendering services.

The Supreme Court, reversing the judgement of the lower court declaring the contract of employment to be void, considered that there had been a true contract of employment.

The contract of employment was of a consensual nature which did not need to be drawn up in a specific form unless so required by the law. The aim of such a legal requirement was to protect the worker but failure to comply did not necessarily invalidate the contract unless the law itself had so stipulated.

In the present case, the provision requiring the contract to be in writing was to be found in the Constitution of the Medical Association (Decree No. 40651 of 21 June 1956), in accordance with which the practice of medicine in an undertaking, community or private institution, whatever the nature of the duties performed, must be the subject of a written contract. The preamble to this decree stressed the desirability of strengthening the juridical cohesion of professional deontology by establishing a legal foundation for the ethics of medical practice.

It can be concluded from the terms of this provision that the contract in writing is not a formality *ad substantiam* but merely *ad probationem*, whose aim is to enable the Medical Association to control, for reasons of professional prestige and deontological principles, the manner in which its members enter into obligations under contracts of employment. Consequently, the absence of a written contract could not result in the contract being invalid. At the most, what was involved was a disciplinary failing on the part of the doctor vis-à-vis the Medical Association.

Unlawful purpose of the contract of employment

Brazil [5]

The Regional Labour Tribunal, upholding the judgement of the court of first instance, rejected the petition of an employee of a gambling house on the grounds that, since such establishments are prohibited by law, the contract of employment was *ipso jure* void since its purpose and the duties performed were illegal. At the same time the Court decided to forward the dossier on the case to the police authorities for submission to the Public Prosecutor so that he might take the appropriate action.

Minority opinion. In the opinion of one of the judges, the defendant's allegation that there was no employment relationship since his business was illegal – and could even constitute a penal offence – ought not to be allowed since it meant that a crime was being invoked to benefit the perpetrator of that crime. Such a decision would abet the illegal enrichment of gambling houses at the expense of their employees and place such establishments in a privileged situation compared with other employers engaged in lawful activities, who had to comply with all their labour and fiscal obligations.

Spain [6]

The management of a night-club terminated the employment relationship of the plaintiff, whose job was to act as a dance hostess, receiving in addition to a fixed wage a commission on each bottle of champagne opened in the company of clients.

According to the defendant management, the contract of employment ought to be considered void since its purpose was unlawful and, according to the provisions of the Civil Code, neither of the parties could demand its performance.

The Court was of the opinion that in considering the unlawfulness or turpitude of the purpose of the contract as grounds for declaring it void, a distinction had to be made, within the context of the acknowledged frivolousness of the establishment, between immorality which could be ascribed to the plaintiff, on account of excesses in her behaviour, and immorality connected with the show put on for the customers, for which the management that organised and financed the establishment was responsible. In the present case, no specific accusation had been laid against the plaintiff and no evidence had been produced that her behaviour had been excessive or scandalous. The abstract reference made by the defendant to unlawfulness, without explaining its nature or who was responsible (the plaintiff or the management), could not serve as grounds for dismissal. To accuse someone of scandalous or immoral behaviour suppositions were not enough; specific acts had to be proved and recorded among the facts on which the decision was based. While it was the aim of the legislator to uphold the moral order, the administrative authorities had appropriate powers in this connection to authorise the show or to close down the establishment, in which case the resulting employment effects would be of another order.

Employer's authority

Argentina [7]

A woman employee assigned to new duties, which in her opinion were tantamount to demotion, brought an action against the undertaking calling for her reinstatement in the managerial position she had previously occupied.

The Court of Appeal, confirming the judgement of the lower court, rejected the plaintiff's claim. In accordance with section 66 of the Act respecting contracts of employment, a change in category resulting from assignment to new duties can either be accepted by the worker or rejected, in which case he can consider himself dismissed. It is not possible, however, to apply to the courts for reinstatement in the previous post. Such a possibility existed in the original text of the Act respecting contracts of employment (section 71) but it was abolished in the new rules governing contracts of employment. According to section 66 of this text, a worker who does not accept the new conditions can only consider himself dismissed. If a court ordered such reinstatement it would be assuming the duties that rightly belong to the legislator by requiring an action which had been expressly eliminated from the legal provisions in order to avoid outside interference in the exercise of the employer's powers of organisation and management.

Discrimination on grounds of sex

Federal Republic of Germany [8]

The Federal Post Office granted time off for housework to female employees who had the sole responsibility for a family and household. A male worker, who lived alone with two young children and had to care for them with no outside help, claimed that he too should be entitled to time off for housework.

The Court upheld his claim. Although neither women nor men had a right to time off for housework, which was granted voluntarily by the employer, the principle of equality of treatment laid down in the Constitution (section 3, paragraph 3, of the Basic Law) required that, in so far as such time off was granted to women workers, it had also to be granted to men workers in the same position.

Italy [9]

A clause of a national collective agreement in force since 1972 in a public undertaking fixed the retirement age at 60 for men and 55 for women. A woman worker who had reached the age of 55 and had been pensioned off before the entry into force of Act No. 903 respecting equality of treatment between men and women in employment, dated 9 December 1977, wished to continue in her employment beyond this limit.

The Court of Cassation considered the clause illegal. It was contrary to the constitutional provisions in force for any clause in an individual or collective contract of employment to oblige women to retire at an earlier age than men, thus prejudicing the development of their career and the receipt of various benefits and allowances.

United Kingdom (Great Britain) [10]

A company's redundancy procedure, which had been ratified by its employees, provided that part-time workers would be dismissed before applying the "last in, first out" criterion to full-time workers on a unit basis. In accordance with this procedure, 60 part-time women, 20 full-time men and 26 full-time women workers were dismissed.

Two of the part-time women workers claimed that their selection for redundancy in accordance with the agreed procedure amounted to indirect sex discrimination and unfair dismissal. Under the Sex Discrimination Act of 1975 (section 1 *(b)*) a requirement or condition which applies equally to a man is unlawfully discriminating if (i) it is such that the proportion of women who can comply with it is considerably smaller than the proportion of men; (ii) it cannot be shown to be justifiable irrespective of the person to whom it is applied; and (iii) it is to a woman's detriment because she cannot comply with it. One of the women had always worked part time and had two adult children; the other had begun by working full time but had switched to part-time work following the birth of a child.

The Employment Appeal Tribunal held that the requirement that an employee should be full time before the "last in, first out" rule applied was indirectly discriminatory against women and that the company had not shown that it was justifiable.

United Kingdom (England) [11]

Under British Rail engineering staff rules, all employees, their spouses and dependent children enjoy concessionary rail travel. On retirement both men and women continue to enjoy certain reduced-fare travel facilities but the spouses and dependent children only of men, not of women, continue to benefit from these facilities. The appellant complained that this difference in treatment amounted to unlawful discrimination within the meaning of the Sex Discrimination Act. The provisions of this Act prohibiting discrimination against women in employment do not apply to provision in relation to death or retirement (section 6 (4)).

After the Employment Appeal Tribunal and the Court of Appeal had delivered differing judgements, the case went to the House of Lords, which then asked the Court of Justice of the European Communities for a ruling on the applicability in a case of this kind of Article 119 of the Treaty of Rome and the EEC Equal Pay and Equal Treatment Directives. The European Court ruled that the provision of special travel facilities for the families only of former male employees after retirement constituted discrimination against former female employees within the meaning of Article 119.

In the light of this ruling, the House of Lords held that when a law of the United Kingdom has been passed after an international treaty has been concluded dealing with the same subject-matter, its provisions are to be

construed, if they are reasonably capable of being so, in a way which is not incompatible with the international treaty. Since the clause in the above-mentioned section 6 (4) was capable of bearing either a narrow meaning or a wider one, it had to be interpreted in such a way as to comply with the international treaty. Accordingly, the denial of travel facilities to the spouses and dependent children of retired female employees constituted unlawful discrimination on the basis of sex.

Suspension of the contract of employment

Ivory Coast [12]

A company informed its staff and the labour inspectorate that it was having to suspend its activities owing to economic difficulties.

At a meeting with the members of the staff, at which the labour inspectorate was represented, the employees were offered the choice of accepting a temporary suspension of their contracts of employment without pay but retaining their seniority and being given priority for rehiring when the undertaking resumed its activities, or rejecting this solution and breaking the contractual links in return for payment of all entitlements but with no priority for subsequent rehiring.

When the undertaking resumed its activities it rehired the workers who had opted for suspension of their contracts and filled the remaining vacancies with other workers than those which had opted for termination of their contracts. The latter sued the employer for unfair dismissal without the authorisation of the labour inspectorate and for having contracted other workers.

The Court of Appeal of Abidjan rejected the appeal. The undertaking had acted in accordance with article 24 of the inter-occupational collective agreement in offering its employees a choice between suspension and termination and had so informed the staff delegates and the labour inspectorate. Since these steps had been taken with the agreement of the persons concerned, including those who had opted for termination, they could not now claim that it was a case of unfair dismissal.

Senegal [13]

An undertaking applied to the labour inspectorate for permission to make staff cutbacks involving the dismissal of 84 workers. The staff delegates opposed this step. The labour inspectorate, after completing an inquiry, refused permission for the dismissals but, taking into account the economic reasons put forward, proposed that the contracts of 83 workers be suspended for three months. This solution was accepted by the management, which then signed a conciliation agreement with the representatives of the central trade union organisation (with staff delegates being present) and with the representative of the labour inspectorate.

The Labour Tribunal rejected the action brought by a worker affected by this measure. The labour inspectorate is empowered to propose alternative ways of avoiding collective dismissals without it being necessary to secure the express agreement of the workers concerned under the same circumstances as would apply in authorising a justified dismissal. The fact that the conciliation agreement had only been signed by representatives of the central trade union organisation in no way detracted from its validity.

Termination of the employment relationship

India [14]

The Allahabad High Court decided that where the termination of the services of a workman was found to be invalid, the ordinary rule was that the workman would be entitled to full back wages except to the extent that he was gainfully employed during the enforced idleness. The burden of proof was upon the employer. An industrial tribunal had erroneously taken the view that it was to be presumed that the workman would have managed to obtain alternative employment and that there had to be evidence that he had remained unemployed in the intervening period.

German Democratic Republic [15]

A worker and his section chief who were under the influence of drink swore at their head of department for refusing to have them driven home in a works car. Disciplinary proceedings were instituted against both. The section chief was given a strong reprimand. The worker thereafter absented himself from his work, partly on vacation and partly on sick leave, from 10 November to 5 December 1980, from 8 December to 7 January 1981, and again from 13 to 26 January. On 13 March he was dismissed without notice, the trade union committee's consent having been obtained on 6 March. The worker appealed to the disputes commission, which annulled the dismissal without notice.

The employers brought judicial proceedings to have the dismissal declared valid. They were unsuccessful. The Court held that a dismissal without notice four months after the conduct complained of could no longer be justified. Dismissal without notice was to be resorted to only when there had been a serious breach of duty of such a nature that it was no longer possible to employ the worker in the undertaking and when it was necessary in all the circumstances to put an end to the employment relationship at once. On the facts of the case this was clearly not the position since the defendant had both been granted leave and been employed in his normal job since the incident complained of. The plaintiffs had accordingly failed to prove that dismissal without notice was necessary.

Equal pay

France [16]

The Order of 25 May 1965 laid down the conditions for the grant of housing allowances to members of the staff of mines or similar undertakings who are heads of families. Section 2 of this Order defines heads of families with the right to free housing or a monthly housing allowance as married men, men caring for children or relatives (parents or siblings) who are unable to work and are without resources, and married women whose husbands are dependent on them.

The Council of State was called upon to decide whether the above-mentioned provision was discriminatory in requiring that a married woman's husband should be dependent on her and not insisting upon the same requirement for a married man. The Council of State deemed the provision to be unlawful. Section 9 of Decree No. 46-1433 of 14 June 1946 respecting the staff regulations for persons employed in mines and similar undertakings provided that women should receive the same remuneration as men for the performance of equal work. Such a provision proscribed any discrimination in wages and other social benefits or supplements either in cash or in kind; such benefits included housing allowances as an additional element of the workers' remuneration.

Federal Republic of Germany [17]

In a case in which the staff rules of a company provided for the employer to pay old-age benefit only to full-time workers, a part-time woman worker's claim was granted at the first instance but rejected by the Court of Appeal.

The Federal Labour Court held that the Court of Appeal had not adequately considered whether the exclusion of part-time workers from old-age benefit contravened the fundamental requirement of equality of treatment of workers, including the principle of equal pay for men and women, which forbade the making of arbitrary distinctions. In principle, the only difference between part-time and full-time workers was that the latter's remuneration was reduced in accordance with their shorter working hours. Old-age benefits were an element of remuneration but were based not simply on the principle of payment for work done but also on length of service. There was no difference of substance between the length of service of a part-time worker and that of a full-time worker. The difference between the two was accordingly not in itself sufficient to justify the exclusion of part-time workers from company old-age benefit. Different treatment would only be permissible if there were objective reasons for it – for example if the part-time work were exclusively in the worker's interest and involved appreciable additional costs for the employer, who might thus wish to offer incentives to full-time workers.

The Court of Appeal should examine whether this exclusion in practice had the effect of placing women at a disadvantage as compared with men; if it did, it was for the employer to establish the grounds on which he had made a distinction between full-time and part-time workers. The case was referred back to the Court of Appeal for further examination in the light of these principles.

India [18]

Drivers employed by the Delhi Police Force had a lower scale of pay than drivers employed by the Railway Protection Force, though both formed part of the Delhi administration. The petitioner claimed that his scale of pay as a police force driver should be at least the same as that of other drivers in the service of the city's administration.

The Supreme Court, referring to article 39 *(d)* of the Constitution which proclaims the principle of equal pay for equal work for both men and women, held that this meant equal pay for equal work for everyone and as between the sexes. The provisions of article 14 of the Constitution, requiring equality before the law and the equal protection of the laws, and of article 16, specifying equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, had to be interpreted in the light of the principle mentioned above. The Court, after referring to relevant provisions of other national Constitutions and the Preamble to the Constitution of the ILO, concluded that the principle of equal pay for equal work could be deduced from articles 14 and 16 of the Constitution construed in the light of article 39 *(d)* and could be properly applied to cases of unequal scales of pay based on no classification or irrational classification, though those drawing the different scales of pay did identical work under the same employer.

The respondents were ordered to fix the scale of pay of Delhi Police Force drivers on a par with that of the drivers of the Railway Protection Force.

Educational leave

Canada [19]

A teacher was granted leave of absence for further training. During this time he was to receive 65 per cent of his salary. While he was on leave, the collective agreement relating to teachers expired. The teacher himself accepted a temporary position while continuing to attend his courses. The School Board refused to pay the teacher for his educational leave arguing that, with the expiration of the collective agreement, it was not obliged to pay the salary. It also claimed that acceptance of a temporary position had terminated the agreement. The Alberta Court of Queen's Bench, in allowing an action for the recovery of the wages, held that the educational leave

agreement was a separate contract that could stand independently of the collective agreement and as such survived the expiration of the agreement. Additionally, acceptance of the temporary position did not terminate the educational leave contract, as the coexistence of work and leave had been contemplated.

Maternity protection

Federal Republic of Germany [20]

The plaintiff started work on 2 November 1981 following an interview a few days previously. At the interview she answered in the negative a question as to whether she was pregnant. On 3 November 1981 she presented a medical certificate attesting that she was ten weeks pregnant. On the same day the employer contested the validity of the employment relationship and sent her home.

The Court upheld the woman's claim. It held that the employer was not entitled to ask the plaintiff whether she was pregnant, so that even a deliberately false reply would not be a ground for invalidating the employment contract unless the employment was to be in a job in which the law prohibited the employment of pregnant women.

Under a legislative amendment of 13 August 1981 to section 661a.1.1 of the Civil Code, an employer may not discriminate against a worker on the basis of sex when establishing an employment relationship. The reason for asking a woman candidate for a job whether she is pregnant can only be to ascertain whether her employment would lay upon the employer the obligations deriving from the employment of a pregnant woman. Section 661a of the Civil Code is designed to ensure that considerations of the kind shall no longer have any weight when an employer engages a worker. To allow an employer to question women candidates as to pregnancy would compel them to reveal circumstances which would diminish their chances of obtaining the job as compared with men. Such a question is therefore not compatible with section 661a of the Civil Code, except in respect of jobs which may not be undertaken by pregnant women.

France [21]

A woman was hired in January 1977 for a period of one year. Her contract was renewed on various successive occasions for periods of two or three months each time. On 10 October 1978, one month before her latest contract was due to expire, she was notified by her employer that her employment would terminate on 13 November 1978. The woman worker submitted a medical certificate to the employer stating that she was pregnant. The employer refused to alter his decision on the grounds that he had received the certificate more than eight days after the notice had been given.

The Court pointed out that, where a contract of specified duration was renewed for successive periods which were not the subject of a previous agreement, the rules applicable to contracts of unspecified duration should be applied in the event of dismissal. The contract had been terminated, therefore, not because it had reached the end of its term but at the end of the period of notice. Although the woman worker had not submitted the medical certificate within eight days of receiving her notice, as required by section L.122-25-2 of the Labour Code, her failure to do so in this case was irrelevant since the employer had not complied with the obligation laid down in section L.122-14 of the Labour Code to summon the worker to an interview prior to giving notice. Since this requirement had not been met, the notice of dismissal was invalid and the eight-day limit could not apply.

Compulsory age of retirement

Spain [22]

Additional provision 5a of the Workers' Charter provides that "there shall be a maximum age limit to the capacity to work as well as for contracts of employment, to be fixed by the Government in the light of the state of social security resources and the employment market. *In any event, the maximum age shall be 69 years*, without prejudice to the ability to complete the qualifying periods for a retirement pension. Ages for the grant of retirement pensions may be freely agreed upon in collective bargaining without prejudice to social security provisions in this matter."

A labour court, which was called upon to pass judgement in a case concerning a worker dismissed for having passed the age of 69 years, asked the Constitutional Court for a ruling as to the unconstitutionality of the above-mentioned provision, considering that it was inconsistent with article 35 of the Constitution (the duty to work and the right to work of all Spaniards) as well as article 14 (principle of equality before the law without any discrimination).

The Constitutional Court held that such a provision (the part italicised above) was unconstitutional, "construed as a standard establishing the incapacity to work at 69 years of age and directly and unconditionally stipulating that the employment relationship shall be terminated at that age".

The Court pointed out that although the principle of equality set forth in article 14 of the Constitution did not involve equal legal treatment in all cases, without regard to any differentiating element, any difference of treatment in the exercise of rights and freedoms had to have an objective and reasonable justification.

The arguments put forward by those upholding the constitutionality of the contested provision were based on three lines of reasoning.

The first had to do with the diminution of the capacity to work which is a consequence of ageing. According to the Court it was not reasonable to

presume a general incapacity at one and the same age for all workers, whatever the sector in which they were employed and the type of activity they performed. For example, such a presumption of incapacity would not apply if a worker, on reaching this age, continued to be engaged in the same activity as a self-employed worker not covered by the Charter. The fixing of a maximum age for employment could not be compared with the fixing of a minimum age since the latter was aimed at ensuring a basic training within the context of a policy aimed at promoting genuine equality for all citizens and removing the obstacles to the full physical and mental development of their personality.

As regards the second line of argument – that retirement represented a step forward in the process of the humanisation of work since it was a means of protecting the elderly – the Court considered that such protection was based on different criteria from those forming the basis for compulsory retirement. The Court referred to the ILO's Older Workers Recommendation, 1980 (No. 162), Part IV of which recommends that, wherever possible, the transition to retirement should be voluntary. Repeated proposals for the age of retirement to be lowered were not aimed at fixing an age for compulsory retirement but at the age of eligibility for the grant of a retirement pension.

The third line of argument depicted compulsory retirement as a policy for sharing out the work available, which implies limiting the right to work of one group of workers in order to guarantee the right to work of another group. The Court considered that, in this context, the fixing of a maximum age to remaining at work would be constitutional, provided that it thereby ensured the achievement of the goals pursued by employment policy, which is to say that, in the event of unemployment, this limitation would ensure that an opportunity to work would be provided without entailing any abolition of work posts whatever. On the other hand, if such a limitation is allowed, a personal economic sacrifice would have to be compensated since a lawful constitutional end could not be pursued by disproportionately impairing a benefit conferred by the Constitution.

For these reasons a maximum working age could only be constitutional within the framework of an employment policy and under the conditions indicated. The contested part of provision 5a could not be interpreted in isolation as itself establishing an incapacity to work but had to be interpreted along with the rest of the provision as authorisation both for the Government to fix an age limit and for the parties to collective bargaining to establish ages for the grant of retirement pensions. The Government's authority to act is based on the condition that any action must be warranted by the state of social security resources and the employment market.[1] If the Government does not use such powers, then the challenged provision (the part italicised above) is of no effect because it could not in itself result in the termination of the employment relationship.

Teachers

India [23]

The Kerala High Court decided that teachers are not "workmen" within the terms of the Indian Industrial Disputes Act notwithstanding the fact that the Indian Supreme Court had declared that education was an "industry". The object of a teacher's employment was of a different nature to that of the more usual worker.

Illegal immigrant workers

United States [24]

Eight employees joined a union against the wishes of their employer. The following day the employer wrote to the National Immigration and Naturalisation Service (INS) asking it to check the status of five of these employees, who were Mexican nationals. The evidence showed that the employer already knew they were illegal immigrants. After an INS check, the five employees were arrested but were offered voluntary departure as a substitute for deportation, which they accepted.

The National Labour Relations Board initiated proceedings against the employer, charging that he had dismissed the employees because of their union activities. The United States Court of Appeals upheld the Board's conclusion that the employer had deliberately discharged the five employees in violation of the Labour Management Relations Act by sending the letter to the INS in retaliation for their union activity. It was clear from the evidence that it was the letter which precipitated the INS investigaton and thus it was the letter, and not their illegal status, which was the proximate cause of their departure. There is no legal obligation on an employer to notify the INS that he employs illegal aliens and an employer has no right to rely on a "moral obligation" to report them merely to sanctify an otherwise unjustifiable act of anti-union discrimination.

The Court held that there was no reason why the usual remedies of offers of reinstatement and back pay should not apply with certain adjustments. First, the offer of reinstatement should be subject to the employees' obtaining lawful authorisation to live and work in the United States. This offer should be kept open for four years to enable them to satisfy this requirement. It should be sent to them in Spanish and proof of their receipt of it should be obtained. Second, back pay would not be payable for any period when the employees were not lawfully entitled to be present and employed in the United States. However, since this might result in their receiving no back pay at all, the Court fixed a minimum amount of back pay of six months to be paid in any event, as representing the minimum time during which the employees might reasonably have remained employed without detection by the INS but for the employer's unfair labour practice.

Employment accident benefit

France [25]

A journalist, who had to interview members of the Model Aircraft Federation in Rouen, a meeting which lasted till late at night, and was to attend the trials of a new car model in Paris the following day, was killed in a car crash while travelling between these two cities at a time when he had altered his normal itinerary in order to travel to the house of a woman friend where he intended to spend the night. The Social Security Fund refused to consider this an employment accident, maintaining that the victim had changed his itinerary for personal reasons. The Court of Appeal of Rouen considered that it was an employment accident. The nature of the victim's duties excluded any concept of a fixed timetable or itinerary. In addition, the car in which he was travelling belonged to his employer, who paid his travelling costs. Although evidence had been given of the relationship existing between the person concerned and the woman friend in whose house he was intending to spend the night, in view of the late hour and the fact that it was summer and there would consequently be difficulties in finding hotel accommodation, it was logical that in order to be sure of having a place to sleep near to the place in which he was to perform his functions the following day he should have chosen that particular spot. Such a choice was within the powers of judgement of a senior employee of the undertaking in the performance of his duties and in the given circumstances with regard to time, itinerary, convenience and the demands of his job.

The Court of Cassation upheld the decision of the Court of Appeal of Rouen.

Spain [26]

A worker was killed in an employment accident while working as a mechanic for an air company. He also worked for another company as a pilot. The two activities were compatible in view of the special work schedule he operated under and both undertakings paid regular social security contributions for him.

The Tribunal was called upon to decide whether the surviving widow and children were entitled to employment accident benefits based on the wages he received from both undertakings, bearing in mind that when the accident occurred the worker was on leave from one of them.

The Tribunal held that they were. A person is deemed to be holding more than one job when he is performing services simultaneously for two or more employers whether at different times on the same days or on different days within the same period of time – a week or a month. Since both activities entitled him to social security coverage, in the event that an accident occurred in one of them it assumed the character of an employment accident

for both even when the worker was on leave from one of them, since it is not obligatory to take leave simultaneously from both undertakings.

Invalidity benefit

Federal Republic of Germany [27]

A foreman in charge of electrical installation teams suffered a heart attack and was no longer able to carry on his former occupation. His employers continued to employ him on lighter work and to pay him wages corresponding to his former job on grounds of equity. The Insurance Fund refused to grant the plaintiff a partial invalidity pension on the ground that he had suffered no loss of earnings.

The Federal Social Court held that compensation for loss of earnings was an element of decisive importance in the grant of an invalidity pension and that for this reason a change of job with undiminished earnings would normally result in there being no right to a pension. However, this result could only follow when the continued payment of the former earnings was based on a legal right of the worker – for example, under a collective agreement or works agreement – because only in such cases would he have an adequate guarantee that his loss of earning capacity would continue to be compensated.

In the present case the plaintiff received the higher wages as a matter of equity and not by virtue of any assured right which could be opposed to the grant of a pension.

Federal Republic of Germany [28]

An unskilled Spanish worker was employed as warehouseman. After breaking a bone in his right wrist he was capable of only moderately heavy work over a full day. He claimed a pension for total invalidity, arguing that there were no longer any jobs open to him in view of the incapacity in his right hand, since he had not mastered German.

His claim was rejected on the ground that there were many types of unskilled employment within the capacity of a person with reduced use of his right hand. The fact that some of these might not be open to him because of his limited knowledge of German was irrelevant in this case. To take it into account would result in unequal treatment between German and foreign workers.

Registration of trade unions

Brazil [29]

According to the Labour Code, all persons who are engaged in the same activity or occupation or in similar or allied occupations as employees, agents or other persons working on their own account are entitled to form

associations for the purpose of the study, protection and co-ordination of their economic or occupational interests (section 511). According to another provision in the same text, only occupational associations constituted for the purposes and in the form specified by the preceding section and registered in accordance with section 558 shall be recognised as trade unions and enjoy the rights conferred by the Labour Code (section 512).

The court of first instance, in making an award on a collective dispute, had decided that the officers of occupational associations should be entitled to job security in respect of the plaintiffs' federative activities (the plaintiffs were the Federation of Workers in Cultural and Artistic Undertakings, which covered three states).

The Higher Labour Court, to which the employers appealed, deleted the clause in the arbitration award recognising the right of the officers of the occupational association to job security. According to this Court, the Labour Code guaranteed job security only to the officers of recognised trade unions. The existence of thousands of trade unions proved that such an interpretation did not prevent the creation of new trade unions, as the Federation claimed. The extension of job security to occupational associations would result in a proliferation of associations which would operate outside the control of the Ministry of Labour, alongside first- and second-degree trade union bodies. On the other hand, the labour courts were not empowered to limit job security to the most active or important associations, since this would amount to discrimination without legal basis. In addition, such an interpretation would impose a burden on the undertakings in that there would be a multiplication of the number of employees enjoying provisional job security.

Minority opinion. One of the judges, in a dissenting opinion, declared that, since Brazilian law did not recognise a trade union which had not first been established in the form of an occupational association, it was to be understood that the leaders of associations – which were embryo trade unions – should enjoy job security by virtue either of collective agreements or of arbitration awards. Otherwise employers would be enabled to prevent the establishment of associations and, hence, trade unions.

Strikes

France [30]

A number of deputies applied to the Constitutional Council for a ruling or the constitutionality of the provision in section 8 of the Act respecting the development of staff representative institutions, which added a paragraph to section L.521-1c of the Labour Code declaring that no proceedings whatsoever could be brought against employees, elected or appointed staff representatives or trade union organisations with a view to seeking reparation for damage caused during or on the occasion of a labour dispute, except where the damage arose out of a penal offence or acts which clearly cannot

be considered to form part of the exercise of the right to strike or of trade union rights. These provisions apply to pending proceedings, including those in the Court of Cassation.

The Constitutional Council declared the aforesaid provision to be unconstitutional. Such a provision would mean that no reparation could be made for any damage caused by misdeeds, including serious ones, on the occasion of a labour dispute as long as such damage could be linked, however indirectly, with the exercise of the right to strike or trade union rights, and provided that a penal offence was not involved. This was contrary to the general principle whereby any human act which causes damage to another obliges the person responsible to make good that damage.

Although the legislator had established, with reference to certain matters, reparation schemes which partially or totally superseded this principle by replacing the liability of the perpetrator of the damage with that of another physical or moral person, there were no provisions in French law which permitted the exclusion from any reparation whatsoever of damage resulting from torts attributable to physical or moral persons under private law, whatever the seriousness of the tort. Such a situation would constitute discrimination against some persons, who would be deprived, except in cases of penal offences, of taking any action for compensation, whereas no physical or moral, public or private, French or foreign person suffering moral or material damage attributable to a tort committed by a person under private law was placed under a general prohibition from applying to the courts for reparation. Although the object of the aforementioned provision was to ensure that the constitutionally recognised right to strike could not be threatened by court proceedings against the workers, this object could not justify the infringement by this provision of the principle of equality. The State could not negate the very principle of the right of the victims of tortious acts, who might moreover be employees, staff representatives or trade union organisations, to equality before the law and the public authorities.

Brazil [31]

An amnesty having been declared for political and related offences committed between 1 September 1961 and 18 August 1979, a group of bank employees, who had lost their jobs as a result of an illegal strike (any stoppage of work in the banking sector being prohibited by law), applied for their reinstatement.

The Higher Labour Court considered that the participation of these workers in an illegal strike was serious misconduct. Labelling it as such was a question of fact and the State could not, in declaring an amnesty for political offences, invade the private sphere in which the employer had exercised his right to punish serious misconduct.

Australia [32]

This case called for a decision as to whether employees accrue paid annual leave during a strike. The Court, agreeing that this was the case, declared that if the legislator had intended that only actual performance of work and payment for that performance would constitute employment for the purposes of accruing annual leave, there was then a clear and unambiguous form of words such as "continuous service" which could have been used instead of simply "employment".

Notes

[1] Previous summaries of judicial decisions are contained in *International Labour Review*, Jan.-Feb. 1983, pp. 37-56, while the Jan.-Feb. 1982 issue gives bibliographical details of the summaries published in the *Review* since March 1963.

[2] The *Social and Labour Bulletin* (Geneva, ILO) contains information on other judicial decisions. The reader may also refer to decisions of some industrialised market economy countries published in *International Labour Law Reports* (Alphen aan den Rijn (Netherlands), Sijthoff and Noordhoff).

[3] Supreme Court of India, 18 September 1982. *Indian Factories and Labour Reports*, Allahabad, Vol. 46, 1983, p. 15.

[4] Supreme Court of Justice, Fourth Division, 5 February 1982. *Boletim do Ministério de Justiça*, Lisbon, Mar. 1982, pp. 185-194.

[5] Regional Labour Tribunal, 8th region, Belém, 18 May 1981. *Revista Legislaçao do Trabalho*, Sao Paulo, Aug. 1981, pp. 1002-1003.

[6] Supreme Court, Chamber VI, 3 March 1981. *Revista de Derecho Privado*, Madrid, July-Aug. 1982, p. 753.

[7] National Court of Appeal for Labour Cases, Chamber IV, 26 February 1982. *Derecho del Trabajo*, Buenos Aires, June 1982, pp. 725-726.

[8] Federal Labour Court, 26 January 1982. *Arbeitsrecht in Stichworten*, Bad Homburg, No. 11, 1982, p. 164.

[9] Court of Cassation, Labour Chamber, 23 December 1981. *Rivista Italiana di Diritto del Lavoro*, Milan, July-Sep. 1982, pp. 521-528.

[10] Employment Appeal Tribunal, 22 September 1982. *Industrial Relations Law Reports*, London, 1982, p. 482.

[11] House of Lords, 22 April 1982. ibid., 1982, pp. 257-259.

[12] Court of Appeal of Abidjan, 16 April 1982. *Travail et profession d'outre-mer*, Paris, No. 577, 16 Apr. 1983, pp. 181-182.

[13] Labour Tribunal of Dakar, 21 January 1982. *Revue de droit des pays d'Afrique*, Le Vésinet, France, No. 779, Jan.-Mar. 1983, pp. 101-103.

[14] High Court of Allahabad, 10 February 1982. *Indian Factories and Labour Reports*, Vol. 44, 1982, p. 436.

[15] District Court of Königs-Wusterhausen, 15 May 1982. *Arbeit und Arbeitsrecht*, Berlin, No. 4, 1983, p. 182.

[16] Council of State (Litigation Division), 11 June 1982. *Droit social*, Paris, Feb. 1983, p. 147.

[17] Federal Labour Court, 6 April 1982. *Sammlung arbeitsrechtlicher Entscheidungen*, Cologne, No. 7, 1982, pp. 256-260.

[18] Supreme Court, 22 February 1982. *Indian Factories and Labour Reports*, Vol. 45, 1982, p. 299.

[19] Alberta Court of Queen's Bench, 21 May 1982. *Canadian Labour Law Reports*, Don Mills, Ontario, No. 14, 1982, p. 195.

[20] Labour Court of Frankfurt am Main, 5 August 1982. *Arbeitsrecht in Stichworten*, No. 8, 1983, p. 123.

[21] Court of Cassation, 5 January 1982. *Droit ouvrier*, Paris, Nov. 1982, pp. 436-437.

[22] Constitutional Court, 2 July 1981. *Boletín Oficial del Estado*, Madrid, 20 July 1981 (supplement to No. 172), pp. 1-7.

[23] Kerala High Court, 2 March 1982. *Indian Factories and Labour Reports*, No. 45, 1982, p. 112.

[24] United States Court of Appeals, Seventh Circuit (Chicago), 24 Feb. 1982. *Labor Relations Reference Manual*, Washington, No. 109, p. 2995.

[25] Court of Appeal of Rouen, 3 February 1981. *Droit ouvrier*, Mar. 1983, pp. 106-107.

[26] Central Labour Tribunal, 4 March 1982. *Revista Técnico Laboral*, Barcelona, Vol. IV, No. 14, pp. 562-564.

[27] Federal Social Court, 24 June 1982, 4RJ 165/80.

[28] Federal Social Court, 6 October 1982. M-Dv. Bundesbahn-Versicherungsanstalt, beigeladen Bundesanstalt für Arbeit, ref. 4 RS 91/81.

[29] Higher Labour Court, 18 February 1981. *Revista Legislação do Trabalho*, Sep. 1981, pp. 1082-1084.

[30] Constitutional Council, 22 October 1982. *Recueil Dalloz-Sirey*, Paris, 14 Apr. 1983, No. 14, pp. 189-192.

[31] Higher Labour Court, 2 June 1981. *Revista Legislação do Trabalho*, Aug. 1981, pp. 959-960.

[32] Australian Federal Court, 28 July 1982. *Australian Industrial Law Review*, North Ryde (NSW), Vol. 24, No. 21, Sep. 1982.