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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 (applicable law, rights of foreign workers hired without a permit, employer's liability, worker's liability, freedom of expression); the employment relationship (temporary employment agencies, fixed-term employment contracts, modification of the employment contract, discrimination, dismissal, dismissal on grounds of marriage); conditions of employment (equal pay, paid sick leave); specific categories of workers (homeworkers); social security (employment injury); and labour relations (trade union dues, liability for acts committed while on strike, works committees, lockout).[2]

Applicable law

Brazil [3]

A Brazilian worker was engaged in Brazil to work in Iraq. The Court had to decide whether the law applicable to the case was that of Brazil or of Iraq.

The Court held that, although under section 9 of the Act to institute the Brazilian Civil Code, obligations are governed by the law of the country in which they are entered into, in this case, which related to a contract of employment, the principle of *lex loci executionis* took precedence over that provision. This principle, embodied in the Bustamante Code of Private International Law, which Brazil has ratified, was generally accepted by the courts: labour disputes had to be settled in the light of the circumstances at the place of work and no exception could be made with respect to the applicable legislation. In addition, this principle ensured the necessary equality of treatment for all the workers in an enterprise.

The Higher Labour Court referred the case back to the lower court for a decision on its substance based on the labour legislation of Iraq.

France [4]

The plaintiff was a United States national who had been employed in a European branch of an American company based in Chicago. On being dismissed by the company when he refused to be repatriated to Chicago

headquarters, he appealed to the French courts against his dismissal, claiming the compensation due to him under French law. His refusal to be repatriated was based on a clause in the collective agreement covering engineers and middle management in the metalworking industry and providing that they were entitled to refuse a change in their occupational status that involved a reduction in income or a demotion; any resulting termination of contract was regarded as being on the initiative of the employer and not of the engineer or middle-grade manager, who was therefore entitled to the compensation due for dismissal.

The Labour Court *(Conseil de prud'hommes)* rejected the claim, considering that the worker had been on a temporary posting in Europe and that the dismissal was therefore justified by his refusal to be repatriated.

The Paris Court of Appeal found in favour of the employee and ordered the subsidiary to pay the employee the compensation due under French law. In deciding that this law was applicable, the Court of Appeal took into account a company document handed to all company employees posted abroad, which stated that in the event of termination of the employment contract the employee could choose between the application of the contractual practices of his own country and those of the country in which he was working, in this case France.

In this connection the Court noted that the 1980 Rome Convention on the law applicable to contractual obligations, ratified by France, established the general rule that contracts were to be governed by the legislation chosen by the parties. Even though that Convention had not yet entered into force, its provisions were relevant since they reflected generally accepted principles which had been approved by the French legislature. Under French law the collective agreement was also applicable since it related to the legal status of the worker and not to the employment contract.

The Court also considered that, according to the company's organisation chart, the employee reported to the Chicago headquarters and hence his seniority should be counted from the date he joined the company and not from that of his transfer to Paris. However, given his administrative relationship with the Paris branch, there was nothing to prevent him from lodging an appeal against that branch even though it was only a subsidiary on French soil of the employing organisation.

The Court rejected the arguments of the defendant who primarily sustained that United States law was applicable since the case related to a temporary posting abroad and, as a subsidiary argument, that according to section L.122.14.8 of the French Labour Code providing that where an employee is seconded to a foreign subsidiary and is dismissed by it the parent company is responsible for repatriating and finding equivalent employment for him or, if that company also intends to dismiss him, it must observe the provisions of French law on termination of employment. The Court considered that this section referred to the case of a French company with a foreign subsidiary and not the reverse. The fact that

it stipulated that French law was applicable in cases of dismissal did not permit the deduction by analogy that it laid down a general rule governing conflicts of laws.

Rights of foreign workers hired without a permit

Spain [5]

The plaintiffs, a group of foreign workers holding neither residence nor work permits, had been employed by a fish canning company. They claimed the right to be treated as permanent employees with contracts of unspecified duration, as provided for in section 15 of the Workers' Charter, which states that a contract of employment shall be presumed to be for an unspecified duration.

When their claim was rejected by the lower labour court, the plaintiffs filed an appeal with the Central Labour Court, which rejected it on the ground that Spanish law requires foreign workers employed in Spain to possess a work permit and a residence permit; otherwise their contracts of employment cannot be held to be valid and the workers cannot invoke the full rights deriving from a valid employment contract. This circumstance, however, did not exempt the enterprise from its liabilities for the payment of wages due and infringements of the legislation governing the employment of foreigners in Spain.

Employer's liability

Switzerland [6]

One of the duties of a domestic employee was to dust a collection of guns belonging to his employer. The employee invited a maid working in the same house to look through the telescopic sight of a rifle, believing that the safety catch was on. The rifle went off and the bullet wounded the maid in the head. It could not be determined with certainty whether the bullet was already in the chamber or whether it had entered as a result of the employee's handling of the rifle. However, there could be no doubt that the safety catch had either been released by the employee or been knocked off when passing the rifle to the maid.

The maid, who was 32 years old, suffered a permanent loss of eyesight of 80 per cent, 90 per cent physical disability and total loss of earning capacity.

The Court of Justice of the Canton of Geneva considered that the employer had incurred liability under section 41 of the Code of Obligations because he had failed to take the precautionary measures the circumstances

demanded. It assessed his liability at 20 per cent, holding the employee to be the principal culprit.

The Federal Court, to which the maid appealed, sentenced the employer to pay the totality of the compensation claimed, judging him to be jointly and severally liable for loss of income, the losses due to disability and consequential damages.

In the opinion of the Federal Court, not only was the employer liable under section 41 of the Code of Obligations (liability in tort) but he had also incurred contractual liability under section 328.2 of the Code of Obligations, which establishes the direct liability of the employer for his own acts or omissions, whether or not an assistant has contributed to the damage caused. The obligation to ensure the safety of employees includes preventing accidents that are not attributable to unforeseeable behaviour by the victim that constitutes serious misconduct. In the present case two persons were answerable for the same damage, to which each had contributed by different unlawful acts. Each was, therefore, jointly and severally liable so that the victim could choose to bring an action against either of them. According to the relevant case law, a limitation of liability based on a concurrent misdemeanour by a third party was admissible only with the greatest reservations in order not to deprive the injured party of protection. The possibility of claiming *per se* as between debtors offered adequate protection for the designated debtor and the possibility that the insolvency of the other debtor might render such a claim pointless could not justify limiting the liability of the defendant since it would be a greater injustice if the injured party were thereby to suffer a loss.

Worker's liability

Australia [7]

The defendant was employed by the plaintiff (a teachers' training college) as a vehicle driver and unloader. After a social function at the college at which he served food and drink but also consumed a quantity of alcohol himself, the defendant took one of the college vehicles, with the plaintiff's knowledge and consent, to drive home and had an accident on the way.

The employer sued him for damages, claiming the cost of repairing the vehicle, on the ground not of negligence or breach of contract but that the employee as bailee was liable for the damage.

The employee admitted that he had not acted with the necessary care but denied liability on the ground that by virtue of certain implied terms in his contract of employment he was exempted from liability to the employer for negligence in the course of employment. Furthermore, the plaintiff should have maintened a current insurance policy to indemnify him for any

damage caused to the vehicle and, instead of claiming against the worker, he should have exercised his full rights against the insurer for any loss or damage caused by the defendant's negligence.

The Court found no support for the defendant's affirmation that his employment contract contained terms implicitly exempting him from common law obligations and liability for acts of negligence in the course of his employment. Nor could such terms be implied between bailor and bailee where the bailee was the bailor's employee. The care required of the employee when driving his employer's vehicle was no different from that required of any other driver.

The Court did not decide whether the employer was obliged to maintain in force an insurance policy covering both the employer's and the employee's liabilities for damage caused by the employee's negligent driving.

Freedom of expression

France [8]

An employee was dismissed for having expressed critical opinions in the press about working conditions in the enterprise which employed him. The enterprise considered that such public statements could destroy the confidence which ought to exist in its relations with the employee.

The Court of Appeal declared the dismissal invalid and ordered the worker's reinstatement. The enterprise appealed, arguing that section L. 461-1 of the Labour Code – providing for workers' freedom of expression in the enterprise – had been applied to a situation that was not covered by that provision. The Court of Cassation confirmed the judgement, considering that the Court of Appeal had rightly inferred from that provision that, if the exercise of the right of expression in the enterprise was not liable to punishment, it could not be so outside the enterprise where the law permitted this right, barring abuses, to be exercised in full.

The commentary accompanying the report of this judgement notes that this is the first time that reinstatement of a worker has been ordered in the absence of a legal text expressly requiring it (e.g. provisions for the protection of staff representatives) or declaring the dismissal to be null and void (e.g. provisions prohibiting dismissal for strike action, except in the case of serious offences). In addition, by viewing freedom of expression as a fundamental freedom the judgement gives the concept a dimension that transcends the bounds set in section L. 461-1 of the Labour Code.

Temporary employment agencies

Federal Republic of Germany [9]

In this case the Court had to decide whether an employment agency had engaged in unlawful hiring out of workers or had executed a contract for services.

The client was a fishing company which had turned to the agency when it did not have enough workers of its own to unload a particular cargo of fish. The agency thereupon hired a number of workers for the job, who unloaded the cargo alongside the fishing company's employees, but as a separate gang.

The Court accepted that there had been a contract for services between the agency and the employees it had taken on for the job. These workers had not been integrated with the workforce of the fishing company but had worked as an independent unit. There was accordingly no unlawful hiring out of workers.

Fixed-term employment contracts

Argentina [10]

The National Labour Court of Appeal had to decide whether a written contract of employment fixing an expiry date met the conditions for being regarded as a fixed-term contract, as the enterprise claimed.

The Court ruled that, for a contract of employment to be so regarded, it was not sufficient for it to specify an expiry date; the enterprise had additionally to demonstrate its objective reasons for resorting to this type of engagement, since otherwise it might be a means of circumventing the principles laid down in section 90 of the Act governing contracts of employment (stipulating that a contract is deemed to be for an unspecified duration) and in section 10 of the same Act (establishing the principle of continuity). The conditions laid down in section 90 for a contract to be for a fixed term were accumulative and not alternatives. Since the defendant enterprise had not proved that the particular job justified engagement on a fixed-term basis, the plaintiff was entitled to the compensation claimed.

Modification of the employment contract

France [11]

In some recent decisions the Court of Cassation has ruled that any fundamental modification of the employment contract must be expressly

accepted by the worker concerned. Failing that acceptance, the employer, if he deems it appropriate, may terminate the employment contract on his own initiative; as for the worker, he may challenge the modification yet still continue to work for the enterprise concerned without this being regarded as tacit acceptance of the new working conditions.

The commentary accompanying the reports of these decisions notes that previous case law deemed the worker to have tacitly accepted the modification of his contract if, despite not having agreed to it, he continued to work for the enterprise.

Discrimination

Spain [12]

Two male flight attendants claimed that a clause in the collective agreement of the airline for which they worked permitting stewardesses to take early retirement at the age of 35 years should apply to them. The lower labour court found in their favour. The Central Labour Court upheld the airline's appeal on the ground that the difference in treatment, which appeared to conflict with the principle of equality of the sexes laid down in the Constitution, was justified by the different characteristics expected of men and women, specifically the fact that the public expected the cabin crew to have an attractive presence, which, being a function of age, made early retirement for women in that service desirable.

On the flight attendants' further appeal, the Constitutional Court recognised their right not to be discriminated against on the ground of sex. The case was sent back to the Central Labour Court, which handed down a new judgement confirming that the collective agreement must be interpreted in a manner compatible with the constitutional provisions.

United States [13]

Some of the concepts referred to in this decision need a preliminary word of explanation. The decision concerns two types of criteria applied in the recruitment or promotion of staff: objective, uniform criteria, such as having a high-school diploma or degree or passing an aptitude test, and subjective criteria, meaning the employer's or a supervisor's personal appreciation of the candidate's qualities. The decision also refers to two types of proof in cases of discrimination. The first consists in showing that in a particular case there has been *disparate treatment*, including proof of intent to discriminate, while the second consists in supplying statistical data to show that an apparently impartial practice on the part of the employer has resulted in a discriminatory situation (this is known as *disparate impact analysis*). The decision tackles the question whether statistical evidence of a discriminatory

situation can be tabled to establish a prima facie case in instances where the employer's decision was based on subjective criteria. This question is of interest because the admissibility of such statistical evidence could affect the form in which the burden of proof is shared between the parties.

A discrimination charge was filed by a woman employee who alleged that the employer's practice in matters of promotion – which was not based on objective criteria, such as diplomas or aptitude tests, but on the subjective judgement of supervisors – discrimined against Blacks in general, and against her in particular. Her petition was rejected by the court of first instance and by the court of appeal for lack of proof of the existence of discriminatory treatment.

The Supreme Court, to which the petitioner appealed, was called on to decide whether the courts had to admit as prima facie evidence statistical data proving under-representation of the group against which discrimination was alleged (i.e. disparate impact analysis), even in cases where the action complained of, e.g. recruitment or promotion, was based on personal judgement or the application of subjective criteria, as in the present case.

The defendant argued that faced with a claim based on use statistical evidence an employer could only base his defence on "business necessity" or "job-relatedness". Where the selection criteria were of a general and uniform nature, validation studies could be carried out to determine whether particular selection criteria could predict actual on-the-job performance. However, it was practically impossible to validate subjective criteria in this way. Some qualities, such as common sense, good judgement, originality, ambition, loyalty and tact, could not be measured accurately through aptitude testing. Moreover, success at many jobs in which such qualities were crucial could not itself be measured directly. Because of these difficulties, employers would find it impossible to eliminate subjective criteria and defend such practices in litigation; the only alternative would be to adopt surreptitious quotas in order to ensure that no one could present a claim based on statistical evidence. This would be incompatible with the provisions of section 703 *(j)* of the Civil Rights Act of 1964, whereby nothing contained in Title VII (equal opportunity) was to be interpreted as requiring any employer to grant preferential treatment to any individual or to any group because of race, colour, religion, sex or national origin on account of a numerical imbalance in the groups of persons he employed.

The Supreme Court decided that disparate impact analysis could be applied since to do otherwise would be to go against the purpose of the anti-discrimination legislation. Recruitment and promotion practices that were apparently impartial and had been adopted without any discriminatory intent could have the same effects as intentionally discriminatory practices. Often these practices reflected subconscious prejudices which could lead to conduct prohibited by the law.

The Court recalled that, in cases of this type, previous case law had required proof of intent to discriminate, even though it had admitted statistical evidence in cases where the action complained of had been based on standardised criteria such as diploma requirements or written aptitude tests.

The Court recognised that the extension of disparate impact analysis to subjective employment practices could increase the risk that, in order to avoid litigation, employers would surreptitiously adopt a system of numerical quotas, which would be contrary to the intentions of the law. The Court considered, however, that the standard of proof required in such cases was still very high and that the defendant was free to produce countervailing evidence of his own. In addition, defences based on criteria such as "business necessity" or "job-relatedness" also limited the application of disparate impact analysis since courts were generally less competent than employers in matters relating to business practices.

Dismissal

Belgium [14]

A woman employee dismissed for serious misconduct challenged the validity of her dismissal and petitioned the court to order the company to pay a sum equivalent to her remuneration for the final month of her employment, holiday pay and severance pay.

The company objected that, since it had lodged a complaint against the employee for forgery, use of forged documents, fraud and theft (the reasons for her dismissal), it had sufficient grounds for claiming damages from her and that the labour court should therefore postpone a decision on the employee's claim until such time as a judgement had been handed down on the charge pending.

The Labour Court upheld the claim for payment of the sums in question since these constituted a definite and due debt. It considered that the employer could not withhold the wages of an employee by way of possible compensation or damages from the employee until the amount of such damages or compensation had been fixed by agreement between the parties or by the court. In the present case, the court still had to take a decision on the exact reasons for the dismissal. Moreover, when a worker's employment had been terminated, any pending remuneration had to be paid at the latest on the first pay day following the dismissal.

United Kingdom [15]

Three assistants in a branch of an enterprise were dismissed for failing to prevent serious and persistent stock losses. The assistants had been given warnings on two occasions in the past.

The Employment Appeal Tribunal found in favour of the enterprise. When an employer could not identify which individual in a group was responsible for an act – of commission or omission – he was entitled to dismiss all the members of that group, even where it was possible, or indeed probable, that not all were guilty, provided three conditions were satisfied. First, the act had to be such that it would justify the dismissal of an individual if he were found to have committed it; secondly, the Tribunal had to be satisfied that the act had been committed by one or more of the group, all of whom could be shown to be individually capable of having committed it; and thirdly, the Tribunal had to be satisfied that a proper investigation had been made by the employer to identify the person or persons responsible.

Since the three conditions were satisfied in this case, the dismissal of the three assistants had been a reasonable response.

United Kingdom [16]

A borough council terminated a youth training scheme in order to launch a revised one-year scheme employing fewer staff. All the staff concerned were informed of the decision to end the scheme and were invited to apply for appointments under the new one. Those who were not successful would be dismissed on grounds of redundancy. One of the employees was not offered a new post because she was pregnant and would require six to eight weeks' maternity leave during the currency of the one-year scheme. She appealed to the Industrial Tribunal on the ground of unfair dismissal, which found in her favour. The Court of Appeal overturned this decision, holding that the reason for her dismissal had been redundancy and that, where a woman was selected for redundancy because she was pregnant, the principal reason for dismissal was redundancy and not pregnancy.

The House of Lords allowed the employee's further appeal and restored the decision of the Industrial Tribunal. It considered that she had been unfairly dismissed on grounds of pregnancy and that the Court of Appeal had erred in holding that she had been dismissed on grounds of redundancy and not for reasons connected with her pregnancy. Where pregnancy was the reason that one employee and not another was selected for dismissal on grounds of redundancy, it could not be said that the reason for her dismissal was not directly and intimately connected with her pregnancy.

Dismissal on grounds of marriage

Argentina [17]

Under section 181 of the Act governing contracts of employment, dismissal on grounds of marriage is deemed to have occurred when the dismissal takes place within three months before or six months after the

marriage and the employer fails to give reasons for it or fails to produce evidence supporting the reasons. Section 182 of the same Act provides in such cases for special compensation equal to one year's remuneration to be added to the normal compensation for wrongful dismissal.

The Supreme Court of the Province of Buenos Aires had to decide whether the provisions of section 181 of the Act were applicable to the dismissal of a man. According to the Supreme Court, Title VII of the Act, containing the relevant provisions, covered not only maternity but also the family, which has its origin in marriage, and consequently no distinction was allowable on the basis of sex. Dismissals on the grounds of marriage affected both members of the couple alike and undermined the institution of marriage.

Equal pay

Spain [18]

The collective agreement concluded between an airline and its ground staff stated that it applied to all the ground staff, with exceptions including regularly employed intermittent workers and casual and part-time staff, who were to be covered by rules specifically drawn up for them.

A trade union instituted proceedings demanding recognition of the right of intermittent and casual workers to the same wage levels as those established under the agreement for full-time permanent workers.

After the claim had been rejected by the lower court, the trade union appealed to the Central Labour Court which quashed the earlier decision. It considered that the Workers' Charter authorised the parties to determine the scope of collective agreements but specific groups of workers could not be excluded from that scope without due cause. The principle of equality laid down in article 14 of the Constitution and in a number of labour provisions, such as section 17.1 of the Workers' Charter, required equal treatment in equal circumstances, and did not allow different treatment unless there was sufficient justification. This principle was applicable also to collective agreements, under article 14 of the Constitution and the ILO's Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117), both of which Spain had ratified.

The enterprise appealed to the Constitutional Court on the ground that the Central Labour Court's decision violated article 14 of the Constitution. This article did not establish an absolute principle of equality of treatment but prohibited discrimination on any of the listed grounds. In addition, this principle was not applicable to an agreement between trade unions and employers' organisations, both of which were private bodies. Its application in the present case placed an intolerable restriction on freedom of action,

unnecessarily limited collective bargaining and denied the legitimacy of agreements for specific groups of workers. Moreover, the differentiation established in the agreement was reasonable given that the value of the work of the two groups was not equal, the full-time permanent workers having greater experience.

The Constitutional Court rejected the appeal, holding that the Central Labour Court had not denied the legal possibility of distinguishing between different groups of workers, nor had it restricted collective bargaining rights in an intolerable fashion. It had limited itself to concluding that regular intermittent workers and casual workers, by being excluded from the collective agreement, were employed under conditions that in some respects – especially pay – were inferior to those of the other ground staff and that there was no objective reason that justified such unequal treatment.

The Constitutional Court also recalled that article 14 of the Constitution recognised the right not to be discriminated against but not the hypothetical right to impose differences in treatment; consequently, the right of workers not to be discriminated against could not be challenged by a hypothetical right of the enterprise to lay down separate regulations for certain groups of workers.

France [19]

Under section L.140-2 of the Labour Code, every employer must ensure equal remuneration for men and women performing work of equal value. Work is deemed to be of equal value if it requires a comparable level of overall occupational knowledge in the form of a degree, a certificate or practice in the occupation, of ability acquired through experience, of responsibility and of physical or mental effort.

In this case 13 women workers who were being paid less than three men belonging to the same category but assigned to other types of work sued the employer for non-compliance with that section. The court of first instance ruled that the enterprise had infringed it. The Court of Appeal confirmed the decision of the lower court.

In its appeal to the Court of Cassation the enterprise argued that the effort required of the three men, who had to move heavy loads, was not comparable with the mental fatigue caused by the women's work and that the varied nature of the jobs performed by the men demanded longer training.

The Court of Cassation quashed the decision of the Court of Appeal, holding that it had not taken into account all the necessary elements for determining whether the work was of equal value and had ignored one of the appellant's arguments. The Court of Appeal had ruled that the physical and mental efforts required of the female workers were equivalent to those of the men but had only taken into consideration the arduous nature of the work without also examining, as the appellant had requested, whether the difference in pay was justified by the men having multiple skills and longer training.

Switzerland [20]

A number of actors, both professional and semi-professional, were engaged by two impresarios to perform a play in public. Shortly before the opening night a semi-professional actress had to undergo an operation and was replaced by a professional actress. The professional actors were being paid a fee of 4,000 francs, the semi-professional actress who left the production had been engaged for 2,000 francs and the professional actress who replaced her was offered 2,500 francs.

Knowing how much the professional actors were receiving, the professional actress claimed the difference; plus interest, this amounted to 1,591 francs. Her claim was rejected by the industrial tribunal but the Cantonal Court allowed her appeal and ordered the impresarios to pay the sum claimed.

The impresarios appealed to the Federal Court alleging violation of article 4 (2) of the Constitution. The Federal Court allowed the appeal. Article 4 (2) (3) of the Constitution established an individual right to equal pay which any employee, male or female, could invoke directly before the courts. This provision embodied not only a constitutional right but also an imperative rule of civil law which had been incorporated into the provisions of the Code of Obligations relating to contracts of employment.

The Court noted that there had been a difference in remuneration and that the activity of the actress was qualitatively identical to that of the other three professional actors. It had not been shown, however, that there was a qualitative difference between the roles of the actors in the sense that those assigned to the semi-professional actors were less important.

Nevertheless, the Court considered that a difference in pay for men and women performing work of equal value did not violate the constitutional guarantee if it was based on objective grounds such as age, seniority, family responsibilities, experience, level of skill, risks, etc. There were also other objective circumstances that might justify an exception to the principle of equal pay and were not related to the person or activity of the worker. For example, the economic situation could affect the hiring of new staff. A difference in remuneration introduced on this ground was compatible, at least temporarily, with the principle of equal pay since it had nothing to do with the sex of the workers. However, when such a reason was invoked, its existence had to be clearly established.

In the present case it had to be assumed that the difference in pay for the professional and semi-professional actors was based on an objective factor related to the person of the worker – experience and qualifications – and not sex. In addition, the circumstances in which the professional actress had been engaged to replace a semi-professional actress could, because of the urgency, alter the terms of the problem. Thus an employer who had to replace a worker urgently could find himself having to pay more to the replacement than to the person replaced; conversely, it was possible that a worker might accept a job as a replacement under less favourable conditions

than he could have hoped for given his training if, for example, he was unemployed at the time. Although replacement of a worker did not suffice in itself to render any exception to the principle of equal pay legitimate, in the present case it did not appear that the difference in treatment had been based on sex but rather on an objective factor, namely the urgent need to replace a semi-professional actress without going over the fixed budget.

Paid sick leave

Berlin (West) [21]

The plaintiff had been taken on for a job which involved carrying heavy objects. He had scarcely started work when he felt a sudden pain. After four days on the job he was hospitalised and operated for a hernia. His absence lasted a month and he claimed his wages for that time from his employer. The employer refused, arguing that no employment contract had come into being because at the time it was concluded the plaintiff, owing to his undiagnosed hernia, was not in a condition to do the job he had been taken on for.

The Court found in favour of the plaintiff. The employer's argument would have been admissible only if the plaintiff had known of his condition beforehand. As the evidence was to the contrary, the plaintiff was entitled to sick pay from his employer.

Homeworkers

Federal Republic of Germany [22]

The employer and the works council had concluded an agreement (a "social plan") providing that the compensation payable to workers dismissed for reasons of redundancy should, in the case of workers employed on the premises, be based on seniority and age and, in the case of homeworkers, take the form of a fixed lump sum.

The Court held that this agreement was contrary to the principle of equal treatment for homeworkers engaged in the principal activity of the enterprise. Under law such workers were assimilated to workers in the enterprise and were entitled to the same treatment under the social plan.

Employment injury

Federal Republic of Germany [23]

Two cases of road accidents were found by the Federal Labour Court to be employment injuries even though at the time they took place the workers injured were not on the most direct route from their home to their workplace.

In one case the worker had to go to a clinic for a medical examination and suffered an accident while driving from the clinic to his workplace. The clinic was 28 kilometres from his workplace, whereas his home was only about 8 kilometres away.

In the other case, before starting his night shift the worker drove to a restaurant for a meal, adding some 3 kilometres to his normal journey. He suffered a road accident while walking from the restaurant to his car.

In these two cases the Court held that the journey to work had started at the clinic and the restaurant, respectively, and that the accidents were accordingly covered by the employment injury insurance scheme.

Argentina [24]

A truck driver, who was making a journey for the defendant enterprise, stopped to help another truck driver change a tyre. While doing so he was run over by a vehicle and killed.

The Supreme Court of Justice of the Province of Buenos Aires held that this was a work accident. According to both doctrine and case law the term was understood to apply to any accident that had a causal relationship to the work of the victim. Such a relationship existed when the worker was at his place of work even though not engaged on his specific tasks, provided he had not decided to use the time for his private ends. In the present case the worker, in stopping to offer assistance, had merely observed an inveterate custom among truck drivers and in so doing had not disobeyed the express orders of his employer.

Trade union dues

United States [25]

The Court ruled that legislation which permits an employer and a trade union to enter into an agreement requiring all employees in the bargaining unit to pay union dues as a condition of continued employment, whether or not the employees become union members, does not allow the union, over the objection of paying non-members, to spend funds collected from them on activities unrelated to collective bargaining.

Liability for acts committed while on strike

France [26]

An enterprise which had suffered losses due to unlawful obstruction by strikers of the loading of trucks brought an action for damages against a woman employee, who was both a trade union and a staff delegate, and the local trade union.

The court of first instance allowed the claim, and ordered the employee and the local trade union jointly and severally to pay the damages sought. The Court of Appeal reversed this decision in favour of the employee and the trade union; and the employer's appeal was rejected by the Court of Cassation.

The latter ruled that the trade union could not automatically be held liable for damage caused by abusive acts committed during a strike, even though the strike had been called by the union itself, if its actions had been merely passive and limited to the presence of one person among the workers obstructing the loading of trucks.

As regards the joint and several liability of the employee/trade union delegate who had participated in the strike, the Court considered that, since her functions did not give her any power to represent the workers on strike, she could not be held liable for the totality of the damages claimed (the Court of Appeal had ordered the employee to pay damages of 1 franc).

The commentary accompanying the report of this judgement notes that the decision differs from previous case law in that it departs from the principle of joint and several liability of the strikers or the trade unions, or both. It adds that the hardship caused to workers by previous judgements has been criticised by numerous commentators on the ground that the punishment well might be disproportionate to the offence committed.

Israel [27]

The national union of merchant marine officers declared a strike over wage and grading demands. After the strike began, two captains refused to move their ships from the container pier, which prevented other ships from unloading and created additional expenses and other losses for third parties, who sued the trade union and the captains for damages. After their claim had been rejected by the lower court, the plaintiffs appealed to the Supreme Court.

The Supreme Court had to determine whether the right to strike had been exercised lawfully since it had affected the rights of third parties, who incurred losses due to the strikers' action. The Court considered three legal issues. The first was whether the strikers had been guilty of causing a public nuisance. The Court noted that the shipping companies had ordered the crew to remove the ships and also that the strike did not imply a rupture of the

bond between employer and employees. In addition, the strike order did not prohibit the movement of ships to another berth. The workers could not be exculpated of all wrongs committed since in any strike a distinction had to be made between lawful and unlawful means of action. The second issue was whether the strikers had disobeyed a legally enforceable order. The Court recalled that the port authorities had ordered the ships to be moved. The third issue was whether the strikers had acted negligently. For an accusation of negligence to be upheld, the appellants had to show that the respondents were under a duty of care. In dealing with this concept, the Court recalled previous Israeli case law which had ruled that a strike belonged not to the domain of rights but to that of liberties which were subject to binding limitations. No legal system exempted strikers from all responsibility for acts committed in connection with the strike and in certain circumstances strikers might be held liable to third parties for their acts.

The Court recorded its concern not to set the sort of precedent that might deter workers from calling a lawful strike on account of the risk of having to pay damages. Nevertheless strikers would have to weigh the likely damage to a third party against the expected benefits of the strike. In ambiguous situations strikers should be given the benefit of the doubt; however, a distinction had to be made between performing an act in good faith and performing an act maliciously, and between legitimate defence of a right and failure to observe the law.

The Court noted that there were many cases in which groups of workers having control over or access to public services endeavoured to obtain concessions from the employer by exercising undue pressure on the users of the services. Just as the right to strike had its origin in a desire to counterbalance the dominant position of the employer, so there was nothing to prevent the intervention of the Court in cases where third parties were being coerced by groups of workers. In this particular case, not only was damage to a third party foreseeable but the strikers had counted on producing that effect; they had thus disrupted the balance between the right to strike and the rights of third parties.

In its ruling the Court ordered the captains and the trade union to reimburse only the additional expenses incurred for freight and warehouse charges, and made no award for other losses claimed.

Works committees

France [28]

Under section L.434-6 of the Labour Code works committees are entitled to resort to the services of an expert, paid by the enterprise, in connection with any major project covered by section L.432-2 of that Code, i.e. "any major project . . . to introduce new forms of technology if they are

likely to have consequences for the employment, skills, remuneration, training or working conditions of the staff".

Two decisions have recently dealt with this question. In one case the enterprise had notified the works committee of its intention to install a new computer with terminals in a greater number of services. The works committee, considering this to be a major project for introducing new forms of technology within the meaning of those sections of the Labour Code, decided to call in an expert. The employer maintained that the extension of this computer network did not constitute a new form of technology that might affect employment and hence did not justify recourse to an expert.

The lower court found in favour of the works committee and held the appointment of an expert to be justified. The Court of Cassation confirmed that decision. By installing the new computer and the new terminals, the enterprise had not only introduced more efficient technology but had also significantly altered its management methods by linking up its various units to a central computer system, increasing the number of terminals, providing for programming covering a number of years, with each department being made responsible for its own data inputs and processing, and increasing the number of employees having access to the terminals. It was accordingly a major project designed to introduce new forms of technology that were likely to have consequences for the employment, skills, remuneration and, particularly, training and working conditions of the staff.

In the other case the enterprise had requested a firm of consultants to study ways of restructuring some of its services and introducing data-processing equipment in its warehouses. The works committee considered this to be a major project as defined above and decided to call in an expert, a move which the employer opposed on the ground that it was not warranted by the circumstances.

The lower court decided that the works committee's request for an expert opinion met the conditions laid down in section L.434-6 of the Labour Code. The Court of Appeal confirmed the decision, considering that the works committee was entitled to resort to the services of an expert since the employer had also requested a firm of consultants to carry out a study.

The Court of Cassation quashed the decision of the Court of Appeal and ordered the works committee to pay costs. In its opinion, the works committee could only have recourse to the services of an expert when a major project of the type specified in section L.432-2 of the Labour Code had been proposed. In deciding to request an expert opinion before making sure that the study commissioned by the enterprise was going to result in the preparation of such a project, it had infringed those provisions.

Lockout

Spain [29]

A stop and go strike (at spaced intervals between 6.30 a.m. and 9 p.m.) having been called in an enterprise from 2 to 7 March 1987, the employer decided to close his installations from the 3rd to the 9th on the ground that nothing was being produced and there was a danger to the personnel and the installations.

The lower court declared the lockout illegal and ordered the enterprise to pay the wages due for the days on which the workers had not actually been on strike. The Central Labour Court confirmed the decision of the lower court.

Employers could order a lockout in the event of a strike only in the following circumstances: manifest danger of violence to persons or serious damage to property, unlawful occupation of the premises or serious prejudice to the normal course of production. The enterprise had not proved that any of these conditions were met and it was not sufficient for a strike to be discontinuous to qualify it as unlawful and abusive. Only staggered strikes, strikes by workers performing services in strategic sectors for the purpose of disrupting production, go-slow strikes and working-to-rule were deemed by law to be unlawful or abusive. Since the strike was not among those so listed by the relevant legislation, it was up to the employer to prove that the strike had been of such a nature.

Moreover, for the purposes of qualifying a strike as unlawful or abusive, it was not enough that it should have caused damage to the enterprise; the damage had to be serious and intended by the strikers to exceed what might reasonably be expected from typical strike action.

Notes

[1] Previous summaries of judicial decisions are contained in *International Labour Review*, 1988/2, pp. 189-203; 1987/1, pp. 65-79; 1986/1, pp. 53-69; 1985/1, pp. 31-48; 1984/2, pp. 183-201; and 1983/1, pp. 37-56, while the 1982/1 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] Higher Labour Court, 12 February 1987. *Revista Legislação do Trabalho e Previdência Social* (São Paulo), Sep. 1987, pp. 1079-1081.

[4] Paris Court of Appeal (21st Chamber), 27 November 1986. *Revue critique de droit international privé* (Paris), Apr.-May 1988, pp. 314-329.

[5] Central Labour Court (First Chamber), 15 June 1988. *Actualidad Laboral* (Madrid), 19-25 Sep. 1988, pp. 2018-2019.

[6] Federal Court (First Civil Court), 24 June 1986. *La semaine judiciaire* (Geneva), 2 Dec. 1986, pp. 625-633.

[7] New South Wales Court of Appeal, 2 June 1988. *Australian Industrial Law Review* (North Ryde, New South Wales), 22 Sep. 1988, pp. 328-329.

[8] Court of Cassation, 28 April 1988. Summary of the judgement and commentary in *Dictionnaire permanent social* (Paris), Bulletin No. 319, 2 May 1988.

[9] Federal Labour Court, 11 February 1988. Reference 7RAr 5/86.

[10] National Labour Court of Appeal (Chamber I), 9 June 1987. *Derecho del Trabajo* (Buenos Aires), Oct. 1987, pp. 1641-1642.

[11] Court of Cassation (Social Chamber), 8 October 1987, 17 December 1987, 21 January 1988 and 4 February 1988. Summary of the judgements and commentary in *Dictionnaire permanent social*, Bulletin No. 313, 15 Feb. 1988, pp. 3189-3190. For a similar judgement see Court of Cassation, 9 June 1988. *Cahiers sociaux du Barreau de Paris* (Paris), Sep. 1988, pp. 7 and 8.

[12] Constitutional Court (Second Chamber), 22 December 1987. *El País* (Madrid), 20 Apr. 1988.

[13] Supreme Court of the United States, 29 June 1988, Watson v. Fort Worth Bank Trust. *Fair Employment Cases* (Washington, DC), 9 July 1988, No. 86-6139.

[14] Labour Court of Liège (First Chamber), 30 June 1987. *Journal des tribunaux du travail* (Brussels), 10 Dec. 1987, pp. 483-484.

[15] Employment Appeal Tribunal, 26 October 1987. *Industrial Relations Law Reports* (London), 1988, No. 2, p. 47.

[16] House of Lords, 21 April 1988. *Industrial Relations Law Reports*, 1988, No. 6, pp. 263-266.

[17] Supreme Court of the Province of Buenos Aires, 12 May 1987. *Derecho del Trabajo*, July 1987, pp. 1069-1071.

[18] Constitutional Court (Chamber II), 7 May 1987. *Boletín Oficial del Estado* (Madrid), 5 June 1987.

[19] Court of Cassation, 31 May 1988. *Cahiers sociaux du Barreau de Paris*, Sep. 1988, pp. 9-11.

[20] Federal Court (First Civil Court), 30 June 1987. *La semaine judiciaire*, 5 Jan. 1988, pp. 1-13.

[21] Labour Court of Berlin, 29 March 1988. Reference 8 Sa 72/87. *Arbeitsrecht in Stichworten* (Bad Homburg), 7/88, p. 100.

[22] Labour Court of Kaiserslautern, 24 September 1987. *Arbeitsrecht in Stichworten*, 11/1988, pp. 169-170.

[23] Federal Labour Court, 27 August 1987. References 2 RU 15/87 and 9b RU 28/86.

[24] Supreme Court of Justice of the Province of Buenos Aires, 22 September 1986. *Derecho Laboral* (Buenos Aires), Nov. 1987, pp. 520-521.

[25] Supreme Court of the United States, 28 June 1988. *Labor Relations Reference Manual* (Washington, DC), Vol. 128, No. 2729.

[26] Court of Cassation (Social Chamber), 23 June 1988. Summary of judgement and commentary in *Cahiers sociaux du Barreau de Paris*, Sep. 1988, pp. 13-16.

[27] Supreme Court of Israel, 30 July 1987. *Social and Labour Bulletin*, 4/87, pp. 565-567.

[28] Court of Cassation (Social Chamber), 2 April 1987 and 3 March 1988. *Dictionnaire permanent social*, Bulletin No. 300, 23 Sep. 1987, p. 3519, and Bulletin No. 317, 29 Mar. 1988, p. 3090.

[29] Central Labour Court (Chamber V), 18 May 1988. *Actualidad Laboral*, 5-11 Sep. 1988, pp. 1983-1986.