Judicial decisions in the field of labour law

The judicial decisions summarised below [1] cover the application of general legal principles to labour law (indefeasible employment rights, equality before the law, acquired rights, applicable law, abuse of rights, public policy, vicarious liability of leasing company); the employment relationship (period of probation, seasonal and casual employment contract, successive fixed-term contracts, discrimination, termination of the employment relationship for economic reasons, grounds for dismissal, dismissal of a worker re-engaged after retirement); conditions of employment (equal treatment); free movement of workers; social security (sickness insurance and homosexual cohabitation, widower's pension); and labour relations (lock-out).[2]

Indefeasible employment rights

France [3]

At the request of his employer, a worker signed a statement before starting his holidays whereby he undertook to resume his duties on a fixed date, failing which he would be regarded as having resigned. He returned a week late and the employer refused to take him back.

The Court of Appeal rejected the worker's claim of wrongful dismissal, considering that he had resigned and not been dismissed. It noted that the employer had not exerted any pressure on the worker to sign the statement in question.

The Court of Cassation quashed the decision of the Court of Appeal. The worker could not surrender rights conferred by public policy in the matter of dismissal. The worker's agreement to be regarded as having resigned in the event of returning late from holiday amounted in fact to prior acceptance of a dismissal decided upon by the employer.

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[1] Previous summaries of judicial decisions are contained in *International Labour Review*, 1989/2, pp. 229-248; 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] Court of Cassation (Social Chamber), 27 April 1989. *Dictionnaire permanent social* (Paris), Bulletin No. 351, 1 June 1989, p. 2533.

Equality before the law

Spain [4]

An appeal was made to the Constitutional Court to quash a judgement of the Central Labour Court, which held that failure to re-engage a number of employees who had repeatedly been hired on short-term contracts did not constitute dismissal since the employment relationships in question were governed by administrative rules and were thus excluded from the application of the provisions of labour legislation. The appeal asserted that this judgement had altered, without offering any justification therefor, the criterion sustained one month previously by the same Court in a judgement handed down in an identical case, and contradicted the constant and reiterated doctrine that temporary contracts concluded by the administration with the non-medical staff of social security institutions fall within the scope of the labour legislation.

The Constitutional Court declared that, by virtue of the principle of equality, the decision of a judge or a court could not run counter to decisions adopted previously in what were, for all practical purposes, identical cases, and could only depart from a precedent if there were sufficient and reasonable grounds for so doing.

According to the Constitutional Court both judgements, the one appealed against and the one handed down a month earlier, had related to dismissal proceedings concerning identical cases of persons providing auxiliary clerical services in health establishments, under six-month temporary contracts, in vacant posts to be filled later in accordance with the prescribed procedures.

Having established that the two cases were identical and that the two judgements were based on diametrically opposed criteria, the Constitutional Court considered whether the judgement appealed against constituted an isolated and special response to the case in question or whether it represented an objective and generalised modification of the previous criterion. It noted that, whereas the first judgement conformed to the position the Central Labour Court had consistently taken in the past, the judgement appealed against, without adducing any reasons for the decision, ran counter to the prevailing doctrine by holding that the employment relationships in this case were governed by administrative rules. As there were no express grounds to justify this different treatment, the judgement had given rise to unjustified inequality of treatment which was incompatible with the principle of equality in the application of the law.

[4] Constitutional Court (Chamber I), 8 June 1988. *Boletín Oficial del Estado* (Madrid), 25 June 1988; *Actualidad Laboral* (Madrid), No. 34, 25 Sep. 1988, pp. 2005-2008.

Acquired rights

Chile [5]

An enterprise which was exempt from the provisions relating to weekly rest and public holidays had been remunerating the hours worked by its staff on those days at the legal rate applicable to overtime, regardless of whether the statutory normal hours of work had been exceeded or not. The enterprise consulted the Directorate of Labour to find out whether this practice, which had been willingly agreed upon by the parties but was not set down in writing in the employment contract, constituted a right acquired by the employees.

The Directorate of Labour stated that the contract of employment was consensual. The legal requirement that a contract be drawn up in writing in two copies signed by both parties, each retaining one, was intended to establish proof of its existence and not its validity. The consequences of not having drawn up the employment contract in writing were a fine for the employer and the reversal of the burden of proof, meaning that the terms of the contract were presumed to be those claimed by the worker. Given the consensual nature of the contract, all terms not set down in writing in the contract itself but arrived at through the mutual agreement of the parties had to be understood as forming part of that contract. Such agreement could be formally expressed or tacit, and the day-to-day practice of the employment relationship justified the presumption of a tacit agreement.

The Directorate of Labour concluded that the enterprise's practice of paying its employees overtime rates for work on Sundays and public holidays constituted a clause which had been tacitly incorporated into the contract of employment to supplement or amend the written clauses respecting remuneration and could only be set aside with the consent of both parties.

Applicable law

Argentina [6]

The plaintiff, an Argentine national residing in Spain, had been contracted by the defendant enterprise to work in Madrid as a correspondent.

The Court of Appeal had to decide which law was applicable to the contract of employment. The Court considered that, under section 3 of the Rules governing contracts of employment, the Argentine legislation was not applicable since the Rules provided for its application to contracts of

[5] Consultative opinion of the Directorate of Labour. *Revista Técnica del Trabajo* (Santiago de Chile), Oct. 1988, pp. 30-40.

[6] National Labour Court of Appeal (Chamber V), 27 July 1988. *Derecho del Trabajo* (Buenos Aires), Vol. XLVIII-B, pp. 1770-1773.

employment concluded in Argentina or abroad only if the duties stipulated in the contracts were performed in Argentina. Furthermore, according to section 1210 of the Civil Code, contracts concluded in Argentina for performance abroad had to be judged, from the point of view of their validity, nature and obligations, by the laws and usages of the country in which they were to be performed. Both provisions agreed on the principle of *lex loci executionis* and the case in question did not present any of the circumstances that authorised the waiving of this principle – i.e. the parties' choice or international public policy obstacles. As regards the automatic application of the foreign law, the Court indicated that, although section 377 of the Procedural Code empowered judges to remedy any omissions in the proof of the applicability of the foreign law, this was only possible when one of the parties had invoked the foreign law, which had not been done in the present case.

Consequently, the Court allowed the defendant's appeal claiming the inapplicability of the Argentine law and rejected the complaint, without prejudice to the plaintiff's right to bring an action under other legislation.

Abuse of rights

France [7]

A woman had been engaged subject to a three-month period of probation. At the end of this time, the enterprise proposed extending the period of probation. The employee agreed to this proposal in a letter, stating however that this manner of proceeding created a sense of insecurity. Thereupon the enterprise terminated her contract. Both the Labour Court *(Conseil de prud'hommes)* and the Court of Cassation found in favour of the employee. The notification of the termination of her contract had made no mention of possible deficiencies in her work, but had been provoked by the employee's written reply. This constituted reprehensible irresponsibility on the part of the employer, whence it could be deduced that, by putting an end to the period of probation, the employer had committed an abuse of rights.

Public policy

Switzerland [8]

An enterprise gave one of its employees notice of dismissal. The employee appealed to the Labour Court. Shortly thereafter the parties signed an agreement submitting their dispute to arbitration.

[7] Court of Cassation (Social Chamber), 20 April 1989. *Dictionnaire permanent social*, Bulletin No. 350, 16 May 1989, pp. 2546-2547.

[8] Federal Court (First Civil Court), 23 June 1989. *La semaine judiciaire* (Geneva), 7 Nov. 1989, pp. 593-597.

Almost five years later the arbitrator found in favour of the employee. The enterprise appealed against this decision to the Court of Justice of the Canton of Geneva, which rejected the appeal, and subsequently to the Federal Court, on the grounds that the arbitrator was incompetent to decide the case and that the cantonal court had disregarded the concept of public policy by failing to insist on the application of the cantonal procedural rules which give the state courts exclusive competence in disputes relating to contracts of employment. The Federal Court decided that when a party turns to the competent court and later withdraws his complaint because his adversary has agreed to submit the case to arbitration, there is a clear abuse of rights by the latter if, having allowed the arbitration proceedings to go on for a number of years, he waits for the decision to be handed down before pleading the arbitrator's incompetence *(ratione materiae)* on the basis of provisions designed primarily to protect the worker. Such a manoeuvre could not be defended on the grounds of public policy since the present case was essentially concerned with the legal protection of the interests of the parties to a contract of employment and, in particular, those of the worker, who was presumed to be the weaker party.

Vicarious liability of leasing company

Federal Republic of Germany [9]

Construction company A hired from company B a crane fitted with an extension ladder for the purposes of painting a wall. The lease included the services of the crane operator. The operator extended the ladder beyond the safe limit for the angle at which it was pitched. The crane tipped over when a worker climbed up and he was seriously injured. He claimed damages from company B and the crane operator.

The Federal Labour Court held that the crane operator was excluded from liability under the law since he had been integrated into the workforce of company A and made subject to its instructions.

However, as regards the technical operation of the crane, the operator remained subject to the technical instructions of company B, and was its agent. Company B was therefore liable for his negligence in matters in respect of which he remained under its authority.

Period of probation

Belgium [10]

The plaintiff had worked for an enterprise for six months under a contract of employment which provided for a three-month period of

[9] Federal Labour Court, 5 May 1988. Reference 8 AZR 484/85. *Arbeitsrecht in Stichworten* (Bad Homburg), 4/1989, p. 68.

[10] Labour Court of Liège (Fourth Chamber), 20 October 1988. *Journal des tribunaux du travail* (Brussels), No. 447, 20 Oct. 1989, pp. 393-394.

probation. Some time later, the enterprise hired him again to do the same work; the contract was open-ended and contained a clause fixing a six-month period of probation during which the enterprise could terminate the contract of employment at seven days' notice. The enterprise terminated the employee's contract in accordance with this clause.

The Labour Court of Liège had to decide whether the period of probation fixed in the second contract was lawful. The enterprise relied on the principle of free will set forth in section 1134 of the Civil Code and maintained that the purpose of the contractual clause was well defined, possible and lawful in that it was not prohibited by any law nor was it contrary to accepted custom. The plaintiff contended that the clause should be considered null and void for want of any justifying cause since the parties had already had occasion to get to know each other during the previous contract and the plaintiff had demonstrated his ability to carry out the tasks entrusted to him.

The Labour Court found in favour of the plaintiff. Some contracts entail advantages and disadvantages which it is impossible to determine precisely at the time they are entered into. The period of probation is designed to remove such uncertainty and enable the parties to commit themselves finally in full knowledge of the facts. However, this assumes that at the start of the period of probation the contracting parties are unaware of the implicit advantages and disadvantages. When a contract of employment is terminated during this period, it has to be established whether the parties had truly desired such a period of probation or whether it had not been introduced with the fraudulent intent of evading the legislative provisions relating to periods of notice. This is the meaning to be given to the notion of "cause" and the application of sections 1131 and 1133 of the Civil Code. A clause vitiated by a fraudulent intent has to be regarded as unlawful and invalid. In the present case a previous contract of employment had fixed a three-month period of probation and had run its full term of six months; consequently, since the functions and remuneration in the new contract were identical there was no justification for including a probation clause.

Belgium [11]

A contract of employment fixed a period of probation of the same length as the contract itself. During this period the parties could terminate the employment relationship at seven days' notice. Four months later the worker had to take sick leave for one month. After ten days of sick leave, the worker was given seven days' notice of her dismissal. The social security institution which paid her sickness benefit during her illness claimed reimbursement of the costs from the enterprise, alleging that the probation

[11] Labour Court of Nivelles (First Chamber), 28 April 1989. *Journal des tribunaux du travail*, No. 447, 20 Oct. 1989, pp. 395-396.

clause was invalid and that the employer should pay her monthly wages during her illness. The employer maintained that no legal provision prohibited a six-month contract of employment from fixing a six-month period of probation.

The Labour Court of Nivelles found in favour of the social security institution. There was no justification for a contract of employment fixing a period of probation lasting as long as the contract itself. In such a case the period of probation would be meaningless. The Court reduced the period of probation to one month in pursuance of section 67 of the Act of 3 July 1978.

Seasonal and casual employment contract

Argentina [12]

An enterprise informed a worker that his contract of employment was being terminated and that he had "an acquired right to be re-engaged the following season". The worker was sick at the time the letter was sent to him.

The court of first instance held that the plaintiff was a seasonal worker and that the contract had been interrupted during a period of absence and therefore he had not been dismissed. The worker appealed against this decision.

The National Labour Court of Appeal considered that the work was not of a seasonal nature. According to section 96 of the Act on contracts of employment, a contract of employment for seasonal work existed where the relationship between the parties, although based on permanent needs of the enterprise or unit, is effective only for specified periods of the year and is liable to be repeated for a given period in the course of each year because of the nature of the activity performed. Thus there had to be permanent needs and they had to be satisfied at specified periods. These requirements were not fulfilled in the present case since it related to a public transport enterprise which provided services throughout the year. In the opinion of the National Labour Court of Appeal, the employer had apparently wanted to hire casual staff since the contract of employment stipulated that its purpose was to meet the manpower needs of the enterprise while its own staff were on holiday. However, the casual nature of the relationship had not been proved either, since in this respect section 99 of the Act on contracts of employment requires proof that the worker has been engaged to replace another for a specified period coinciding with the time the latter is absent on leave or for some other justified reason, since workers cannot be replaced for an unspecified period.

[12] National Labour Court of Appeal (Chamber IV), 25 February 1988. *Derecho Laboral* (Buenos Aires), Jan. 1989, pp. 40-41.

Successive fixed-term contracts

Peru [13]

The plaintiff had worked for an enterprise for a number of years on successive fixed-term contracts concluded in conformity with Legislative Decree No. 18138. When the enterprise refused to renew the contract, the worker brought an action for wrongful dismissal. The court of first instance found in favour of the plaintiff.

The Labour Court of Lima, to which the enterprise appealed, found in favour of the appellant and overturned the judgement of the lower court. The worker had signed several fixed-term contracts and had drawn his social security benefits at the end of each. The temporary nature of the contracts, of which he had been fully aware, was not negated by the fact that they had been successive and was justified by the fact that the volume of production of an industrial enterprise could rise or fall with demand; it was these factors that determined the number of workers needed.

Minority opinion. One of the judges dissented from the decision. He held that, according to case law, fixed-term contracts successively renewed for full-time work and over a prolonged period should be converted into contracts of indeterminate duration and that the workers concerned could then be dismissed only in accordance with the procedures laid down in Act No. 24515 for contracts of indeterminate duration.

Discrimination

European Communities [14]

In pursuance of Article 177 of the EEC Treaty, a Danish arbitration board requested from the Court of Justice of the European Communities a decision on questions relating to the interpretation of the Council Directive No. 75/117 of 10 February 1975 on the approximation of the laws of the member States relating to the application of the principle of equal pay for men and women.

These questions arose in connection with a dispute between the Danish Federation of Commercial and Office Employees and an employers' confederation acting on behalf of a certain enterprise. The Federation claimed the payment system in the enterprise involved discrimination based on sex and was contrary to section 1 of Act No. 237 of 5 May 1986, adopted by Denmark in implementation of the aforementioned Directive.

The enterprise paid the same basic wage to all workers in the same wage category in accordance with the terms of a collective agreement signed in

[13] Labour Court of Lima, 8 May 1989. *Actualidad Laboral* (Lima), No. 158, Aug. 1989.

[14] Decision of the Court of Justice of the European Communities, 17 October 1989. Decision 109/88.

1983, but also granted individual increments based on three criteria: flexibility, vocational training and seniority.

The principal questions put by the arbitration board were, first, who is responsible for proving that different pay for two workers doing the same work is due (or not due) to considerations related to sex; and second, are differences in remuneration resulting from wage increments based on flexibility, vocational training or seniority compatible with the Council Directive?

As regards the burden of proof, the Court of Justice held that, where there are no clear rules to show how the enterprise's remuneration system operates, it is up to the enterprise to prove that its remuneration practices are not discriminatory from the moment it is shown that in respect of a significant number of workers the average remuneration of the women is lower than that of the men.

As regards the legality of the criteria applied in paying wage increments, the Court of Justice indicated that, when these criteria are systematically unfavourable to women workers:

(1) the employer may justify application of the flexibility criterion if he can prove it is essential that a worker be able to adapt to work on varying schedules and in varying locations, even though in this case some women might be less able, because of their family responsibilities, to organise their work in a flexible manner; he could not, however, justify the application of this criterion if he uses it to reward quality of work, since it is inconceivable that the work of women should consistently be of inferior quality;

(2) the employer may justify remuneration for a particular type of vocational training if he can show that such training is important for the performance of the specific tasks entrusted to the worker;

(3) the employer does not need to justify use of the seniority criterion.

Spain [15]

The plaintiff was engaged as a medical assistant by a health establishment for three months to fill in for three nurses who were taking their holidays in succession. The contract provided for a probation period of 15 days. The first nurse to be replaced was engaged on a fixed-term contract in the surgical section. The plaintiff was pregnant but had not said so when she was engaged. The medical establishment assigned her to the dialysis section. When she announced that she could not work in this section because of her pregnancy she was told that, having failed to complete the probation period, her services were no longer required.

[15] Constitutional Court (Chamber II), 26 September 1988. *Boletín Oficial del Estado*, 14 Oct. 1988; *Civitas, Revista Española de Derecho del Trabajo* (Madrid), Oct.-Dec. 1988, pp. 617-620.

The Central Labour Court found in favour of the establishment, considering that it had acted in conformity with the provisions of section 14 (2) of the Workers' Charter which permits the employment relationship to be brought to an end during the period of probation at the request of either party, without reasons having to be given. In addition, the action by the establishment should not be viewed as discriminatory since the determining factor in the decision had not been the worker's pregnancy but her failure to complete the probation period.

The plaintiff appealed to the Constitutional Court alleging that her dismissal had been discriminatory and had infringed articles 14 and 35 of the Constitution concerning, respectively, the prohibition of discrimination and the principle of equality.

The Constitutional Court declared that the establishment had improperly extended the scope of the principle of legality, in contravention of a fundamental right, and had committed an arbitrary act of discrimination on grounds of sex. According to the Court, the issue in this case was not one of legality but of conformity with the constitutional principle prohibiting any discrimination on grounds of sex. The possibility allowed for in section 14 (2) of the Workers' Charter could not encroach on the fundamental rights of the individual. Although the principle of non-discrimination could admit of inequality based on objective considerations, in the present case the only explanation for the dismissal given by the medical establishment had been its wish to rescind the contract. In view of the fact that a constitutional right was at stake, the establishment had a duty to show that the reasons for its decision had nothing to do with the woman being pregnant. This duty had already been referred to in the case law of the Constitutional Court which had ruled that in cases of this kind the burden of proof was reversed.

Termination of the employment relationship for economic reasons

United States [16]

According to the legal doctrine established in an earlier case (Toussaint v. Blue Cross and Blue Shield, Michigan), an employer's expressed agreement to terminate an employment relationship only for just cause gives workers enforceable contractual rights. In the present case, involving a salesman dismissed when his post was suppressed for economic reasons, the Court of Appeals ruled that the aforesaid doctrine was not applicable when the termination of a worker's contract had been motivated solely by economic circumstances beyond the employer's control. However, it was open to the employee to challenge the procedure whereby the employer had

[16] United States Court of Appeals (Cincinnati), 6 October 1988. *Individual Employment Rights Cases* (Washington, DC), pp. 1350-1357.

decided which employees were to be dismissed, if the enterprise had an announced policy on this subject.

Grounds for dismissal

Chile [17]

The plaintiff, a teacher in a college, was dismissed for serious failure to carry out her contractual obligations. This failure consisted in having arrived late on 157 out of 180 working days during the previous year.

The Supreme Court decided that she had been improperly dismissed and ordered the defendant collège to pay her one month's severance pay and the appropriate compensation. The teachers' attendance books showed that the plaintiff had been late on a considerable number of occasions but also showed that other teachers, who had been just as late or even later, had not been entered as arriving late. The Supreme Court judged these attendance books not to be sufficiently reliable proof for asserting that the plaintiff's late arrivals constituted grounds for her dismissal; at the same time, it considered that the college appeared to have exercised a margin of tolerance regarding staff arrival times which it had not extended to the plaintiff.

Canada [18]

An employee was dismissed for drunkeness on company premises. He had been employed by the company for 23 years and had worked his way up to the post of foreman. He had a previous history of trouble with the company about his alcoholic consumption: on one occasion he had been suspended and on another told that if he continued to come to work with the smell of alcohol on his breath he would jeopardise his employment. The employee filed a complaint for wrongful dismissal.

The Supreme Court of Ontario found in his favour, considering that there had not been sufficient cause for dismissal. An employer could not dismiss an employee for his past conduct. Moreover, major employers in single-industry communities had a responsibility to provide lengthy notice of termination to their lower management. The company was ordered to pay 24 months' salary in lieu of notice.

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[17] Supreme Court, 5 December 1988. *Revista Técnica del Trabajo*, Sep. 1989, p. 47.

[18] Supreme Court of Ontario, 2 February 1989. *Canadian Labour Law Reports* (Don Mills, Ontario), Vol. 89, 1989, p. 14011.

Dismissal of a worker re-engaged after retirement

Argentina [19]

A retired worker returned to work in the same enterprise. Some time later the employment relationship was terminated. The National Labour Court of Appeal had to decide whether, in calculating compensation, account was to be taken of the total length of time he had worked for the enterprise or only of the time between his return to work after retirement and his dismissal.

The Court recalled the provision in section 252 of the Act on contracts of employment which permits an employer, without having to pay compensation, to terminate the contract of employment of a worker who has fulfilled the qualifying conditions for a full retirement pension. However, when an employer re-engages a retired worker, it should be assumed that he has appraised the worker's abilities and considers him of use to the enterprise; the employer thereby assumes an obligation to provide the statutory compensation in line with the general principle laid down in section 18 of the Act. This was the situation in the present case, and no reduction whatsoever should have been made in the compensatory cash payment since on retirement the worker had not received any compensation from the enterprise. The latter could not accuse the worker of bad faith as he had never concealed the fact – already known to the enterprise – of his retirement.

Equal treatment

Federal Republic of Germany [20]

The State of Hamburg employed teachers in its music school on a full-time and half-time basis. The salary and conditions of service of the half-time teachers were proportional to those of full-time teachers.

Under new state legislation most of the full-time teachers acquired the status of permanent officials with a resulting salary increase and conditions of service on a par with those of permanent officials. However, the conditions of service of the half-time teachers remained unchanged so that proportionately they were now less well paid than the teachers who were full-time employees.

The Federal Labour Court held that the principle of equality of treatment applied and required that the salary of the half-time teachers

[19] National Labour Court of Appeal (Chamber V), 21 April 1988. *Derecho Laboral*, Aug. 1988, p. 396.

[20] Federal Labour Court, 27 July 1988. Reference 5 AZR 244/87. *Arbeitsrecht in Stichworten*, 1/1989, p. 5.

should be aligned, proportionally to the time worked, with that of the full-time employees. The Court rejected the employers' argument that the part-time teachers could not be equated with the full-time employees because the latter had to pass a qualifying examination before being placed on an equal footing with permanent officials. According to the Court, the part-time teachers had not been given an opportunity to take the qualifying examination and so could not be excluded on that basis.

Free movement of workers

European Communities [21]

A citizen of the Federal Republic of Germany was engaged by a Dutch enterprise through a scheme set up under the "Wet Sociale Werkvoorziening" (WSW), a law intended to provide work aimed at maintaining, re-establishing or promoting the occupational aptitudes of persons who, for an indeterminate period and for reasons related to their condition, are not able to work normally. The citizen of the FRG, who was suffering from drug addiction, applied for a temporary residence permit indicating his intention to take up paid employment. Having been refused the permit, he brought an action against the Dutch authorities. The Court of Justice of the European Communities had to consider a preliminary question relating to the interpretation of Article 48 of the EEC Treaty and Article 1 (1) of Council Regulation No. 1612/68 of 15 October 1968, under which any national of a member State, irrespective of his place of residence, has the right to take up activity as an employed person, and to pursue such activity within the territory of another member State. Essentially, the question was whether these provisions had to be interpreted to mean that a national of a member State employed in another member State under a scheme such as the WSW could be recognised, by this fact alone, as a worker within the meaning of Community law.

The Court considered that the term "worker" as used in Article 48 of the Treaty had to be interpreted in a wide sense; similarly, it recognised that a person employed under the WSW scheme was working for another in return for remuneration, thus fulfilling the essential condition of an employment relationship. However, the activities performed under the WSW scheme could not strictly speaking be considered economic activities since they constituted merely a form of re-education or reintegration for the persons performing them, and the paid work, which was designed to match the physical and mental capacities of each individual, was provided to enable these persons to regain, however long it might take, the ability to do a normal job or to lead a more or less normal life. The Court decided,

[21] Decision of the Court of Justice of the European Communities, 31 May 1989. Decision 344/87.

accordingly, that Article 48 (1) of the EEC Treaty should be interpreted to mean that a citizen of a member State employed in another member State under a scheme such as the WSW, in which the activities constituted merely a means of re-education or reintegration, could not be recognised, on this ground alone, as a worker within the meaning of Community law.

Sickness insurance and homosexual cohabitation

France [22]

A divorced mother of three who was living with a woman worker applied for reimbursement of medical expenses as a spouse, citing section 13 of the Act of 2 January 1978 which provides that the common-law wife of an insured person who is dependent upon that person shall be regarded as a dependant entitled to sickness and maternity insurance benefits in kind.

The Court of Cassation rejected the woman's application, observing that the intention behind the law was to limit the effects of entitlement to the *de facto* situation of two persons who had decided to live together as a married couple, without going through the ceremony of marriage, which could only apply to a couple consisting of persons of different sex.

Widower's pension

Argentina [23]

Act No. 23.380 of 10 October 1986 abolished the requirement that a widower had to be incapable of working and to be dependent upon his deceased wife in order to receive a widower's pension.

The National Labour Court of Appeal had to decide whether this provision could be applied to a widower whose wife had died before this law entered into effect. The Court decided that it could, recalling that when the same question had arisen in connection with Act No. 23.266, which extended widows' pension coverage to women who could show they had been living with the man concerned in apparent matrimony, it had ruled that the law did apply to persons who had fulfilled this requirement prior to the entry into force of the law. In dealing with a *de facto* situation similar to the state of widowhood, the same solution should be applied, guaranteeing at the same time the principle of equality before the law since it would be arbitrary to treat two people in the same situation differently solely because they had been widowed on different dates.

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[22] Court of Cassation (Social Chamber), 11 July 1989. *Liaisons sociales – Législation sociale* (Paris), No. 6301, 15 Nov. 1989, p. 13.

[23] National Labour Court of Appeal (Chamber III), 20 April 1988. *Derecho Laboral*, Nov. 1988, p. 552.

Lock-out

France [24]

After a general strike had been called for a certain date, an enterprise, fearing there might be electricity cuts, decided to close a factory on that date and told the workers that those who wished could later make up the hours lost. The Labour Court *(Conseil de prud'hommes)* ordered the enterprise to pay the workers their wages for the day when work was interrupted, together with damages. The enterprise appealed against this decision.

The enterprise maintained that it was a normal prerogative of the employer to decide whether to modify the work schedule or close down the whole or part of the plant in order to avert the consequences of a strike in the electricity company, without having to do so on the grounds of *force majeure*. Shutting down the factory on that day was not a "lock-out" since the workers who wished to make up for the hours lost did not suffer any loss in wages and those who refused that option were not punished in any way. According to the enterprise, the Labour Court had infringed sections 1134 and 1147 of the Civil Code by granting compensation for a loss which had not been caused by the employer.

The Court of Cassation to which the enterprise had appealed upheld the decision of the Labour Court. The enterprise had been warned of the strike action and of the fact that some of the trade unions represented in the enterprise had called on their members to participate in the strike; furthermore, it had not proved that there was a case of *force majeure*. Consequently, the Labour Court had been legally correct in deciding that the closure of the enterprise meant that the workers who wished to obey the strike call were deprived of a constitutionally recognised right.

[24] Court of Cassation (Social Chamber), 27 June 1989. *Liaisons sociales – Législation sociale*, No. 6301, 15 Nov. 1989, pp. 5-6.