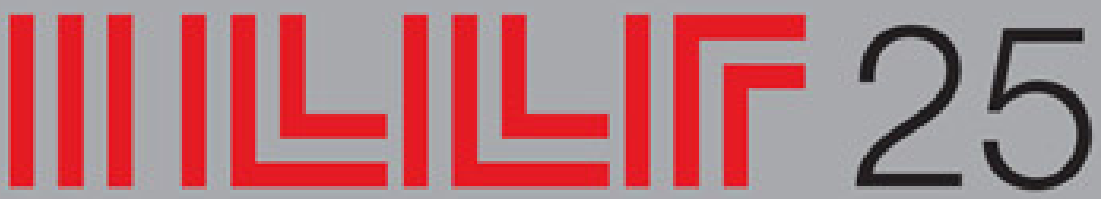
International Labour Law Reports



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VOLUME 25

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DEDICATION

Benjamin Aaron, Professor of Law Emeritus at the University of California School of Law, Los Angeles and former (and Honorary) President of the International Society for Labour Law and Social Security, has withdrawn from the Editorial Board of the *International Labour Law Reports* and as co-reporter for the United States. Professor Aaron has long been a pillar of this publication, contributing to it his rich experience, wise advice and comparative labour law expertise. He has been replaced on the Editorial Board by Professor Alvin Goldman, University of Kentucky College of Law, who will also continue as co-reporter for the United States. Professor Joseph Grodin, University of California, Hastings College of Law, has replaced Professor Aaron as co-reporter for the United States.

It is with deep gratitude and affection that we dedicate this volume of the *ILLR* to Ben Aaron.

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PART ONE

GENERAL PRINCIPLES OF LABOUR LAW AND KEY CONCEPTS

SPAIN

Supreme Court (Social Chamber)
Decision of 4 November 2004

Conflict of Laws – application of foreign employment law – pleading and proof of foreign law

Facts

In November 2000 a Spanish citizen (hereinafter "the employee") was employed in Brazil by the Brazilian company "Automatización y Telecontrol, SL" (hereinafter "the company"), a subsidiary of a Spanish company (hereinafter "the Spanish company"). After nineteen months of continuous employment in Brazil, the employee was terminated (June 2002). There was no written contract, nor a proper dismissal in writing. The employee filed a complaint in a Spanish Labour Court, suing both the Brazilian and the Spanish company, requesting the Court (1) to declare that the termination was unfair and (2) to award him the remedy provided for by the law. The suit was dismissed by the Labour Court of Bilbao (November 2002). After the appeal by the employee, the Superior Court of Justice of Basque Country (March 2003) confirmed the judgment, holding that though the Spanish Courts had jurisdiction over this case, the law applicable was the Brazilian, and that the burden of proof of this law lay on the claimant. Finally, the employee appealed before the Social Chamber of the Supreme Court, focusing the discussion on the pleading and burden of proof of the applicable law.

Decision

The Supreme Court decided to revoke the Superior Court judgment, thus upholding the employee's claim. In the Supreme Court's view, the lack of proof of the applicable law should result in the application of the Spanish law ("lex fori").

Laws Applied

SPANISH CONSTITUTION (1978)
Article 24.1:

Every person has the right to obtain an effective remedy of the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence.

EC CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (ROME, 1980)

Article 6.2:

Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;

unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

JUDGMENT

[…]

CUARTO La cuestión que ha de resolverse entonces en este recurso, tal y como se ha planteado, consiste en determinar los efectos jurídicos que han de anudarse a la inexistencia de prueba del derecho extranjero cuando, como ocurre en este caso, la norma de conflicto señala que éste es el que resulta aplicable. Se trata de un problema jurídico no sencillo, en el que esta Sala de lo Social del Tribunal Supremo ya se había pronunciado en su sentencia de 19 de febrero de 1990, en la que se venía a sostener que la «falta de alegación y prueba no puede conducir, como pretende el recurrente en el motivo séptimo, a la aplicación de la Ley española, pues ello equivaldría al absurdo de sancionar la omisión de prueba deliberadamente querida de la norma extranjera, con la aplicación de la Ley española, cuando se considerase que ésta era más beneficiosa». Así se recuerda en una sentencia más reciente, dictada en Sala General, cuya fecha es de 22 de mayo de 2001(recurso 2507/2000), en la que, aunque se desestimó el recurso de casación para la unificación de doctrina por falta de contradicción entre las sentencia comparadas, dada la importancia del asunto se venía a sentar la misma doctrina anterior de 19 de febrero de 1990, insistiendo en que la ausencia de prueba del derecho extranjero ha de conducir a

la desestimación de la pretensión pues en tales casos «... no se trata de la aportación de un hecho al proceso, cuya falta de prueba perjudica a la parte que fundaba en él su pretensión o su resistencia, sino de una norma o un conjunto de normas que han de ser aplicadas al caso, porque así lo dispone una regla que es imperativa. Por ello, no puede decirse que el Derecho nacional se aplica si no se prueba el Derecho extranjero por la parte que está interesada en esa aplicación. Por el contrario, lo que sucede es que, si el Derecho aplicable es el extranjero, la parte que formula la pretensión tiene que alegar y probar ese Derecho para que su pretensión sea acogida».

Esta doctrina, reiterada en nuestra sentencia de 25 de mayo de 2001(recurso 556/2000), aunque también en un supuesto en que se desestimó el recurso por falta de contradicción, vino a dejar sin efecto la opuesta doctrina anterior de la Sala, precisamente la de la sentencia que hoy se invoca como contradictoria, de 16 de marzo de 1999, en la que, a su vez, se recogía la doctrina de la Sala Primera del Tribunal Supremo contenida en las sentencias de 11.5.1989, 21.5.1989, 23.3.1994, 25.1.1999, 5.6.2000 y 13.12.2000. En suma: la doctrina de la sentencia de contraste ha sido abandonada por esta Sala en las dos sentencias que se acaban de citar, razonándose en ellas el cambio de criterio adoptado.

QUINTO Por otra parte, el Tribunal Constitucional ha abordado recientemente en tres ocasiones el problema de fondo que hoy aquí se suscita. La primera de ellas dio lugar a la STC 10/2000, de 17 de enero, la segunda a la STC 155/2001, de 2 de julio y la tercera a la STC 33/2002, de 11 de febrero.

En la primera -única anterior a la SSTS, Sala 4ª, de 22 y 25 de mayo de 2001 antes citadas- el Tribunal Constitucional, dejando claramente sentado que se trataba de un supuesto de características muy específicas y singular, viene a otorgar amparo a la recurrente, de nacionalidad armenia, que pretendía la aplicación del derecho de su país en el pleito de separación matrimonial que mantenía en España frente a su esposo, de la misma nacionalidad. Partiendo de la aplicabilidad, admitida por todos, del derecho armenio, el Juzgado de 1ª instancia desestimó la demanda de separación al no considerar suficientemente acreditado dicho Derecho extranjero aplicable como consecuencia de la falta de fiabilidad de la traducción privada del mismo. La Audiencia Provincial en fase de apelación había acordado tramitar a petición de la recurrente dos comisiones rogatorias para que quedara constancia procesal fehaciente de la existencia y vigencia del derecho extranjero aplicable, pero a la vistas de la tardanza y las dificultades surgidas en su tramitación, no esperó a que se cumplimentase debidamente dicho trámite y dictó sentencia, desestimando la pretensión de la actora por no haber acreditado el Derecho extranjero aplicable al caso. El Tribunal Constitucional otorga el amparo en este caso, porque la actuación de la

Audiencia no sólo frustró la práctica de una prueba decisiva para el sostenimiento de la pretensión de la recurrente en amparo, sino que, además, le había causado indefensión (art. 24.1 CE), pues de esa ausencia de prueba del derecho extranjero se dedujo la desestimación de la demanda. Se achaca entonces a la Audiencia Provincial la vulneración del derecho a la tutela judicial efectiva de la recurrente, teniendo en cuenta esa específica actuación procesal de no concluir las diligencias de averiguación o constatación acordadas. Todas estas circunstancias llevan al TC a precisar que en supuestos como el presente «y teniendo en cuenta sus singulares circunstancias, la acreditación del Derecho extranjero y la intervención del órgano judicial en su prueba puede trascender de la mera valoración de la prueba de un hecho alegado por la parte en apoyo de sus pretensiones, que, indudablemente, es competencia exclusiva de los órganos judiciales ordinarios». No hay, sin embargo, en esta sentencia doctrina constitucional alguna que determine la necesidad de aplicar la lex fori en caso de ausencia de prueba del derecho extranjero, cuando la norma de conflicto exige su aplicación. Por esa razón nuestra sentencia de 22 de mayo de 2001 antes citada (recurso 2607/2000), dice en un inciso final que la doctrina de la STC 10/2000 no contradice la que se contiene en ella, sino que la corrobora.

La segunda STC de las antes enunciadas es la 155/2001. Resulta conveniente decir que en ésta se viene a otorgar amparo a las mismas trabajadoras que se vieron afectadas (reclamando otros períodos de diferencias) por la sentencia invocada como contradictoria en este recurso, la STS de 16 de marzo de 1999 (recurso 1962/98). Se trata, como se dijo al describir antes su contenido a efectos de saber si es contradictoria con la sentencia recurrida, de dos trabajadoras de nacionalidad española que habían sido contratadas en Pekín para prestar servicios en la Oficina Comercial de España que el Ministerio de Economía y Hacienda tenía en dicha ciudad que reclamaban las diferencias retributivas producidas, en su opinión, porque la retribución pasó a abonárseles unilateralmente en dólares cuando se había pactado el pago en marcos. El Juzgado entendió que no se había acreditado la existencia y vigencia del Derecho chino, aplicable al caso, pero estimó las demandas aplicando supletoriamente el Derecho español. Sin embargo la Sala de lo Social al resolver el recurso de suplicación planteado por la Administración, partiendo de la aplicabilidad del Derecho chino, la ausencia de su prueba y vigencia determinaba la desestimación de la demanda, no la aplicación del Derecho interno. En sede constitucional el TC afirma en la sentencia que comentamos que «la cuestión que se suscita desde la perspectiva constitucional que nos es propia consiste en determinar, "ex" art. 24.1 CE, si la Sentencia dictada en suplicación carece o no de suficiente motivación al haberse limitado a declarar la aplicabilidad del Derecho chino y la exigencia de su prueba por la parte actora,

pero sin llegar a razonar, fundamentar o justificar en modo alguno el porqué de su decisión revocatoria de la Sentencia de instancia (que, reconociendo tales circunstancias, aplicó subsidiariamente la legislación laboral española con base en la propia doctrina del Tribunal Supremo)". Y de ello se extrae la conclusión de que "el órgano judicial impidió a la parte actora conocer la "ratio decidendi" de su resolución, es decir, las razones por las cuales se revocó la anterior decisión judicial, denegándole su derecho al cobro de las diferencias salariales pretendidas en contra, no sólo del reconocimiento de tal derecho efectuado por el Juez a quo, sino también del propio reconocimiento efectuado por la parte demandada de la existencia de la deuda contraída con las actoras, y todo ello contrariando, a la hora de aplicar la legalidad vigente, la doctrina sentada en la materia por el Tribunal Supremo de deberse estar, en defecto de prueba del Derecho extranjero invocado en el proceso, al Derecho español, según se desprende de una reiterada jurisprudencia. Doctrina jurisprudencial que, ciertamente, es más respetuosa con el contenido del art. 24.1 CE que la solución adoptada por la Sentencia impugnada de tener por decaída la demanda, dado que el Derecho español, con carácter sustitutorio del que resulta aplicable, también puede ofrecer en una situación de tráfico externo la respuesta fundada en Derecho que el citado precepto constitucional exige». En esta sentencia del TC, prácticamente coetánea a la de la Sala Cuarta TS pero posterior a la misma, ya se dice de forma clara que es más respetuoso con el derecho a la tutela judicial efectiva aplicar el Derecho español ante la falta de prueba del Derecho Extranjero y se actúa en consecuencia otorgando el amparo a las mismas personas que lo habían obtenido en nuestra sentencia de 16 de marzo de 1999, sentencia que fue aportada por las demandantes al recurso de amparo una vez iniciada su tramitación y unida a las actuaciones, tal y como consta en decimosexto de los antecedentes de hecho.

La tercera de las SSTC a que venimos haciendo referencia es la 33/2002, de 11 de febrero, en la que ha venido a decidir un caso en el que se debatía el mismo problema jurídico y en una situación de hecho prácticamente idéntica a la que en el presente recurso se ha de resolver ahora. Una trabajadora inglesa, contratada en Inglaterra, fue despedida y accionó en Madrid frente a esa decisión extintiva ante el Juzgado de lo Social, que, una vez afirmada su propia competencia, ante la falta de prueba del derecho extranjero por la demandante, desestimó la demanda de despido. Esa decisión fue confirmada por la Sala de lo Social del Tribunal Superior de Justicia de Madrid a la hora de resolver el recurso de suplicación que frente a aquélla se interpuso. Por su parte, la Sala de lo Social del Tribunal Supremo inadmitió el recurso de casación para la unificación de doctrina interpuesto por la demandante por falta de identidad entre la sentencia recurrida y la que se ofreció como contradictoria.

El Tribunal Constitucional en la referida sentencia estima que tales decisiones judiciales de instancia y suplicación son contrarias al artículo 24 CE, derecho a la tutela judicial efectiva en su vertiente de derecho de acceso al proceso en orden a la obtención de una resolución sobre el fondo de la pretensión articulada. El TC razona al respecto afirmando que «... ante la falta de prueba del Derecho extranjero (que era la normativa que ambos órganos judiciales consideraban aplicable al caso) se optó por no resolver sobre la pretensión deducida por la actora (calificación de su despido), evitando, además, hacerlo a través de la aplicación subsidiaria de la lex fori, es decir, de la legislación laboral española. Ahora bien, tal óbice (falta de prueba del Derecho extranjero) resultaba inexistente, puesto que al ser la parte demandada la que había invocado el Derecho inglés era a ella (y no a la actora) a quien correspondía acreditar su contenido y vigencia, conforme a lo dispuesto en el entonces vigente art. 12.6 del Código Civil (hoy sustituido por la normativa establecida en el art. 281 de la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil). A pesar de ello le fue exigida a la parte actora su prueba, sin darle en ningún momento la oportunidad de llevarla a cabo a través de los cauces procesales oportunos, y ligando a la falta de acreditación del contenido y vigencia del Derecho inglés la desestimación de su pretensión (en el caso del Juzgado) y la inadmisión de la demanda, aunque a través de Sentencia (en el caso del Tribunal Superior de Justicia). Es obvio, pues, que a la parte actora le fue negada de forma no razonable una resolución sobre el fondo de su pretensión (en forma semejante al caso enjuiciado en la STC 10/2000, de 31 de enero, F. 2».

Analizando la doctrina que se contiene en la sentencia que se acaba de transcribir se observa que no se estima constitucionalmente aceptable que el Tribunal del Orden Jurisdiccional Social no lleve a cabo un pronunciamiento de fondo cuando no queda acreditada la legislación extranjera, en caso de que -como aquí ocurre- la norma de conflicto la señala como aplicable, pues en tal caso ha de aplicarse subsidiariamente la lex fori, la legislación laboral española. Esta es la verdadera razón de decidir de la sentencia constitucional, al margen de las argumentaciones complementarias que en la sentencia se formulan sobre la circunstancia concreta de que en este supuesto no debía hacerse recaer sobre la demandante los efectos desestimatorios de su pretensión por no acreditar la existencia y alcance de una norma extranjera, cuya aplicación ni siquiera invocó, sino que tales efectos adversos deberán recaer sobre la parte que invocó tal aplicabilidad, la empresa demandada. No obstante, el problema, como se ha dicho, no se resuelve por el TC aplicando los principios de las carga de la prueba y sus consecuencias sobre la pretensión, sino que la vulneración del derecho de tutela judicial efectiva se aprecia al no haber suplido la Sala de lo Social del TSJ

la realidad de la falta de prueba del Derecho extranjero con el Derecho español para resolver la controversia.

SEXTO Concluyendo, la doctrina del Tribunal Constitucional -máximo intérprete de la Constitución Española y del alcance de los derechos fundamentales (artículos 53.2 y 161 CE)- se muestra abiertamente opuesta a la que el Pleno de esta Sala adoptó en la sentencia antes citada de 22 de mayo de 2001, y ante tal situación procede rectificar la referida doctrina y ajustarla a los razonamientos del TC antes recogidos y a los que nos debemos remitir. Por ello, si la sentencia recurrida ante la ausencia de prueba del derecho extranjero desestimó la demanda de despido, infringió el artículo 24 CE al no aplicar supletoriamente la legislación laboral española, ante la falta de prueba sobre la realidad y vigencia del Derecho inglés, para resolver el caso controvertido.

Pudo también el TSJ o el propio Juzgado de lo Social en su día antes de resolver sobre las pretensiones planteadas utilizar las facultades de averiguación que en este punto y de forma potestativa le confiere el número segundo del artículo 281 de la Ley de Enjuiciamiento Civil, en el que se dice que «el derecho extranjero deberá ser probado en lo que respecta a su contenido y vigencia, pudiendo valerse el tribunal de cuantos medios de averiguación estime necesarios para su aplicación», pero esa naturaleza potestativa de la utilización de tales facultades de indagación determina que ahora no pueda entenderse que se haya producido la infracción del referido precepto, aunque se recuerde de esta forma la existencia de tal posibilidad como alternativa querida por el Legislador para resolver estos casos.

En consecuencia, la doctrina ajustada a derecho es la de la sentencia de contraste (TS 16 de marzo de 1999) que contiene la que se sostuvo anteriormente por esta Sala antes de que el Pleno de la misma la revisara en la repetida STS de 22 de mayo de 2001, lo que determina la necesidad de estimar el recurso de casación para la unificación de doctrina planteado y la devolución de las actuaciones a la Sala de procedencia para que, con absoluta libertad de criterio pero partiendo de la necesidad de aplicar los criterios antes apuntados, decida lo que en derecho proceda sobre el recurso de suplicación planteado por el trabajador frente a la empresa demandada.

Voto particular que formula el Excmo. Sr. Magistrado D. Luis Gil Suárez, en relación con la sentencia de la Sala de lo Social del Tribunal Supremo de 4 de noviembre de 2004, recaída en el recurso de casación para la unificación de doctrina núm. 2652/2003, al que se adhieren los Excmos. Sres. Magistrados D. Mariano Sampedro Corral y D. Manuel Iglesias Cabero.-

Mediante este voto particular expresamos con todo respeto nuestra discrepancia del parecer mayoritario de la Sala, que se recoge en la precedente

sentencia. Las razones en que se apoya nuestro desacuerdo se exponen en los razonamientos jurídicos que siguen.

[…]

SEGUNDO.- No compartimos el criterio de la mayoría de la Sala. Entendemos que siendo aplicable el derecho extranjero (cosa que no se pone en duda, en absoluto, en el presente recurso), la falta de constancia o de prueba del contenido del mismo ha de determinar necesariamente el decaimiento de la acción ejercitada, al carecer ésta del apoyo jurídico necesario para que pueda prosperar. La relación jurídica de autos se rige por el derecho brasileño, por lo que el derecho español no puede servir de sustento a la pretensión de autos, que es claramente extraña al mismo; y ello aunque el demandante alegue la aplicación del derecho español, dado que, una vez que se llega a la conclusión de que éste derecho no rige la referida relación laboral, esa alegación del actor carece por completo de eficacia y trascendencia, pues el fundamento de toda pretensión procesal es algo objetivo, que existe con base en la propia naturaleza de la misma y de la relación jurídica discutida, y sin que tal fundamento y naturaleza puedan ser alterados por la voluntad, la conveniencia o el capricho del actor. Y es sabido que éste está obligado a demostrar la certeza y realidad de todos los elementos que constituyen la base de su pretensión (salvo la vigencia y contenido del derecho patrio, al que alcanza de lleno el principio «iura novit curia»), de modo tal que si no logra demostrar dicha realidad y certeza de alguno de esos elementos, su pretensión no puede prosperar por faltar un punto de apoyo esencial de la misma. El criterio que se mantiene en este voto particular es el que esta Sala proclamó en su reciente sentencia del Pleno de la misma de 22 de mayo del 2001; el cual criterio había sido ya mantenido en una anterior sentencia de 19 de febrero de 1990, y fue seguido también en la sentencia de 25 de mayo del 2001. Se recuerda que la citada sentencia de 19 de febrero de 1990 manifiesta que «tal falta de alegación y prueba no puede conducir, como pretende el recurrente en el motivo séptimo, a la aplicación de la Ley española, pues ello equivaldría al absurdo de sancionar la omisión de prueba deliberadamente querida de la norma extranjera, con la aplicación de la Ley española, cuando se considerase que ésta era más beneficiosa». Y la sentencia de Sala General de 22 de mayo del 2001 explica: «la parte demandante ha fundado su pretensión en el Derecho español y, al no resultar aplicable éste, aquélla ha de ser desestimada, pues carece de fundamento. Esta conclusión no pude obviarse por una aplicación indirecta del Derecho nacional como consecuencia del fracaso en la prueba del Derecho extranjero. En primer lugar, porque, como ya se ha dicho, la parte no ha tratado en ningún momento de probar el Derecho extranjero, sino de excluir la aplicación de éste a favor de su tesis favorable a la del Derecho nacional y esta posición lleva a la desestimación

de la pretensión deducida. En segundo lugar, porque las reglas de la carga de la prueba no juegan en el mismo sentido en el caso de hechos que de normas que han de ser imperativamente aplicadas. En efecto, aquí no se trata de la aportación de un hecho al proceso, cuya falta de prueba perjudica a la parte que fundaba en él su pretensión o su resistencia, sino de una norma o un conjunto de normas que han de ser aplicadas al caso, porque así lo dispone una regla que es imperativa. Por ello, no puede decirse que el Derecho nacional se aplica si no se prueba el Derecho extranjero por la parte que está interesada en esa aplicación. Por el contrario, lo que sucede es que, si el Derecho aplicable es el extranjero, la parte que formula la pretensión tiene que alegar y probar ese Derecho para que su pretensión sea acogida. Esto no está suficientemente claro en el art. 12.6.2º CC, que señala que es «la persona que invoque el derecho extranjero» la que tiene el deber de probarlo. Pero la recta inteligencia del precepto parte de que tiene obligación de acreditar el Derecho extranjero quién ha de fundar su demanda en él por ser el Derecho necesariamente aplicable. Hay una tercera razón que impone esta conclusión y es que, como ha señalado la doctrina científica, la norma del párrafo 1º del art. 12. 6 del CC es imperativa y establece con claridad que los órganos judiciales españoles tienen que aplicar de oficio las normas de conflicto del Derecho español. Pues bien, si la norma de conflicto española establece que el Derecho aplicable es el extranjero, esta conclusión imperativa no puede desplazarse como consecuencia de la mayor o menor diligencia probatoria de las partes en el proceso, porque esto convertiría en disponible algo que no lo es y favorecería además las conductas estratégicas, como la presentación de demandas fundadas en un Derecho notoriamente inaplicable con la expectativa de que la inhibición probatoria del demandante y el eventual fracaso de la prueba por el demandado pudieran llevar a la aplicación de un Derecho que resulta más conveniente para los intereses del primero». Y añade a continuación que «la tesis del recurso al Derecho nacional por falta de prueba del extranjero conduce además a la inseguridad jurídica, pues se desconoce cuál es el Derecho aplicable al ser éste un mero resultado de la prueba que ha de realizarse en el proceso. Y, por último, esa tesis conduce a consecuencias que pueden resultar contrarias a la propia lógica de las reglas de conflicto cuando como consecuencia del resultado -siempre contingente- de la prueba pudiera resultar aplicable un Derecho que, como sucedería en este caso, está completamente al margen de los elementos de conexión que pondera la norma de conflicto para establecer la regla sustantiva que ha de ser aplicada. Por lo demás, esta conclusión no puede considerase contraria al derecho a la tutela judicial efectiva, pues la parte ha tenido oportunidad a lo largo del proceso de probar el Derecho aplicable y las dificultades que esta prueba pudiera plantear

no justifican en ningún caso la exclusión del Derecho aplicable según la norma de conflicto».

TERCERO La sentencia mayoritaria, para adoptar su decisión modificadora de la anterior y reciente doctrina de esta Sala, se basa en tres sentencias del Tribunal Constitucional: la sentencia 10/2000 de 17 de enero, la sentencia 155/2001 de 2 de julio y la sentencia 33/2002 de 11 de febrero; sobre todo se apoya en esta última. Pero ninguna de estas tres sentencias justifica, en nuestra opinión, este cambio jurisprudencial. A).- La sentencia 10/2000 en ningún momento concluye que ante la falta de demostración del contenido y vigencia del derecho extranjero, el Juzgador deba aplicar el derecho español; lo que tal sentencia decretó fue la nulidad de la sentencia impugnada en amparo y ordenó «retrotraer las citadas actuaciones judiciales seguidas... al momento inmediatamente anterior a la providencia de 21 de febrero de 1997, para que se proceda a la práctica de la prueba del derecho extranjero aplicable al caso». Para la exacta valoración de esta decisión y su relación con el caso debatido en la presente litis, se recuerda que en el recurso de apelación tramitado ante la Audiencia Provincial de Vizcaya, se recibió el pleito a prueba, a solicitud de la apelante, y la citada Audiencia Provincial remitió una comisión rogatoria a fin de que se aportase a los autos el derecho extranjero (en aquel caso, el de la República de Armenia) aplicable al caso; esta comisión rogatoria se cumplimentó pero no de modo correcto, por lo que la citada Audiencia Provincial ordenó el envío de una segunda comisión rogatoria, la cual resultó extraviada en el Ministerio de Justicia; por todo ello, poco después la Audiencia acordó traer los autos a la vista con citación de las partes para sentencia, se celebró tal vista, y se dictó sentencia desestimando el recurso de apelación y confirmando la resolución de primera instancia, que había denegado la pretensión ejercitada en la demanda. La sentencia del Tribunal Constitucional 10/2000 acogió favorablemente el recurso de amparo formulado por la actora del pleito originario, basándose en que «es obligado considerar que la frustración de la práctica de la prueba sobre el derecho extranjero es imputable a la actitud de la Audiencia Provincial, quien no dio ninguna razón para celebrar la vista y dictar Sentencia antes de la devolución de la segunda comisión rogatoria, sin que por tal pueda tenerse el simple hecho, por otra parte evidente, de que no se pudo practicar dicha prueba como consecuencia, obviamente, de no haberse devuelto la tantas veces citada segunda comisión rogatoria»; de lo que deduce que «no cabe sino concluir que la Audiencia Provincial no sólo ha frustrado la práctica de una prueba decisiva para el sostenimiento de la pretensión de la recurrente en amparo (práctica en la que había acordado, a instancia de la recurrente, colaborar para su consecución), lo que de suyo ha

lesionado el derecho a utilizar los medios de prueba pertinentes (art. 24.2 CE) de la señora Ch., sino que, además, causándole indefensión (art. 24.1 CE), desestimó su demanda de separación a consecuencia, precisamente, de la frustración de dicha prueba, sólo imputable al órgano judicial». Por todo lo cual el Tribunal Constitucional declaró la nulidad de la sentencia de la Audiencia Provincial de Vizcaya y ordenó «retrotraer las citadas actuaciones judiciales seguidas ante la Sección Primera de la Audiencia Provincial de Vizcaya al momento inmediatamente anterior a la Providencia de 21 de febrero de 1997, para que se proceda a la práctica de la prueba del derecho extranjero aplicable al caso». Resulta claro, por consiguiente, que el supuesto examinado en esta sentencia del Tribunal Constitucional no es equiparable al que se aborda en la presente litis, dado que la nulidad que en aquella se declara se funda esencialmente en el hecho de no haberse practicado una prueba del derecho extranjero que había sido admitida y ordenada por la propia Audiencia Provincial; situación ésta que no aparece en el actual proceso. Y además dicha sentencia 10/2000 no dispone en ningún momento la aplicación del derecho español; es más, el mandato de que se practique la prueba del derecho extranjero, no se compagina, en absoluto, con la aplicación al caso del derecho español. B).- La sentencia del Tribunal Constitucional 155/2001, de 2 de julio, estimó el recurso de amparo ejercitado en aquel caso, por entender que la sentencia en él impugnada, que había sido dictada por la Sala de lo Social del Tribunal Superior de Justicia de Madrid, carecía «de motivación suficiente al haberse limitado a declarar la aplicabilidad del derecho chino y la exigencia de su prueba por la parte actora, pero sin llegar a razonar, fundamentar o justificar en modo alguno el porqué de su decisión revocatoria de la sentencia de instancia (que, reconociendo tales circunstancias, aplicó subsidiariamente, la legislación laboral española con base en la propia doctrina del Tribunal Supremo)». A este respecto esta sentencia 155/2001 precisa que «en el supuesto enjuiciado lo cierto es que el órgano judicial impidió a la parte actora conocer la «ratio decidendi» de su resolución, es decir, las razones por las cuales se revocó la anterior decisión judicial, denegándole su derecho al cobro de las diferencias salariales pretendidas en contra, no sólo del reconocimiento de tal derecho efectuado por el Juez «a quo», sino también del propio reconocimiento efectuado por la parte demandada de la existencia de la deuda contraída con las actoras, y todo ello contrariando, a la hora de aplicar la legalidad vigente, la doctrina sentada en la materia por el Tribunal Supremo de deberse estar, en defecto de prueba del Derecho extranjero invocado en el proceso, al Derecho español, según se desprende de una reiterada jurisprudencia». Pero en el caso analizado en la presente litis ni la sentencia del Tribunal Superior de Justicia del País Vasco revocó la de instancia, sino que se limitó a confirmarla, ni existió ningún

reconocimiento por la parte demandada de la existencia de deuda alguna en favor del actor. Además, en nuestra opinión, tal sentencia tiene una motivación adecuada y suficiente con lo que no puede sostenerse que vulnere el mandato del art. 120-3, en relación con el art. 24-1, de la Constitución española; a lo que se añade que dicha sentencia no conculca, en absoluto, la jurisprudencia del Tribunal Supremo imperante en el momento en que se dictó, sino que, por el contrario, la sigue fielmente. Estas claras diferencias entre el caso que dio lugar a la sentencia 155/2001 que estamos comentando y el que se aborda en la presente litis, explican perfectamente que no se adopte en éste una solución similar a la que aquélla propugna, y por tanto no procede resolver la controversia planteada en la presente litis mediante la aplicación del derecho español. C).- Resta, por examinar la sentencia 33/2002 de 11 de febrero. La decisión que esta sentencia adopta se construyó sobre la base de partida de considerar que el Tribunal Superior de Justicia de Madrid, al dictar la sentencia impugnada en amparo, «impidió de forma no razonable la adopción de una resolución sobre el fondo de la pretensión ejercitada en la demanda, pues «optó por no resolver sobre la pretensión deducida por la actora»; el Tribunal Constitucional estima que el Tribunal Superior de Justicia de Madrid ligó «a la falta de acreditación del contenido y vigencia del Derecho inglés... la inadmisión de la demanda, aunque a través de sentencia», de lo que deduce que es obvio «que a la parte actora le fue negada de forma no razonable una resolución sobre el fondo de su pretensión». Debe destacarse que la referida sentencia del Tribunal Superior de Justicia de Madrid, en su fallo dispuso la desestimación del recurso de suplicación «sin entrar a conocer sobre el fondo al haber incumplido la actora la obligación de acreditar el contenido y la vigencia del Derecho aplicable» como se constata en el apartado d) del antecedente 2 de la sentencia del Tribunal Constitucional; por ello en el fundamento jurídico 4 de la misma se estima que «se ha inadmitido la demanda al entender los órganos judiciales que existía un motivo impeditivo para entrar a conocer del fondo del asunto, cual era la falta del Derecho extranjero». Ahora bien, en el supuesto de autos, la sentencia del Tribunal Superior de Justicia del País Vasco no manifiesta, en modo alguno, que se abstenga de entrar a conocer del fondo del asunto, lo que supone una diferencia relevante en relación con el supuesto tratado en la sentencia del Tribunal Constitucional 33/2002. En cualquier caso, en los supuestos en que en conflictos análogos al de autos la sentencia de los Tribunales ordinarios desestima la pretensión de la demanda por no haberse acreditado el derecho extranjero, la cuestión de determinar si tal sentencia resuelve o no el fondo del proceso, no es, en absoluto, una cuestión de interpretación de la Constitución, sino de mera legalidad ordinaria, y por ello el criterio que pueda mantener el Tribunal Constitucional con respecto a este punto concreto no vincula a los demás

Tribunales de Justicia. Y en nuestra opinión es obvio que tal sentencia desestimatoria resuelve el fondo de la cuestión planteada en la litis y lo hace denegando la pretensión base del proceso, siendo desacertado sostener que esa sentencia no resuelve la pretensión de la demanda. Las razones que se recogen en los próximos fundamentos jurídicos de este voto particular, confirman plenamente este criterio. Tampoco es materia de interpretación constitucional, sino de mera legalidad ordinaria, dilucidar si la falta de prueba del derecho extranjero aplicable al caso determina la desestimación de la demanda o produce la consecuencia de tener que solucionar la controversia mediante la aplicación del derecho español. Y no tratándose de materia de interpretación constitucional, el criterio que con respecto a tal cuestión mantiene el Tribunal Constitucional tampoco vincula a los Tribunales ordinarios. Por todo lo expuesto, estimamos que la doctrina y decisiones de las tres sentencias del Tribunal Constitucional mencionadas no deben obligar a esta Sala a modificar la jurisprudencia por ella sentada en sus aludidas sentencias de 22 (RJ 2001, 6477) y 25 de mayo del 2001 y 19 de febrero de 1990. Aún cuando lo consignado hasta este punto, es suficiente para explicar los fundamentos de este voto particular, creemos conveniente añadir las consideraciones que se recogen en los siguientes razonamientos jurídicos.

CUARTO Toda relación jurídica, salvo supuestos excepcionales que no hacen al caso, se rige por la normativa propia de un solo ordenamiento jurídico nacional. Por ello, en los casos en que se presentan o pueden presentarse interferencias o conexiones entre diferentes ordenamientos de tal clase, las correspondientes normas de conflicto determinan cual es la legislación nacional aplicable a la relación jurídica de que se trate. Es sabido que en el ámbito propio de las relaciones de trabajo, esas normas de conflicto se recogen en el art. 6, en relación con los arts. 3 y 4, del Convenio Internacional sobre la Ley aplicable a las obligaciones contractuales abierto a la firma en Roma el 19 de junio de 1980. Por consiguiente, no cabe duda que la Ley nacional que los Tribunales de Justicia han de aplicar al caso debatido es necesariamente la que resulte de los mandatos contenidos en estas normas de conflicto, las cuales son de carácter imperativo; no siendo posible, a tal objeto, aplicar otros criterios no establecidos en tales mandatos y menos aún eludir la aplicación de la Ley extranjera que éstos impongan y resolver el asunto conforme a la Ley nacional basándose en la sola razón de que el contenido y vigencia de esa Ley extranjera no fue demostrado en el juicio correspondiente. Este último criterio infringe frontalmente las referidas normas de conflicto. 1.- Pero además esta posición, según la que aunque la norma de conflicto imponga con toda evidencia la aplicación de la norma extranjera, los Tribunales españoles tienen que resolver

el proceso conforme a la Ley española, si el contenido y vigencia de aquélla no resultó demostrado en el pleito, no sólo supone vulnerar las normas de conflicto mencionadas, sino que introduce un amplísimo margen de inseguridad en las relaciones jurídicas que de un modo u otro puedan verse inmersas en tal clase de situaciones, habida cuenta que: a).- Antes de que la relación jurídica de que se trate, haya dado lugar al planteamiento de ninguna demanda judicial ni a la tramitación de ningún proceso, los sujetos que en dicha relación intervienen no pueden saber a ciencia cierta si la legislación nacional por la que ésta se viene rigiendo, es la que en definitiva resultará aplicable en cada reclamación judicial que sobre ella pueda suscitarse, pues todo dependerá del resultado de la prueba practicada en cada proceso futuro. b).- Una vez que se haya iniciado un pleito referente a esa relación jurídica, la aplicación en él de una u otra legislación nacional dependerá, no de una pauta o criterio objetivo y seguro, sino del resultado de la prueba en el pleito, que es siempre algo aleatorio y contingente. c).- Incluso, si son varias las contiendas judiciales que se plantean con respecto a esa relación jurídica, cabe la posibilidad de que el resultado y valoración de la prueba sean diferentes en cada uno de esos litigios, lo que conduciría al absurdo de tener que aplicar distintas legislaciones nacionales, según cada caso, a una misma relación jurídica. d).- Estas inconsecuencias e inseguridades se deben a que la posición de la que discrepamos, en primer lugar se aparta de los mandatos de las normas de conflicto, cuya observancia es de obligado cumplimiento en estos casos, y las vulnera; y en segundo lugar, sustituye tales normas de conflicto por la aplicación de un criterio que, por un lado, es eventual e inseguro, y por otro es manifiestamente ajeno y extraño a la naturaleza del vínculo discutido y al alcance y ámbito de vigencia de los ordenamientos jurídicos nacionales. 2.- La tesis que defiende la sentencia mayoritaria propicia, de forma nada desdeñable, el empleo por alguno de los interesados de conductas estratégicas e incluso fraudulentas, pues le da la oportunidad de alegar la aplicación de la legislación que le sea más favorable en la controversia planteada, aunque sepa perfectamente que tal legislación no es aplicable; alegación que puede verse coronada por el éxito dada la eventualidad de los criterios que esa tesis propugna. Así lo destacaron con especial insistencia las citadas sentencias de esta Sala de 22 y 25 de mayo del 2001 y 19 de febrero de 1990. Debe tenerse en cuenta, a este respecto, que este tipo de conductas son especialmente frecuentes en relación con la aplicación del Derecho del Trabajo español, dado el carácter marcadamente protector y beneficioso para los trabajadores que el mismo ostenta. Es más, es evidente que el caso sobre el que versa el presente proceso encaja perfectamente en esta clase de supuestos, pues el demandante funda su demanda en el derecho español, cuando es totalmente claro que el derecho que rige la relación jurídica de autos es el brasileño.

QUINTO La postura que se defiende en la sentencia mayoritaria y en las otras resoluciones judiciales que siguen igual criterio, mantiene que, como el demandante, en la mayoría de los casos, solicita en su demanda la aplicación del derecho español, no está obligado a demostrar en el juicio la realidad y vigencia del derecho extranjero, por cuanto que dicha carga recae sobre el demandado, al ser éste quien insta la aplicación de ese derecho extranjero. No compartimos, en absoluto, este parecer, habida cuenta que: A).- Como se desprende de lo que se explicó en el primer párrafo del segundo fundamento de derecho de este voto particular, la obligación de demostrar el contenido del derecho extranjero no se tiene que unir a la concreta solicitud de que tal derecho se aplique a ese caso, sino que está vinculada claramente con la pretensión ejercitada en la demanda. Y si ésta pretensión se basa en una relación jurídica regida por el derecho extranjero (como es el caso de autos), es indiscutible que ese derecho extranjero es fundamento ineludible de esa pretensión, lo quiera o no lo quiera el demandante; y por ello es totalmente irrelevante que diga en su demanda que su reclamación se apoya en el derecho español. Como se dijo en el referido razonamiento jurídico de este voto particular, «el fundamento jurídico de toda pretensión procesal es algo objetivo, que existe con base en la propia naturaleza de la misma y de la relación jurídica discutida, y sin que tal fundamento y naturaleza puedan ser alterados por la voluntad, la conveniencia o el capricho del actor». Esta conclusión no se contrapone, de ningún modo, a lo que prescriben los arts. 217 y 281-2 de la Ley de Enjuiciamiento Civil. Es obvio que el art. 217-2 liga la carga de la prueba, no con las alegaciones concretas de aplicaciones normativas o de hechos, sino con la pretensión ejercitada, pues con toda claridad habla del «efecto jurídico correspondiente a las pretensiones de la demanda y de la reconvección», efecto jurídico que se producirá «según las normas jurídicas a ellos aplicables». Y en el caso de autos las normas aplicables son las propias del derecho brasileño, y por tanto el contenido de estas normas tenía que haber sido acreditado por el actor. Y no desvirtúa esta conclusión el art. 281-2 de la Ley de Enjuiciamiento Civil que no dice nada respecto a quien tiene que demostrar el contenido del derecho extranjero. Lo mismo acontecía bajo la vigencia del ya derogado art. 1214 del Código Civil que aludía al cumplimiento de la obligación o a la extinción de la obligación, materias centrales y básicas de las pretensiones ejercitadas en el pleito. Así pues, si la relación jurídica debatida se rige por el derecho extranjero, este derecho es uno de los elementos básicos en que se asienta la pretensión del demandante, y por ende es dicho demandante quien está obligado a demostrar el contenido y vigencia de ese derecho extranjero. Por consiguiente, si esta demostración no se realiza la acción ejercitada en la demanda no puede prosperar, debiendo ser

desestimada. Desestimación ésta que alcanza por completo al fondo del asunto debatido, como es obvio que acontece en los casos en que no se logra probar los hechos en que se apoya la demanda o cuando quiebra alguno de los elementos nucleares de la pretensión ejercitada en las misma. Las razones determinantes de esa desestimación son manifiestas y claras, no alcanzándose a comprender que en ocasiones se afirme que tal desestimación carece de motivación suficiente. B).- Pero aunque se admitiese como hipótesis que la demanda se funda en el derecho español, tampoco podría ser acogida favorablemente la misma, al haberse llegado a la conclusión de que la normativa aplicable al caso debatido es la extranjera; cosa totalmente clara en el presente litigio. Si la demanda funda su pretensión en la aplicación del derecho español, y resulta que éste es inaplicable a la relación jurídica discutida, pues se rige por el derecho extranjero, quiebra y se desmorona totalmente el fundamento de tal demanda, debiendo ser rechazada, sin necesidad de más razones ni argumentos. También se trataría de un rechazo o desestimación que afecta al fondo de pretensión ejercitada y que está adecuadamente fundado, pues necesariamente se ha de rechazar una demanda cuando se pone de manifiesto que el fundamento esencial en que la misma se basa, es inexistente o irreal.

SEXTO La decisión adoptada por la sentencia de la Sala de lo Social del País Vasco contra la que se dirige el recurso de casación para la unificación de doctrina de que ahora tratamos, no vulnera, en forma alguna, ningún precepto de la Constitución española. Lo expresado en el razonamiento jurídico precedente hace lucir con nitidez que dicha decisión resuelve el fondo del asunto y se apoya en fundamentos acertados y sólidos, lo que impide que aquí puedan tener efectividad argumentos que en ocasiones similares se han manejado con base en los arts. 24 y 120-3 de la Constitución. Si uno de los elementos constitutivos de la pretensión base de la demanda resulta irreal o inexistente, o no se logra su constatación o probanza, necesariamente esa demanda tiene que ser desestimada; siendo tal desestimación totalmente respetuosa con el derecho a la tutela judicial efectiva; máxime cuando el interesado tuvo la oportunidad a lo largo de todo el proceso de acreditar la realidad y contenido de ese elemento básico de su pretensión. Pero lo que en nuestra opinión no resulta explicable es que, en aras a una pretendida violación del derecho a la tutela judicial efectiva, se acuda a la aplicación a la relación jurídica combatida de unos preceptos legales (los del derecho español) que nada tienen que ver con ella y que en ningún momento han regulado ni regulan tal relación. Esta particular solución, para nosotros, sí que quebranta los derechos fundamentales de la contraparte, toda vez que dicha contraparte se encuentra con que los Tribunales resuelven la controversia planteada aplicando, sin

verdadera justificación razonable, una normativa completamente ajena y extraña a esa relación jurídica de que se trata. Y resulta especialmente inadecuado e ilógico hablar de vulneración del derecho a la tutela judicial efectiva en aquellos casos (nada infrecuentes, y entre los que se encuentra el de autos, en nuestra opinión) en que el demandante, a sabiendas de que la relación jurídica debatida se rige por el derecho extranjero, insta en su demanda la aplicación del derecho español, por la sola razón de que le es más favorable. Estimar en estos supuestos que la desestimación de la demanda, en razón a la no acreditación del derecho extranjero, infringe el art. 24 de la Constitución, nos parece incomprensible, máxime cuando la parte demandante conoce que esa legislación extranjera es la que regula la relación jurídica controvertida, y ella ha hecho todo lo posible para impedir su aplicación a la misma.

[…]

VOTO PARTICULAR que formula el Magistrado Excmo. Sr. D. Mariano Sampedro Corral, en relación con la sentencia de la Sala de lo Social del Tribunal Supremo de 4 de noviembre de 2004, recaída en el recurso de casación para unificación de doctrina núm. 2652/2003.-

[…]

SEGUNDO En este voto se admite y acoge plenamente el contenido del voto particular de dos magistrados de la Sala, al que me he adherido y firmado, y, únicamente, se emite para aportar algunas matizaciones en relación con la aplicación del derecho interno, cuando se ha tenido por no probado el derecho extranjero aplicable, que es la doctrina sentada por la sentencia mayoritaria.

1. El sistema de conflicto de Leyes aplicable al contrato de trabajo ha sido regulado, tras una inicial inhibición de los órganos competentes en el ámbito comunitario, por el Convenio de Roma de 19 de junio de 1980, -Convenio que aún no siendo derecho comunitario, sino Convenio Internacional suscrito por los entonces miembros de la Comunidad Europea, pueden ser interpretado por el TJCE, a partir de uno de agosto de 2004-, regulador de la Ley aplicable a las obligaciones contractuales. Este Convenio, que determina la Ley que ha de regir en una relación jurídica cuyos miembros estén dispersos, y que tiene carácter universal y consecuente aplicación preferente incluso si la Ley designada por el mismo es la de un Estado no contratante (STS 29 de septiembre de 1998; Rec. 4796/1997 en relación con el artículo 2 del Convenio), no ha sido objeto de controversia en la sentencia mayoritaria que parte del supuesto, antes afirmado, de la aplicación al despido controvertido de la Ley extranjera, en el caso, el derecho brasileño. Por ello no se argumentan, ni se hará, en este voto particular, referencia alguna a los diferentes criterios establecidos en el citado convenio

sobre designación de la norma conflictual aplicable al contrato de trabajo, sino que lo que va a considerarse es si la determinación de la Ley conflictual, conforme la legislación interna, puede ceder a favor de la Ley extranjera, cuando no se ha acreditado en el proceso, ni por prueba de la parte que la alegó principalmente, ni por la averiguación de oficio del órgano judicial, la norma correspondiente de derecho extranjero.

2. Sostengo, con el mayor respeto a la decisión mayoritaria -que antaño y en fechas no muy lejanas fue la contraria,: sentencia de la Sala General de 22 de mayo de 2001 - que en el fondo de la sentencia puede latir una confusión «entre ius y foro» de modo que la pacífica competencia -en cuanto no discutida, ni examinada en el caso litigioso- del órgano jurisdiccional español para conocer de la pretensión de despido ejercitada por el trabajador español, contratado en territorio extranjero por empresa mercantil extranjera, que le despidió, cuando prestaba servicios en dicho territorio, se extiende «con carácter imperialista» a lo que prácticamente constituye una derogación judicial de la norma conflictual aplicable, según el derecho interno, que tiene carácter imperativo.

3. La aplicación de la norma conflictual no depende del resultado de la prueba tendente a acreditar su contenido y significación, ni, consecuentemente, puede estar mediatizada por la doctrina de la carga de la prueba.

De todas maneras, aún dando beligerancia a la influencia de la prueba practicada en el proceso, sobre la aplicación o no de la norma conflictual, creemos que la no acreditación del derecho extranjero no autoriza la conclusión de la aplicación de la norma interna, que sienta la sentencia mayoritaria. El derecho procesal laboral -como ámbito jurídico en el que se actúa un derecho subjetivo de naturaleza privada- está regido por el principio dispositivo; principio que, a su vez, implica el principio de libre aportación de los hechos por las partes -el juzgador no puede introducir hechos en el proceso; STS 7 de diciembre de 1988- y de su prueba por quien los alegó, con el efecto negativo de que la parte que alega los hechos y no los prueba, debe soportar las consecuencias inherentes a la no probanza (artículos 1214 del Código Civil, hoy derogado, y 217.2 de la vigente Ley de Enjuiciamiento Civil).

También puede ser objeto de prueba la costumbre y el derecho extranjero (artículos 1.3 CC y 281.2 LECiv), pero que la prueba pueda tener como objeto las normas de costumbre y del derecho extranjero no implica la desvirtuación de los principios de alegación y prueba de parte sobre los hechos, sino la confirmación de los mismos a salvo de ciertas matizaciones, como las que hacen referencia a la aplicación del derecho extranjero. Al efecto, el artículo 12.b) apartado segundo del CC, derogado expresamente por la Disposición derogatoria única 2.1 de la vigente LECiv 1/2000, de 7 de enero, establecía que «la persona que invoque el Derecho extranjero deberá acreditar su contenido y

vigencia por los medios de prueba admitidos en la Ley española», añadiendo que «para su aplicación el juzgador podrá valerse, además, de cuantos instrumentos de averiguación considere necesarios dictando al efecto las providencias oportunas». Esta disposición ha sido sustituida por la contenida en el artículo 281.2 LECiv 1/2000, en forma diferente y mas matizada, al preceptuar, tras una primera afirmación expresiva de que «también serán objeto de prueba la costumbre y el derecho extranjero», que «el derecho extranjero deberá ser probado en lo que respecta a su contenido y vigencia, pudiendo valerse el Tribunal de cuantos medios de averiguación estime necesarios para su aplicación «de cuantos medios de averiguación estime necesarios para su aplicación».

El principio dispositivo de aportación de parte admite ciertas matizaciones, tanto en el Código Civil como en la vigente y supletoria Ley de Enjuiciamiento Civil, pero ninguna de ellas tiene el alcance que reconoce la sentencia mayoritaria, y antes al contrario, a la luz del artículo 12.1 CC, que se encuentra vigente, expresivo de que «la calificación para determinar la norma de conflicto se hará siempre con arreglo a la Ley española», parece que infringe dicho precepto la decisión judicial que abandona su rectoría, que tiene carácter imperativo, para condicionar su aplicación a lo que resulte acreditado en la fase probatoria del proceso. Si se entiende que el juzgador debió extremar la actividad tendente a averiguar de oficio el contenido y vigencia del derecho extranjero, la solución correcta sería declarar la nulidad de actuaciones con retroacción de los autos a la fase probatoria o a la de diligencia para mejor proveer (art. 88.1 LPL) -diligencia final en la Ley de Enjuiciamiento Civil-, a fin de que, se proceda a averiguar la existencia de la Ley extranjera, que ha de aplicarse imperativamente, pero no, a partir de dicha falta de probanza aplicar el derecho interno.

ANNOTATION

This is a case of unfair dismissal in which the employee, a Spanish citizen, had been continuously employed and working in Brazil for a Brazilian company during almost two years. After his dismissal, the employee sued the Brazilian company in the Spanish labour courts, eventually succeeding and obtaining the legal remedy provided for unfair dismissal in the Spanish Employment Law.

These are the substantial questions of law that arise before the Supreme Court: what are the effects of the lack of proof of the applicable law, and who should bear the negative effects of said lack of proof. From the beginning of the judicial proceedings, the plaintiff pleaded the application of the Spanish Em-

ployment Law, not the Brazilian Law. It was the defendant who alleged that the latter, not the former, should apply to the case, but his allegation was not followed by proper evidence as to the content of the Brazilian Employment Law in force.

The Spanish legal position on the proof of foreign law hinges on the principle of foreign law as a fact. Therefore, foreign law shall be proved as if it were a fact. Generally, the burden of proof lies on the party who alleges a fact. More precisely article 217 of the Spanish Civil Procedure Act (2000) imposes on the complainant the burden of proving those facts which produce, according to the applicable law, the legal effect corresponding to the prayer of the complaint. In our case, the complainant did not plead the application of the Brazilian Law and hence did not even try to establish its content in the Spanish courts. On the contrary, it is the defendant who raises the important question of the application of the Brazilian Law. None of the Spanish labour courts that ruled in this case had any doubt that, according to articles 2 and 6.2(a) of the EC Convention on the Law Applicable to Contractual Obligations (the "Rome Convention"), it was the Brazilian Law, not the Spanish that should govern the dismissal. But since the content of the Brazilian Employment Law was not determined at the trial, there were two possible solutions for the court: either applying the Spanish Employment Law, as lex fori, or dismissing the complaint with prejudice. The latter was the choice of the lower courts; the Supreme Court's choice is now the opposite.

The Supreme Court (Social Chamber) case law on this topic has not been consistent over the last years. The principle of application of lex fori, that was hold in a judgment of 19 February 1990, was reversed in a later decision of 15 March 1999 and then confirmed in a decision of 22 May 2001. Now, in 2004, we observe a third change in a judgment in which the highest Court sustains the validity of the principle of application of lex fori in case of lack of proof of the applicable foreign law. Why has the Supreme Court changed its doctrine affirmed in 2001, the same that had been in force during most of the nineties?

The main reason for the change is the doctrine of the Spanish Constitutional Court. Three constitutional judgments are cited by the Supreme Court as legal authorities for its change of doctrine. The most decisive of the three is the constitutional judgment 33/2002, of 11 February 2002. In this case, a British citizen, employed in England, sued her employer in Spain. The labour courts declared applicable the English Law. Since its content was not proved by any party to the case, the court dismissed the claim with prejudice. The employee lodged an individual appeal for protection ("*recurso de amparo*") to the Constitutional Court, alleging infringement of her constitutional right to obtain an effective remedy of the courts (Article 24 of the Spanish Constitution). Her appeal was successful and the Constitutional Court reversed the labour court decision, find-

ing that the lack of proof of the English Law could not harm the position of the party who did not plead its application and consequently did not bear the burden of proof.

The Supreme Court's decision strongly relies on this constitutional precedent, without adding more discussion of the issue: the Supreme Court considers that when the foreign law that is applicable to the case is not proved, it is not constitutionally acceptable that a labour court dismiss the complaint with prejudice, rather than apply a solution according to the Spanish substantive law (lex fori).

This Supreme Court's decision was a very controversial one. Some justices filed dissenting opinions, a practice not so common at the Social Chamber. The starting point for their discussion is the assertion that the Constitutional Court judgments cited by the majority's opinion do not warrant the Supreme Court's decision. But the strongest argument offered by the dissenting justices is that *conflict-of-laws rules are mandatory*. Therefore, if according to Article 6 of the EC Convention on the Law Applicable to Contractual Obligations, the Brazilian law should govern the plaintiff's dismissal, it is up to the plaintiff to prove and establish its content at trial, even though its application was not pleaded by him, but by the defendant.

We agree only in part with the dissenting opinion. We will offer legal arguments of a strictly formal type, and also we will appraise the negative practical consequences of automatically applying the domestic law as suppletive law. In our opinion, the main points concerning the case at issue may be set forth as follows:

1. The applicable law in a given case is pointed to by conflict-of-laws rules that are mandatory, notwithstanding the freedom of choice by the parties (Article 3 of the aforementioned EC Convention).

2. If the applicable law is a foreign law, it shall be treated as a fact, meaning that both its content and its validity must be proved.

3. It is up to the parties, not to the trial judge, to prove both the content and the validity of the foreign law. However, the judge should play an active role in order to find out the foreign law that is in force and applicable. Article 281.2 of the Civil Procedure Act states that judges are empowered to make use of whatever means of inquiry they may deem necessary for the purpose of the application of the foreign law. According to the Supreme Court's majority, this legal rule does not imply a judicial duty to bring evidence on the content of the foreign law. Of course, one can entertain a different opinion, and we certainly do. When Article 281.2 of the Civil Procedure Act empowers judges in the aforesaid terms, it is because it previously has declared that the foreign law shall be proved as regards its content and its validity. It is a must, a requirement, not an option.

Besides, when a law empowers a public authority, such as a judge, to do something, one should not construe the empowerment as an option that the judge can freely dispose of, as if he/she were a private citizen: it is rather a legal tool in his/her hands in order to achieve the result sought by the law. Finally, the specific rules applicable to the procedures at the labour courts stress the major role of the judge in conducting trials and even in introducing evidence on the issues raised by the parties (Article 88 of the Labour Procedure Act).

4. The main point remains that the burden of proving the content and the validity of the foreign law lies with the parties. But which should bear the consequences of an eventual lack of establishment at trial of the foreign law? In the case at discussion, it was obvious that the party interested in applying the Brazilian law was the defendant, not the employee, who guessed or knew that the Spanish employment law was more favourable to him. For this reason, the plaintiff did directly plead the application of the Spanish law. At the trial, the defendant pleaded the application of the Brazilian law, without proving its content and its validity. Given this situation, who bears the burden of proof? For us, it is clear that once decided that the applicable law is the Brazilian, the burden of proof should lie with the plaintiff, since Article 217.2 of the Civil Procedure Act says: the burden of proof is on the plaintiff to show those "*facts*" which produce, according to the "*applicable law*", the legal effect corresponding to the prayer of the complaint. Here, the "*applicable law*" is the conflict-of-laws rule that points to the Brazilian law, which in turn is one of those "*facts*" that produce the legal effect corresponding to the prayer.

5. The Spanish judicial procedure applied in the labour courts of first instance features the important characteristic of concentrating the parties' pleadings and evidence in only one session (the trial). According to this system, all the evidence that may be admitted by the judge shall be introduced at that only session. So it is not unusual that a party may be surprised at the trial by an allegation made by the other party, or even by a consideration made by the judge: for instance, that the applicable law is the Brazilian law. If this occurs, the party who bears the burden of proof (in our case, the plaintiff), who must show the content of the Brazilian employment law in force, should be given the opportunity to do so in a reasonable time. To that purpose the judge is empowered by the Labour Procedure Act: its Article 88 states that once the trial is over the judge may determine further evidence to be heard in an act to take place a few days or weeks after.

If one considers the facts of this case (*an employee hired in Brazil by a Brazilian company and working in Brazil all through the day of his dismissal*), one is immediately shocked by the step taken by the employee, suing his employer in a

Spanish court and pleading the application of the Spanish employment law. But it is indeed more surprising that the court declared its jurisdiction over this case. Once the jurisdiction affirmed, there could not be any doubt about the law applicable to the dismissal: since the employee had habitually carried out his work in Brazil, and since no choice of the law by the parties was expressed or demonstrated during the trial, the Brazilian law should govern the dismissal. This is the solution which results from Articles 2 and 6.2(a) of the EC Convention on the Law Applicable to Contractual Obligations. But in the astonishing conclusion of this case, the Spanish Employment Law, not the Brazilian Law, will be applied to decide on the dismissal. How do our courts reach this seemingly wrong conclusion?

The Spanish courts, in the first place, could have possibly held their lack of jurisdiction over this case. For the plaintiff, a Spanish citizen, it was crucial to his case that the Spanish Labour Court held its jurisdiction. According to Council Regulation (EC) No. 44/2001, an employer domiciled in a Member State may be sued in the courts of the Member State where he is domiciled (Article 19.1). In this case, the employer was not a Spanish company, nor was it a company domiciled in any of the EC Member States. So, the only way for the plaintiff to persuade the court of its jurisdiction was to sue a Spanish company, besides the Brazilian company. As the latter was a subsidiary of a Spanish company, it was easy for the plaintiff to find a Spanish defendant, the one who would open the doors of the Spanish courts. However, such an extension of the parties who are sued in this case is admissible only when the plaintiff can prove that his real employer was not the Brazilian subsidiary but the Spanish mother-company. As far as we know from the texts of the judgments of both the Supreme Court and the Superior Court of Justice, there is no basis for such a conclusion. If the Spanish company is not the real employer of the dismissed worker, the jurisdiction of the Spanish courts cannot be held.

But even admitting the jurisdiction of a Spanish court, it is absolutely clear that this court should have applied the Brazilian law to solve the dispute. The lack of pleading and proof of the Brazilian law should have prejudiced the party who bore the burden of proof and who actually failed to establish the applicable law. And a court cannot tolerate a shift of the burden to the party who formally pleads the application of a foreign law (typically the defendant in cases of dismissal) when this is the law applicable to the plaintiff's (not the defendant's) case. The so many times mentioned Article 217 of the Civil Procedure Law establishes that the burden of proof is on the plaintiff to show those "*facts*" which produce, according to the "*applicable law*", the legal effect corresponding to the prayer of the complaint. This is an objective approach to the burden of proof, not a subjective one based on what or what not the claimant says in his/her

claim. And this objective approach, we conclude, should have been the one adopted by the Spanish Supreme Court. Of course, this conclusion has nothing to do with the possibility of giving effect to the mandatory rules of the law of the forum (Article 7 of the Rome Convention), an issue that was not at stake in the reported case.

SWEDEN

Labour Court
AD 2005 No. 87

Gender equality – application for employment – refusal to employ based on minimum height requirement – indirect discrimination – objective justification – burden of proof

HEADNOTES

Facts

In October 2002 Ann-Charlotte N. (hereinafter A-C.N.) applied for employment at Volvo Personvagnar AB (hereinafter 'the company'). The application concerned three of the company's plants: the body shop, the paint shop and the assembly shop. A-C.N. stated in her application that she was 159.7 cm tall. On 31 October 2002 the company stated in a letter to her that she could not be employed because she was too short. The company demanded that workers in the three plants should be between 163 and 195 cm tall. The height requirement was introduced in 2000, apparently following the recommendations of the company's health and safety office. The Equal Opportunities Ombudsman (hereinafter JämO), which is a state agency responsible for enforcement of the Equal Opportunities Act (1991:433), and which is entitled to sue for discrimination on behalf of individual job applicants or employees, with their consent, sued the company (and its employer organisation) in the Labour Court for indirect sex discrimination, stating that in applying the minimum height requirement to A-C.N. the company disregarded the ban on indirect discrimination, as laid down by the Act. JämO argued that the company's requirement treated women unfairly, since women are statistically shorter than men, and that the requirement, even if based on objectively justified factors unrelated to discrimination on grounds of sex, was neither appropriate nor necessary. JämO demanded damages in the amount of 200,000 SEK from the company (about 22,500 euro). The company refuted the claim, arguing that the height requirement was based on

objectively justified grounds unrelated to sex discrimination, i.e. an attempt to decrease the risk of repetitive strain injury.

Decision

The Court held, with reference to the presented evidence, that the company did not show in a convincing manner that the requirement of a certain height was either appropriate or necessary in order to achieve the company's objective, and had negative consequences for women. In establishing the amount of damages for indirect discrimination the Court took into consideration the fact that the company had obviously no intent to discriminate against the female job applicant, which is why the Court awarded a rather small amount of damages, SEK 40, 000 (about 4,500 euro).

Law applied

EQUAL OPPORTUNITIES ACT (1991:443)
Indirect discrimination
Section 16
An employer may not disfavour a job seeker or an employee by applying a provision, a criterion or a method of procedure that appears to be neutral but which in practice is particularly disadvantageous to persons of one sex, unless the provision, criterion or method of procedure is appropriate and necessary and can be justified with objective factors that are not connected to the sex of the persons.
Scope of prohibitions
Section 17
The prohibitions against sex discrimination contained in Sections 15 and 16 apply when the employer
1) decides on an employment issue, selects a job seeker for an employment interview or implements other measures during the employment procedure,
2) [---].

JUDGMENT

[After having restated the facts and the applicable legal provisions of the Equal Opportunities Act, the Court continued in the following manner with reference to the *legal background]*

The concept of indirect discrimination is based on unfair treatment, comparison and balancing of interests (Bill 1999/2000:143, p. 42).

Unfair treatment occurs when an employer applies a provision, criterion or procedure that seems to be neutral, but which at closer scrutiny is in fact particularly disadvantageous to persons of one sex. This implies that these persons will be treated unfairly, which is reflected in the fact that, when compared to other persons, it will be more difficult for such persons to meet the established criteria or provisions, or that the applied procedures will have a negative effect on them (see above Bill, p. 42).

In order to determine whether a given provision, etc., treats persons of one sex unfairly one must compare the proportion of women who can and who cannot satisfy the said provision, and the proportion of men who can or cannot satisfy it. The purpose of the comparison is to establish whether the provision treats persons of one sex unfairly as a group. The difference between the number of women who can and who cannot satisfy the provision and the number of men who can and who cannot satisfy it should be significant in order to be able to determine that one group has been treated unfairly. The factual circumstances of the case must be assessed. The legislator and the European Court of Justice have delegated the power to the courts to work out the details of such comparisons (see above Bill, p. 42).

There is a certain scope for an employer to apply a provision, criterion or procedure even if its application has negative effects on persons of one sex. Such assessment is made by balancing of interests. The provision, criterion or procedure in question is examined in relation to the employer's need for its application with reference to his activities. In addition to acceptable need in relation to the employer's activities, application of such provision, criterion or procedure should also be acceptable if the employer uses national regulations relating to important societal goals within the framework of the social or employment policies (above bill, p. 43). The European Court of Justice has demonstrated in a number of cases how balancing of interests should be done. It is essentially a question of applying the so-called proportionality principle … .

As regards the burden of proof in cases of sex discrimination the legislative history of the Act shows that it is the duty of the person discriminated against to present the facts which indicate that discrimination has occurred, after which the burden of proof is shifted onto the employer, who will have to show that the alleged unfair treatment is unrelated to sex. As regards indirect discrimination this means that the employee or the job applicant who feels discriminated against will have to show that the seemingly neutral provision, criterion or procedure is particularly disadvantageous to persons of one sex. It is then up to the employer to show that the objective of the provision can be justified with objective factors and that the measure is appropriate and necessary in order to achieve this objective (see above Bill, p. 48-9). This legal framework is based on

the Burden of Proof Directive (97/80/EC) and the case law of the European Court of Justice.

Some key points of departure for the case

In order to declare that there is a case of indirect discrimination it must be established that persons of one sex have been treated particularly unfairly as compared to the members of the other sex. The case under discussion clearly shows that many women are excluded from employment by the company because of the company's height requirement of between 163 cm and 195 cm. The parties have agreed that about 25 % of women are excluded from employment at the company, whereas only 2 % of men are affected in the same way. The difference is attributed to the fact that women are statistically shorter than men, which is why fewer of them reach the required height of 163 cm as compared with men. The parties have also agreed that the difference is significant, and, consequently, the application of the height requirement entails that women are particularly disfavoured in comparison with men.

The parties have also agreed that JämO has presented facts which give reason to believe that discrimination has occurred, which is why the burden of proof has shifted onto the employer. Accordingly, it is incumbent on the employer to show that the height requirement can be justified by objective reasons which are unrelated to gender, and that it is appropriate and necessary for the objective to be achieved.

The employer parties have stated that the objective of the height requirement is to reduce repetitive strain injuries ("musculo-skeletal" injuries) of workers. The parties do not dispute the fact that the company's objective regarding the height requirement is within the scope of the Act as regards the objectivity and acceptability of reasons. The parties do not agree, however, on whether the height requirement is appropriate and necessary to achieve this objective.

The Court then went on to discuss the statement of two expert witnesses, both of them professors, concerning the company's height requirement, and whether the latter could be considered as appropriate and necessary. The following excerpts from the opinion are restated here:

The evidence with respect to the issues in dispute relates, among other things, to the investigations and statements made by professors Roland K.(hereinafter R.K.) and Jörgen E. (hereinafter J.E.). R.K. is an Adjunct Professor of Mechanical Engineering and Industrial Ergonomics at Chalmers University of Technology. He has been doing research in the field of ergonomics for a long time now at various places, such as, for example, the National Institute of Working Life. J.E. is a professor of Industrial Work Science at the University of

Linköping. He has been busy, among other things, with ergonomic issues in the car industry.

R.K. submitted an investigation on behalf of the company concerning the relevance of the height requirement of 163-195 cm necessary for employment as assembler or operator at the company plants. The investigation concerned certain positions, equivalent, in principle, to various working tasks, which had been selected and studied in detail from an ergonomic point of view with the assistance of a special computer programme. [---] A number of typical positions were identified which were ergonomically unsuitable, such as tasks involving working with hand(s) above the head, reaching for objects located outside normal reach, working in bent or huddled positions, and working with neck bent or turned.

Briefly, the following conclusions were drawn by R.K.

The work in the plants implies that shorter assemblers and operators (below approximately 160-165 cm) have to perform work in awkward working positions. There is a large amount of scientific literature confirming that there is a link between the working positions that have to be adopted and a risk for developing a repetitive strain injury. Generally speaking, these working positions are not harmful per se, unless they are accompanied by other aggravating factors, above all prolonged strain. [---] According to R.K. the investigation shows clearly that the imposition of the height requirement is absolutely necessary. Although it is impossible to determine that the minimum height should be 163 cm exactly, there is nothing that would contradict the reasonableness of such standard. Since the problems increase at the body height of 165 centimetres already, the height requirement should be set to less than 165 cm.

J.E. submitted, at the request of JämO, comments on R.K.'s examination, making the following statement. Current research in the field of ergonomics shows that repetitive strain injuries affecting workers are caused by different factors. Many hold the view that psychosocial causes are at least as important as physical strain. It is important to design and organise a work place in the best possible way from the point of view of ergonomics. When this is impossible, a selection must be made among the workers, so that those who run a higher risk of injury should be eliminated. In connection with such selection a global assessment of a number of different factors should be made, such as age, body height, muscle strength, smoking habits, previous repetitive strain injuries, physical activity, health status, illnesses, coordination, range of movement. Different factors have different significance. By means of such global assessment the employer has far better opportunities to select the most suitable individuals. In this way a better and more accurate assessment can be made as to whether a given worker runs the risk of developing a repetitive strain injury. Such proce-

dure would, in his view, enable more women to apply for employment. An operator's or assembler's height will affect, of course, the working position he or she must adopt with respect to certain working tasks. The working posture is one of the important factors when assessing the risks for repetitive strain at work. But this factor is not crucial. [---] The shorter the worker, the higher the risk of sustaining a repetitive strain injury at work. Where to draw the borderline regarding the height requirement depends, among other things, on the level of risk for strain injuries that the employer is ready to accept.

R.K. submitted the following remarks concerning the method for making a more comprehensive assessment. Apart from body height, there is a shortage of reliable research material with regard to other factors relating to an individual person that may affect the risk of sustaining repetitive strain injuries. The significance of a given individual's age, his or her smoking habits and previous strain injuries may, however, have some relevance. He does not think that measuring the length of a person's arm or head, for example, would lead to different results than measuring the person's body height. Greater muscle strength might be a relevant protective factor in another industry, but not in the company in question. There is no support in general for the view that good physical condition implies a lesser risk for strain injuries. An examination of, for example, coordination skills might be of interest, but this factor does not have the same relevance as body length.

[The Court then went on to examine the main issue of whether indirect discrimination had been proved]

The investigation shows that the parties agree on the fact that, taking into consideration all the working environment measures introduced by the company, the work in the affected plants is ergonomically cumbersome in general. Both R.K. and J.E. agree that some working positions are unsuitable from the point of view of the risk of repetitive strain injury applying to all persons, irrespective of their height.

Furthermore, R.K. has determined, with reference to the investigation showing that short persons are forced to work in awkward working positions, that these persons are exposed to repetitive strain and the following injuries of locomotive organs to a larger extent than others. According to him workers measuring less than 160-165 cm are at greater risk than taller persons. However, according to the Labour Court, it is impossible to form a clear view on the basis of R.K.'s investigation as to whether the difference concerning the risk associated with different body height can be expressed in definite terms. Neither is it possible to draw any definite conclusions regarding differences in the level of

risk concerning persons falling within the height interval, who R.K. regards to be at greater risk.

J.E. agrees to a certain extent with R.K., since he is also of the opinion that body height is an important factor in assessing the risk of repetitive strain injuries, as applied to the work in the case. In his view it would be more effective, however, to make a broader assessment in which even individual risk factors would be taken into consideration when making a selection of persons suitable for employment, bearing in mind that the objective of such assessment is to reduce the risk of repetitive strain juries. J.E. referred to one especially important risk factor to be considered in such assessment in this context, and that is any repetitive strain injuries sustained by a given person in the past. Even R.K. has stated that the evidence indicates that any previous repetitive strain injury sustained by a person in the course of work increases the risk of similar injury.

Taking into consideration the factual circumstances prevailing at the company the investigation reveals that there are workers who are shorter than 163 cm. The company has not been able to specify how many workers are shorter than that, and consequently, to give information concerning the proportion of such workers in the entire number of workers who do not satisfy the height requirement. No investigation has either been presented that would show the incidence of workers of different body heights having sustained repetitive strain injuries involving locomotive organs.

Carina S. and Elisabeth S., two workers at the company, who are both shorter than 163 centimetres, have stated that they have not experienced any physical pain connected with the performance of their working activities. Rolf J., the chief safety delegate, has stated that employees experience ergonomic problems irrespective of their body height, and that in his view these problems apply equally to those with a body height of 170-180 cm as to those who are shorter. He stated further that it has never happened that a worker called attention to his or her body height as a problem.

The above-stated arguments and the presented results of the investigation indicate in the opinion of the Labour Court that the emerging picture concerning the height requirement and its significance for risk reduction of work-related repetitive strain injuries is far from clear. Application of the lower end of the height range has a clearly negative effect on women's chances as job seekers, since by failing to satisfy the requirement they are automatically sifted out, and therefore excluded from any further tests. According to the Court and based on the evidence submitted to it, the company has not shown in a convincing manner that the height requirement is an appropriate or necessary measure for the achievement of the company's objective, which is why it must not be permitted, taking also into consideration its adverse effects on women applicants. It follows

from the investigation presented before the Court that there is no reason to make individual assessments depending on the plant that is affected. The application of the height requirement to A-C.N. when she applied for work in the company shall be deemed, accordingly, to constitute a violation of the ban on indirect discrimination, as laid down in section 16 of the Equal Opportunities Act.

[In assessing the question of damages the Labour Court held]

The assessment of the case implies that the company shall pay general damages to A-C.N. In deciding the amount of damages that shall be paid, the fact that the company had obviously no intent to discriminate should be taken into consideration. This is rather a matter of making, what turned out to be, an unacceptable assessment with respect to the justification of the height requirement, as applied. In a global assessment, taking into consideration these circumstances as well as the violation involved in relation to A-C.N., the amount of 40,000 Swedish crowns in damages shall be awarded to the plaintiff.

The Labour Court's decision was unanimous.

[Source: Labour Court Judgments 2005, published by the National Courts Administration, Stockholm 2006]

ANNOTATION

The Volvo case is the first case ever tried by the Swedish Labour Court relating to indirect discrimination on the grounds of sex. Indirect discrimination is not an entirely new concept in Swedish labour law. Since the first sex discrimination act from 1979 (the Equal Opportunities Act in Working Life) indirect discrimination has been prohibited, but the fact was not stated explicitly in that Act. However, the 1991 Act concerning Equality between Men and Women prohibits indirect discrimination by an explicit provision, but no definition of indirect discrimination is given. However, in the amendments to the Act introduced in 2000 a definition relating to indirect discrimination was given, restating very closely the definition on indirect discrimination to be found in the EC directive (97/80) on the burden of proof in cases of discrimination based on sex. The proportionality principle is applied. The balancing to be performed in assessing whether or not discrimination exists refers to a kind of standard or norm that needs a careful assessment of prerequisites. It is the question of whether the

employer's measures or actions are appropriate and necessary to achieve the stated objectives.

In the reported case it would seem that decisive importance was attached to the fact that some female workers were short, and that the safety delegate had never heard of any problems related to height, in spite of the many learned statements made by the professor experts, which, on the other hand, were partly contradictory.

This judgment illustrates clearly the conceptual model of the burden of proof forming the basis of Directive 97/80/EC and the Swedish legislation in the area. The fact that the employer uses a selection criterion which is typically prejudicial to a greater number of women than men is regarded as *prima facie* evidence ("*Beweis des ersten Anscheins*") of discrimination on grounds of sex. A heavy burden of proof is therefore imposed on the employer, who must demonstrate that his conduct had no connection with the party's sex. The evidence presented by the employer concerning the requirement of a certain body height was found to be insufficient. The Court seems to have attached special importance to the fact that the employer's investigation did not give account of any practical experiences from the work places in question, concerning a link between body height and development of repetitive strain injuries.

HUNGARY

Supreme Court Civil Council Labour Branch
No. I. 10.282/2003

Terminating executive officers – definition of executive officer

HEADNOTES

Facts

The plaintiff was in an employment relationship with the defendant for an indefinite period of time as of October 2, 1989, and he worked as a deputy managing director from January 1, 1992.

The plaintiff was one of the founders of the defendant's legal predecessor and he worked for the defendant as one of the owners of the defendant. According to his statement in the lawsuit his responsibilities included co-ordinating technical and economic matters, negotiating with the Tax and Financial Auditing Office about controls, representing the defendant in dealing with other authorities and in lawsuits, visiting clients all over the country, and he received a lump-sum payment for 2,800 km of car use every month.

L.M, the managing director stated as a witness that in his absence the plaintiff had to "substitute for him 100 %"; on these occasions he could make decisions on his own, but in the majority of the cases they discussed matters over the telephone, decisions of greater significance were made by the managing director while important decisions were made together by him and by the plaintiff. The plaintiff was not authorized to sign for the company but "as concerns everyday correspondence, he was entitled to sign on his own". This statement was not contested by the plaintiff. R. S., the service leader, testified that the defendant's economic position had weakened considerably and as a consequence the number of orders had fallen, and "the plaintiff, as deputy managing director, had significantly less work than previously". The plaintiff did not contest the defendant's statement either, according to which he was entitled to make contract offers on his own, and if the offer was accepted, the contract was concluded with the plaintiff's signature.

The defendant terminated the plaintiff's employment relationship by ordinary dismissal as of February 12, 2001 with reference to economic reasons which necessitated the reduction of staff, as part of which the plaintiff's job would cease.

Decision

The Plaintiff qualified as an executive employee and hence was not eligible for protection against unlawful termination.

Laws applied

LABOUR CODE SECTION 90

(1) Employers shall not terminate an employment relationship by ordinary dismissal during the periods specified below:

a) incapacity to work due to illness, not to exceed one year following expiration of the sick leave period, furthermore, for the entire duration of eligibility for sick pay on the grounds of incapacity as a result of an accident at work or occupational disease,

b) for the period of sick leave for the purpose of caring for a sick child,

….

(2) The notice period of dismissal, if the duration of termination restriction described in Subsection (1)

a) is more than fifteen days, may commence after another fifteen days,

b) is more than thirty days, may commence after another thirty days.

…

LABOUR CODE SECTION 100

Unlawful Termination of an Employment Relationship and its Legal Ramifications

(1) If it is determined by court that the employer has unlawfully terminated an employee's employment, such employee, upon request, shall continue to be employed in his original position.

(2) At the employer's request the court shall exonerate reinstatement of the employee in his original position if the employee's continued employment cannot be expected of the employer.

…

(6) If employment is terminated unlawfully the employee shall be reimbursed for lost wages (and other emoluments) and compensated for any damages arising from such loss. The portion of wages (other emoluments) or damages recovered elsewhere shall neither be reimbursed nor compensated.

(7) An employee, if his employment was not terminated by ordinary dismissal, shall be eligible for his average earnings payable for the notice period (Section 93) and severance pay payable in the event of ordinary dismissal, in addition to the provisions set forth in Subsection (6).

LABOUR CODE SECTION 188

(1) For the purposes of this Act, an employer's executive employee and his/her deputy (deputies) shall be construed as executive employees (hereinafter referred to as "executive employees").

(2) In respect of executive employees, the provisions of this Act shall be applied subject to the exceptions set forth in this Chapter.

LABOUR CODE SECTION 188/A

(1) The owner or the entity exercising ownership rights may, with respect to the positions of key importance for the employer's operations, prescribe that employees filling such positions are to be deemed executive employees for the purposes of Subsection (3) of Section 190, Sections 191 and 192, and Subsections (2)-(4) of Section 192/A. The employee concerned shall be notified of this condition when establishing the employment relationship.

(2) For the duration of employment, the stipulation described in Subsection (1) above, if so resolved by the owner or the entity exercising ownership rights, shall not effect the employment relationship of the employee, unless there is an agreement to the contrary.

LABOUR CODE SECTION 190

(1) The prohibition set forth in Subsection (5) of Section 79 shall not apply to executive employees.

(2) In respect of the termination of the employment relationship of executive employees by ordinary dismissal, the provisions of Subsection (2) of Section 89 and of Sections 90-92 shall not apply.

(3) The right of extraordinary dismissal of an executive employee may be exercised according to Subsection (4) of Section 96, within three years of the occurrence of the cause serving grounds therefor, or in the event of a criminal offense up to the statute of limitation.

…

JUDGMENT

The court of first instance (labour court)

In his action the plaintiff requested the court to determine the unlawfulness of the ordinary dismissal by the defendant and to apply the legal consequences pursuant to Section 100 of the Labour Code with exoneration from reinstatement in his original position.

In its interlocutory decision the labour court stated that the plaintiff's employment relationship terminated by ordinary dismissal by the defendant on February 12, 2001 was unlawful, and it would cease on the day when the decision became final.

As concerns the plaintiff's job the labour court concluded that the plaintiff – in spite of the title of his position – did not qualify as an executive employee pursuant to Subsection (1) of Section 188 of the Labour Code because he did not have decisive influence on the employer's operation and economic management. In spite of the fact that the plaintiff made and accepted contract offers and made decisions, these had to be discussed with the managing director, consequently, in the absence of decisions on the merits made independently of the managing director, he did not possess the scope of authority and competence necessary for qualifying as an executive employee.

In consideration of these, the labour court examined the existence of the prohibition of dismissal referred to in the action. The court ascertained that the ordinary dismissal dated February 12, 2001 and sent by post was received by a neighbour at the plaintiff's registered domicile on February 13, and the plaintiff could have been informed about it by his daughter on the same day at the earliest. However, as that day the doctor stated his incapacity to work retrospectively – as from February 12 – the ordinary dismissal violated the prohibition of dismissal set forth in Subsection (1) of Section 90 of the Labour Code. The plaintiff announced his disease to the defendant, thereby complying with his obligation to co-operate.

The court of second instance (county court)

The decision of first instance was affirmed by the court of second instance in its interlocutory decision, with reference to its valid reasons.

Supreme Court

The defendant submitted an appeal for review against the final interlocutory decision and requested that it should be annulled and a decision dismissing the plaintiff's action should be made. The defendant contested the courts' ascertainment according to which the deputy managing director did not qualify as an

executive employee. In his point of view Subsection (1) of Section 188 of the Labour Code lays down unequivocal provisions about this capacity; moreover, the owner of the entity may prescribe that other lower-rank employees are to be deemed executive officers, too, pursuant to Section 188/A of the Labour Code. For this reason the prohibition of dismissal concerning the plaintiff did not apply, and the facts of the case were also interpreted mistakenly by the courts in this matter as the plaintiff only claimed but did not prove that his incapacity to work had been declared by his doctor prior to being notified of the dismissal, furthermore he served proof for his incapacity to work only after a long period of time had elapsed. It was also disregarded that the plaintiff had previously requested and had been granted days off for this period.

In his counterclaim the plaintiff requested that the final interlocutory decision be maintained in force. He held the view that the decision of first instance, affirmed by the final decision, with respect to the existence of the prohibition of dismissal was substantiated. Furthermore, the Labour Court was right in qualifying the plaintiff's job pursuant to Subsection (1) of Section 188 of the Labour Code.

The Supreme Court ordered the procedure of review. The request for review is grounded in view of the following.

In order to establish whether the action was grounded, the Labour Court was right to examine first the existence of the personal scope of Subsection (1) of Section 188 of the Labour Code in the case of the plaintiff, who held the position of deputy managing director. The court took a right stand when it stated – contrary to the statements in the defendant's request for review – that the title of the job itself had no exclusive importance, therefore the content of the job also had to be examined on the merits.

With respect to belonging to the scope of Subsection (1) of Section 188 of the Labour Code, the position of the given job in the hierarchy of the employer's organization and the scope of authority and competence associated with the job are of significance. As concerns the application of the rules laid down in Chapter X of the Labour Code, the deputy director has the same legal standing as the director, however, it does not ensue from this that the deputy director has the same scope of authority and competence as the director in the hierarchy of the employer's organization.

The labour court inferred the absence of the condition set forth in Subsection (1) of Section 188 of the Labour Code without due grounds. It could be established from the facts of the case that the plaintiff was "the second person" in the defendant's company (the plaintiff himself made a statement to this effect); therefore his position in the organization was immediately below that of

the managing director, and with respect to his scope of authority and competence he had a decisive influence on the defendant's management and operation.

The Supreme Court ruled that – with respect to deputy directors – their legal standing equalling that of the first director, as regulated in Subsection (1) of Section 188 of the Labour Code, is not conditional on the scopes of authority and competence being the same.

With respect to the plaintiff as an employee qualifying pursuant to Subsection (1) of Section 188 of the Labour Code, the rules concerning the prohibition of dismissal specified in Section 90 of the Labour Code did not apply [Subsection (2) of Section 190 of the Labour Code]. The final decision was unlawful in stating that the defendant's ordinary dismissal was against the law for reasons of violating the prohibition of dismissal. In the absence of the prohibition of dismissal, the final decision was not in conflict with the resolutions of principle related to the prohibition of dismissal, referred to in the request for review.

In view of the above the Supreme Court annulled the final interlocutory decision, including the interlocutory decision of first instance, too.

ANNOTATION

The Hungarian Labour Code itself gives the definition of who shall be construed as executive employees (executives). The following three groups of people shall be considered as executives:

1) The employer's (labour organization's) executive.

2) The deputy of the employer's executive. Such a deputy is the employee who, in the executive's absence or hindrance, is entitled to act in his or her full scope of authority and competence and/or who has a decisive influence on the employer's operation on account of his or her scope of authority and competence. In accordance with judicial practice it is not sufficient to have the word "deputy" in the employee's job or title if the employee's role in the management of the labour organization is not of decisive importance. If it is questionable whether the employee is really the executive's deputy or whether the regulations pertaining to executive officers can be applied to him or her, not the title of the job but the nature of the tasks effectively performed by the employee (scope of authority) shall be decisive. In this case this is the relevant aspect.

3) Similarly, the owner (or the entity exercising ownership rights) may, with respect to the positions of key importance for the employer's operations (major rights of decision, outstanding responsibility), prescribe that employees filling such positions are to be deemed executive officers.

Rules slightly different from usual apply to the termination of the employment relationship of executive employees. In respect of the termination of the employment relationship of executives of any of the above three types the general rules of the Labour Code (Sections 86-94 of Act XXII of 1992) shall be applied with the consideration of the special regulations of Chapter X pertaining to employees in executive positions. If the executive's employment relationship is established for a definite period of time, the general rules shall be applied to its termination. In the case of ordinary dismissal, if the executive's employment relationship for an indefinite period of time is terminated by ordinary dismissal, the general rules pertaining to ordinary dismissal shall be applied with the following deviations:

a) the reason for ordinary dismissal need not be given, and

b) the regulations pertaining to the prohibition of dismissal and to the period of notice need not be applied either (e.g. there is no protection against dismissal).

Naturally, the parties may agree to deviate from the above regulations as it is made possible by the Labour Code for the contracting parties.

If the executive officer's mandate ceases, a further problem may arise, namely how to apply the regulations set forth in the Labour Code concerning the termination of the employment relationship of an executive officer concurrently with the rules laid down in Act CXLIV of 1997 on Business Associations. Pursuant to Act CXLIV the mandate of the executive officer shall terminate a) upon the expiration of the mandate, b) upon the removal of the executive officer, c) upon the occurrence of statutory grounds for disqualification, d) upon resignation or e) upon the death of the executive officer.

In the case of an executive officer one shall examine primarily whether one or more than one employment relationship(s) have been established by the parties for the fulfilment of executive tasks and of other tasks to be performed in the framework of the employment relationship. If one legal relationship has been established for these, the removal of the executive officer by the superior body, the expiration of the mandate and the occurrence of statutory grounds for disqualification shall lead to the termination of the employment relationship at the same time, while in the case of separate legal relationships these will terminate only the mandate of the executive officer without affecting the employment relationship itself.

JAPAN

Supreme Court (Second Petty Bench)
Kansai Medical University v. Mori et al.

Legal status of trainee doctors – whether they are "workers" protected by the Labor Standards Law and the Minimum Wage Law

HEADNOTES

Facts

Defendant is an educational corporation operating a medical university and an affiliated hospital. Mr. X graduated from the university and became a licensed doctor in May 1999. He then entered the clinical training program at the defendant's hospital, engaging in various medical practices as a trainee doctor under the supervision of preceptors. He stayed at the hospital from 7:30 a.m. to 10:00 p.m. every business day and on weekend mornings, and received a scholarship of 60,000 yen per month, as well as allowances for occasional night duties, from the defendant. The program would last for a year, to be followed by another year of advanced training at a different hospital. However, Mr. X died suddenly from a heart attack in August 1999.

His parents sued the defendant, alleging that it had violated the Minimum Wage Law by employing Mr. X for such a small amount of money. Both the Osaka District Court (Sakai Branch) and the Osaka High Court decided in favor of the plaintiffs. They rejected the defendant's theory that Mr. X was outside of the coverage of the Minimum Wage Law because he was in an educational program, and ordered the defendant to pay about 420,000 yen to make up the difference between the minimum wage and the actual payment. The defendant appealed to the Supreme Court.

Decision

The Supreme Court affirmed the decision of the high court, holding that Mr. X was a worker within the meaning of the Minimum Wage Law.

Laws Applied

MINIMUM WAGE LAW

Article 5. 1. The employer shall pay wages equal to or greater than the minimum wage amount to workers to whom the minimum wages are applicable.

2. If a labor contract between the employer and a worker to whom the minimum wage provisions are applicable provides for wages less than the minimum wage amount, such portion of the contract shall be null and void. In this case, the voided portion shall be deemed to have provided for the same amount as the minimum wage...

Article 2. The definitions of the terms in this Law listed in the following items shall be as prescribed in the said items:

(1) "Worker" shall mean the worker provided for in Article 9 of the Labor Standards Law (Law No. 49 of 1947)...

LABOR STANDARDS LAW

Article 9. In this Law, worker shall mean a person who is employed at an enterprise or place of business ... and receives wages therefrom, without regard to the kind of occupation.

JUDGMENT

A trainee doctor is a registered doctor who has passed the national examination and has been licensed by the Minister of Health, Labor and Welfare to practice medicine under the Medical Law. This Law obliges a newly licensed doctor to endeavor to undergo clinical training for two years or more at a hospital attached to a university or designated by the Minister (Art. 16-2 para. 1). The aim of the clinical training is to improve the capability of the doctor. It is certainly of an educational nature in this sense, but trainees are supposed to perform medical acts and duties under the supervising doctors according to the training program. When a trainee performs such acts and duties, he/she is inevitably rendering services to the operator of the hospital. So long as we may say that such acts and duties are performed under the direction and supervision of the operator, the trainee is a worker within the meaning of Article 9 of the Labor Standards Law.

In the present case, the clinical training program of the otorhinolaryngology department of the defendant's hospital was designed to have trainees perform medical acts and duties, and Mr. X did so under the direction of preceptors at such times and places as designated by the defendant, excepting the days the

hospital was closed to outpatients. His work constituted the medical service the defendant provided for the patients who came to the hospital. Moreover, the defendant gave monetary rewards to Mr. X. They were paid in the form of scholarship payments and allowances, but the defendant in fact withheld income tax on the premise that they were wages.

Thus, we must say that Mr. X rendered services under the direction and supervision of the defendant and therefore that he was a worker within the meaning of Article 9 of the Labor Standards Law and Article 2 of the Minimum Wage Law. Accordingly, the defendant should have paid him the prescribed minimum wage under Article 5 paragraph 2 of the Minimum Wage Law. The decision of the court below was correct and we dismiss the appeal of the defendant.

[Source: Case No. (ju) 1250 of 2002, decided on June 3, 2005: Minshu 59-5-938]

ANNOTATION

1) The Labor Standards Law is the main piece of legislation protecting employment conditions of Japanese workers. Its definition of "workers," which is in essence those who are employed for wages, is common to some other statutes such as the Minimum Wage Law, the Occupational Health and Safety Law, and the Workers' Accident Compensation Insurance Law. There are many lower-court cases involving a question whether a person is a "worker" to be covered by such statutes or an independent contractor. The Supreme Court held in the Yokohama-minami Labor Standards Inspection Office case (Decision of November 28, 1996, rodo-hanrei 714-14) that a truck driver who owned the vehicle and contracted with a manufacturing company for carriage of goods was not a worker, thereby denying his claim to workers' accident compensation insurance benefits. Although he contracted exclusively with the company and was in a dependent position in various aspects, the Court stressed that he worked at his own risk and calculation using his own vehicle and that the company did not control or supervise the way he worked except for the destination and the arrival time of the goods. The Court did not present a theoretical framework, but many agree that a decision should be made on a case-by-case basis with due regard to such relevant factors as freedom to decline the order of work, direction and supervision over the course of work, temporal and geographical restrictions, permissibility of work by an alternate, furnisher of tools and materials, possibility of dealing with other clients, the nature of the compensation, and the treatment of the compensation for taxing purposes.

It should be noted that the Trade Union Law adopts a wider definition of "workers." Even those who are regarded as independent contractors under the Labor Standards Law may be covered by the Trade Union Law if they are suitable for unionization and collective bargaining.

2) The present case concerned a person who was not an independent contractor but a participant in an educational program, and the Supreme Court held squarely that a trainee doctor was a "worker" within the meaning of the Labor Standards Law and the Minimum Wage Law. The decision emphasizes at the outset that a trainee doctor is licensed to practice. This is presumably because the Court wanted to distinguish it from an "intern" under the old system of the 1960s, who has graduated from a medical university but is being trained at a hospital before taking the national examination. By contrast, a trainee doctor is fully qualified as a doctor and in fact performs various medical practices on behalf of the hospital, integrated into its operation and placed under its direction and supervision. Although the monetary compensation was labeled as a "scholarship," income tax on wages was withheld by the defendant. The Supreme Court does not seem to find any difficulty in reaching its conclusion, and most academics are in support of it. It is therefore rather regrettable that many trainee doctors had worked under similarly deplorable conditions.

The plaintiffs here filed a separate lawsuit against the defendant for damages for the death of their son, claiming that he died from overwork and the defendant was responsible for it. The Osaka High Court upheld the claim, ordering the defendant to pay over 84 million yen (Kansai Medical University case, Osaka High Court, July 15, 2004, rodo-hanrei 879-22). Thanks in part to their lawsuits, the conditions of trainee doctors have been improved considerably in recent years. In 2004 two years of clinical training became mandatory for a newly licensed doctor, and the Ministry of Health, Labor and Welfare is seeing to it that the trainee doctors are treated properly under the new system.

PART TWO

BASIC RIGHTS PERTAINING TO LABOUR

GERMANY

Federal Labour Court
Decision of 14 December 2004 –1 ABR 51/03

Freedom of association – an employees' association's competence to participate in collective bargaining – trade union quality

HEADNOTES

Facts

The parties involved dispute whether the defendant – an employees' association named UFO (Unabhängige Flugbegleiter Organisation e.V – Independent Organisation of Flight Attendants) – has the competence to conclude collective agreements, i.e. if it has trade union quality.

Initially, UFO had been founded as a professional association for cabin flight attendants, aimed at providing a common platform for members of the ÖTV (Gewerkschaft öffentlicher Dienst, Transport und Verkehr – Union of Public Services, Transport and Traffic) and of the DAG (Deutsche Angestelltengewerkschaft – German Union of White-Collar Workers). In 1999, when they realized that union membership among cabin flight attendants was constantly dropping, UFO decided to become a trade union itself, aiming at the conclusion of collective agreements. As a consequence, its association articles were amended. Since then, the association's purpose has been "to safeguard and improve the interests of flight attendants in Germany and to further their occupational interests and their interests in collective bargaining, in particular by concluding collective agreements, if necessary by using measures of industrial action". UFO's articles of association furthermore provide details on industrial action measures and the payment of strike benefits. The latter is guaranteed to members participating in measures of industrial action for more than three days, irrespective of membership duration or the sum of membership fees paid. So far, UFO has not called its members out on strike action.

At first Lufthansa explicitly rejected to enter into negotiations with UFO. It had changed its mind in 2002. Among the collective agreements Lufthansa subsequently concluded with UFO, there were several agreements simply copying

agreements between ver.di and Lufthansa. However, UFO concluded also a few collective agreements of its own and others in which UFO could bring in its own ideas. On 31 March 2002, UFO had 6.467 members, i.e. 32 per cent of all cabin flight attendants working in or from Germany.

The applicant trade union ver.di (Vereinigte Dienstleistungsgewerkschaft – United Services Union), resulting from a later merger of DAG and ÖTV with three other trade unions and representing 3 million members, claims that UFO is no trade union. According to ver.di's view, UFO is lacking the necessary powers and capabilities.

Decision

1. Even a comparatively small employees' association can have sufficient power to be acknowledged as a trade union: if it organises specialised employees who can, at short notice, hardly be replaced.

2. If a trade union restricts its competences to a profession concentrated in a few local focal points, a comparatively small organisational structure may be powerful enough to perform trade union tasks.

3. A trade union shall be structurally independent of its social antagonist. This principle is only violated if, due to personal or organisational interrelations or due to considerable financial allocations, the independent representation of interests is seriously endangered.

Law Applied

ARTICLE 9 PARA. 3 SENTENCE 1 GG (GRUNDGESETZ – GERMAN CONSTITUTION):

"The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession."

JUDGMENT

…

III. Der Antrag ist, wie das Landesarbeitsgericht mit im Wesentlichen zutreffender Begründung erkannt hat, unbegründet. Der Beteiligte zu 2) ist eine Gewerkschaft.

1. Nach der Rechtsprechung des Senats muss eine Arbeitnehmervereinigung bestimmte Mindestvoraussetzungen erfüllen, um tariffähig und damit eine Gewerkschaft im arbeitsrechtlichen Sinne zu sein. Sie muss sich als satzungsgemäße Aufgabe die Wahrnehmung der Interessen ihrer Mitglieder in

deren Eigenschaft als Arbeitnehmer gesetzt haben und willens sein, Tarifverträge abzuschließen. Sie muss frei gebildet, gegnerfrei, unabhängig und auf überbetrieblicher Grundlage organisiert sein und das geltende Tarifrecht als verbindlich anerkennen. Weiterhin ist Voraussetzung, dass die Arbeitnehmervereinigung ihre Aufgabe als Tarifpartnerin sinnvoll erfüllen kann. Dazu gehört einmal die Durchsetzungskraft gegenüber dem sozialen Gegenspieler, zum anderen aber auch eine gewisse Leistungsfähigkeit der Organisation (…). Diese Rechtsprechung ist verfassungsgemäß (…). ...

2. Hiernach erfüllt der Beteiligte zu 2) die Voraussetzungen einer tariffähigen Arbeitnehmervereinigung.

a) Nach den zutreffenden, von der Antragstellerin nicht angegriffenen Ausführungen der Vorinstanzen hat sich der Beteiligte zu 2) in § 2 seiner Satzung die Aufgabe gestellt, die Interessen seiner Mitglieder als Arbeitnehmer wahrzunehmen, und ist willens, für diese Tarifverträge abzuschließen. Auch ist er, wie das Landesarbeitsgericht ebenfalls unangegriffen ausgeführt hat, frei gebildet und erkennt das geltende Tarifrecht an.

b) Zutreffend hat das Landesarbeitsgericht erkannt, dass der Beteiligte zu 2) überbetrieblich organisiert ist. (…). … Die Zuständigkeit des Beteiligten zu 2) erstreckt sich nach § 2 Nr. 1 und nach § 4 Nr. 1 der Satzung auf die Flugbegleiter aller aus Deutschland operierenden Luftverkehrsgesellschaften. Wie das Landesarbeitsgericht richtig ausgeführt hat, steht der überbetrieblichen Organisation nicht der Umstand entgegen, dass die Mitglieder des Beteiligten zu 2) überwiegend Angestellte von Unternehmen des Lufthansa-Konzerns sind. Dies ist im Übrigen lediglich Ausdruck der zwischen den Luftverkehrsunternehmen bestehenden Größenverhältnisse.

c) Wie das Landesarbeitsgericht ebenfalls zutreffend ausgeführt hat, ist der Beteiligte zu 2) gegnerfrei. Das Erfordernis der Gegnerfreiheit bedeutet, dass einer Gewerkschaft grundsätzlich keine Personen angehören können, die ihrerseits Arbeitgeberfunktionen wahrnehmen (…). Diesem Erfordernis wird er Beteiligte zu 2) gerecht. Bei ihm sind weder Arbeitgeber noch deren Repräsentanten organisiert. Auch der bei ihm – jedenfalls zur Zeit der Entscheidung des Landesarbeitsgerichts – als Leiter des Tarifressorts tätige Herr H nahm bei der DLH keine Arbeitgeberfunktionen wahr.

d) Der Beteiligte zu 2) besitzt auch die erforderliche Gegnerunabhängigkeit.

aa) Nach der ständigen Rechtsprechung des Bundesarbeitsgerichts und des Bundesverfassungsgerichts ist die Gegnerunabhängigkeit notwendige Voraussetzung einer Gewerkschaft (…). … Das Merkmal ist nicht im formalen, sondern im materiellen Sinn zu verstehen (…). Es bedeutet für eine Koalition, welche die Arbeits- und Wirtschaftsbedingungen ihrer Mitglieder durch Abschluss von Tarifverträgen wahren und fördern will, dass sie vom tariflichen

Gegenspieler unabhängig genug sein muss, um die Interessen ihrer Mitglieder wirksam und nachhaltig vertreten zu können. Sie muss über ihre eigene Organisation und ihre Willensbildung selbst entscheiden können (…).

Nicht jegliche Beeinträchtigung der Unabhängigkeit schließt die Gewerkschaftseigenschaft aus. An einer dafür konstitutiven Voraussetzung fehlt es vielmehr erst dann, wenn die Vereinigung strukturell vom sozialen Gegenspieler abhängig ist (…). Würden an die Gegnerunabhängigkeit überspannte Anforderungen gestellt, bestünde die Gefahr, dass die Koalitionsfreiheit ausgehöhlt wird (…). An der erforderlichen Unabhängigkeit fehlt es daher erst dann, wenn die Abhängigkeit vom sozialen Gegenspieler in der Struktur der Arbeitnehmervereinigung angelegt und verstetigt und die eigenständige Interessenwahrnehmung der Tarifvertragspartei durch personelle Verflechtungen, auf organisatorischem Weg oder durch wesentliche finanzielle Zuwendungen ernsthaft gefährdet ist (…). Daran ist insbesondere zu denken, wenn sich eine Gewerkschaft im Wesentlichen nicht aus den Beiträgen ihrer Mitglieder, sondern aus Zuwendungen der Arbeitgeber finanziert und zu befürchten ist, dass die Arbeitgeberseite durch Androhung der Zahlungseinstellung die Willensbildung auf Arbeitnehmerseite beeinflussen kann (…). Bei der Beurteilung verbietet sich eine schematische Betrachtung. Maßgeblich sind die Umstände des Einzelfalls.

bb) Hiernach scheitert die Gewerkschaftseigenschaft des Beteiligten zu 2) nicht am Grundsatz der Gegnerunabhängigkeit. Auch die Tätigkeit von Herrn H als Leiter seines Tarifressorts führt nicht zu struktureller Abhängigkeit vom sozialen Gegenspieler. Das Landesarbeitsgericht ist zu Recht davon ausgegangen, dass selbst eine – von ihm freilich gerade nicht festgestellte – vergütete Freistellung von Herrn H durch die DLH zum Zwecke der Tätigkeit beim Beteiligten zu 2) allein nicht ausreichend wäre, um eine Gegnerabhängigkeit des Verbandes anzunehmen.

Allein die Vergütung eines einzelnen Mitarbeiters des Beteiligten zu 2) durch die DLH rechtfertigt nicht die Annahme, dieser finanziere sich in einem Maße, das seine Entscheidungsfreiheit beeinträchtige, aus Zuwendungen der Arbeitgeber. Es gibt auch keinerlei Anhaltspunkte für die Annahme, der Beteiligte zu 2) sei von Herrn H Finanzierung durch DLH abhängig. Vielmehr ist er bei über 6.000 Mitgliedern und Mitgliedsbeiträgen von 0,5 % des Monatseinkommens ersichtlich ohne Weiteres in der Lage, die Tätigkeit seiner Beschäftigten einschließlich derjenigen von Herrn H selbst zu finanzieren. Anderes behauptet auch die Antragstellerin nicht.

Auch die mit einer Fortzahlung der Vergütung etwa verbundenen Einflussmöglichkeiten der DLH auf die innere Unabhängigkeit von Herrn H und auf dessen Loyalität gegenüber dem Beteiligten zu 2) erscheinen jedenfalls

ohne Hinzutreten weiterer Umstände nicht als ausreichend, um die strukturelle Unabhängigkeit des Beteiligten zu 2) in Frage zu stellen. Zwar hat(te) Herr H als Leiter des Tarifressorts eine gerade für den Abschluss von Tarifverträgen zentrale Position inne. Er ist (war) aber in die Arbeit der Tarifkommissionen eingebunden und weder in der Gefahr noch in der Lage, sich an diesen vorbei beim Abschluss von Tarifverträgen einem einseitigen Diktat der Arbeitgeberseite zu unterwerfen. Auch ist nicht ersichtlich, dass der Beteiligte zu 2) bei Auftreten von Loyalitätskonflikten in der Person von Herrn H gehindert (gewesen) wäre, die etwa mit dessen Bezahlung der DLH eröffneten Einflussmöglichkeiten umgehend zu beseitigen. …

e) Der Beteiligte zu 2) besitzt ferner die erforderliche Durchsetzungsfähigkeit.

aa) Nach der ständigen Rechtsprechung des Senats muss eine Arbeitnehmervereinigung Durchsetzungskraft besitzen, um sicherzustellen, dass der soziale Gegenspieler Verhandlungsangebote nicht übergehen kann. Ein angemessener, sozial befriedender Interessenausgleich kann nur zustande kommen, wenn die Arbeitnehmervereinigung zumindest so viel Druck ausüben kann, dass sich die Arbeitgeberseite veranlasst sieht, sich auf Verhandlungen über eine tarifliche Regelung von Arbeitsbedingungen einzulassen. Die Arbeitnehmervereinigung muss von ihrem sozialen Gegenspieler ernst genommen werden, so dass die Arbeitsbedingungen nicht einseitig von der Arbeitgeberseite festgelegt, sondern tatsächlich ausgehandelt werden. Ob eine Arbeitnehmervereinigung eine solche Durchsetzungsfähigkeit besitzt, muss auf Grund aller Umstände im Einzelfall festgestellt werden (…).

Auch diese Rechtsprechung ist verfassungsgemäß (…). Allerdings dürfen an die Tariffähigkeit keine Anforderungen gestellt werden, die erheblich auf die Bildung und Betätigung einer Koalition zurückwirken, diese unverhältnismäßig einschränken und so zur Aushöhlung der durch Art. 9 Abs. 3 GG gesicherten freien Koalitionsbildung und -betätigung führen. Durchsetzungsfähigkeit gegenüber dem sozialen Gegenspieler zur Teilnahme an einer sinnvollen Ordnung des Arbeitslebens kann daher nicht bedeuten, dass die Arbeitnehmer-Koalition die Chance des vollständigen Sieges haben muss. Es muss nur erwartet werden können, dass sie vom Gegner überhaupt ernst genommen wird, so dass die Regelung der Arbeitsbedingungen nicht einem Diktat der einen Seite entspringt (…).

Für die Beurteilung der Durchsetzungskraft kommt im Einzelfall insbesondere der Mitgliederzahl entscheidende Bedeutung zu (…). Die Organisationsstärke ist dabei im Verhältnis zu dem von der Arbeitnehmerkoalition selbst gewählten räumlichen und fachlichen Organisationsbereich zu bewerten. In diesem muss sie sich gegenüber der

Arbeitgeberseite durchsetzen können (…). Bei einer nur kleinen Zahl von Mitgliedern kann sich die Möglichkeit einer Arbeitnehmervereinigung, empfindlichen Druck auf den sozialen Gegenspieler auszuüben, auch daraus ergeben, dass es sich bei den organisierten Arbeitnehmern um Spezialisten in Schlüsselstellungen handelt, die von der Arbeitgeberseite im Falle eines Arbeitskampfs kurzfristig überhaupt nicht oder nur schwer ersetzt werden können (…). Dem kann nicht entgegen gehalten werden, durch die Anerkennung "kleiner" Gewerkschaften sei die den Tarifpartnern obliegende sinnvolle Ordnung des Arbeitslebens gefährdet. Vielmehr ist auf Grund der durch Art. 9 Abs. 3 gewährleisteten Koalitionsfreiheit jede Gewerkschaft berechtigt, für sich zu entscheiden, für welche Arbeitnehmer und in welchem Wirtschaftsbereich sie tätig werden will (…).

Die Durchsetzungskraft einer Arbeitnehmervereinigung kann sich darin zeigen, dass sie schon aktiv in den Prozess der tariflichen Regelung von Arbeitsbedingungen eingegriffen hat (…). Dabei können auch Anschlusstarifverträge ein Anzeichen für Durchsetzungskraft sein. Dieses Indiz ist aber dann nicht ausreichend, wenn es sich bei den Tarifverträgen um Schein- oder Gefälligkeitstarifverträge handelt oder wenn sie auf einem Diktat der Arbeitgeberseite beruhen (…).

bb) Hiernach verfügt der Beteiligte zu 2) über die erforderliche Durchsetzungsfähigkeit.

(1) Sie ergibt sich bereits aus der Organisationsstärke. Der Beteiligte zu 2) hatte am 31. März 2002 6.467 Mitglieder. Bei ca. 20.000 Flugbegleitern ergab sich damit ein Organisationsgrad von etwa 32 %. Dieser erlaubt ihm, genügend Druck auf die Arbeitgeberseite auszuüben, um diese zu ernsthaften Verhandlungen zu veranlassen. Dem steht nicht entgegen, dass es sich bei den Flugbegleitern um eine vergleichsweise kleine Berufsgruppe handelt. Sie können die Arbeitgeberseite in einem Arbeitskampf gleichwohl unter erheblichen wirtschaftlichen Druck setzen. Zwar haben sie für den Luftverkehr nicht dieselbe Schlüsselposition wie Piloten. Dennoch sind sie auf Passagierflügen unverzichtbar. In ihrer Funktion können sie jedenfalls kurzfristig kaum durch andere Arbeitnehmer ersetzt werden. Da schon der Ausfall weniger Flüge für die Luftverkehrsgesellschaften erhebliche wirtschaftliche Folgen hat, können doch ausgefallene Flüge regelmäßig nicht einige Tage oder gar Wochen später nachgeholt werden, ist ein Streik der Flugbegleiter geeignet, die Arbeitgeberseite zu ernsthaften Verhandlungen zu zwingen.

Anhaltspunkte für die Annahme, die beim Beteiligten zu 2) organisierten Flugbegleiter seien nicht bereit oder in der Lage, erforderlichenfalls einen Arbeitskampf zu führen, sind nicht ersichtlich. Ein solcher ist in § 2 Nr. 1 der Satzung des Beteiligten zu 2) und in dessen Regularien zu Arbeitskampf-

maßnahmen und Streikunterstützung als Mittel zur Durchsetzung von Tarifverträgen ausdrücklich vorgesehen. Wie das Landesarbeitsgericht zutreffend ausgeführt hat, gibt es keinen Grund für die Annahme, diese Regelungen seien nicht ernst gemeint. Vielmehr leisten die Mitglieder des Beteiligten zu 2) ihre Mitgliedsbeiträge ersichtlich auch zu dem Zweck, im Falle von Arbeitskämpfen eine Streikunterstützung zu ermöglichen. Im Übrigen ist die Zahlung einer Streikunterstützung ohnehin keine notwendige Voraussetzung für die Durchsetzungskraft einer Arbeitnehmervereinigung (…). Dementsprechend bestehen auch keine Zweifel an der finanziellen Fähigkeit des Beteiligten zu 2), einen Arbeitskampf zu führen. …

(2) Wie das Landesarbeitsgericht richtig ausgeführt hat, sprechen auch die von dem Beteiligten zu 2) im Laufe des vorliegenden Verfahrens geschlossenen Tarifverträge für seine Durchsetzungsfähigkeit. Sie zeigen, dass er von der Gegenseite als Verhandlungspartner ernst genommen wird. Zwar sind unter diesen Tarifverträgen zu einem großen Teil Anschlusstarifverträge. Diese entsprangen aber weder einem einseitigen Diktat der Arbeitgeberseite noch handelt es sich um bloße Schein- oder Gefälligkeitsverträge. Dies wird insbesondere durch die Entwicklung der Verhandlungen mit dem Lufthansa-Konzern belegt. Während dieser in den Jahren 2000 und 2001 Tarifverhandlungen mit dem Beteiligten zu 2) noch ausdrücklich abgelehnt hatte, sah er sich – offensichtlich auf Grund der tatsächlichen Entwicklung – ab Sommer 2002 veranlasst, diesen als Verhandlungspartner anzuerkennen und mit ihm Tarifverträge zu schließen. Zu diesen gehörten auch Vereinbarungen, in die der Beteiligte zu 2), wie in Ziff. IX des Vergütungstarifvertrages Nr. 24 vom 7. März 2003, eigene Vorstellungen einbrachte. Im Übrigen kann jedenfalls in wirtschaftlich schwierigen Zeiten, wenn die Arbeitgeberseite auf eine Senkung der Personalkosten drängt, die bloße Erstreckung tariflicher Ansprüche auf bisher nicht erfasste Arbeitnehmer Ausdruck von Durchsetzungskraft sein. Darüber hinaus hat der Beteiligte zu 2) auch eigenständige Tarifverträge mit der Arbeitgeberseite geschlossen, wie den mit der Arbeitsrechtlichen Vereinigung Hamburg (AVH) für die CFG am 1. Januar 2002 geschlossenen Tarifvertrag "Entgeltumwandlung Privatrente", den am 9. Januar 2003 mit der German Wings GmbH für das Kabinenpersonal geschlossenen Tarifvertrag Personalvertretung und den mit der Augsburg Airways GmbH & Co. KG am 3. April 2003 geschlossenen Vergütungstarifvertrag Nr. 1 für das Kabinenpersonal. Dabei musste das Landesarbeitsgericht jedenfalls unter den vorliegenden Umständen den Einzelheiten des Zustandekommens dieser Tarifverträge nicht nachgehen. Anhaltspunkte für die Annahme, sie beruhten auf einem Diktat der Arbeitgeberseite oder seien Schein- oder

Gefälligkeitstarifverträge, sind weder von der Antragstellerin vorgetragen noch sonst ersichtlich. …

f) Der Beteiligte zu 2) verfügt über einen organisatorischen Aufbau, der ihn befähigt, die Aufgaben einer Gewerkschaft für die Flugbegleiter wahrzunehmen.

aa) Nach der ständigen Rechtsprechung des Senats muss eine Gewerkschaft auch von ihrem organisatorischen Aufbau her in der Lage sein, die ihr gestellten Aufgaben zu erfüllen. Der Abschluss von Tarifverträgen erfordert Vorbereitungen. Hierfür sind die wirtschaftlichen Entwicklungen und sonstigen Rahmenbedingungen zu beobachten und zu prognostizieren, um daraus die Tarifforderungen zu entwickeln. Auch muss die tatsächliche Durchführung eines Tarifvertrags überwacht und abgesichert werden. Das Verhandlungsergebnis, das regelmäßig Kompromisscharakter hat, muss verbandsintern vermittelt und durchgesetzt werden. Die Erfüllung dieser Aufgaben muss eine Arbeitnehmervereinigung sicherstellen, um als Gewerkschaft Tarifverträge abschließen zu können (…).

An den erforderlichen Organisationsaufbau können dabei keine starren Mindestanforderungen gestellt werden. Maßgeblich sind auch insoweit die Umstände des Einzelfalls. Entscheidend ist, ob die Organisation ihre Aufgaben in dem selbst bestimmten Zuständigkeitsbereich erfüllen kann. Erstreckt sich dieser auf das gesamte Bundesgebiet und auf Arbeitnehmer in einer Vielzahl von Berufen und Sparten, wird regelmäßig eine erhebliche organisatorische Ausstattung auch in der Fläche erforderlich sein (…). Beschränkt dagegen eine Gewerkschaft ihre Zuständigkeit auf eine Berufsgruppe, die sich noch dazu räumlich auf wenige Schwerpunkte konzentriert, kann auch ein relativ kleiner, zentralisierter Apparat ausreichen, um Tarifverhandlungen effektiv zu führen, die Durchführung von Tarifverträgen zu überwachen und abzusichern sowie die Mitglieder zu betreuen. Meist wird eine leistungsfähige Organisation einen hauptamtlichen Mitarbeiterapparat erfordern. Unabdingbare Voraussetzung für eine Gewerkschaft ist die Beschäftigung hauptamtlicher Mitarbeiter aber nicht. Es ist nicht von vornherein ausgeschlossen, eine leistungsfähige Organisation auch auf der Grundlage ehrenamtlicher Mitarbeit aufzubauen. Allerdings müssen dann die ehrenamtlichen Mitarbeiter über die erforderlichen Kenntnisse und Erfahrungen verfügen.

bb) … Wie das Landesarbeitsgericht festgestellt hat, sind in den Büroräumen des Beteiligten zu 2) in M auf drei Vollzeitstellen sechs Angestellte beschäftigt, die sich mit Verwaltung, Steuerfragen, Buchhaltung und der Betreuung der EDV befassen. Hinzu kommen nach den Feststellungen des Landesarbeitsgerichts mit Herrn H, Frau S, Herrn L und Frau R vier weitere Mitarbeiter, die im Umfang von insgesamt drei Vollzeitstellen für tarif- und berufspolitische Fragen, für Rechtsfragen und für die Öffentlichkeitsarbeit

zuständig sind. Dabei ist für die Stärke des organisatorischen Aufbaus ausschlaggebend, dass dem Beteiligten zu 2) die Arbeitskraft dieser Mitarbeiter tatsächlich zur Verfügung steht. Dagegen kommt es auf deren von der Antragstellerin mit Nichtwissen bestrittene Bezahlung nicht entscheidend an. Außerdem sind mit den Bereichen Altersversorgung, Arbeitsrecht und für strategische Fragen vier im Ruhestand befindliche ehrenamtliche Mitarbeiter befasst, die aus ihrer früheren Tätigkeit über einschlägige Erfahrungen verfügen. Daneben gibt es eine erhebliche Anzahl weiterer ehrenamtlicher Mitarbeiter. Dazu gehören insbesondere die 91 Mitglieder der vom Beteiligten zu 2) gebildeten acht Tarifkommissionen.

Angesichts dieser Feststellungen ist es rechtsbeschwerderechtlich nicht zu beanstanden, dass das Landesarbeitsgericht den organisatorischen Aufbau des Beteiligten zu 2) unter Berücksichtigung der besonderen Verhältnisse des Luftverkehrsgewerbes als für die Wahrnehmung der Aufgaben einer Flugbegleitergewerkschaft ausreichend erachtet hat. Das Landesarbeitsgericht hat dabei zu Recht berücksichtigt, dass der Beteiligte zu 2) ein hochspezialisierter Verband ist, dessen Mitglieder zu einem Großteil in den Flughäfen Frankfurt am Main und München erreichbar sind und sich im Übrigen auf eine überschaubare Zahl von Flughäfen verteilen. Bei einer derartigen Struktur genügt bereits eine vergleichsweise geringe Anzahl hauptamtlich Beschäftigter, um die Mitglieder des Verbands zu erreichen, die Belegschaften anzusprechen, die Verhandlungen und den Abschluss von Tarifverträgen vorzubereiten und deren Durchführung zu überwachen. Keinen Bedenken begegnet auch die Erwägung des Landesarbeitsgerichts, wegen der leichten Erreichbarkeit der Flughäfen seien dort feste hauptamtliche Repräsentanten des Beteiligten zu 2) nicht erforderlich. Insbesondere angesichts der vom Beteiligten zu 2) für die maßgeblichen Flugunternehmen gebildeten, mit insgesamt 91 Mitgliedern vollständig besetzten acht Tarifkommissionen ist auch eine sachgerechte Vorbereitung und Durchführung von Tarifverhandlungen gewährleistet. Dies findet seine Bestätigung in den vom Beteiligten zu 2) bereits geschlossenen Tarifverträgen (…).

ANNOTATION

The Federal Labour Court's decision of 14 December 2004 deals with the characteristics of a trade union, distinguishing it from other employees' associations in terms of Article 9 (3) GG. This is a question directed at the heart of the German system of industrial relations. For only trade unions can conclude collective agreements (*Tarifverträge*); only trade unions may call out on strike. The

conditions under which an employees' association is to be regarded as possessing trade union quality are hence of utmost importance for the functioning of the German system of collective bargaining. Nevertheless, the German legislator has not specified these conditions. The central provision labour courts may consult in order to decide whether an employees' association has trade union quality is a constitutional one: Article 9 (3) GG, guaranteeing the freedom to form associations to safeguard and improve working and economic conditions.

However, not any employees' association is an association in terms of Article 9 (3) GG; not any association in terms of Article 9 (3) GG is a trade union. According to the established case law of the Federal Labour Court, an employees' association shall fulfil a long list of requirements before it is acknowledged as possessing trade union quality. When developing that list, the Court has had to balance two conflicting interests: on the one hand, only strong trade unions, being able to put pressure on the employers' side, guarantee appropriate results of collective bargaining. On the other hand, if the requirements for acknowledgement were too demanding, it would become very difficult for new trade unions to be recognised. Established trade unions are of course interested in keeping newcomers out. For more often than not the formation of new trade unions is on the account of established trade unions' membership. And all in all, the density of German trade unions is steadily declining.

As well as both lower courts, the Federal Labour Court found that the employees' association named UFO has trade union quality. Formally, the decision does not bring about many new facets. It rather is a good example illuminating the requirements of trade union recognition in Germany. As will be shown, the way the Federal Labour Court judges the facts at stake, however, may well be interpreted as an indication for a considerable relaxation of the formally rather high requirements. However, from among the many arguments put forward by ver.di, only the most relevant can be discussed in the following.

1. The characteristics of an association in terms of Article 9 (3) GG

As indicated already earlier, under German law a trade union is an association in terms of Article 9 (3) GG meeting several extra requirements. As a consequence, an association claiming to be a trade union first of all has to show the characteristics of an association in terms of Article 9 (3) GG. As well as any association in terms of Article 9 GG, an association in terms of Article 9 (3) GG shall be an association under private law, allowing voluntary membership. However, associations in terms of Article 9 (3) GG differ from others in terms of Article 9 GG as regards their aim, which consists in safeguarding and improving of working and economic conditions. In addition, according to the Federal Labour Court's established case law, an association in terms of Article 9 (3) GG

shall fulfil a whole range of further criteria: (a) First of all, the association shall be established for unlimited duration. (b) Secondly, a corporate structure is required: The association shall be organized in a way guaranteeing its continuity even if members leave and new persons join it. (c) Moreover, associations in terms of Article 9 (3) GG have to follow the principles of democratic decision-making. (d) Furthermore, the association may only consist of members belonging to either employees' side or employers' side. (e) An employees' association may also not be restricted to one establishment but shall be an interplant association. (f) In addition, an association in terms of Article 9 (3) GG shall be independent from its social antagonist. (g) Last not least, associations in terms of Article 9 (3) GG shall be independent from third parties, as e.g. the state, political parties or the churches.

In the case at stake, ver.di questioned *inter alia* UFO's independence of the employers' side, claiming that Lufthansa paid one of UFO's employees. According to the Federal Labour Court's established case law, "independence of the social antagonist" means that an association in terms of Article 9 (3) GG shall (only) be independent enough for being able to represent its members' interests effectively. For a trade union shall be able to decide about its own organisation and decision-making. However, as already indicated, not any impairment of its independence may exclude trade union quality. Otherwise, freedom of association would be undermined. According to the Federal Labour Court's established case law the requirement to be independent of the social antagonist is hence only lacking if the association is structurally governed by its social antagonist, i.e. if the dependency was founded and consolidated in the employees' association's structure and if either personal or organisational linkages or substantial financial allowances seriously endangered the associations ability to safeguard its members' interests independently. Such circumstances may particularly occur if a trade union's budget is substantially financed by employers' payments and if it has to be feared that the threat to stop payments could influence its decisions.

In the case of UFO, the Federal Labour Court was convinced that the association's independence was not seriously endangered because UFO had more than 6,000 members paying membership fees and was hence able to pay its employees. Even if one of UFO's employees would have in fact been paid by an airline company – a question not further pursued by the Federal Labour Court -, the association was hence sufficiently independent of its social antagonist.

2. Additional requirements of parties competent to conclude collective agreements

As already indicated above, not any employees' association in terms of Article 9 (3) GG has trade union quality. To be a trade union, an association must fulfil further requirements.

(a) The most important and most disputed of these is the disposal of sufficient power to exert pressure on the employers' side. This necessity is based on the assumption that proper functioning of the autonomous system of collective bargaining would be undermined if powerless associations were allowed to participate in collective bargaining. But it creates a barrier for new associations claiming to be trade unions and stabilises already established large trade unions. Therefore, but also due to an intervention of the Federal Constitutional Court, the Federal Labour Court has gradually lowered the standards of this criterion since the 1980s.

Today an employees' association shall possess the necessary power to guarantee that the social counterpart cannot simply ignore a bargaining offer. For an appropriate compromise of interests with socially pacifying effects may only be reached if the employees' association is able to exert as much pressure as necessary to cause the employers' side to engage in collective bargaining. The employees' association has to be taken seriously by its social antagonist in order to safeguard that working conditions are not unilaterally determined by the employers' side but are in fact negotiated between both parties to the collective agreement. Whether or not an employees' association disposes of such a power has to be determined taking into account all circumstances of the respective case.

The Federal Constitutional Court has found the requirement of sufficient power compatible with Article 9 (3) GG. The Court emphasised, however, that no demands shall be made retroacting considerably on the formation and activities of an association in terms of Article 9 (3) GG, limiting that association disproportionately and hence contributing to an erosion of the right to form associations and the associations' right to be active as guaranteed under Article 9 (3) GG. As a consequence, "power to exert pressure on the social antagonist" does not mean that the employees' association shall have the chance to win completely. It only requires that the association is taken seriously by its social antagonist, so that the regulation of working conditions cannot simply be dictated by one side.

One criterion possibly decisive to judge the power to exert pressure is the number of members. However, as the Federal Labour Court emphasises in the case at stake, the association's power shall be judged in relation to its regional and occupational scope determined by the association itself. Within this scope,

the association shall be able to stand up to the employers' side. If an association has only a small number of members, the ability to exert sufficient pressure on the social antagonist may also result from the fact that its members are specialists who work in key positions and, in case of industrial action, cannot or can only hardly be replaced on short notice. In addition, the sufficient power of an employees' association may also be concluded from the fact that it has already actively participated in collective bargaining. Even if collective agreements concluded by other (established) trade unions are simply copied, this can be an indication for the association's power, unless these collective agreements shall be regarded as sham or courtesy collective agreements.

Although in March 2002 UFO had only 6,467 members – a number close to nothing when compared to ver.di's 3 million members – the Federal Labour Court assumed that the association disposed of the necessary power. For UFO represented about 32 per cent of all cabin flight attendants countrywide. And though even the number of 20,000 flight attendants countrywide is a rather small one, the Court found that cabin flight attendants can put the employers' side under considerable pressure. Of course, the Court had to concede, their position was not as crucial as that of pilots. Nevertheless it regarded cabin flight attendants as indispensable for passenger flights. At least at short notice, the Court stated, they can hardly be replaced. In addition, the cancellation of only a few flights may have considerable economic effects for the airline because flights cancelled cannot simply take place a few days or even weeks later.

Facts indicating that UFO was not ready or unable to call out its members on strike if necessary were not presented. On the contrary, as the Court emphasised, the standing rules of UFO explicitly provided for measures of industrial action and strike benefits as means to enforce collective agreements. Moreover, the Court took the fact that UFO had concluded several collective agreements as an indication of its power to put pressure on the social antagonist. Although many of these agreements simply copied collective agreements concluded between ver.di and Lufthansa, the Court found that they were neither the result of the employers' unilateral dictate nor were they to be regarded as mere sham or courtesy collective agreements. It then considered the development of negotiations between UFO and the Lufthansa group as a proof of the association's necessary power. While Lufthansa initially explicitly rejected to enter into negotiations with UFO, it had changed its mind and had recognised UFO as a partner for collective bargaining since summer 2002. Among the collective agreements subsequently concluded between UFO and the Lufthansa group were also agreements in which UFO had brought in its own ideas. In times of economic difficulties, when the employers' side is urging for a cut of personnel cost, the mere extension of collective agreements to employees so far not cov-

ered by the collective agreement can also be an expression of sufficient power. Moreover, UFO had concluded a few of its own collective agreements.

(b) The other criterion distinguishing a trade union from a mere association in terms of Article 9 (3) GG concerns its organisational structure. According to the established case law of the Federal Labour Court a trade union shall be able to perform its tasks. The conclusion of collective agreements needs to be prepared. For that purpose, a trade union has to watch and to forecast economic developments and other framework conditions in order to develop demands to be negotiated. In addition, the factual implementation of a collective agreement shall be controlled and secured. The results of collective bargaining, usually constituting a compromise, have to be communicated and accomplished within the association. In order to be recognised as a trade union competent to conclude collective agreements, an employees' association must hence guarantee proper performance of these tasks.

However, as the Federal Labour Court stated, no abstract requirements can be set up in that respect. It all depends, whether or not the association is capable of fulfilling its tasks within the frame of its self-determined scope of competences. If the association's self-determined scope covers the whole territory of Germany and employees of a variety of occupations and professions, usually considerable equipment also all over Germany will be required. If, however, a trade union limits its scope to one occupational group, concentrated to a few focal points as it is the case with UFO, also a comparatively small, centralised organisation may suffice to negotiate collective agreements effectively, to control and safeguard their implementation and to attend to the members. Usually, an effective organisation will require a full-time crew of employees. However, as the Court put it, the employment of full-time employees is no indispensable requirement of a trade union.

GREAT BRITAIN

Court of Appeal
Regina (National Union of Journalists) v Central Arbitration Committee
(Secretary of State for Trade and Industry intervening)

Recognition of trade union – whether recognition agreement with another union in force – impact of European Convention on Human Rights

HEADNOTES

Facts

The National Union of Journalists (NUJ) applied directly to Mirror Group Newspapers Ltd (MGN) to be recognised voluntarily in relation to journalists employed in its sports division. The NUJ had a high level of support among the journalists in question and initially was led by MGN to believe that it would be granted voluntary recognition. However, without warning MGN recognised the British Association of Journalists (BAJ), a breakaway union from the NUJ, which had a very low level of support among the journalists in question. After its rejection by MGN the NUJ made a formal claim for recognition under the statutory recognition machinery, which came into force in 2000. The Central Arbitration Committee (CAC) held that it had no power to entertain the NUJ's application because there was already in force a recognition agreement with the BAJ. The Administrative Court (Hodge J) upheld the CAC's decision, as, on appeal, did the Court of Appeal.

Decision

The CAC was entitled to find that the agreement with the BAJ was not a sham and was binding on the BAJ and MGN when it was signed and so was in force at the time of the NUJ's application. The British legislation did not involve a breach of either Article 11 or 14 of the European Convention on Human Rights.

Law Applied

SCHEDULE A1 TO THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992, as inserted by the Employment Relations Act 1999, paragraph 35:

An application ... is not admissible if the CAC is satisfied that there is already in force a collective agreement under which a union is (or unions are) recognised as entitled to conduct collective bargaining on behalf of any workers falling within the relevant bargaining unit.

EUROPEAN CONVENTION ON HUMAN RIGHTS, ARTICLES 11(1) AND 14:

Everyone has the right to freedom of assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination . . .

JUDGMENT

LORD JUSTICE BUXTON:

. . .

1. In considering the decision of the CAC and the apparently unusual outcome of it, it is relevant to remind ourselves of what the CAC said in paragraph 42 of its determination:

> "We are comforted by two matters in reaching this negative conclusion on the question of support for the voluntarily recognised union. The first is that it coincides with the traditional understanding of voluntary recognition."

They then quote from Deakin and Morris Labour Law, 3rd edition, at page 765 in the following terms.

> "A further, and less commented on, consequence of the voluntary nature of trade union recognition is that there is no mechanism to control the employer's choice of union. Thus, there is nothing to prevent an employer recognising a union which may have only minimal support among the workforce."

2. The CAC continued:

> "Second, and more pertinent, is the emphasis placed in the White Paper which preceded the introduction of the statutory recognition procedure on the desirability of taking inter-union disputes outside the scope of the Panel's jurisdiction."

3. However, having said that, the CAC indicated that it was very far from satisfied about the outcome that its application of paragraph 35 had produced. It said this in paragraph 43 of its determination, immediately after the passage that I have just read:

> "43. Nevertheless, we should like to put on record our firm belief that the exclusionary rule contained in paragraph 35 has not achieved justice in this case. The employer has been able to defeat what are in all probability the wishes of a majority of the relevant workforce by the simple expedient of concluding a voluntary recognition agreement with a wholly unrepresentative union. It may be said that the principle of avoiding CAC adjudication upon inter-union disputes was regarded by Parliament as more important than the principle of providing collective bargaining where a majority of the appropriate workforce desire it. Even accepting that, we think this case displays a lacuna in the legislation. Were the BAJ a non-independent trade union, which it is not, its recognition by the Company could be challenged under Part VI of the Schedule. Were the BAJ affiliated to the Trades Union Congress, which it is not, the NUJ could have recourse to the procedures of the TUC to bring about a resolution of the issues raised by the case. Since the BAJ is independent but not affiliated, the defeated majority union has no avenue of potential redress, once it is excluded from the statutory recognition process. This seems to us highly unsatisfactory."

4. But the nub of the matter, as the CAC recognised in those two passages, was that once the union with which the employer had concluded the agreement was indeed an independent union (as there is no doubt that the BAJ is), then the CAC had, and this court has, to apply the wording of the scheme including paragraph 35. Before the CAC and before the judge a range of matters were argued in relation to the proper construction of paragraph 35. But before us the argument came down to an argument about the meaning of the words "already in force" in that paragraph.

5. As to the agreement itself, it is not necessary to set out the whole of it. It starts with a number of, if I may be permitted to say so, wholly proper, though possibly aspirational, intentions in the relationship between MGN and BAJ, and then comes in paragraph 4 to a paragraph headed "union recognition". It is necessary to set that out because it plays a part in the argument in this case:

> "'By this agreement MGN formally recognises the rights of the BAJ union and no other organisation ..."

and then there is a series of bullet points, of which I need only read, I think, the first two:

> "• to negotiate changes to pay, hours and holidays on behalf of the employees within scope

> "• to be informed and consulted about training plans and any other changes involving redundancies or the transfer of an undertaking affecting the employees within scope."

6. Clause 7(1) relates to negotiating procedure, harking back to the first of the bullet points just referred to, and says:

> "7(1) The parties will negotiate on pay, hours and holidays within the scope of this agreement in an open and constructive manner and keeping with the spirit of this agreement
>
> (2) The procedure for handling proposals from either party is set out at appendix B."

7. If we turn to appendix B we find a scheme for the creation of a Joint Negotiating Committee, with a chairman rotating between both sides and various other structural arrangements for the composition of the JNC which appear to be of a familiar nature.

8. Against that background I turn to the question of construction: what is meant by the agreement being "already in force"? As a matter of normal legal or contractual understanding, I would think that an agreement is "in force" when it can be shown to be binding on the parties to it. No one has been able to point to any authoritative, or indeed any, exposition of the meaning of this phrase in general contractual practice, nor have the court's own researches revealed anything of that sort. But that, in my estimation, is straightforwardly what contract lawyers would understand by the statement that an agreement was in force. Yet the NUJ as part of its case argued that since collective agreements are not legally binding, contractual analysis in a circumstance like this is inappropriate. But, for my part, I would think, first, that the understanding that collective agreements are not legally binding only applies to the enforcement of those agreements and not to their formation; and I am fortified in that view by it being the same as that of the expert CAC, as stated in paragraph 44 of its determination. Secondly, and in any event, contractual analysis must at least provide a strong analogy when one is looking at an agreement such as this, and indeed some of the submissions, and in particular the first submission of Mr Hendy QC for the NUJ, did draw on contractual theory.

9. The CAC itself accepted that the fact that the parties considered themselves to be bound was not conclusive as to whether the agreement was in force, but subject to that, as I would think, they agreed with the approach that I have just ventured to suggest. I draw that from paragraphs 47 and 48 of their determination, addressing in fact a submission by Mr Linden for MGN, which he will forgive me for not setting out. The CAC said this in paragraph 47:

> "We think it must be open to a Panel to conclude in an appropriate case that the parties, by inaction, have abandoned a recognition agreement, even if they also convince the Panel that they believe otherwise. If actions speak louder than words, we think they (or rather inaction) also speak louder than beliefs, at least in some contexts."

10. The CAC, however, went on to say that that was not this case. They said this in paragraph 48:

> "We think that in this case the normal rule applies and that the recognition agreement came into force on July 3, upon the signatures of Mr Turner on behalf of the BAJ and Mr Budd and Mr Reed, who signed on behalf of MGN."

11. The CAC then went on say that Mr Hendy had submitted before them that there were features of this particular recognition agreement which made its coming into force dependent on the satisfaction of certain conditions which have not in fact been fulfilled. They were under the impression that Mr Hendy had not developed those submissions. He assures us that he indeed did so, and whatever the rights and wrongs of that he has certainly been free to and has developed those submissions before this court. It is to those that I must now turn.

12. The first submission, which was related to the main argument but was not the same as it, was that the creation and indeed coming into operation of the Joint Negotiating Committee was a condition precedent to the coming into force of the agreement. I cannot agree. Firstly, that is not what the agreement says or can be interpreted as saying. That is not my view only, but also that of the CAC, who said at the end of paragraph 48, in relation to Mr Hendy's arguments sketched out at least before them:

> "... we have not been able to read the recognition agreement in the way suggested [by counsel]."

Nor, with respect, can I.

13. Secondly, and in any event, such an interpretation would be extremely unlikely in an industrial relation context, because it would potentially produce uncertainty and conflicts if an agreement was made between the parties, but then said not to be in force until some step was taken. The CAC addressed the industrial relations realities of such a situation in paragraph 45 of its determination. True it is that there it was addressing an argument advanced by Mr Hendy somewhat different from that which I am dealing with at the moment; that is to say, that implementation of the agreement at large had to take place before it could be said to be "in force". But the practical force of the condition precedent argument is just the same as the practical force of Mr Hendy's implementation argument that he raised before the CAC but not before us. The CAC said of that:

> "We think that the employer ... would receive short shrift from the union it recognised in March if it recognised a different union in April and justified its actions to the first union on the grounds that the first union's recognition agreement was not in force when it was signed."

That, if I may say so, seems self-evident. The condition precedent argument therefore does not, in my judgement, run.

14. Mr Hendy, however, put the case in a different way before this court in particular in paragraphs 25 and 26 of his skeleton argument which I will venture to set out:

> "25. It is not submitted that such an entitlement [that is to say the entitlement to negotiate] needs to have been exercised in order to satisfy the CAC that the agreement is already in force. However, if the entitlement has not yet been exercised, it is submitted that it is then incumbent on the CAC to consider whether:
>
> (a) there is a real and genuine intention on the part of both parties that the entitlement to negotiate will be exercised; and
> (b) the entitlement to negotiate is reasonably capable of being exercised; and
> (c) there is a real prospect that the entitlement to negotiate will be exercised on a reasonably certain future date or on the happening of a specified likely event; and, in any case, in the reasonably near future.
>
> 26. It is submitted that on the facts of the present case none of the three conditions specified could be fulfilled."

15. Expanding on or possibly summarising those submissions, Mr Hendy said to us that "in force" meant more than that there was simply an agreement. That agreement must be reasonably capable of being operated and have reasonable prospects of being so operated.

16. That formulation and the points listed in Mr Hendy's skeleton argument, to which he said the CAC should have had regard, comes in my view very close, at least in this case, to suggesting that the agreement was in fact a sham. When pressed on that point I did not understand Mr Hendy to resile from such a contention, at least in the sense of saying that it was known that the agreement would never work.

17. But whatever arguments that were or were not put to them, it is clear that the CAC were very unenthusiastic indeed about this agreement, and alert to the possibilities of paragraphs 35 being misused. They heard evidence from the people who made the agreement, and they were best placed to determine (and I have no doubt that if they thought it justified would have determined) whether or not that agreement was a sham. There is no basis on which this court can make such a finding or come near to doing so.

18. Once it is agreed, or at least accepted, that the agreement is genuine, albeit being used to an end that paragraph 35 did not envisage, the additional re-

quirements argued for by Mr Hendy simply cannot stand up. As the CAC held, there may come a time when failure to act or impossibility cause the agreement to collapse or force a tribunal to say that it has collapsed. But unless the possibility of the agreement operating is simply not believed in by the parties to it, and as we have seen the CAC did not so find, it is wrong as a matter of contract, or indeed as a matter of logic, to say that an agreement does not come into present force simply on the basis of doubts about its future viability.

19. That makes it strictly unnecessary to go on to the dispute between the parties as to whether this agreement had in fact been operative. That question is, however, relevant because if the agreement is being operated, it must follow as a matter of necessity that it is "in force", whatever the understanding of that expression might be.

20. The CAC heard some evidence about this and made some findings about it. They said in paragraph 50 of their determination:

> "The heart of the July agreement is contained in its clause 4, where the 'MGN formally recognises the rights of the BAJ union and no other organisation' to negotiate on a list of matters, including changes to pay, hours and holidays and proposed redundancies. Mr Turner of the BAJ has sought recently to deal on behalf of the Sports Division journalists in respect of two matters falling within that list (the proposed redundancies and the move to seven-day publication) and MGN has discussed these matters with him - and, just as important, has refused to discuss them with the NUJ. This seems to us to be evidence of attempts to make the July agreement work, albeit in a halting way, rather than evidence of abandonment or suspension."

That on its face was evidence that the CAC was entitled to accept which went against any suggestion that the agreement was a mere shell or something that nobody was going to take any notice of.

21. Mr Hendy argued that the evidence was irrelevant. As I understood it, the submission was this. Paragraph 35 requires a "collective agreement" for collective bargaining to be in force. Section 178 of the Act refers to specific matters that are covered by a collective agreement and by the bargaining process. The only part of the agreement in this case that referred to bargaining was the first limb of clause 4(1). The second limb of clause 4(1), apparently dealing with redundancy, did not extend to bargaining or negotiation. No bargaining or negotiation had taken place between MGN and BUJ on the matters referred to in the first limb of clause 4(1); that is to say, pay and holidays.

22. I fear I have to say that I think that that objection is too refined. All that the CAC was looking for, and all that it needed to look for, was an earnest desire to work within the agreement; not evidence that any of its specific provisions had in fact been carried out. Granted that the agreement was in existence, the

evidence that the parties had dealt according to any of its terms, even if those were not the terms that gave it its status as a collective agreement, was in my judgement sufficient to show that the written agreement, genuinely signed up to, was not merely a piece of paper.

23. I would therefore uphold the CAC and the judge on this part of the case. I turn to the arguments raised on the European Convention on Human Rights.

24. Before the CAC and the judge, the NUJ asserted its rights of association under Article 11 of the Convention and said that they were being interfered with by the refusal of MGN to negotiate with them, and the fact that MGN were able to use paragraph 35 to that end.

25. The only case that was relied on for the proposition that that situation fell under Article 11 was Wilson v United Kingdom (2002) 35 EHRR 513. Mr Hendy relied on paragraph 42 of that determination, and in particular the words:

> "A trade union must thus be free to strive for the protection of its members' interests, and the individual members have a right, in order to protect their interests, that the trade union should be heard ..."

26. That, it was said, demonstrated that a right to negotiate on the part of the trade union was part of the Article 11 rights of its members. That was plainly not what the court thought. It went on in that very paragraph to say:

> "Article 11 does not, however, secure any particular treatment of trade unions or their members and leaves each State a free choice of the means to be used to secure that right to be heard ..."

27. It then went on in paragraphs 43 and 44 to expand on that view, and in particular said in paragraph 44:

> "The Court has not yet been prepared to hold that the freedom of a trade union to make its voice heard extends to imposing on an employer an obligation to recognise a trade union."

28. That the court has still not been prepared to take that step is demonstrated by the admissibility case of Popov v Bulgaria, application number 48047/99, drawn to our attention by the industry of Mr Coppel who represents the Secretary of State. In that case, on page 15 of the ruling, the court said this:

> "The court notes that the Convention does not per se guarantee to trade unions the right to collective bargaining."

and for that point it quoted Wilson v National Union of Journalists.

29. It is clear to me, as I believe it to have been clear to the constitution of this court that gave permission for this appeal, that the right to be recognised for

the purposes of collective bargaining does not fall within the rights guaranteed by Article 11.

30. Before us, however, the Convention was deployed in a different way, to say that the NUJ might be able to take advantage of a combination of their rights under Article 11 and Article 14, the prohibition against discrimination. This point was not raised either before the CAC or before the judge below, and therefore we have the disadvantage of not enjoying their considered view on it; the argument being, in brief terms, that it was discriminatory to afford the rights of negotiation to the BAJ but not to the NUJ.

31. Both MGN and the CAC were prepared to concede, and did concede, that the facts of this case fell within the "ambit" of Article 11 for the purposes of the application of Article 14. That may have been a generous concession. The question of what is meant by the ambit of a particular Article of the Convention is far from clear, at least in the jurisprudence of this jurisdiction. It had been hoped that the House of Lords in the case of *Ghaidan v Mendoza* [2004] 2 AC 557 would find itself impelled to give guidance on that subject, but in the events that occurred it did not need to do so.

32. It does at least seem clear, though not actually decided by anybody, that the optimistic view of the "ambit" of a Convention right that was adopted by at least one of the judges in this court in *Ghaidan* is not correct. But what the right answer is is not at the moment clear, and one is bound to say that there is some paradox in saying that a factual situation that has been authoritatively held not to fall under Article 11, nonetheless comes within the ambit of Article 11. However, be that as it may, that concession was made and we of course respect it.

33. The obvious difficulty facing the NUJ in this case is to point to any action by the state that has discriminated against them. They may well say that they have been discriminated against by MGN, but MGN is not the state or a state-supported body.

34. Mr Hendy at the end of his submissions therefore reformulated the case in this way:

> "By precluding a representative trade union from using the statutory procedure, the legislature is actively impeding the right of the employees to be heard through the negotiating procedure. The State has permitted that state of affairs through the terms of paragraph 35."

35. I have to say that I find that formulation and that description of this case wholly artificial. This case is completely different from the only case that comes even remotely near to it, the closed shop case of Young and others v United Kingdom. In that case, once the European Court of Human Rights had managed to find a right of non-association lurking within Article 11 it had no difficulty in holding that the state was responsible for legislation that allowed, and some

would say encouraged, the punishment of workers for their exercise of that right. But in this case paragraph 35 is not limiting or punitive, or aimed at a particular category of workers, but it is even-handed in according primacy to existing voluntary agreements.

36. I would venture respectfully to adopt in that respect paragraph 35 of the skeleton argument of Miss Dinah Rose, on behalf of the CAC, which read as follows:

> "Even if there were a difference in treatment, the appellant has failed to identify any ground for that difference in treatment which falls within the ambit of Article 14. The reason why the NUJ is denied access to the statutory recognition procedure in paragraph 35, is not because of any particular feature or status of the NUJ to which the legislation is hostile. It is merely because another union has already entered into an agreement with the employer. The result would be identical if it were the NUJ which had entered into an agreement and the BAJ was seeking statutory recognition. This treatment does not disclose any discrimination within the ambit of Article 14."

37. In my view, all that can be said, and indeed is said, is that the state should take positive steps to prevent the use of paragraph 35 in the way in which MGN has used it in this case. But there are at least two objections to that. First, it is inconsistent with the guidance given in the Wilson case as to the obligations of the state with regard to collective bargaining. Secondly, a failure to take that general step cannot possibly be characterised as an act of discrimination by the state against the National Union of Journalists, and it is that, and not some general issue of the character of the scheme as a whole, that has to be established under Article 14.

38. I would dismiss this appeal.

LORD JUSTICE LATHAM: I agree.

SIR MARTIN NOURSE: I also agree.

[Source [2005] EWCA Civ 1309]

ANNOTATION

The re-introduction of a statutory recognition machinery in the United Kingdom was discussed in the annotation to the *Kwik-Fit* case at 23 ILLR 305. What was said there does not need to be repeated here. By early 2006 the CAC had received some 500 applications for statutory recognition under the proce-

dure introduced in 2000. Only a handful of the CAC's decisions have been reviewed by the courts, which, unlike in the case of the earlier 1975 procedure, have been generally supportive of the CAC's approach, as they were in this case.

In this case the non-legal merits were all on the side of the unsuccessful applicant union, the NUJ. It undoubtedly had majority support in the bargaining unit, but was unable to bring a statutory claim for recognition because of the employer's voluntary decision to recognise a non-representative union. Why should the legislation be drafted this way? The driving force behind it was the desire to keep the CAC out of the business of deciding inter-union disputes. These had proved to be a major bone of contention under the previous statutory procedure and the desire of those responsible for the new legislation was not to allow the new machinery to used to further such disputes. As part of this policy paragraph 35 of the Schedule A1 deprives the CAC of jurisdiction to consider claims for recognition from an alternative union where there is already a recognition arrangement in place with a union. What was perhaps not given sufficient consideration in the drafting of the legislation was the process by which the 'blocking' recognition arrangement is put in place. With one exception (see below), the old British voluntary tradition prevails: recognition is regarded as a matter for the employer and union alone and the latter has to meet no particular standard of representativeness in order for its agreement with the employer to block an application by another union to the CAC. The NUJ tried hard to bring into paragraph 35 some limiting factor which would have excluded the BAJ but neither the CAC nor the two courts which heard the arguments found them convincing or, indeed, workable.

The one exception to the above statement is where the blocking agreement is concluded by the employer with a union which does not meet the test of being independent (and thus does not hold a certificate of independence issued by the Certification Officer, the state official who adjudicates upon issues of union independence). Part VI of the Schedule provides a mechanism whereby the support of the workers for a recognised but non-independent union can be assessed, even though the recognition arises from a voluntary agreement and not under the statutory procedure. This procedure, which, unhelpfully, can be triggered only by a worker or workers in the bargaining unit, may lead to a ballot of the relevant workforce to determine whether the non-independent union should continue to be recognised. A negative result would remove the block on a recognition application under the statutory procedure by another union. However, in this case the BAJ was an independent union. There is also an extra-legal procedure which can be followed where the two contending unions are affiliated to the Trades Union Congress (TUC – the central trade union body), for the TUC has its own procedures for dealing with inter-union conflicts.

However, in this case the BAJ was not affiliated to the TUC and so those procedures were not available. So, the limitations of paragraph 35 were fully exposed in this case.

In a final attempt to circumvent paragraph 35 the NUJ sought to argue that the domestic legislation was in conflict with the European Convention on Human Rights, an argument which, if successful, might have induced the court to take a bolder line on the construction of the paragraph or at least have led it to declare the paragraph to be in conflict with the Convention. This latter step would have put political pressure on the Government to amend paragraph 35, which was why the relevant governmental department was represented in the Court of Appeal. However, the case-law of the European Court on Human Rights seemed to be clear that Article 11(freedom of association) did not require Member States to provide a statutory recognition procedure at all and therefore a particular form of recognition procedure would not be subject to review on human rights grounds unless it independently infringed some provision of the Convention. In a desperate attempt to meet this requirement the NUJ argued in the Court of Appeal (but not below) that such an independent infringement could be founded on the provisions of Article 14 (non-discrimination). However, Article 14 does not generate a free-standing right but only an obligation upon Member States to provide the rights found in the other Articles in a non-discriminatory way. In this case it was impossible for the NUJ to show it had been discriminated against, as opposed to simply having its interests harmed by paragraph 35. As counsel for the CAC pointed out, if MGN had recognised the NUJ voluntarily, the BAJ would have been excluded equally from the CAC's jurisdiction.

UNITED STATES OF AMERICA

Court of Appeals for the Tenth Circuit
Double Eagle Hotel & Casino v. NLRB

Employees' right to discuss their concerns about an employer imposed system for sharing gratuities – protected concerted activity

HEADNOTES

Facts

When a gambling casino's mandatory tip sharing policy resulted in friction between security guards and slot technicians, the casino issued a rule prohibiting discussion of the tip-splitting policy and thereafter dismissed one employee and suspended two others for violating that prohibition. The issue in this case: do employees who are not protected by a labor organization and who are not seeking to organize or join a labor organization have a right protected by the National Labor Relations Act to discuss with each other issues concerning their compensation?

Decision

An employer can prohibit employee discussions that may interfere with business operations but cannot impose a blanket prohibition against employees discussing with each other issues concerning the terms or conditions of their employment.

Laws Applied

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 157:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . ."

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 158 (A)(1):

"It shall be an unfair labor practice for an employer to . . . interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 ...."

JUDGMENT

Before TACHA, Chief Circuit Judge, McWILLIAMS and HARTZ, Circuit Judges. TACHA, Chief Circuit Judge.

. . .

I. BACKGROUND

Double Eagle operates a hotel and casino in Cripple Creek, Colorado. In the casino, two types of employees interact with the customers playing slot machines: slot technicians and security officers. The slot technicians oversee the operation of the machines, including repairs, while the security officers are in charge of policing the slot area. Each type of employee receives tips from customers and are required by casino policy to share these tips.

* * *

Prior to May 21, 2001, all tips were pooled with half the tips going to slot technicians and the other half to security officers. Because the slot technicians outnumbered the security officers, a slot technician's share of the tip pool was smaller than a security officer's share. On May 21, in response to complaints from the slot technicians, Double Eagle changed its tip-splitting policy. Under the new policy, tips were not first divided between the different groups of employees. Instead, each slot technician and security officer received an equal share of the total tip pool.

By October 2001, the relative number of slot technicians and security officers had shifted. Because the security officers now outnumbered the slot technicians, the slot technicians sought to revert to the original tip-splitting policy so that they could receive a larger share of the tips. This created friction between the two groups of employees, and as a result, Double Eagle management orally issued a rule prohibiting discussion of the tip-splitting policy. After a number of incidents in which the slot technicians expressed their dissatisfaction over the tip-splitting policy, including one in which a slot technician violated the tip rule, one technician was fired and two others were suspended. Alleging violations of

the NLRA [National Labor Relations Act- ed.], the employees' union, International Brotherhood of Electrical Workers, Local No. 113, initiated administrative proceedings against Double Eagle.

Although the administrative law judge ("ALJ") found that Double Eagle committed numerous violations of the NLRA, we limit our discussion to the few issues that Double Eagle raises in its petition for review. The ALJ held that the tips rule violated § 8(a)(1) of the NLRA. As a result, the ALJ held that the employees who were disciplined for violating this rule had been unlawfully punished. The ALJ also ordered Double Eagle to cease and desist from maintaining a rule prohibiting discussion of the tip-splitting policy on the casino floor and to offer reinstatement and back pay to the disciplined employees. Double Eagle appealed this order and the Board affirmed on these issues. The Board further held that Double Eagle's "Customer Service," "Confidential Information," and "Communication" rules violated § 8(a)(1). Double Eagle timely petitions for review of the Board's decision and the NLRB cross-petitions for enforcement of the order.

II. DISCUSSION

A. Standard of Review

Section 10 of the NLRA, which grants this Court jurisdiction to consider Double Eagle's petition, requires that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e). . . .

Although the NLRA does not expressly state a standard of review for the Board's legal determinations, our review is clearly established by existing case law. We give deference to the Board's interpretation of the NLRA. . . .

B. Customer Service Rule

. . . The customer service rule, contained in Double Eagle's employee handbook, states:

> Never discuss Company issues, other employees, and personal problems to or around our guests. Be aware that having a conversation in public areas with another employee will in all probability be overheard.

The Board held that this rule overly restricted the employees' ability to discuss work-related issues and therefore violated § 8(a)(1). Double Eagle petitions for review of this holding, arguing that the Board erred because it misinterpreted the scope of its rule.

The Board began its analysis of the customer service rule by recognizing that "[a] rule like the one at issue here, which prohibits employees from discussing working conditions, is viewed by the Board as analogous to a no-solicitation rule for purposes of considering its legality." . . . The right to solicit employees to join the union is guaranteed by § 7 because self-organization could not occur without the ability to solicit. The right to solicit, however, is not absolute. As the Ninth Circuit has recognized, "the right of employees to solicit or distribute materials must be balanced against an employer's right to maintain discipline in its establishment." *N.L.R.B. v. Silver Spur Casino,* 623 F.2d 571, 582 (9th Cir. 1980) (citing *Republic Aviation Corp. v. N.L.R.B.,* 324 U.S. 793, 797-98 . . . (1945)).

In *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 57 L. Ed. 2d 370, 98 S. Ct. 2463 (1978), the Supreme Court discussed how this balancing occurs in retail industries:

> In the retail marketing and restaurant industries, the primary purpose of the operation is to serve customers, and this is done on the selling floor of a store or in the dining area of a restaurant. Employee solicitation in these areas, if disruptive, necessarily would directly and substantially interfere with the employer's business. On the other hand, it would be an unusual store or restaurant which did not have stockrooms, kitchens, and other nonpublic areas, and in those areas employee solicitation of nonworking employees must be permitted. *Id.* at 506.

Based on this reasoning, the Ninth Circuit held in *Silver Spur* that a casino – which it found more akin to a retail than non-retail industry – could prohibit solicitation in its gambling area, restaurant, and bar. 623 F.2d at 583.

Upon determining that the customer service rule should be treated as a no-solicitation rule, the Board held that Double Eagle "lawfully could prohibit employees from soliciting each other and discussing their working conditions in the casino's gambling areas, and adjacent aisles and corridors frequented by customers, but it could not maintain a general ban on that activity beyond that area." 341 N.L.R.B. No. 17 at 2. Double Eagle does not dispute this interpretation of the NLRA. Instead, it contends that its customer service rule complies with this requirement and that the Board erred in interpreting its rule more broadly.

The Board interpreted the customer service rule to "prohibit discussion in 'public areas.' Thus, for example, the rule would bar discussions in such public areas as parking lots and restrooms." *Id.* Because the prohibition on discussing employment-related issues was not limited to the gaming floor and adjacent corridors, the Board held that the rule was overly broad and therefore violated § 8(a)(1).

Double Eagle objects to the Board's interpretation of this rule because the rule does not state that employees cannot discuss company issues in "public areas." The term "public areas" appears only in the second sentence of the rule, and this second sentence does not prohibit any discussion – it merely cautions employees that guests will likely overhear any conversation held in public areas. The rule properly interpreted, Double Eagle argues, does not prohibit all discussion of company issues in "public areas" because the employees can discuss issues when guests are not around.

Double Eagle's interpretation is more consistent with the text of the rule. Nonetheless, even under this interpretation, the rule violates § 8(a)(1). The rule's first sentence, which prohibits discussion of company issues, contains nothing to limit the scope of its application. Under this rule, the presence of a single guest can transform an area in which employees have a right to discuss work conditions, such as the parking lot or break room, into a place where discussion is prohibited. While existing case law permits a casino to limit employees' discussions on the gaming floor, *see, e.g., Silver Spur,* 623 F.2d at 583, no court has interpreted the NLRA to permit an employer to adopt a no-discussion rule that follows each of its customers. We therefore hold that even accepting Double Eagle's interpretation of its customer service rule, the rule is unlawfully broad.

C. Tips Rule

Double Eagle also argues that the Board erred in holding its unwritten rule prohibiting discussion of the tip-splitting policy violated § 8(a)(1). Double Eagle contends that its rule is lawful because it only prohibits discussion of the tip-splitting policy on the casino floor, not in other areas. The Board's opinion did not discuss the tips rule; instead, it simply adopted the reasoning given by the ALJ. *See* 341 N.L.R.B. No. 17 at 1 n.6 ("For the reasons set forth by the judge, we agree with the judge that the Respondent's oral rule, proscribing the discussion of tips and its tip policy anywhere on the Respondent's property, is overly broad and unlawful."). We therefore look to the ALJ's decision to review this issue.

Double Eagle argued before the ALJ that the tips rule only prohibited discussion of the tip-splitting policy on the casino floor and that this rule was necessary to avoid disrupting its customers. The ALJ rejected these arguments. The judge found that the tips rule "was not limited to the gaming floor but was general – anytime, anywhere on company property." . . . Additionally, the judge held that "even if the rule was simply limited to the gaming floor" the rule would be unlawful. . . .

In arriving at this conclusion, the ALJ acknowledged that existing precedent permitted a casino to prohibit solicitation on the gaming floor. The judge, however, relied on cases recognizing "a distinction between 'talking' and 'solicitation.'" *Id.* (quoting *W.W. Granger, Inc.,* 229 N.L.R.B. 161 (1997)). Based on this distinction, the ALJ concluded that "prohibiting employees from discussing matters pertaining to unionization while on duty, but allowing discussion of other matters, violates Section 8(a)(1)." *Id.* (citing *Teledyne Advanced Materials,* 332 N.L.R.B. No. 53 (2000)). Thus, the ALJ rejected analyzing the tips rule under the no-solicitation case law and held that Double Eagle could not prohibit discussion of the tip-splitting policy at all.

We disagree. The rule's legality must be considered in the context of no-solicitation, as opposed to no-discussion, precedent. To begin, we note that the customer service rule – the first rule discussed above – was properly treated by the Board as a no-solicitation rule because it "prohibited employees from discussing working conditions." 341 N.L.R.B. No. 17 at 2. The tips rule is identical in this respect – it prohibits employees from discussing a policy that directly affects their income. We also note that both parties rely on no-solicitation cases in addressing the rule.

Moreover, the no-discussion cases relied on by the ALJ arose in a non-retail context, whereas a casino is more appropriately considered a retail environment. See Silver Spur, 623 F.2d at 583. We think the distinction between the two contexts is important for the following reasons. As discussed above, when considering rules which restrict employees' § 7 rights, employees' right to self-organize must be balanced against the employer's right to operate its business. *See Republic Aviation Corp. v. N.L.R.B.,* 324 U.S. 793, 797-98 . . . (1945). In work areas where no customers are present, the employees' productivity is of primary concern. Consequently, "an employer may implement rules against solicitation during work hours to prevent interference with work productivity." *Wal-Mart Stores, Inc. v. N.L.R.B*., 400 F.3d 1093, 1099 (8th Cir. 2005).

When worker productivity is the primary concern, no-discussion rules should be distinguished from no-solicitation rules. See id. (quoting *W.W. Grainger, Inc.*, 229 N.L.R.B 161, 166 (1977)). Such a distinction is sensible because discussion of union activities is often less disruptive than solicitation and therefore has a less significant impact on worker productivity. The Board's decisions also properly recognize that employees' discussions can adversely affect productivity and therefore may be limited. Indeed, an employer may adopt a no-discussion rule; however, the rule must apply to all topics, not simply those related to the job. *See Teledyne Advanced Materials,* 332 N.L.R.B. No. 53 at 1 ("It is well established that an employer violates Section 8(a)(1) when, as here, employees are forbidden to discuss unionization while working,

but are free to discuss other subjects unrelated to work."). This rule prohibits an employer from discriminating against union discussions under the pretext of increasing worker productivity. If worker productivity is really the concern, then all non-work-related discussions should be prohibited because these topics all interfere with the employees' work equally.

In restaurants, bars, casinos, and other retail stores, however, the employer's interest is not limited to productivity, but also includes the treatment of its customers. *Cf. Beth Israel,* 437 U.S. at 506 ("In the retail marketing and restaurant industries, the primary purpose of the operation is to serve the customer."). As a result, "employee solicitation [on the selling floor of a store or in the dining area of a restaurant], if disruptive, necessarily would directly and substantially interfere with the employer's business." *Id.* Therefore, when the enjoyment of the customer is at issue – as it is in the retail and service context – there is less of a reason to treat solicitation and discussion differently because both could prove equally disruptive to the customer. Consequently, the Board's decisions treat no-discussion and no-solicitation rules identically in this context. *See, e.g., Aroostook County Regional Ophthalmology Ctr.*, 317 N.L.R.B. 218, 218 n.4 (1995) (treating a rule that prohibited discussion of grievances "within earshot of patients" as a no-solicitation rule). Because the tips rule was adopted in a retail setting for the purpose of preventing discussion of working conditions around customers, we conclude that the tips rule must be considered under the same legal standard as the customer service rule. Thus, contrary to the ALJ's conclusion, Double Eagle can maintain its tips rule so long as it is limited to the casino's gambling area, and adjacent aisles and corridors frequented by customers.

Double Eagle contends that the rule was so limited, and that it merely stated that employees could not discuss tip-splitting while on the casino floor. The ALJ, however, found that the tips rule prohibited discussion of the tip-splitting policy anywhere on the premises. Double Eagle therefore argues that the Board, by adopting the ALJ's decision, erred in finding that the rule extended beyond the casino floor and that it could not maintain its tips rule limited in this way.

Whether the tips rule applied only on the casino floor or more broadly is a question of fact. We therefore review the record to determine whether the Board's finding is supported by substantial evidence. . . . No fewer than four employees testified before the ALJ that the tips rule extended beyond the casino floor. See Tr. at 165 ("We were told that we couldn't discuss tips . . . on the floor, in the break room, locker room, anywhere.") (testimony of Carol Marthaler); *id.* at 95 (employees could not discuss the tip-splitting policy on "the gaming floor, break room, [or] bathrooms.") (testimony of Betty Ingerling); *id.* at 187 ("You were not to talk about tips on the premises.") (testimony of Lowell

Moses); *id*. at 193 ("We were not to discuss [the tip-splitting policy] on the floor, break room, out back in our smoking area, anyplace within the building.") (testimony of Larry Custer).

Although there was also testimony to the contrary, the substantial evidence standard of review does not permit us to question the Board's balancing of this conflicting evidence. . . . The Board's conclusion that the tips rule applied beyond the casino floor is supported by substantial evidence and therefore we accept this factual finding. Thus, because we interpret § 8(a)(1) to prohibit a no-solicitation rule of this breadth, we deny Double Eagle's petition on this issue.

Although we hold that the tips rule violated § 8(a)(1), we must exercise our authority to modify the Board's order. *See* 29 U.S.C. § 160(f) (granting courts of appeals jurisdiction to "enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board"). The order requires Double Eagle to "cease and desist from maintaining a rule prohibiting employees from discussing tips or the Respondent's tip policy on the casino floor." Yet the rule announced by the Board with respect to the customer service rule also applies to the tips rule, and therefore "the Respondent lawfully [can] prohibit employees from . . . discussing their working conditions in the casino's gambling area, and adjacent aisles and corridors frequented by customers, but it [cannot] lawfully maintain a general ban on that activity beyond that area." We therefore modify the order so that it is consistent with the law. The order shall be modified to require Double Eagle to cease and desist from:

> Maintaining a rule prohibiting employees from discussing their working conditions outside of the casino's gambling area and adjacent aisles and corridors frequented by customers.

D. Disciplinary Action Taken Against Employees

Three employees were disciplined for violating the tips rule. Because the Board determined that this rule violated § 8(a)(1), it held that these disciplinary actions were also unlawful. To remedy this violation, the Board ordered Double Eagle to offer reinstatement and back pay to these employees. Double Eagle objects to this part of the order, arguing that the employees were disciplined for conduct that it could lawfully proscribe: discussing the tip-splitting policy while on the casino floor.

Section 8(a)(3) of the NLRA prohibits employers from "discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Under this provision, an employer is prohibited from disciplining an employee who has exercised rights protected by § 7. Section 8(a)(3) violations arise when an employer has disciplined an employee for breaking a rule that the

Board determines violates § 8(a)(1). In this case, the Board held that the discipline violated § 8(a)(3) because the employees were punished for violating the tips rule, which it held was unlawfully broad. An overbroad rule, by definition, encompasses both activity which can be lawfully proscribed and activity which cannot. Relying on its own precedent, a majority of the Board concluded that . . . "where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule." 341 N.L.R.B. No. 17 at 1 n.3.

. . .

Double Eagle argues that . . . because it only punished employees who had discussed tips on the casino floor, the disciplinary actions did not violate § 8(a)(3). We first note that the ALJ's findings support Double Eagle's assertion that the disciplinary actions were taken based on discussion of the tip-splitting policy on the casino floor. With respect to the discharged employee, Betty Ingerling, the ALJ found that "there is no doubt from Respondent's admissions that absent Ingerling discussing the tip policy on the casino floor she would not have been discharged." *Double Eagle,* 2003 NLRB LEXIS 90 at 27. In discussing the suspended employees, Carol Marthaler and Barbara McCoy, the ALJ stated that "the Respondent admits that Marthaler and McCoy were discharged because they talked on the gaming floor about [a tip issue in] violation of the Respondent's rule prohibiting such discussions." Id. Therefore, all three employees were disciplined for actions that they could have been disciplined for under a lawful tips rule.

. . . Our decision is based in large part on the amount of deference we are required to give to the Board's interpretation of the NLRA.

* * *

[W]e must accept the majority's interpretation if it is a "reasonable one." See *Four B Corp.,* 163 F.3d at 1182 ("For the Board to prevail, it need not show that its construction is the best way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one.") (*quotations and emphasis omitted*).

We conclude that the Board's interpretation is reasonable. By adopting the rule that all disciplinary actions imposed pursuant to an unlawful rule are unlawful, the Board reduces the chilling effect that results from imposition of overbroad rules. The situation under consideration is analogous to a constitutional overbreadth challenge. Under the overbreadth doctrine, a defendant convicted for acts that may be lawfully proscribed can nonetheless have his conviction overturned by arguing that the statute is unconstitutional because it is overbroad. Courts permit these overbreadth challenges because they facilitate

the striking down of laws which have a chilling effect on persons whose actions may not be lawfully proscribed. As the Supreme Court explained in *Brockett v. Spokane Arcades, Inc.*:

> An individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. 472 U.S. 491, 503 . . . (1985).

Similar interests are present here. The Board has previously recognized the need to protect employees from rules that have a chilling effect on the exercise of their rights. In *Lafayette Park Hotel,* the Board noted that "where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." 326 N.L.R.B. 824, 825 (1998) . . .

Therefore, we hold that a disciplinary action for violating an unlawful rule is itself a violation of the NLRA. Because we also hold that the tips rule violated § 8(a)(1), Double Eagle's discipline of employees who violated the tips rule violates § 8(a)(3). We therefore deny Double Eagle's petition requesting modification of the order with respect to offering reinstatement and back pay to employees Ingerling, Marthaler, and McCoy.

E. Confidentiality Rules

Double Eagle also petitions for review of the Board's determination that two of its rules restricting dissemination of confidential information violate § 8(a)(1). The Board held that Double Eagle's "Confidential Information" and "Communication" rules are unlawful because they restrict employees' right to discuss wages and other terms of employment. Double Eagle argues that the rules, properly interpreted, place no such limitation on its employees.

In its employee handbook, Double Eagle maintains a rule establishing its policy regarding confidential information. The rule states:

> *CONFIDENTIAL INFORMATION*
>
> Pursuant to Company policy . . . you may be required to deal with many types of information that are extremely confidential and with the utmost discretion must be observed. It is essential that no information of this kind is allowed to leave the department, other than by activity/job requirement, either by documents or verbally. A list, which is not all-inclusive, of the types of information considered confidential is shown below:
>
> • disciplinary information

- grievance/complaint information
- performance evaluations
- salary information
- salary grade
- types of pay increases
- termination data for employees who have left the company

Information should be provided to employees outside the department or those outside the Company only when a valid need to know can be shown to exist.

The casino's "Communication" rule incorporates this definition of confidential information and states that, without prior approval of management, an employee is not, "under any circumstances, permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any non-employee."

In *Lafayette Park Hotel*, the Board discussed how employer confidentiality rules should be balanced against employees' § 7 rights. The Board noted that "businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information." 326 N.L.R.B. at 826. Because of this interest, the Board in *Lafayette Park Hotel* held that a rule preventing employees from divulging "hotel-private" information did not violate § 8(a)(1). *Id.* The employer's interest in confidentiality, however, is outweighed by employees' need to discuss their terms of employment, and thus "employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid." *Id.* In addition, when a confidentiality provision is reasonably interpreted to prevent employees from discussing working conditions, the Board has held that rule is unlawful. *See, e.g., IRIS, U.S.A., Inc.,* 336 N.L.R.B. 1013 (2001).

. . . In *Aroostook County Ophthalmology Ctr.*, the court stated that "there can be no quarrel with the claim that, under the NLRA, employees are generally free to discuss the terms and conditions of their employment." . . . 81 F.3d 209, 212 (D.C. Cir. 1996). Similarly, in *Brockton Hospital v. NLRB,* the court struck down a confidentiality rule because it limited employees' ability to discuss "wages, hours, and working conditions – the very stuff of collective bargaining." . . . 294 F.3d 100, 107 (D.C. Cir. 2002).

We agree with the Board and the D.C. Circuit that a company has a significant interest in maintaining its confidential information, but that confidential information cannot be defined so broadly as to include working conditions. Under this holding, Double Eagle's definition of "confidential information" clearly

violates § 8(a)(1) because it expressly includes "salary information[,] . . . salary grade[, and] . . . types of pay increases." Furthermore, because the "Communication" rule prohibits communicating "confidential information," employees could reasonably interpret it to prevent discussion of salary information, and therefore it is also unlawful. . . .

III. CONCLUSION

For the foregoing reasons, we deny Double Eagle's petition and grant the NLRB's cross-petition for enforcement, subject to the modification pertaining to the tips rule.

[Source: 414 F.3d 1249 (2005) (petition for writ of certiorari denied 2006 U.S. LEXIS 1145.)]

ANNOTATION

The National Labor Relations Act was primarily adopted to foster the ability of workers to organize labor unions, bargain collectively with employers through such organizations, and enjoy the benefits of collective agreements. The language of the Act, however, is sufficiently broad so that it protects two or more employees engaged in other sorts of activities for their mutual support or benefit.

American employers often try to avoid labor market pressures by fostering a work culture that treats personal compensation as a confidential matter. As a result, often those working side-by-side do not know whether they are receiving the same, better, or worse compensation than others doing the same or comparable work. This is reflected in Double Eagle's confidential information policy. Accordingly, the decision in this case has a broad potential impact inasmuch as it provides labor organizers with a legal tool for encouraging workers to disregard such employer policies and share information about the terms and benefits of their employment so that they might more readily detect inequities in the enterprise's internal labor market and, thereby, recognize the possible need for collective action. The decision also offers American workers, who otherwise generally are subject to arbitrary discipline, including dismissal, an avenue for legal redress when they are penalized by an employer for breaching this rule of workplace etiquette.

UNITED STATES OF AMERICA

Supreme Court of California
Miller v. Department Of Corrections

Sexual harassment resulting from pattern of favoritism for employees having intimate sexual relations with manager – retaliation against employee who in good faith reports perceived violation of civil rights protections

HEADNOTES

Facts

A prison warden was accused of giving unwarranted favorable treatment to female employees with whom the warden was having sexual affairs. Female employees sued on the ground that, in violation of the California Fair Employment and Housing Act, such conduct constituted sexual harassment of those who did not have an intimate relationship with the warden. The issue in this case: whether, in light of the evidence presented in support of and in opposition to the summary judgment motion, the lower court properly found that plaintiffs failed to present a *prima facie* case of sexual harassment under the state statute.

Decision

Widespread sexual favoritism in a workplace may create an actionable hostile work environment because the demeaning message is conveyed to female employees that they are viewed by management as "sexual playthings" or that workplace advancement is conditioned upon engaging in sexual conduct with managers. Such a message constitutes prohibited sexual harassment, and the evidence presented in the summary judgment proceedings was sufficient to establish a *prima facie* case of sexual harassment under the appropriate legal standard.

Protection is available against retaliation for good faith reporting of an alleged violation of civil rights.

Law Applied

CALIFORNIA GOVERNMENT CODE § 12940(J)(1), (4)(C)

"It shall be an unlawful employment practice, … [f]or an employer, … because of sex … to harass an employee … . For purposes of this subdivision, "harassment" because of sex includes sexual harassment … ."

JUDGMENT

GEORGE, Chief Judge:

Plaintiffs, two former employees at the Valley State Prison for Women, claim that the warden of the prison at which they were employed accorded unwarranted favorable treatment to numerous female employees with whom the warden was having sexual affairs, and that such conduct constituted sexual harassment in violation of the California Fair Employment and Housing Act (FEHA). (Gov. Code, § 12900 et seq.) The trial court granted summary judgment in favor of defendants, concluding that the conduct in question did not support a claim of sexual harassment, and the Court of Appeal affirmed. We must determine whether, in light of the evidence presented in support of and in opposition to the summary judgment motion, the lower courts properly found that plaintiffs failed to present a prima facie case of sexual harassment under the FEHA.

For the reasons explained below, we conclude that, although an isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment, when such sexual favoritism in a workplace is sufficiently widespread it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as "sexual playthings" or that the way required for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or the management. We further conclude that, contrary to the Court of Appeal's determination, the evidence presented in the summary judgment proceedings was sufficient to establish a prima facie case of sexual harassment under the appropriate legal standard, and thus that the Court of Appeal erred in affirming the trial court's grant of summary judgment in favor of defendants. Accordingly, we shall reverse the judgment rendered by the Court of Appeal.

I

On June 15, 1999, plaintiffs Edna Miller and Frances Mackey … alleged that during their employment with the Department, they were subjected to sexual discrimination and harassment in violation of the FEHA. They also alleged that defendants retaliated against them for complaining about the discrimination and harassment.

On August 17, 2001, the trial court granted defendants' motion for summary adjudication of issues with respect to plaintiff Miller, except as to her claim for disability discrimination. The court also granted summary judgment in favor of defendants with respect to plaintiff Mackey. Miller voluntarily dismissed her complaint as to her remaining cause of action for disability discrimination, and judgment was entered in favor of defendants. This appeal followed.

* * *

A

Miller began working for the Department as a correctional officer in 1983. In 1994, while employed at the Central California Women's Facility (CCWF), she heard rumors that the chief deputy warden, Lewis Kuykendall, was having sexual affairs with his secretary, Kathy Bibb, and with another subordinate, associate warden Debbie Patrick. Another Department employee at CCWF, Cagie Brown, told Miller that she, too, was having an affair with Kuykendall. Miller complained to Kuykendall's superior officer at the CCWF, Warden Tina Farmon, about what she considered the "inappropriate situation" created by Kuykendall's relationships with Bibb, Brown, and Patrick. Farmon informed Miller that she had addressed the issue.

In February 1995, the Department transferred Miller to the Valley State Prison for Women (VSPW), where Kuykendall now served as warden. By May 1995, Patrick and Brown had been awarded transfers to VSPW. Patrick enjoyed unusual privileges such as reporting directly to Kuykendall rather than to her immediate superior. In the meantime, Bibb had become an instructor at CCWF and Miller served on an interview committee that evaluated Bibb's application for a promotion to the position of correctional counselor, a position that would entail a transfer to VSPW. Bibb's promotion was awarded despite the opposition of Patrick. When the interviewing panel did not select Bibb, Miller and other members of the panel were informed by an associate warden that Kuykendall wanted them to "make it happen." There was evidence Bibb had bragged to plaintiff Mackey of her power over the warden, and a departmental internal af-

fairs investigation later concluded Kuykendall's personal relationship with Bibb rendered his involvement in her promotion unethical.

Brown admitted to Miller that she had sexual relations with Kuykendall and bragged about her power over him and stated her intention to use this power to extract benefits from him. Brown had told Gantong, another employee, that Kuykendall promised to secure Brown's transfer to VSPW and to aid in her promotion to the position of facility captain. Miller also claimed Brown received special assignments and work privileges from Kuykendall, and Kuykendall's secretary, Sandra Tripp, agreed with this assessment. Tripp's employment was terminated after she made public Kuykendall and Brown's affair.

In July 1995, Brown and Miller competed for a promotion to a temporary post as facility captain at VSPW. Brown announced to Miller that Kuykendall would be forced to give her, Brown, the promotion or she would "take him down" with her knowledge of "every scar on his body." Kuykendall served on the interview panel, conduct that the departmental internal affairs investigation report later branded unethical because of his sexual relationship with Brown. Brown received the promotion, despite Miller's higher rank, superior education, and greater experience. According to Miller's deposition, the officers involved in the selection process expressed surprise that Brown had been promoted, because they had recommended Miller for the higher position, and these officers and other employees commented to Miller that Brown's selection was unfair. According to plaintiff's estranged husband, William Miller, also a Department employee, many employees were upset by Brown's promotion. They attributed the promotion to the sexual affair between Kuykendall and Brown, believing Brown to be unqualified. Brown and Miller later competed for promotion to a permanent facility captain position, and Brown again secured the promotion.

Within a year and a half, Brown was promoted to the position of associate warden, a pace of promotion that was unusually rapid. Kuykendall again served on the interview panel. Miller's failure to be promoted to the position of facility captain made her ineligible to compete for higher-ranking positions, and Brown became her direct supervisor. According to Cooper, the internal affairs investigator, William Miller informed Cooper that other employees were outraged by the pace of Brown's promotions and "employees were saying things like, what do I have to do, 'F' my way to the top?"

[Miller asserted she was afraid to complain because of the adverse employment actions taken against two other female employees who had complained concerning the warden's affairs. The internal affairs report noted that, as to Bibb and Brown, "[b]oth relationships were viewed by staff as unethical from a business practice standpoint and one [*sic*] that created a hostile working environ-

ment." Also, there were rumors that employees, including Bibb, secured promotions because they had sexual relations with their superiors.]

Kuykendall conceded he had danced with Bibb at work-related social gatherings and there was evidence he telephoned her at home hundreds of times from his workplace. Employees, including Mackey and Miller, witnessed Bibb and Kuykendall fondling each other on at least three occasions at work-related social gatherings occurring between 1991 and 1998 where employees of the institution were present. One Department employee, Phyllis Mellott, also complained that at such a gathering Kuykendall had put his arms around her and another employee and made unwelcome groping gestures. Kuykendall was present with Bibb in 1998 when she was arrested for driving under the influence of alcohol, a circumstance of which Miller and other employees were aware. Kuykendall failed to initiate an internal affairs investigation concerning the incident or report his own involvement. He also conceded he had heard complaints that Patrick received favorable treatment because of her relationship with him.

Plaintiffs presented evidence that the three women who were having sexual affairs with Kuykendall – Patrick, Bibb, and Brown – squabbled over him, sometimes in emotional scenes witnessed by other employees, including Miller.

[Miller eventually complained as well that chief deputy warden Vicky Yamamoto interfered with Miller's direct access to the warden because Miller, who had heard that Yamamoto was a lesbian, refused dinner invitations that Yamamoto did not extend to male employees. Miller also complained that Yamamoto and Brown had an intimate relationship that was interfering with operations. Miller asserted that after making this complaint, Brown and Yamamoto made her work life miserable and diminished her effectiveness by frequently countermanding her orders, undermining her authority, reducing her supervisory responsibilities, imposing additional onerous duties on her, making unjustified criticism of her work, and threatening her with reprisals when she complained to Kuykendall about their interference.]

In September 1997, Miller telephoned Brown to confront Brown concerning her relationship with Kuykendall and to complain about the mistreatment she had suffered at the hands of Brown and Yamamoto. During this conversation, which Miller permitted Mackey and others to overhear, Brown acknowledged that Yamamoto was heaping unjustified abuse on Miller and that Kuykendall was aware of Yamamoto's mistreatment of Miller but would do nothing to rectify the situation. Miller subsequently informed Cooper, the internal affairs investigator, that during this telephone conversation Miller had threatened to make a public announcement concerning the affair between Brown and Kuykendall.

The next day, Brown accused Miller of tape-recording their telephone conversation. Brown entered Miller's office, ordered plaintiff Mackey (Miller's assistant) to leave, and then physically assaulted Miller, holding her captive for two hours. When Mackey went to Yamamoto to secure assistance for Miller, Yamamoto did not intervene. When Miller reported the affray to Kuykendall and threatened to report his relationship with Brown to higher authorities within the Department, Kuykendall responded that no one would believe her. Kuykendall told Miller to take time off from work and that upon her return she would not be required to report to Brown or Yamamoto. He subsequently awarded her a promotion. Kuykendall failed to investigate the assault after Miller complained to him. The internal affairs investigation concluded that Brown had committed assault and false imprisonment and that Kuykendall's failure to intervene or to discipline Brown constituted a violation of Department policy.

* * *

Miller stated that she joined three other employees early in 1998 in complaining confidentially to Lewis Jones, Kuykendall's superior officer and the Department's regional administrator, concerning Yamamoto (and Kuykendall's failure to curtail Yamamoto's abuse of Miller), stating that the "institution was out of control." She recalled that Jones stated "he was dealing with Mr. Kuykendall on the disruption of the institution," but Miller did not observe any follow-up. She did not complain to Jones specifically about sexual harassment.

Later in 1998, regional administrator Jones recommended a departmental Office of Internal Affairs investigation, which, as noted above, began investigating misconduct on the part of Kuykendall, Yamamoto, and Brown… . Brown began a campaign of ostracism against Miller. According to Miller's declaration and deposition testimony, Yamamoto also harassed Miller with unannounced inspections and interference with her orders; Kuykendall withdrew accommodations that previously had been accorded Miller because of a physical disability, and … on one occasion, Brown angrily confronted Miller about her statements to the internal affairs investigator, would not allow Miller to terminate the conversation, and followed Miller home to continue the harangue. Upon Miller's complaint, a court order issued requiring Brown to stay away from Miller.

Miller suffered increasing stress and resigned from the Department on August 5, 1998. She filed a government tort claim with the Department in November 1998, followed by a complaint with the Department of Fair Employment and Housing in March 1999. She filed her complaint in superior court on June 15, 1999.

As a result of the internal affairs investigation, Kuykendall retired, Yamamoto was transferred and demoted, and Brown resigned with disciplinary proceedings pending.

B

[Plaintiff Frances Mackey alleged that her entitlement to supplemental pay was revoked when Brown became suspicious that Mackey had complained to Kuykendall concerning the sexual affair he was having with Brown and that Brown subjected Mackey to verbal abuse in the presence of coworkers. Mackey also asserted she was persuaded not to jeopardize her career, having observed the termination of the employment of another woman who had complained about Kuykendall's affair.]

* * *

Mackey was assured that her statements to the internal affairs investigator would be kept confidential, but they were not. Kuykendall subsequently reduced her responsibilities and denied her access to the work experience she needed in order to be promoted to the position of correctional counselor. Mackey testified in her deposition that she believed she failed to receive a promotion to that position because she was not sexually involved with Kuykendall.

In addition, Brown repeatedly interrogated Mackey about her statements to the internal affairs investigator and attempted to contact Mackey outside of work. Stress led to health problems, and Mackey was unable to work between August 1998 and January 1999. Upon her return to work, Mackey was demoted and suffered further mistreatment and humiliation. A few months later she resigned, finding the conditions of employment intolerable. Mackey filed a government tort claim with the Department in February 1999 and filed a complaint with the Department of Fair Employment and Housing in March 1999. Mackey joined Miller in filing suit on June 15, 1999, alleging, among other claims, sexual discrimination and retaliation in violation of the FEHA.

* * *

II

A

We emphasize at the outset that the present case comes to us on appeal from a grant of summary judgment and summary adjudication. A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law… . The moving

party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish, a prima facie case … ." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 … .) … On appeal from the granting of a motion for summary judgment, we examine the record *de novo*, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. …

B

The FEHA expressly prohibits sexual harassment in the workplace. It is an unlawful employment practice "[f]or an employer … because of … sex … to harass an employee … ." (Gov. Code, § 12940, subd. (j)(1).) The FEHA also provides that "[sexual] [h]arassment of an employee … by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." (*Ibid*.) For the purposes of the relevant provisions of the FEHA, " 'harassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions." (*Id*., § 12940, subd. (j)(4)(C).)

According to the Fair Employment and Housing Commission (FEHC), the agency charged with administering the FEHA, harassment on any basis prohibited by the FEHA includes (but is not limited to) *verbal harassment*, including "epithets, derogatory comments or slurs on a basis enumerated in the Act"; *physical harassment*, including "assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the Act"; and *visual harassment*, including "derogatory posters, cartoons, or drawings on a basis enumerated in the Act." (Cal. Code Regs., tit. 2, § 7287.6, subd. (b)(1)(A), (B) & (C).) The regulations also specify that "unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors" constitute harassment. (*Id*., § 7287.6, subd. (b)(1)(D).) In the specific context of sexual discrimination, prohibited harassment may include "verbal, physical, and visual harassment, as well as unwanted sexual advances." (*Id*., § 7291.1 subd. (f)(1).)

Past California decisions have established that the prohibition against sexual harassment includes protection from a broad range of conduct, ranging from expressly or impliedly conditioning employment benefits on submission to or tolerance of unwelcome sexual advances, to the creation of a work environment that is hostile or abusive on the basis of sex. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 607-608.) Such a hostile environment may be

created even if the plaintiff never is subjected to sexual advances… . In one case, for example, a cause of action based upon a hostile environment was stated when the plaintiff alleged she had been subjected to long-standing ridicule, insult, threats, and especially exacting work requirements by male coworkers who evidently resented a female employee's entry into a position in law enforcement. (*Accardi v. Superior Court*, *supra*, 17 Cal.App.4th at pp. 347-348.)

We have agreed with the United States Supreme Court that, to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their sex. (See *Aguilar v. Avis Rent A Car System, Inc.*, *supra,* 21 Cal.4th at p. 130, relying upon *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21.) The working environment must be evaluated in light of the totality of the circumstances: "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." (*Harris v. Forklift Systems, Inc.*, *supra*, 510 U.S. at p. 23.)

The United States Supreme Court has warned that the evidence in a hostile environment sexual harassment case should not be viewed too narrowly: "[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' [Citation.] ... . [T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. ... The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing ... and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." (*Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81-82 … .)

Our courts frequently turn to federal authorities interpreting Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (Title VII) for assistance in interpreting the FEHA and its prohibition against sexual harassment… . Although the FEHA explicitly prohibits sexual harassment of employees, while Title VII does not, the two enactments share the common goal of preventing discrimination in the workplace. Federal courts agree with guidelines established by the Equal Employment Opportunity Commission (EEOC), the agency

charged with administering Title VII, in viewing sexual harassment as constituting sexual discrimination in violation of Title VII. (See *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 64-65.) In language comparable to that found in the FEHA and in FEHC regulations, federal regulatory guidelines define sexual harassment as including unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that has the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." (29 C.F.R. § 1604.11(a)(3) (2004).)

A lengthy policy statement issued by the EEOC has examined the question of sexual favoritism, relying in part upon a number of federal court decisions that have considered the kind of harassment claim brought by plaintiffs, namely one based principally on the favoritism shown by supervisors to employees who are the supervisors' sexual partners. (Off. of Legal Counsel, Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism (Jan. 12, 1990) No. N-915-048 in 2 EEOC Compliance Manual foll. § 615 (EEOC Policy Statement No. N-915-048.) In its 1990 policy statement, the EEOC observed that, although isolated instances of sexual favoritism in the workplace do not violate Title VII, widespread sexual favoritism may create a hostile work environment in violation of Title VII by sending the demeaning message that managers view female employees as " 'sexual playthings' " or that "the way for women to get ahead in the workplace is by engaging in sexual conduct." We believe the policy statement provides a useful guide in evaluating the issue before us.

… The policy statement begins with an explanation that "[a]n *isolated* instance of favoritism toward a 'paramour' (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders. [Fn. omitted.] A female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man, nor, conversely, was she treated less favorably because she was a woman." (EEOC Policy Statement No. N-915-048, *supra*, § A, italics added.)

* * *

Finally, the EEOC discusses sexual favoritism that is more than isolated and that is based upon consensual affairs: "If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is im-

plicitly conveyed that the managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is 'sufficiently severe or pervasive "to alter the conditions of [their] employment and create an abusive working environment." ' [Citations.] [Fn. omitted.] An analogy can be made to a situation in which supervisors in an office regularly make racial, ethnic or sexual jokes. Even if the targets of the humor 'play along' and in no way display that they object, co-workers of any race, national origin or sex can claim that this conduct, which communicates a bias against protected class members, creates a hostile work environment for them. [Citations.]" (EEOC Policy Statement No. N-915-048, *supra*, § C.)

In addition, according to the EEOC, "[m]anagers who engage in widespread sexual favoritism may also communicate a message that the way for women to get ahead in the workplace is by engaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment. [Fn. omitted.] This can form the basis of an implicit 'quid pro quo' harassment claim for female employees, as well as a hostile environment claim for both women and men who find this offensive." (EEOC Policy Statement No. N-915-048, *supra*, § C.)

* * *

Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment… . Furthermore, applying this standard to the circumstances of the present case, we conclude that the evidence proffered by plaintiffs, viewed in its entirety, established a prima facie case of sexual harassment under a hostile-work-environment theory. A … trier of fact reasonably could find from the evidence in the record set forth below that a hostile work environment was created in the workplace in question.

* * *

Considering all the circumstances "from the perspective of a reasonable person in the plaintiff's position" (*Oncale v. Sundowner Offshore Services, Inc.*, *supra*, 523 U.S. at p. 81), and noting that the present case is before us on appeal after a grant of summary judgment, we conclude that the foregoing evidence created at least a triable issue of fact on the question whether Kuykendall's conduct constituted sexual favoritism widespread enough to constitute a hostile work environment in which the "message [was] implicitly conveyed that the managers view women as 'sexual playthings' " or that "the way for women to get

ahead in the workplace is by engaging in sexual conduct" thereby "creating an atmosphere that is demeaning to women." (EEOC Policy Statement No. N-915-048, *supra*, § C.) In terms we previously have borrowed from the United States Supreme Court in measuring sexual harassment claims, there was evidence of 'sufficiently severe or pervasive' conduct that "alter[ed] the conditions of [the victims'] employment" … such that a jury reasonably could conclude that the conduct created a work environment that qualifies as hostile or abusive to employees because of their gender. (*Aguilar v. Avis Rent A Car System, Inc.*, *supra*, 21 Cal.4th at p. 130.)

…

D

In reaching its contrary conclusion, the Court of Appeal essentially conceded that widespread sexual favoritism *could* support a claim for sexual harassment if the accompanying conduct were sufficiently pervasive or severe, but concluded plaintiffs had failed to make an adequate showing in this respect, especially in the absence of any evidence that they had been sexually propositioned or that the sexual affairs were nonconsensual. But California law (like the EEOC policy statement quoted above) provides that plaintiffs may establish the existence of a hostile work environment even when they themselves have not been sexually propositioned… . Further, as the EEOC policy statement points out, even widespread favoritism based upon *consensual* sexual affairs may imbue the workplace with an atmosphere that is demeaning to women because a message is conveyed that managers view women as "sexual playthings" or that the way required to secure advancement is to engage in sexual conduct with managers. In focusing upon the question whether the sexual favoritism was coercive, the Court of Appeal overlooked the principle that even in the absence of coercive behavior, certain conduct creates a work atmosphere so demeaning to women that it constitutes an actionable hostile work environment.

* * *

Defendants attempt to counter plaintiffs' claims by referring to a number of the cases holding that isolated preferential treatment of a sexual partner, *standing alone*, does not constitute sexual discrimination… . In such instances, the discrimination is said to turn merely on personal preference, and male and female nonfavored employees are equally disadvantaged. Although we do not dispute the principle stated by these cases, we believe the Court of Appeal and defendants err in equating the present case with those cases. Whether or not Kuykendall was motivated by personal preference or by discriminatory intent, a hostile work environment was shown to have been created by widespread favor-

itism. As discussed, plaintiffs in the present case alleged far more than that a supervisor engaged in an isolated workplace sexual affair and accorded special benefits to a sexual partner. They proffered evidence demonstrating the effect of widespread favoritism on the work environment, namely the creation of an atmosphere that was demeaning to women. Further, as the EEOC policy statement observes, an atmosphere that is sufficiently demeaning to women may be actionable by both men and women.

* * *

Certainly, the presence of mere office gossip is insufficient to establish the existence of widespread sexual favoritism, but the evidence of such favoritism in the present case includes admissions by the participants concerning the nature of the relationships, boasting by the favored women, eyewitness accounts of incidents of public fondling, repeated promotion despite lack of qualifications, and Kuykendall's admission he could not control Brown because of his sexual relationship with her – a matter confirmed by the Department's internal affairs report… .

Finally, defendants warn that plaintiffs' position, if adopted, would inject the courts into relationships that are private and consensual and that occur within a major locus of individual social life for both men and women – the workplace. According to defendants, social policy favors rather than disfavors such relationships, and the issue of personal privacy should give courts pause before allowing claims such as those advanced by plaintiffs to proceed… .

We do not believe that defendants' concerns about regulating personal relationships are well founded, because it is not the relationship, but its effect on the workplace, that is relevant under the applicable legal standard. Thus, we have not discussed those interactions between Kuykendall and his sexual partners that were truly private. Moreover, the FEHA already clearly contemplates some intrusion into personal relationships. Specifically the FEHA recognizes that sexual harassment occurs when a sexual relationship between a supervisor and a subordinate is based upon an asserted quid pro quo.

III

As noted, plaintiffs also alleged a cause of action for retaliation in violation of the FEHA.

* * *

Neither the trial court nor the Court of Appeal reached the question whether defendants had taken an adverse employment action against plaintiffs based on

their complaints of sexual harassment, or the question whether there was a causal connection between the asserted protected activity and any adverse action, because each court determined that plaintiffs had failed to make a prima facie showing that they had engaged in protected activity by opposing sexual harassment that was prohibited by the FEHA.

The Court of Appeal acknowledged that, under certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA… .

The Court of Appeal concluded, however, that although plaintiffs had opposed Kuykendall's conduct, they had not engaged in protected activity, because they had not expressed opposition to sex discrimination or sexual harassment. As the court understood the record, "[p]laintiffs were not complaining about sexual harassment but unfairness. This is not protected activity under the FEHA."

* * *

We have concluded *ante*, contrary to the determination of the Court of Appeal, that the conduct plaintiffs complained of *may* constitute sexual harassment in violation of the FEHA. We do not believe employees should be required to elaborate to their employer on the legal theory underlying the complaints they are making, in order to be protected by the FEHA. (See *Moyo v. Gomez*, *supra*, 40 F.3d at p. 985 [in analyzing retaliation claims, courts should recognize that plaintiffs have limited legal knowledge]; *Gifford v. Atchison, Topeka & Santa Fe Ry. Co.*, *supra*, 685 F.2d at p. 1157 ["It requires a certain sophistication for an employee to recognize that an offensive employment practice may represent sex or race discrimination that is against the law"]; see also *Drinkwater v. Union Carbide Corp.*, *supra*, 904 F.2d at p. 866 [although the plaintiff's hostile work environment claim based upon isolated sexual favoritism did not survive summary judgment, her retaliation claim did – [Union Carbide] is not free to retaliate against plaintiff simply because she has failed to build her sex discrimination claim properly," and she was not required "to guess the outcome of New Jersey law correctly"].) Furthermore, even if ultimately it is concluded defendants' conduct did not constitute a violation of the FEHA, we are not persuaded by defendant's claim that only an employee's mistake of fact, and not a mistake of law, may establish an employee's good faith but mistaken belief that he or she is opposing conduct prohibited by the FEHA. (See *Moyo v. Gomez*, *supra*, 40 F.3d at p. 985 [the employee's good faith "*reasonable* mistake may be one of fact or law"]; *Drinkwater v. Union Carbide Corp.*, *supra*, 904 F.2d at p. 866 [sanctioning

a retaliation claim in light of the plaintiff's reasonable belief concerning the law].)

Particularly in view of the EEOC policy statement quoted at length *ante*, whether or not a jury or a court ultimately concludes defendants' conduct constituted sexual harassment, employees such as plaintiffs reasonably could believe they are making a claim of sexual harassment in violation of the FEHA when they complain of sexual favoritism in their workplace. Although plaintiffs may not have recited the specific words "sexual discrimination" or "sexual harassment," the nature of their complaint certainly fell within the general purview of the FEHA, especially when we recall that this case is before us on review of a grant of summary judgment.

The FEHA's stricture against retaliation serves the salutary purpose of encouraging open communication between employees and employers so that employers can take voluntary steps to remedy FEHA violations (*Flait v. North American Watch Corp.*, *supra*, 3 Cal.App.4th at p. 476), a result that will be achieved only if employees feel free to make complaints without fear of retaliation. The FEHA should be liberally construed to deter employers from taking actions that would discourage employees from bringing complaints that they believe to be well founded. The act would provide little comfort to employees, and thereby would fail in its ameliorative purpose, if employees feared they lawfully could lose their employment or suffer other adverse action should they fail to phrase accurately the legal theory underlying their complaint concerning behavior that may violate the act.

Similar concerns recently were expressed by the United States Supreme Court in commenting upon the need to protect whistleblowers who complained that a recipient of federal education funding intentionally discriminated on the basis of sex. (*Jackson v. Birmingham Bd. of Educ.* (2005) [161 L. Ed. 2d 361, 125 S. Ct. 1497].)

[Source: 115 P.3d 77 (2005).]

ANNOTATION

In 2003, Vault Career Services, a career guidance information company, conducted a survey of over 1000 professionals in the U.S. in which 47 percent of the respondents stated they had been involved in at least one workplace romance and 19 percent stated they would be willing to become involved in such a romance even though they had never engaged in such activity. In January 2006, the Society for Human Resource Management (SHRM) announced the findings

of a random poll of human resource managers and workers in which 40 percent of the polled workers reported having been involved in a workplace romance. The poll also found that 72 percent of the surveyed workplaces did not have a workplace romance policy, and that about a third of those reporting having such a policy had not committed the policy to a written document. In workplaces with a workplace romance policy, almost a third prohibit romantic relationships among co-workers and a little under half with a policy discourage such relationships but do not prohibit them. Employers adopting policies that prohibit or discourage workplace romantic relationships largely attribute their policy to fear of sexual harassment claims or fear of retaliatory conduct when a relationship ends, or both. A significant portion of those surveyed also listed fear of lowered productivity and adverse affects on employee morale as additional reasons for prohibiting or discouraging workplace romances. Finally, the survey found that those policies that restrict workplace romances often bar such relationships with those in a subordinate position and to a lesser degree, those in the same work group.

In the SHRM survey, human resource managers reported that about 60 percent of those involved in workplace romances get married and about 30 percent of those married before the romance get divorced. Also, according to the survey, about 44 percent of such romances result in complaints of favoritism, about 20 percent result in complaints of sexual harassment, and, with almost as much frequency, they result in complaints of stalking or retaliation. The managers also reported that about 25 percent of such romances cause reduced productivity or reduced morale.

The principle case provides some guidance respecting the legal need for employers to adopt regulations respecting workplace romances. Although it finds that favoritism toward sexual partners does not of itself violate the statutory prohibitions against sex discrimination or sexual harassment, it does hold an employer liable for damages if it permits favoritism arising out of consensual romantic relationships among employees to be so common as reasonably to create a perception either that management regards access to sexual relations with other employees as a management, or perhaps even an employee, prerogative, or that workplace benefits can be earned through sexual intimacy.

In addition, the court makes it clear that the statutory protection against retaliation is available so long as the reporting employee believed in good faith that there had been a violation of civil rights protections regardless of whether in fact or law such a violation had occurred. Many state courts provide relief against such retaliation even if it is not specifically prohibited by a statute. See, for example, the discussion in *LoPresti v. Rutland Regional Health Services, Inc.*, reported elsewhere in this volume.

UNITED STATES OF AMERICA

Federal Supreme Court
Smith v. City of Jackson

Age Discrimination in Employment Act – availability of Disparate Impact Theory of Liability

HEADNOTES

Facts

Police and public safety officers employed by the City of Jackson, Mississippi, brought suit against the city under the federal Age Discrimination in Employment Act (ADEA), alleging that salary increases they received were less generous than increases received by younger officers, and that this had a disparate impact upon older officers. A Federal District Court granted the City's motion for summary judgment, and dismissed the complaint, holding that disparate impact theory is not available under the ADEA, and the Court of Appeals for the Fifth Circuit affirmed. The Supreme Court granted certiorari to resolve a conflict among the Circuits on that question.

Decision

The ADEA authorizes recovery in disparate impact cases, but only when plaintiffs can identify a specific test, requirement, or practice that has a disparate impact on the basis of age and demonstrate that the test, requirement, or practice is not based on reasonable factors other than age. The salary differentials complained of were unquestionably based upon the City's perceived need to make junior officers' salaries competitive with comparable positions in the market, and were therefore reasonable as a matter of law. The Fifth Circuit's judgment is affirmed.

Law applied

FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT.

JUDGMENT

Justice STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, and an opinion with respect to Part III, in which Justice SOUTER, Justice GINSBURG, and Justice BREYER join.

I

… On October 1, 1998, the City adopted a pay plan granting raises to all City employees. The stated purpose of the plan was to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability."

On May 1, 1999, a revision of the plan, which was motivated, at least in part, by the City's desire to bring the starting salaries of police officers up to the regional average, granted raises to all police officers and police dispatchers. Those who had less than five years of tenure received proportionately greater raises when compared to their former pay than those with more seniority. Although some officers over the age of 40 had less than five years of service, most of the older officers had more.

Petitioners are a group of older officers who filed suit under the ADEA claiming both that the City deliberately discriminated against them because of their age (the "disparate treatment" claim) and that they were "adversely affected" by the plan because of their age (the "disparate impact" claim).

The District Court granted summary judgment to the City on both claims. The Court of Appeals held that the ruling on the former claim was premature because petitioners were entitled to further discovery on the issue of intent, but it affirmed the dismissal of the disparate impact claim. Over one judge's dissent, the majority concluded that disparate impact claims are categorically unavailable under the ADEA. Both the majority and the dissent assumed that the facts alleged by petitioners would entitle them to relief under the reasoning of Griggs.

We granted the officers' petition for certiorari, and now hold that the ADEA does authorize recovery in "disparate impact" cases comparable to Griggs. Because, however, we conclude that petitioners have not set forth a valid disparate impact claim, we affirm.

II

During the deliberations that preceded the enactment of the Civil Rights Act of 1964, Congress considered and rejected proposed amendments that would have included older workers among the classes protected from employment discrimination. Congress did, however, request the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." … The Secretary's report, submitted in response to Congress' request, noted that there was little discrimination arising from dislike or intolerance of older people, but that "arbitrary" discrimination did result from certain age limits. Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment (22 June 1965), reprinted in U.S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act (1981) (hereinafter Wirtz Report). Moreover, the report observed that discriminatory effects resulted from "[i]nstitutional arrangements that indirectly restrict the employment of older workers."

In response to that report Congress directed the Secretary to propose remedial legislation, and then acted favorably on his proposal. As enacted in 1967, sec. 4(a)(2) of the ADEA, now codified as 29 U.S.C. sec. 623(a)(2), provided that it shall be unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age" … Except for substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language of that provision in the ADEA is identical to that found in sec. 703(a)(2) of the Civil Rights Act of 1964 (Title VII). Other provisions of the ADEA also parallel the earlier statute.

Unlike Title VII, however, sec. 4(f)(1) of the ADEA contains language that significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" (hereinafter RFOA provision).

III

In determining whether the ADEA authorizes disparate impact claims, we begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the

same meaning in both statutes… . We have consistently applied that presumption to language in the ADEA that was "derived in haec verba from Title VII." Our unanimous … interpretation of sec. 703(a)(2) of the Title VII in Griggs is therefore a precedent of compelling importance.

In Griggs, a case decided four years after the enactment of the ADEA, we considered whether sec. 703 of Title VII prohibited an employer "from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites." … accepting the Court of Appeals' conclusion that the employer had adopted the diploma and test requirements without any intent to discriminate, we held that good faith "does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." We explained that Congress had "directed the thrust of the Act to the consequences of employment practices, not simply the motivation." We relied on the fact that history is "filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality." And we noted that the Equal Employment Opportunity Commission (EEOC), which had enforcement responsibility, had issued guidelines that accorded with our view… . We thus squarely held that sec. 703(a)(2) of Title VII did not require a showing of discriminatory intent.

While our opinion in Griggs relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view, we have subsequently noted that our holding represented the better reading of the statutory text as well… . Neither section 703(a)(2) nor the comparable language in the ADEA simply prohibits actions that "limit, segregate, or classify" persons; rather the language prohibits such actions that "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's" race or age (explaining that in disparate impact cases, "the employer's practices may be said to 'adversely affect [an individual's status] as an employee'" … (quoting 42 U.S.C. section 2000e-2(a)(2))). Thus the text focuses on the effects of the action on the employee rather than the motivation for the action of the employer… .

Griggs, which interpreted the identical text at issue here, thus strongly suggests that a disparate impact theory should be cognizable under the ADEA. Indeed, for over two decades after our decision in Griggs, the Courts of Appeal uniformly interpreted the ADEA as authorizing recovery on a "disparate impact" theory in appropriate cases… . It was only after our decision in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), that some of those courts concluded that the ADEA did not authorize a disparate impact theory of liability… . Our opinion in Hazen Paper, however, did not address or comment on the issue we decide today. In that case, we held that an employee's allegation that he was discharged shortly before his pension would have vested did not state a cause of action under a disparate treatment theory. The motivating factor was not, we held, the employee's age, but rather his years of service, a factor that the ADEA did not prohibit an employer from considering when terminating an employee. While we noted that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA,"… we were careful to explain that we were not deciding "whether a disparate impact theory of liability is available under the ADEA … ." In sum, there is nothing in our opinion in Hazen Paper that precludes an interpretation of the ADEA that parallels our holding in Griggs.

The Court of Appeals' categorical rejection of disparate impact liability, like Justice O'CONNOR's [dissenting opinion], rested primarily on the RFOA provision and the majority's analysis of legislative history. As we have already explained, we think the history of the enactment of the ADEA, with particular reference to the Wirtz Report, supports the pre-Hazen Paper consensus concerning disparate impact liability. And Hazen Paper itself contains the response to the concern over the RFOA provision.

The RFOA provision provides that it shall not be unlawful for an employer "to take any action otherwise prohibited under subsectio[n] (a) … where the differentiation is based on reasonable factors other than age discrimination" in most disparate treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place. See Hazen Paper, 507 U.S., at 609, 113 S.Ct. 1701 ("[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."). In those disparate treatment cases, such as in Hazen Paper itself, the RFOA provision is simply unnecessary to avoid liability under the ADEA, since there was no prohibited action in the first place. The RFOA provision is not, as Justice O'CONNOR suggests, a "safe harbor from liability" since there would be no liability under sec. 4(a). See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (noting, in a Title VII case, that an employer can defeat liability by

showing that the employee was rejected for "a legitimate, nondiscriminatory reason" without reference to an RFOA provision).

In disparate impact cases, however, the allegedly "otherwise prohibited" activity is not based on age… . It is, accordingly, in cases involving disparate impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was "reasonable." Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion.

Finally, we note that both the Department of Labor, which initially drafted the legislation, and the EEOC, which is the agency charged by Congress with responsibility for implementing the statute, … have consistently interpreted the ADEA to authorize relief on a disparate impact theory… .

The text of the statute, as interpreted in Griggs, the RFOA provision, and the EEOC regulations all support petitioners' view. We therefore conclude that it was error for the Court of Appeals to hold that the disparate impact theory of liability is categorically unavailable under the ADEA.

IV

Two textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate impact theory, the scope of disparate impact liability under ADEA is narrower than under Title VII. The first is the RFOA provision, which we have already identified. The second is the amendment to Title VII contained in the Civil Rights Act of 1991, 105 Stat. 1071. One of the purposes of that amendment was to modify the Court's holding in Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S. Ct. 2115, 104 L.Ed.2d 733 (1989), a case in which we narrowly construed the employer's exposure to liability on a disparate impact theory … While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, Wards Cove's pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA.

Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. To be sure, Congress recognized that this is not always the case, and that society may perceive those differences to be larger or more consequential than they are in fact. However, as Secretary Wirtz noted in his report, "certain circumstances … unquestionably affect older workers more strongly, as a group, than they do younger workers." Thus, it is not surprising that certain employment criteria

Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group. Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII. While the ADEA reflects Congress' intent to give older workers employment opportunities whenever possible, the RFOA provision reflects this historical difference.

Turning to the case before us, we initially note that petitioners have done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They have not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers. As we held in Wards Cove, it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." … Petitioners have failed to do so. Their failure to identify the specific practice being challenged is the sort of omission that could "result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances … .' … In this case not only did petitioners thus err by failing to identify the relevant practice, but it is also clear from the record that the City's plan was based on reasonable factors other than age.

The plan divided each of five basic positions – police officer, master police officer, police sergeant, police lieutenant, and deputy police chief – into a series of steps and half-steps. The wage for each range was based on a survey of comparable communities in the Southeast. Employees were then assigned a step (or half-step) within their position that corresponded to the lowest step that would still give the individual a 2% raise. Most of the officers were in the three lowest ranks; in each of those ranks there were officers under age 40 and officers over 40. In none did their age affect their compensation. The few officers in the two highest ranks are all over 40. Their raises, though higher in dollar amount than the raises given to junior officers, represented a smaller percentage of their salaries, which of course are higher than the salaries paid to their juniors. They are members of the class complaining of the "disparate impact" of the award.

Petitioners' evidence established two principal facts: First, almost two-thirds (66.2%) of the officers under 40 received raises of more than 10% while less than half (45.3%) of those over 40 did. Second, the average percentage increase for the entire class of officers with less than five years of tenure was somewhat higher than the percentage for those with more seniority. Because older officers tended to occupy more senior positions, on average they received smaller in-

creases when measured as a percentage of their salary. The basic explanation for the differential was the City's perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market. Thus, the disparate impact is attributable to the City's decision to give raises based on seniority and position. Reliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities. In sum, we hold that the City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a "reasonable factor other than age" that responded to the City's legitimate goal of retaining police officers.

While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.

Accordingly, while we do not agree with the Court of Appeals' holding that the disparate impact theory of recovery is never available under the ADEA, we affirm its judgment.

It is so ordered.

[Justice SCALIA concurred separately in the plurality opionion. JUSTICE O'CONNOR, joined by JUSTICES THOMAS and KENNEDY, dissented. These opinions are omitted. CHIEF JUSTICE REHNQUIST did not participate].

[Source: 125 S. Ct. 1536]

ANNOTATION

There are two principal theories of "discrimination" under the U.S. discrimination statutes: *intentional* discrimination, involving *disparate treatment* of an individual *because* of that individual's race, sex, age, etc., and *unintentional* discrimination, involving the *disparate impact* upon the individual's group (race, sex, age, etc.) resulting from a neutral selection device or criterion, such as a height requirement, or passage of a test. *Intentional* discrimination is generally unlawful unless it can be justified as a *bona fide occupational qualification ("BFOQ"),* which is a difficult standard for an employer to meet.

Disparate impact theory was first recognized by the United States Supreme Court (in *Griggs v. Duke Power Co.)* through an expansive interpretation of Title 7 of the Civil Rights Act of 1964, applicable to discrimination on the basis of

race, color, sex, national origin, or religion. In 1991, Congress expressly incorporated disparate impact theory into Title 7, and clarified that selection devices or criteria which are shown to have a disparate impact upon a particular group are unlawful unless shown by the employer to be "job related and consistent with business necessity". While that standard is not as difficult for employers to meet as the BFOQ defense, it is still a high standard.

Neither Title 7 nor the 1991 Civil Rights Act apply to age discrimination, however, which is regulated by a separate statute, the Age Discrimination in Employment Act. Most lower federal courts assumed that disparate impact would apply to age discrimination, by analogy to the reasoning in *Griggs v. Duke Power*, but language in the Supreme Court's decision in *Hazen v. Biggins* cast doubt on that assumption, and some courts began to take a different view, including the Court of Appeal that decided the *Jackson* case, and the Supreme Court took that case in order to resolve the conflict.

The Supreme Court in *Jackson*, resolves the conflict by deciding (5-3) that disparate impact theory *is* available under the ADEA, because of similarities between that statute and the provisions of Title 7 which, before the 1991 Civil Rights Act, were relied upon to support that theory. But the court then proceeds to limit the application of disparate impact theory under the ADEA in ways which make its practical availability highly problematic.

The ADEA, unlike Title 7, contains a provision that makes otherwise prohibited conduct legally permissible if based on a "reasonable factor other than age" (RFOA). The court in *Jackson* views this provision as establishing a different standard of justification for disparate impact claims under the ADEA. Instead of requiring that the factor that causes the disparate impact be "job related and consistent with business necessity", the court limits the relevant inquiry to whether the factor is "reasonable", and decides that the City of Jackson's explanation for the disputed salary differentials was "reasonable" as a matter of law.

In addition, the Court decides that ADEA disparate impact cases are to be governed by the standards set forth in the 1989 decision in *Ward's Cove,* instead of by the more plaintiff-friendly standards which Congress adopted in the 1991 amendments to Title 7. One of those standards, as the Court notes, requires the plaintiff to identify the particular employment practices which the plaintiff claims to give rise to a disparate impact, and faults the plaintiffs in *Jackson* for failing to do that. But that requirement is not limited to *Ward's Cove*; the same or at least a very similar requirement is imposed in Title 7 cases by the language of the 1991 Civil Rights Act. In *Ward's Cove* the Supreme Court held, contrary to prior Court of Appeal decisions and to some language in prior Supreme Court opinions, that instead of it being the employer's burden to demonstrate that an employment practice with disparate impact is justified by business re-

quirements, it is the *plaintiff's* burden to demonstrate that it is *not* justified. This part of the *Ward's Cove* decision was expressly overturned by Congress in the 1991 Act, but since the Court in *Jackson* decides that it is *Ward's Cove* rather than the 1991 Act which governs disparate impact analysis in ADEA cases, its opinion implies that a plaintiff who contests a particular employment practice based on its disparate impact will bear the burden of demonstrating that the practice is not a "reasonable" non-age factor.

Thus, the Court's decision may turn out to be something of a pyrrhic victory for plaintiffs seeking to invoke disparate impact analysis under the ADEA. The Court does not attempt to define the term "reasonable" in this context – does it mean simply "rational" as opposed to "arbitrary", or does it connote some balanced judgment that takes into account both the nature of the disparate impact and the business (or governmental) interests apparently served. But the fact that the Court undertakes to decide the reasonableness of the City's justification for its disparate salary increases without bothering to remand for further proceedings in the trial court suggests that the standard is not particularly high. And, if it turns out that the burden is upon the plaintiffs to show *lack* of reasonableness, it requires some imagination to conceive of a case in which the plaintiffs are likely to prevail.

UNITED STATES OF AMERICA

Federal Supreme Court
Jackson v. Birmingham Board of Education

Title IX of the Education Amendments of 1972 – availability of action by employee of school district for retaliation against him for complaining of discrimination against girls' athletic program

HEADNOTES

Facts

Title IX of the Education Amendments of 1972 (20 U.S.Code sec. 1681(a)) provides that "[n]o person . . . shall, on the basis of sex, be . . . subjected to discrimination under any education program receiving Federal assistance". Roderick Jackson, the girls' basketball coach at a public high school, discovered that his team was not receiving equal funding and equal access to athletic equipment and facilities. After complaining, unsuccessfully, to his supervisors he received negative work evaluations and ultimately was removed as the girls' coach. He then sued in federal district court, claiming the school board had retaliated against him because he had complained of sex discrimination in the high school's athletic program, and that such retaliation violated the no-discrimination provision of Title IX.

Title IX does not contain an explicit prohibition against retaliation. Neither, for that matter, does it contain an explicit provision authorizing private lawsuits for discrimination in violation of the statute. But the federal Supreme Court had held earlier that the statute does, by implication, allow for a private cause of action. The question in this case was whether a private cause of action could be maintained by someone claiming retaliation who was neither himself a victim of the prohibited discrimination nor within the class of persons protected against discrimination by the statute. The district court answered that question in the negative and, assuming the truth of Jackson's allegations, dismissed his case. The Court of Appeals for the 11th Circuit affirmed, agreeing that Title IX created no cause of action for retaliation, or at least not by someone not within the

class protected against discrimination by the statute. The Courts of Appeal for the 4th and 5th Circuits having reached a different conclusion, the Supreme Court granted *certiorari* to decide the conflict.

Decision

Title IX's private right of action encompasses claims of retaliation against an individual because he has complained about sex discrimination. When a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX. In prior cases, the Court relied on Title IX's broad language prohibiting a funding recipient from intentionally subjecting any person to "discrimination" "on the basis of sex." Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is subjected to differential treatment. Moreover, it is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. The Eleventh Circuit's contrary conclusion is reversed and the case remanded for further proceedings.

Law Applied

See judgment.

JUDGMENT

Justice O'CONNOR delivered the opinion for the Court:

According to the complaint, Jackson has been an employee of the Birmingham school district for over 10 years. In 1993, the Board hired Jackson to serve as a physical education teacher and girls' basketball coach. Jackson was transferred to Ensley High School in August 1999. At Ensley, he discovered that the girls' team was not receiving equal funding and equal access to athletic equipment and facilities. The lack of adequate funding, equipment, and facilities made it difficult for Jackson to do his job as the team's coach.

In December 2000, Jackson began complaining to his supervisors about the unequal treatment of the girls' basketball team, but to no avail. Jackson's complaints went unanswered, and the school failed to remedy the situation. Instead, Jackson began to receive negative work evaluations and ultimately was removed as the girls' coach in May 2001. Jackson is still employed by the Board as a teacher, but he no longer receives supplemental pay for coaching.

After the Board terminated Jackson's coaching duties, he filed suit in the United States District Court for the Northern District of Alabama. . . . The Board moved to dismiss on the ground that Title IX's private cause of action does not include claims of retaliation. The District Court granted the motion to dismiss.

The Court of Appeals for the Eleventh Circuit affirmed. It assumed, for purposes of the appeal, that the Board retaliated against Jackson for complaining about Title IX violations. It then held that Jackson's suit failed to state a claim because Title IX does not provide a private right of action for retaliation, reasoning that "[n]othing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations." Relying on our decision in *Alexander v. Sandoval*, the Court of Appeals also concluded that a Department of Education regulation expressly prohibiting retaliation does not create a private cause of action for retaliation: "Because Congress has not created a right through Title IX to redress harms resulting from retaliation, [the regulation] may not be read to create one either." Finally, the court held that, even if Title IX prohibits retaliation, Jackson would not be entitled to relief because he is not within the class of persons protected by the statute. . . .

II

A

Title IX prohibits sex discrimination by recipients of federal education funding. The statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." More than 25 years ago, in *Cannon v. University of Chicago, 441 U.S. 677, 690-693, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)*, we held that Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination. In subsequent cases, we have defined the contours of that right of action. In *Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992)*, we held that it authorizes private parties to seek monetary damages for intentional violations of Title IX. We have also held that the private right of action encompasses intentional sex discrimination in the form of a recipient's deliberate indifference to a teacher's sexual harassment of a student . . . or harassment of a student by another student [citations omitted]. In all of these cases, we relied on the text of Title IX, which, subject to a list of narrow exceptions not at issue here, broadly prohibits a funding recipient from subjecting any person to "discrimination" "on the basis of sex." Re-

taliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

The Court of Appeals' conclusion that Title IX does not prohibit retaliation because the "statute makes no mention of retaliation," ignores the import of our repeated holdings construing "discrimination" under Title IX broadly. Though the statute does not mention sexual harassment, we have held that sexual harassment is intentional discrimination encompassed by Title IX's private right of action. . . . Thus, a recipient's deliberate indifference to a teacher's sexual harassment of a student also "violate[s] Title IX's plain terms. . . . Likewise, a recipient's deliberate indifference to sexual harassment of a student by another student also squarely constitutes "discrimination" "on the basis of sex. . . . "Discrimination" is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach.

Congress certainly could have mentioned retaliation in Title IX expressly, as it did in § 704 of Title VII of the Civil Rights Act of 1964, providing that it is an "unlawful employment practice" for an employer to retaliate against an employee because he has "opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]"). Title VII, however, is a vastly different statute from Title IX, and the comparison the Board urges us to draw is therefore of limited use. Title IX's cause of action is implied, while Title VII's is express. Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition. See *20 U.S.C. § 1681* . By contrast, Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute. . . . Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.

Title IX was enacted in 1972, three years after our decision in *Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969)*. In *Sullivan*, we held that *42 U.S.C. § 1982* , which provides that "[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," pro-

tected a white man who spoke out against discrimination toward one of his tenants and who suffered retaliation as a result. Sullivan had rented a house to a black man and assigned him a membership share and use rights in a private park. The corporation that owned the park would not approve the assignment to the black lessee. Sullivan protested, and the corporation retaliated against him by expelling him and taking his shares. Sullivan sued the corporation, and we upheld Sullivan's cause of action under *42 U.S.C. § 1982* for "[retaliation] for the advocacy of [the black person's] cause." *396 U.S., at 237, 90 S.Ct. 400*. Thus, in *Sullivan* we interpreted a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition.

Congress enacted Title IX just three years after *Sullivan* was decided, and accordingly that decision provides a valuable context for understanding the statute. . . . Retliation for Jackson's advocacy of the rights of the girls' basketball team in this case is "discrimination" "on the basis of sex," just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race.

B

The Board contends that our decision in *Alexander v. Sandoval, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001)* , compels a holding that Title IX's private right of action does not encompass retaliation. *Sandoval* involved an interpretation of Title VI of the Civil Rights Act of 1964, which provides in § 601 that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI. Section 602 of Title VI authorizes federal agencies to effectuate the provisions in § 601 by enacting regulations. Pursuant to that authority, the Department of Justice promulgated regulations forbidding funding recipients from adopting policies that had "the effect of subjecting individuals to discrimination because of their race, color, or national origin." The *Sandoval* petitioners brought suit to enjoin an English-only policy of the Alabama Department of Public Safety on grounds that it disparately impacted non-English speakers in violation of the regulations. Though we assumed that the regulations themselves were valid, we rejected the contention that the private right of action to enforce intentional violations of Title VI encompassed suits to enforce the disparate-impact regulations. Thus, *Sandoval* held that private parties may not invoke Title VI regulations to obtain redress for disparate-impact discrimination because Title VI itself prohibits only intentional discrimination.

The Board cites a Department of Education regulation prohibiting retaliation "against any individual for the purpose of interfering with any right or privilege secured by [Title IX] and contends that Jackson, like the petitioners in *Sandoval,* seeks an "impermissible extension of the statute" when he argues that Title IX's private right of action encompasses retaliation. This argument, however, entirely misses the point. We do not rely on regulations extending Title IX's protection beyond its statutory limits; indeed, we do not rely on the Department of Education's regulation at all, because the statute *itself* contains the necessary prohibition. . . . In step with *Sandoval,* we hold that Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex.

. . .

C

Nor are we convinced by the Board's argument that, even if Title IX's private right of action encompasses discrimination, Jackson is not entitled to invoke it because he is an "indirect victi[m]" of sex discrimination. The statute is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint. If the statute provided instead that "no person shall be subjected to discrimination on the basis of *such individual's* sex," then we would agree with the Board . . . However, Title IX contains no such limitation. Where the retaliation occurs because the complainant speaks out about sex discrimination, the "on the basis of sex" requirement is satisfied. The complainant is himself a victim of discriminatory conduct.

Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also "to provide individual citizens effective protection against those practices." We agree with the United States that this objective "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." If recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result. . . . Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel. . . . Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied.

Title IX's enforcement scheme also depends on individual reporting because individuals and agencies may not bring suit under the statute unless the recipient has received "actual notice" of the discrimination. . . . If recipients were able to avoid such notice by retaliating against all those who dare complain, the statute's enforcement scheme would be subverted. We should not assume that Congress left such a gap in its scheme.

Moreover, teachers and coaches such as Jackson are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are "the only effective adversar[ies]" of discrimination in schools. See *Sullivan, supra, at 237, 90 S.Ct. 400* ("[A] white owner is at times 'the only effective adversary' of the unlawful restrictive covenant").

The Board is correct in pointing out that, because Title IX was enacted as an exercise of Congress' powers under the Spending Clause, private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue," When Congress enacts legislation under its spending power, that legislation is "in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." As we have recognized, "[t]here can ... be no knowing acceptance [of the terms of the contract] if a State is unaware of the conditions [imposed by the legislation on its receipt of funds]." [The Court concluded that, on the basis of its prior decisions, the Board had adequate notice that its retaliatory actions would subject it to liability.]

To prevail on the merits, Jackson will have to prove that the Board retaliated against him *because* he complained of sex discrimination. The amended complaint alleges that the Board retaliated against Jackson for complaining to his supervisor, Ms. Evelyn Baugh, about sex discrimination at Ensley High School. At this stage of the proceedings, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." . . . Accordingly, the judgment of the Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[The dissenting opinion of Justice THOMAS is omitted].

[Source: 125 S.Ct. 1497]

ANNOTATION

As the Court notes, Title VII of the Civil Rights Act of 1964, which prohibits discrimination, *inter alia*, on the basis of sex, makes it unlawful for an employer to retaliate against an employee because of that employee's opposition to sex discrimination *under that statute*. But Title VII was not available to Roderick Jackson because he was not complaining of discrimination in access to a federal funded program, in violation of Title IX, rather than employment discrimination under Title VII. If the Court had upheld the Eleventh Circuit, employees like Jackson would be vulnerable to retaliation for complaining of discrimination that is prohibited by some statute other than Title VII.

Beyond its holding, the Court's decision is of significance for two other reasons. One is its reiteration of the principle that statutory prohibition of "discrimination" reaches a broad range of disparate treatment. The other is its discussion of the significance of protecting against retaliation in order to achieve the core objectives of the prohibition against discrimination. In both respects, the decision may have implications for the interpretation of other anti-discrimination statutes, including those which prohibit discrimination in employment.

PART THREE

MANPOWER

FRANCE

Court of Cassation, Chamber for Social and Labour Matters
IBM France v. Chatard
April 20th 2005

Part-time employees – priority for full-time jobs – information provided by employer – methods – intranet.

HEADNOTES

Facts

Mr. Chatard had been employed by IBM France since October 20th 1966 as assistant operator then programmer analyst, with a part-time position starting in July 1993 at his own request. In December 1998, he applied for a full-time job.

He brought a case in the Industrial Tribunal (*Conseil de prud'hommes)*, the court of first instance in France for all individual disputes concerning employment contracts. He considered that his employer had not met the legal obligation to inform him of the list of jobs available, nor had he been given the priority to which he was entitled, so he sued his employer for damages.

Following the ruling of the Industrial Tribunal, on January 9th 2003, the Orléans Court of Appeal ordered IBM France to pay Mr. Chatard 3,050 euros in damages for non-compliance with article L. 212-4-9 of the French Labour Code and inform Mr. Chatard of the list of full-time jobs available in his employment category or similar jobs on stand-by.

IBM France appealed to the Chamber for Social and Labour Matters at the Court of Cassation. The company considered that article L. 212-4-9 of the French Labour Code did not specify any particular method for the employer to fulfil the obligation to "inform" part-time employees who wished to apply for a full-time position of the list of jobs available, and that they had met this obligation perfectly using the modern method of posting an exhaustive, permanent list on "INTRANET", including the job title, type of work, location, and availability date, as well as code-protected detailed observations, thus providing ample information for any interested party to identify positions "corresponding" to their

own; that, in that case, the Orléans Court of Appeal's requirement that the employer establish a personal list limited to positions corresponding to the employee's current job for each person requesting a change in working hours went against the aforementioned text by adding a requirement that was never in the original article; that this is even more true as the order issued to IBM to inform Mr. Chatard in the future of the list of full-time jobs available in his employment category or similar jobs was already satisfied by the data available on the company intranet, listing "jobs available by type and level of responsibility".

Decision

The Court of Cassation rejected the appeal against the decision of the Orléans Court of Appeal and confirmed their ruling.

Law applied

ARTICLE L. 212-4-9 OF THE FRENCH LABOUR CODE

"Part-time employees who wish to take or resume a full-time job and full-time employees who wish to take or resume a part-time job in the same business unit or elsewhere in the same company are given priority for jobs in their own employment category or similar positions. Employers must inform these employees of the list of corresponding jobs available. (…)"

JUDGMENT

The Chamber for Social and Labour Matters at the Court of Cassation noted that "while employers may inform employees about jobs available via electronic communication systems, particularly a corporate INTRANET network, in application of article L. 212-4-9 of the French Labour Code, they are obliged to circulate specific information concerning jobs that may correspond to the person's employment category, or similar positions, to part-time employees wishing to take up full-time employment, or full-time employees wishing to transfer to a part-time job". On these grounds, the Court of Cassation rejected IBM France's appeal against the Orléans Court of Appeal ruling.

[Source Court of Cassation (Chamber for Social and Labour Matters) Judgment dated April 20th 2005, Court of Cassation bulletin n° 03-41.802 FS-P+B+R+I].

ANNOTATION

The use of electronic communication methods in companies is not a particularly new phenomenon. Labour law has been dealing with related issues for several years. The French Court of Cassation was, however, asked to rule on a specific issue concerning the obligation to inform employees about certain rights, which, in a particular company, was exclusively implemented via the intranet network. In a decision that may seem severe, considering the business of the company involved (IBM France) and the supposed corporate culture of their employees, the Court of Cassation stated that supplying information by the intranet network alone did not absolve employers from their legal obligation to provide information While approving the use of intranet, the Court emphasised that the employer's obligation is not simply a formal requirement, to be fulfilled one way or another, but that the employee has, above all, a right to effective information. This decision provides an opportunity to re-examine the use of corporate intranet by employers and explore the limitations of this system.

Article L. 212-4-9 of the French Labour Code grants employees of a company "priority in obtaining jobs in their own employment category or similar positions". This priority is applicable both for part-time employees interested in full-time jobs and full-time employees who wish to transfer to part-time positions. The text specifies that "employers must inform these employees of the list of corresponding jobs available".

While these legal provisions may quite frequently lead to discussion aimed at determining the types of jobs that must be proposed, it is much less common to hear a dispute on the method used to transmit the information. Until now, employers had used conventional methods and the French Court of Cassation had never been asked to rule on the employer's use of the company's intranet network.

In this case, following a practice that is relatively widespread today in major companies, the employer had circulated "an exhaustive, permanent, list including the job title, type of work, location, and availability date" for available jobs on the intranet network and each employee also had the possibility of accessing more detailed information about the positions proposed using a personal access code.

An employee claimed that his rights had been infringed and obtained damages in compensation for the prejudice he suffered due to lack of individual information, as the Court of Appeal considered that the employer should establish "a personal list restricted to jobs corresponding to the employee's current position for the benefit of each person requesting a change in working hours".

The company argued in the Court of Cassation that article L. 212-4-9 of the French Labour Code did not specify the methods to be used to inform employees and that posting a full list of available positions on the company's intranet network was compliant with legal requirements.

This was not the opinion of the Chamber for Social and Labour Matters at the Court of Cassation, who rejected the appeal and considered that: "while employers may inform employees about jobs available via electronic communication systems, particularly a corporate INTRANET network, in application of article L. 212-4-9 of the French Labour Code, they are obliged to circulate specific information concerning jobs that may correspond to the person's employment category, or similar positions, to part-time employees wishing to take up full-time employment, or full-time employees wishing to transfer to a part-time job."

This ruling emphasised two distinct points. Firstly, the Court of Cassation confirmed that: "employers may inform employees about available jobs via electronic communication systems, particularly a corporate intranet network". This information on the status of jobs available in the company makes it possible for employees to apply for other positions, thus constituting an instrument for internal job mobility. It may even be considered that this practice contributes to the employer's obligation of good faith in the performance of employment contracts, to the extent that it offers employees the possibility of developing their careers in the company. However, the French Court of Cassation also stated the principle that employers may not count on circulating the information via the intranet network only to fulfil their obligations under article L. 212-4-9 of the French Labour Code. They must "circulate specific information concerning jobs that may correspond to the person's employment category, or similar positions" and this information must be personally targeted, whereas the posting on intranet is, necessarily, general and impersonal.

This approach sets real limitations on the use of intranet and calls for several observations. From a legal point of view, article L. 212-4-9 of the French Labour Code does not specify the means by which employers "must inform these employees of the list of corresponding jobs available". However, the law gives some indications justifying the Court of Cassation's decision.

Indeed, priority for these positions only concerns employees "who wish to take or resume" a full- or part-time job. Employees must have expressed this desire to their employer to be entitled to priority. As a result, the right to information operates in the context of individual work relations between the employer and each employee, rather than on a corporate level. The corporate intranet network is necessarily an impersonal medium. Of course, employers may provide access to customized information for employees via personal access

codes, but this network is still only a database and employees have to take active steps to access the information. Article L. 212-4-9 of the French Labour Code stipulates that the employer has an obligation to inform, but does not impose any obligation on the employee. This being the case, considering that posting the vacant positions on line was sufficient would lead to modifying the nature of the rules in the French Labour Code.

It should be added that employees do not always have easy access to their company's intranet, or the necessary skills to use all its functions, even if this argument may seem a little far-fetched in the case of employees of a major computer company! If we leave aside the specific nature of this company's business, the requirement for personal information certainly guarantees actual compliance with the employees right to information. Furthermore, it may generally be assumed that employees are not necessarily capable of making the correlation between the list of available positions and their own capacity to fill a "similar" position. Employees can certainly form an opinion by consulting the list of available positions, but employers must propose other positions they might not necessarily have identified as suitable.

While this decision seems to preclude providing general information solely via the company intranet instead of giving employees customised information, it does not prohibit the use of intranet in addition to specific, personal information. The company could thus send employees a specific list of positions for which they could apply, referring them to the intranet to access details of these jobs, using codes to identify the information of interest to them.

It would even be possible to envisage that, in the future, the Court of Cassation would not object to employers simply classifying lists of positions available on the company intranet according to the various employment categories, without going so far as to provide customised information to individual employees. Indeed, the Court referred to "circulation" of this information, but did not insist on customised information sent to each employee, unlike the ruling of the Orléans Court of Appeal. The decision also mentioned "categories" of employees who had expressed a desire to change jobs, without referring to employees as individuals. Although the judges at the Court of Cassation are relatively mature in age, they have obviously retained some capacity to adapt to the intrusion of new information and communication technologies in labour law !

GREAT BRITAIN

Court of Appeal
Bunce v Postworth Ltd t/a Skyblue

Contract of employment – statutory employment rights based upon whether arising between temporary agency worker and employment agency

HEADNOTES

Facts

The basic facts of this appeal were set out, and the earlier stages of the proceedings were described, in paras 3-4 of the judgment of Lord Justice Keene as follows:

> 'The present appeal arises out of a claim for unfair dismissal brought by the appellant, Mr Bunce, against the present respondent, Postworth Ltd, trading as Skyblue, and GT Railway Maintenance Ltd, trading as Carillion Rail. As the employment tribunal found, Skyblue is an employment agency and Carillion Rail is an associated company whose business is railway maintenance and civil engineering. The appellant is a welder, who entered into an agreement with Skyblue, as a result of which he was sent on a regular basis to carry out welding work for Carillion Rail and other companies. It is not in dispute that, in the 52 weeks before his engagement was ended by Skyblue on 19 December 2002, the appellant worked on 142 assignments, mostly for Carillion Rail but on 39 of them for other companies engaged in railway maintenance. He worked for all or part of each of those 52 weeks. However, the employment tribunal concluded that he was not an employee of either Skyblue or Carillion Rail and that in consequence it had no jurisdiction to hear his unfair dismissal claim.
> No appeal was lodged against the decision that he was not an employee of Carillion Rail. The appeal to the Employment Appeal Tribunal ('the EAT') concerned solely the issue whether he had been an employee of Skyblue within the meaning of s.230 of the 1996 Act. The EAT upheld the decision on that issue by the employment tribunal on two grounds: first, that there was an absence of mutuality of obligation between the appellant and Skyblue, and secondly that on the facts, particularly the minimal control exercised by Skyblue (as opposed to Carillion), the tribunal had been entitled to conclude that there was no contract of service

with Skyblue. That decision of the EAT is now challenged in the appeal to this court.'

Decision

The appeal was dismissed on the basis that the Employment Tribunal and the EAT had been entitled to conclude that no contract of employment had existed between the appellant worker and the respondent employment agency.

Law applied

The law applied was identified and described in para 2 of the judgment of Lord Justice Keene as follows:

Who is an employee? According to the definition provided by s.230(1) of the 1996 Act, he is

> "an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment."

A contract of employment is then defined by s.230(2) as meaning

> "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."

A contract of service is not further defined. It appears that the legislature took the view that a contract of service was a creature already sufficiently well-known to the law and was content to leave it to the courts to apply the principles established in the case law for determining when a contract of service exists or does not exist. The contrast normally drawn in those decided cases has been between a contract of service and a contract for services, the latter being where the task covered by the contract is performed by an independent contractor.'

JUDGMENT

LORD JUSTICE KEENE delivered the following unanimous judgment of the Court of Appeal:

1. This is another appeal which is concerned with the legal problems which arise from the increased use of workers supplied by an employment agency to a client in situations where, in the past, the worker would normally have been regarded as the employee of either the employment agency or the client. The employment status of the worker in such cases may be relevant in a number of types of ways. It may, for example, affect whether anyone is vicariously liable for the torts committed by him in the course of his work. But one of the most im-

portant ways in which such an issue may be relevant, as in the present case, is in respect of the statutory right enjoyed by employees not to be unfairly dismissed. Putting it shortly, it is only an 'employee' who has the right under s.94(1) of the Employment Rights Act 1996 ('the 1996 Act') not to be unfairly dismissed by his 'employer'.

[The law applied is then set out, in para 2 of the judgment, as above 'Law Applied']

[The basic facts and history of the litigation are then set out, in para 3 to 4 of the judgment, as above 'Facts']

[The judgment then continues as follows:]

5. It is necessary to set out the relevant facts in more detail. The employment tribunal found that the appellant's relationship with Skyblue began when he signed a written agreement on or about 10 November 2001. The document was entitled 'Associate – term and conditions of engagement'. The terms expressly provided that this was a contract for services as between Skyblue and the appellant and stated that

> 'for the avoidance of doubt these terms and conditions shall not give rise to a contract of employment'

between Skyblue and the appellant. Clause 3(a) provided that Skyblue agreed to engage the services of the appellant on 'these terms and conditions' and

> 'shall undertake to obtain suitable assignments for the associate (ie the appellant) with clients to work as assistant welder.'

A subsequent provision specified that he would be paid at an hourly rate of £ 12. Clause 3(b) stated that the failure of Skyblue to obtain suitable assignments for the associate

> 'shall not give rise to any liability on the part of the employment business (ie Skyblue) and the associate recognises that there may be periods between Assignments when no work is available.'

Clause 3(c) provided that

> 'The associate shall not be obliged to accept an assignment offered by the employment business.'

The agreement provided for a time-sheet to be produced at the end of each week by the associate to Skyblue, the time-sheet being signed by a representative of the client. Skyblue would then pay the associate at the agreed hourly rate for

the hours worked, subject to deductions for National Insurance, income tax and any other deductions required by law. Under the agreement the appellant was entitled to paid annual leave but not to sick pay.

6. Clause 7(a) of the agreement dealt with an associate's obligations in respect of the conduct of an assignment. It is relied on by the appellant as being of importance to this appeal. It stated that the associate agreed that during every assignment and afterwards as appropriate he/she would

> '(a) Cooperate with the client's staff and accept the directions, supervision and instruction of any person in the client's organisation to whom he/she is responsible and conform to the client's rules and regulations and normal hours of work and practice.'

7. Clause 8 provided as follows:

> '(a) The employment business may at any time without notice and without liability instruct the associate to end an assignment.
>
> (b) If the associate is unable for any reason to work on an assignment he/she should inform the employment business by no later than 1 hour prior to the start time on the first day of the absence to enable the employment business to make alternative arrangements with the client.'

8. There was also, as part of the same document, a set of terms headed 'associate's agency agreement'. These too were signed by the appellant. Many of the terms were the same as or similar to those in the first part of the document, but they also provided that the associate appointed the employment business as his agent to arrange Assignments with clients. Clause 2(a) stated that

> 'This and the client temporary agreement regulate assignments undertaken by the associate with the client under a contract for services, which applies on each occasion when the associate provides services to the client.'

'The client temporary agreement' was said to be a document 'in the form shown overleaf which sets out the terms upon which the associate provides services to the client'. That document is not in evidence.

9. The tribunal found that the appellant was provided with training, certification materials and tools by Skyblue.

10.The tribunal did not make any explicit findings about how the system set up under these arrangements operated in practice. Evidence in witness statements filed on behalf of the respondents indicated that, when Skyblue were told by a client, such as Carillion Rail, of the need for a certain number of welders, Skyblue would then identify that number of individuals on their data base. Skyblue then would telephone a person on their data base, such as the appellant, about the assignment. If he accepted it, he would be told the location and nature of the job. Once there, he was directed what to do by the local supervisor. When

the work was done, it would be inspected by a welder inspector employed by Carillion Rail or other end-client company, as the case might be. The client company in due course would pay Skyblue on a monthly basis a sum based on the number of welders and hours worked that month and their hourly rates. The tribunal found that the rate of pay for the appellant was considerably higher than that of employees of Carillion Rail.

11. It was also found that in November 2002 there was a change in management responsibilities for those such as the appellant, with his immediate line manager becoming an employee of Carillion Rail. The tribunal did not regard this as changing the relationship between the appellant and Skyblue, and that is not suggested by either party to this appeal.

12. Eventually there were complaints by Carillion Rail about alleged deficiencies in the appellant's work and on 19 December 2002 he was informed orally by Skyblue that they were terminating the relationship.'

13. In its extended reasons, the employment tribunal referred to a number of authorities on the meaning of a contract of service. It cited the well-known passage from the judgment of MacKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, at 515 where he said this:

> 'A contract of service exists if these three conditions are fulfilled.
>
> (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
>
> (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
>
> (iii) The other provisions of the contract are consistent with its being a contract of service.'

The tribunal noted that mutuality of obligation had been described as the 'irreducible minimum' required for a contract of employment, referring to Nethermere (St. Neots) Ltd v Gardiner [1984] IRLR 240. Referring to the written agreement of 10 November 2001 in the present case, the tribunal found that that necessary mutuality of obligation did not exist. The appellant was not entitled to expect a constant stream of work and Skyblue would not insist upon him accepting assignments offered to him.

14. The tribunal then went on to consider whether, if there was such mutuality of obligation, the other factors present indicated that this was a contract of service. It approached this issue by considering the factors set out in the judgment of Mummery J in Hall v Lorimer [1992] ICR 739. In the light of various

factors which it listed, it again concluded that the appellant was not an employee. It also held that he was not self-employed. As I have already indicated, the EAT upheld the tribunal on both points, particularly emphasising, on the second, the lack of control by Skyblue over the work.

15. The finding that the agreement of 10 November 2001 did not establish a contract of service between the appellant and Skyblue is not challenged on this appeal. The submission made by Mr Hogarth, QC, on behalf of the appellant, is that that was simply the umbrella agreement covering the relationship generally between the appellant and Skyblue. But when the appellant was actually working, he was an employee because there was then a sufficient mutuality of obligation. During those periods of work there existed separate contracts for each specific assignment, such a contract arising on each occasion when Skyblue offered the appellant an assignment and he accepted it. It was, it is contended, each such contract . . . was a contract of service, because the appellant was doing work at Skyblue's request and was being paid for it by Skyblue.

16. It is accepted by the appellant that, when he was working, control over his work was exercisable by the end-user client. Some elements of control remained with Skyblue, such as telling him where the site was at which he was to work, but once he was at the site it was the client who could direct him what he was to do and how he was to do it. But, submits Mr Hogarth, that power of control originated in the written contract with Skyblue, since it was clause 7(a) of that agreement which obliged the appellant to 'accept the directions, supervision and instruction of any person in the client's organisation to whom he/she is responsible'. Thus the contractual right of control was originally with Skyblue, who were in effect delegating the power of control to the client. It is contended that that gave Skyblue sufficient control for the purpose of establishing a contract of service under which the appellant was Skyblue's employee, especially when it is combined with the right retained by Skyblue to instruct the appellant to end an assignment: clause 8(a).

17. Mr Hogarth also criticises the employment tribunal's decision for not dealing adequately with the position in respect of separate contracts for each assignment. He has taken us through the various factors listed by the tribunal when it was considering whether there was a contract of service and he argues that some of them were not indicative of the absence of such a contract. He instances amongst others the absence of sick pay, the absence of a disciplinary and grievance procedure and the absence of any need for a period of notice by either party when terminating the arrangement. Furthermore it is said that the tribunal failed to have regard to all the specific criteria set out in Hall v Lorimer. Finally, it is argued that the tribunal's conclusion that the appellant was neither an

employee nor self-employed was bizarre and postulates some new category of worker.

18. It is perhaps helpful to take first this last group of criticisms of the tribunal's decision. It is right that the employment tribunal did not deal at any length with the possibility of a separate contract of service relating to each assignment. What it said on that topic was this:

> 'Whilst we appreciate from the cases of Dacas v Brook Street Bureau UK Ltd [2003] IRLR 190 and Franks v Reuters Ltd [2003] IRLR 423 that a "temporary worker" ostensibly with an employment agency can in certain circumstances be regarded as the employee of either the agency or the host company, we find that in this case there is nothing approaching the consistency and continuity of placement that existed in the reported cases.'

The reference to 'consistency and continuity of placement' may seem a little Delphic, but must have been intended to reflect the fact that, in both the cases mentioned, the individual worker had spent several years working with the end-user client (having been placed there by an employment agency) and that in both cases this court was prepared, partly because of that length of service, to envisage the possibility of a contract of service between the worker and the end-user client. The tribunal here did not deal further with the possibility of a contract of service arising with Skyblue each time the appellant accepted an assignment, but that must be seen in the context of the case being advanced before it on his behalf at that stage in the proceedings. We have in the appeal bundle the written note of the submissions made on his behalf, as well as the summary of them in the tribunal's extended reasons. They do not reveal any suggestion of there being separate contracts of service for each assignment. The respondent's solicitor did deal with this possibility but it is clear that it was not a central issue before the tribunal. That perhaps explains the limited attention given to it in the tribunal's reasons. It is an argument which has only subsequently been adopted on the appellant's behalf.

19. I do not find Mr Hogarth's critique of the tribunal's approach to the factors relevant to deciding whether there is a contract of service persuasive. As Mummery J (as he then was) emphasised in Hall v Lorimer itself, the factors he referred to were not intended to be exhaustive nor were they to be applied in a mechanistic way. He was at pains to point out (at p.172) that

> 'The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or im-

> portance in any given situation. The details may also vary in importance from one situation to another.'

Such factors as the presence or absence of a grievance procedure have been regarded as of some relevance: see, for example, McMeechan v Secretary of State for Employment [1997] IRLR 353 at 360. But what is clear is that the tribunal sought to apply the approach commended in Hall v Lorimer -- indeed, it quoted from the relevant passage in that case, and I can see no basis for criticising its conclusion. In any event, the appellant does not challenge that conclusion, in so far as it relates to the 'umbrella' written contract of 10 November 2001. None of his arguments focuses on the real issue in this case, which is whether there were separate contracts of service with Skyblue each time an assignment was accepted, or at least a sufficient possibility of the existence of such contracts to justify remitting this matter to the employment tribunal to consider the issue afresh.

20. That issue involves two propositions: first, that a further contract between the appellant and Skyblue came into existence in respect of each assignment; and secondly, that each such contract with Skyblue was a contract of service. On the first of those issues, Mr Hogarth relies on a number of authorities to demonstrate that it is legally possible to have both a general 'umbrella' contract in cases such as this and specific contracts for each assignment. Such a possibility seems to have been envisaged by Sir John Donaldson, MR, in O'Kelly v Trusthouse Forte plc [1983] IRLR 369 at 382, a case dealing with casual catering staff. It was said that, if there was an umbrella or master contract,

> 'it would be a contract to offer and accept individual contracts of employment and, as such, outside the scope of the unfair dismissal provisions.'

In McMeechan, an employment agency case, this court held that each specific engagement on which a worker went was capable of giving rise to a contract of employment. Moreover, Waite LJ, with whom the rest of the court agreed, said at p.359:

> 'There is nothing inherently repugnant, whether to good relations in the workplace or in law, about a state of affairs under which, in an employment agency case, the status of employee of the agency is allocated to a temporary worker in respect of each assignment actually worked, notwithstanding that the same worker may not be entitled to employee status under his general terms of engagement.'

There was, in fact, in that case no master or umbrella agreement between the temporary workers and the agency (see 355), and as each specific job arose, a job sheet containing detailed contractual terms was completed. It was, therefore, a strong case on its facts. Nonetheless, the statement of principle set out above

and relied on by Mr Hogarth was not confined to cases where there was no umbrella agreement. That decision was followed in Clark v Oxfordshire Health Authority [1998] IRLR 125, again a decision of this court.

21. I have no difficulty in accepting that there may, in certain circumstances, exist both a master or umbrella agreement, governing the relationship between a worker and an employment agency, and individual contracts in respect of specific assignments or tasks. As a matter of legal principle, that is entirely possible. It is in reality more likely that individual assignment contracts will exist with the agency where there is no master agreement containing detailed terms in being, as in McMeechan, than where there is, since the terms of the latter may well cover what is to happen on each assignment. Thus in Dacas v Brook Street Bureau there was an express master agreement between Mrs Dacas and Brook Street Bureau but this court found that there was only that one contract, Mummery LJ saying at paragraph 64:

> 'There was no basis in the documents or in the evidence for finding another contract between Brook Street and Mrs Dacas governing her work at West Drive,'

that being the location of the council hostel where Mrs Dacas had worked on a specific assignment. Indeed, Mr Hogarth was unable to refer to any reported case where there has been found to exist, as between the worker and the employment agency, both a master contract and separate contracts for each assignment. Nonetheless, it is, I accept, a situation which could arise and the authorities indicate that that is so.

22. The issue on this part of the case is whether such separate contracts did exist, as between the appellant and Skyblue, in respect of each assignment, as well as the written agreement of 10 November 2001. In considering this issue, one has to bear in mind the very detailed provisions of that written agreement. They dealt not only with the rate of pay which the appellant was to receive on each assignment but also with the 'Conduct of assignments', that is to say, how he was to conduct himself on each assignment. Clause 7 required him to cooperate with the client's staff and to accept the directions of the client's responsible persons; to take all reasonable steps for his and others' safety; and not to act in a way detrimental to the client's interests. By clause 13 he undertook to observe all health, safety, environmental and welfare requirements in force at any site. And, as I have set out earlier, clause 2(a) of the agency agreement part of that document stated that that agreement and the client temporary agreement 'overleaf' regulated assignments undertaken by the associate with the client.

23. Given these very detailed provisions governing the relationship between Skyblue and the appellant in respect of each assignment, I can see little room for individual contracts between those parties for each assignment. It was clearly implicit in that agreement that, once the appellant had accepted a specific as-

signment, he would carry it out. I say nothing about the possibility of individual contracts between the appellant and the end-user client, as envisaged in Dacas: that is not a line of argument advanced before us. But on the evidence and documents in this case, I am not persuaded that there was a second contract between Skyblue and the appellant each time he was sent on a specific engagement.

24. However, even if there was such a contract for each assignment, whether arising separately from the document of 10 November 2001 or in some way under its provisions, the appellant faces the further hurdle of establishing that such contracts were contracts of service with Skyblue. On that issue, the legal principles applicable were recently and authoritatively reviewed by this court in Dacas and I do not find it necessary to engage in a further analysis of previous authorities. The court in that case (paragraph 49) re-emphasised the point that

> 'there is an "irreducible minimum of mutual obligation necessary for a contract of service", ie an obligation to provide work and an obligation to perform it, coupled with the presence of control: see, for example, Carmichael v National Power plc at pp.45 (per Lord Irvine of Lairg) and 47 (Lord Hoffmann); Montgomery v Johnson Underwood at paragraphs 21, 23, 46 and 47 and the other authorities cited in the judgments in those cases . . .. In the absence of a contract, or of a contract having those features, the applicant cannot qualify as an employee, even though it may well seem surprising not to regard the applicant as an employee. A tribunal must, however, resist the temptation to conclude that an individual is an employee simply because he is not a self employed person carrying on a business of his own: Wickens v Champion Employment [1984] ICR 365 at 371 and Ironmonger v Movefield Ltd [1988] IRLR 461 at paragraphs 19-21.'

I note in passing that those two authorities referred to by Mummery LJ and endorsed by him, both of them being employment agency cases, do indeed provide support for the employment tribunal's approach in this case, namely that the appellant was not an employee simply because he was not self-employed. In any event, whether or not there is some sui generis category of worker neither self-employed nor an employee under a contract of service, the question remains whether in this present case there was a contract of service with Skyblue.

25. The importance of control as a feature of contracts of service and in particular control not only over what the worker does but how he does it is long-established. In the vicarious liability case of Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd [1947] AC 1, Lord Porter in a well-known passage at p.17 emphasised that what matters is the ability to control the method of performing the task. He added:

> 'It is true that in most cases no orders as to how a job should be done are given or required: the man is left to do his own work in his own way. But the ultimate

> question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done.'

26. In Montgomery v Johnson Underwood Ltd [2001] IRLR 269 Longmore LJ saw such control as an essential feature of a contract of service:

> 'Mutuality of obligation and the requirement of control on the part of the potential employer are the irreducible minimum for the existence of a contract of employment.' (paragraph 46)

In Dacas, the court rejected the argument that there was a contract of service between Mrs Dacas and the employment agency, not only because of a lack of mutuality of obligation but also because the agency

> 'did not exercise any relevant day-to-day control over her or her work at West Drive . . . The real control over the work done by Mrs Dacas at West Drive and over her in the workplace was not exercised by Brook Street' (per Mummery LJ at paragraph 64).

There are many other authorities which indicate that such control will normally be a necessary condition, though not always a sufficient one, for the existence of a contract of service.

27. Although Mr Hogarth refers to the exceptional situation of the master of a ship under a charter party, where the master is generally the employee of the ship owner, even though the charterer can direct the employment of the vessel (see Lord Wright in Montreal v Montreal Locomotive Works Ltd [1947] 1 DLR 161 at 169), he accepts the importance of this factor of day-to-day control. It is also accepted that, in the present case, such control over the appellant and his work rested with the client company. That is why the appellant's submission is that it is enough that such control has been 'delegated' to the client under a contract with Skyblue, and that this means that Skyblue has sufficient control to be his employer.

28. Is it enough that the ability of the client to control the day-to-day work originates in an agreement with Skyblue? It is to be observed that the contractual term principally relied on by the appellant, clause 7(a), requiring him to accept the directions, supervision and instruction of the client, seems to be a standard term in these contracts used these days by employment agencies. A term in almost identical words was a feature of the agreement in Dacas between Mrs Dacas and the agency, as it was in Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471. It does not seem to have occurred to anyone in those cases that the origin of the client's control in a term of the contract between the worker and the agency was enough for the agency to be seen as having sufficient control for these purposes. Of course, that does not itself invalidate the argument based on 'delegation', since it has not previously been considered by the courts.

29. I cannot, however, accept that the mere fact that the client's day-to-day control originates, so far as the appellant's obligation is concerned, in a term of the contract between Skyblue and the appellant is enough to satisfy the requirement for control by Skyblue. The law has always been concerned with who in reality has the power to control what the worker does and how he does it. In the present case, during the periods when the appellant was working on an assignment, it was the client, the end-user, who had the power to direct and control what he did and how he did it. That is not in dispute. Skyblue could not exercise such control over the appellant. Nothing before us in the evidence indicates that Skyblue retained any such power – unlike the situation in McMeechan: see p.355, paragraph (5)(g). Once that state of affairs arose, as it did on any assignment, Skyblue lacked the necessary control over the appellant for him to be seen as their 'servant', in the old 'master and servant' terminology, during the time he was on that assignment. That the client's power to exercise day-to-day control over him had its origins in the agreement dated 10 November 2001 with Skyblue cannot make good that deficiency. I would reject the appellant's argument based on the concept of delegation.

30. That is really fatal to his case. It means that there was and is no prospect of establishing that there was a contract of service with Skyblue, even during the periods of time when the appellant was working on an assignment. For those reasons I would not upset the decision by the employment tribunal.

31. Like those who constituted the court in Dacas, I recognise that this effectively deprives those in the position of the appellant of much of the protection afforded to workers by the 1996 Act, certainly in respect of the right not to be unfairly dismissed. Indeed, the appellant is in a worse position than Mrs Dacas, because even if he could establish a contract of service with each end-user client, as was suggested in that case, it would not enable him to claim the minimum one year's continuous employment with an employer, required in order to qualify under the 1996 Act for protection from unfair dismissal: see ss.108(1) and 210. But that is the result of Parliament's decision to require a qualifying period of employment before a claim for unfair dismissal can be brought and it seems to be an intended result.

32. What is clear is that there is now a large and growing number of people in full-time or nearly full-time work who, because they work under agency arrangements, do not enjoy the full range of employment rights conferred under the legislation on those working under more conventional arrangements. As Mummery LJ commented in Dacas, paragraph 9, this problem may in due course be regarded as a matter for legislation. It is not one capable of being overcome by judicial creativity. In the absence of such legislation, the state of affairs which I have described will persist, at least in cases such as that of the ap-

pellant, since I cannot see that he has the benefit of a contract of service with the employment agency Skyblue.

33. It follows that, for the reasons I have set out, I would dismiss this appeal.

[Source: The decision is available on publicly accessible websites such as http://www.hmcourts-service.gov.uk under the neutral citation of [2005] EWCA Civ 490. It is reported as [2005] Industrial Relations Law Reports 557.]

ANNOTATION

1. The purpose of reporting this decision is to chart and describe the developments, and the lack of the underlying and general development, since and from the decision of the Court of Appeal in Montgomery v Johnston Underwood, in 2000, reported as GB1 in Vol 21 of these reports at pp199-214. These two decisions form parts of a now quite long series of cases in which workers, whose work arrangements are made, and in many cases to some extent operated, by or via the intermediation of an employment agency, have sought to establish their entitlement to statutory employment rights against either the employment agency or the enterprise which is the end-user of their services, or both of them. In these cases, as in this particular case, the workers have generally failed to show that they have the necessary contract of employment with either of the other two parties to the triangular relationship within which their work is arranged and takes place. This Annotation examines the grounds on which and the legal-structural reasons for which workers in this situation are failing to experience a vindication of their statutory employment rights.

2. It is useful to consider in slightly greater detail how arguments proceed, according to whether the worker's attempt to establish a contract of employment is directed towards the end-user on the one hand or the employment agency on the other. If the worker is advised to seek to establish employment protection rights, he or she may find his or her path blocked by one or other of the following obstacles:

(a) that the employment agency is able to maintain that it has no continuing contract with the worker. In particular the view may be taken that there is insufficient *mutuality of obligation* for the arrangement between the agency and the worker to constitute a continuing contract. These then are the obstacles which have to do with the issues of *contract and continuity*.

(b) Alternatively or additionally the worker may encounter a different obstacle consisting in an analysis to the effect that, even if a continuing contract can be discerned between the worker and the employment agency, that contract

does not have the character of a contract *of employment*, usually because the employment agency does not have sufficient *control* over the worker for the contract to qualify as such. This is the obstacle which has to do with *employee status*.

3. These obstacles have loomed large in the cases in which workers employed via employment agencies have sought to establish statutory employment rights against the agency. The issues of contract and continuity have tended to become inter-twined with those of employee status into a complex of negativity which militates strongly against the finding of a continuous contract of employment between the worker and the employment agency. Somehow, the triangularity of the work arrangement creates the sense that mutuality, continuity and control have been distributed (between the agency and the end-user) and thereby fragmented and, ultimately, negated. Although a contract of employment was successfully established between the worker and the employment agency in *McMeechan v Secretary of State for Employment* [1997] IRLR 353 (CA), the contrary result was arrived at in the subsequent leading cases of *Montgomery v Johnson Underwood* [2001] IRLR 269 (CA) and *Dacas v Brook Street Bureau (UK) Ltd* [2004] IRLR 358 (CA).

4. There had, however, been some grounds for optimism that workers in such triangular work arrangements might have a better chance of success if they sought to establish statutory employment rights against the end-user of their services. Such claims succeeded in *Motorola Ltd v Davidson* [2001] IRLR 4 (EAT) and in *Franks v Reuters Ltd* [2003] IRLR 423 (CA) and seemed to have been further encouraged by the majority judgements in *Dacas v Brook Street Bureau (UK) Ltd* [2004] IRLR 358 (CA), very recently followed in *Muscat v Cable & Wireless plc* [2006] EWCA Civ 220 (CA). However, the present decision in *Bunce v Postworth Ltd t/a Skyblue* seems to indicate a more negative stance, reverting to that taken by the Employment Appeal Tribunal in *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471. So workers in these triangular work arrangements seem fated for the time being at least to continue to be at risk of 'falling between two stools', that is to say of having continuing difficulty in establishing continuing contracts of employment against the agency on the one hand or the end-user on the other.

5. The underlying reason for that continuing difficulty consists of a proposition which seems to receive tacit and unquestioned acceptance in all these cases. For it seems to be regarded as uncontroversial, to the point where it is not seriously controverted or canvassed before the courts, that a worker in such a situation, let us call it an agency employment relationship, cannot hope to establish the existence of a tripartite employment contract which will qualify that worker as an employee *both* of the employment agency *and* of the end-user enterprise.

Nor – and this is no less important – does the worker benefit from any legal principle or promise which might assert that, if the work relationship in question resembles a bilateral contractual employment relationship in all major respects except that of its triangularity, then the worker should not be deemed qualification as a worker under a contract of employment by reason alone of that triangularity, but should instead benefit from a proposition that he or she must have a contractual employer somewhere in the triangular relationship, which it is the task and responsibility of the courts to identify if the legislators have failed to do so.

6. It is, of course, largely a matter of opinion as to how far the construction of a tripartite or triangular contract of employment in the agency employment situation might be thought to lie within the competence of the courts without their being involved in doing violence to the principles and methods of the common law of contract. Such a construct must seem difficult and counter-intuitive to the judges who have adjudicated in this now considerable series of cases, since they have not seen fit to experiment with such a solution, despite their frequent acknowledgements of the real lacuna in the coverage of statutory employment protections which results from their generally negative decisions in this particular field. In the *Dacas* case, two of the judges in the Court of Appeal, Mummery and Sedley LJJ, seemed willing to contemplate the possibility of these protective constructs, but the present decision in *Bunce* signally fails to pursue that initiative.

7. So the workers in agency employment situations have to continue to try to argue for their having a contract of employment either with the employment agency or with the end user enterprise, with no guarantee that they will not be allowed to fall between two stools, being held to have a contract of employment with *neither* possible employer. It continues to be the case, moreover, as was observed in these Reports in the annotation to the *Montgomery* decision, that there is no sufficient policy consensus to secure legislation to deal with this lacuna, either at national or international level. The issue was not addressed in a revision of the British legislation regulating employment agencies carried out in 2003; and although both the European Commission and the International Labour Organisation remain committed to legislative initiatives in the general areas of the regulation of temporary agency work and the personal scope of employment legislation, neither such initiative seems likely to tackle this particular problem of triangular work arrangements involving employment agencies or other intermediary enterprises. The present decision indicates the gravity of the problem which hitherto remains unresolved.

PART FOUR

INDIVIDUAL EMPLOYMENT RELATIONSHIP

BELGIUM

Supreme Court
R.S.Z. v. Bruurs Marc
10 January 2005

Remuneration for purposes of social security contribution calculation – employee or self-employed – significance of label given by parties

HEADNOTES

Facts

The employee was engaged under a contract for services, i.e. as an independent contractor. This implied a distinct treatment of fees received for purposes of deducting social security contributions. However the courts were faced with the question of whether the work relationship was as labelled by the parties or was in reality a "dependent" employment relationship.

Decision

The Court relabelled the contract for services into an employment contract and recalculated the social security deduction accordingly.

Law Applied

See Judgment.

JUDGMENT

…

Considering that according to article 14, paragraph 2 of the Social Security Act of 27 June 1969, the notion of remuneration that is taken into account for the calculation of social security contributions, is defined by reference to article 2 of the Act on Protection of Remuneration of 12 April 1965 and refers to the

monies and the advantages that can be monetarily valued which the employee is entitled to, from his employer, by virtue of the employment relationship;

Considering that the relabelling by the court of the agreement for the independent delivery of services into an employment contract, because the performance of the contract shows that performances are delivered in subordination, results in an application of the social security status for subordinate employees;

Considering that in an agreement for the independent delivery of services, the amount of fees that the contract party pays to the independent workers can be determined by taking into account –among other things- the social security contributions the independent workers has to pay for social security purposes;

Considering that the part of the fees that was originally intended by the parties for the payment of the social security contributions of the self employed worker, specifically relates to the agreement for the independent delivery of services and not to the employment relationship; this part can not, as a result of the relabelling be considered an advantage or remuneration to which the employee is entitled by virtue of the employment relationship; that this part can therefore not be part of the calculation basis for the social security contributions for subordinate employees;

That the count of the grounds that challenges the legality of the court of appeals decision with respect to the social security contributions that are due, solely on the ground that that the agreed upon fee for the self employed services should necessarily be the calculation basis for the social security contributions in the framework of the self employed agreement that is relabelled into an employment contract, cannot be accepted;

The court, on those grounds, dismisses the application for judicial review.

[Source: No.S030039N, 10 January 2005]

ANNOTATION

Introduction

Labour law is in principle applicable to employees only. Self-employed workers are in general not covered by the protective provisions of labour and employment law. While there may be some limited changes in the area, making protective provisions on anti-discrimination and health and safety law applicable to all those covered by some form of work relationship, the general principle

of non applicability of labour and employment law to self-employed workers, remains intact.

This *summa division* of labour and employment law also holds in social security law. The social security system of self-employed is completely separate from the one for subordinate employees. The latter is more protective for the worker concerned and not as a mere coincidence also more expensive.

It is therefore of the utmost importance to determine whether a worker will be covered by the social security system of the subordinate employees or self-employed workers.

It is certainly not easy in border line cases to make the distinction between the two kinds of workers. It may therefore come as no surprise that sometimes the parties' decision was erroneous and may have to be reversed. The question that comes up at that point in time is on what basis such a decision to relabel is taken. What criteria are taken into account? Furthermore it then also needs to be determined on what basis the social security contributions will have to be calculated.

1. Defining subordinate employment relationship – lower courts case law

Under the Employment Contracts Act of 3 July 1978, a subordinate employee is defined as a person who enters into an undertaking with an employer to perform work, in a relationship of subordination, in return for pay.

Self-employment is defined in a negative way, as a work/pay exchange relationship which is not a dependent employment relationship, i.e. where there is no subordination of one party towards the other. The distinguishing factor is the legal, and not the economic subordination of one party towards the other.

Legal subordination is the consequence of the employer's authority over the employee. Authority involves the right to direct the worker's work (give instructions) and to control the performance of his/her work (supervision). The potential to exercise authority is sufficient. It does not need to be effectively exercised.

As labour law provisions are mandatory, the label of the contract as provided in the contract itself, by the parties, may not be decisive for a court's ruling.

The courts have used a number of factual indicia in order to try to determine when subordination is present. There is no formalised hierarchy between these indicia. Their presence or absence is not decisive for the purposes of determining the nature of the relationship. Courts freely value them on a case by case basis.

In this context, the following indicia were quite often taken into account by lower courts:

1. obligation for the worker to use all reasonable means to accomplish a desired result ("obligation de moyens");
2. absence of right to organise his work and working hours freely; observance of working hours;
3. obligation to work a minimum of hours per week or month;
4. obligation to justify absences;
5. precise instructions as regards the performance of the activity;
6. existence of an internal control and sanction system;
7. obligation to attend meetings;
8. obligation to submit activity reports;
9. obligation to work exclusively for the other contract party (exclusivity);
10. obligation to respect prices unilaterally fixed by the other party;
11. insertion of the worker in the employer's organisation;
12. absence of personal financial risk connected to the results of the activity;
13. absence of invoicing;
14. prohibition of substitution;
15. prohibition to hire personnel;
16. obligation to accept the work and the prohibition to refuse it;
17. remuneration unilaterally fixed by the employer;
18. payment of a fixed remuneration, without consideration of the work performed or working hours;
19. guarantee of minimum income;
20. reimbursement of business expenses;
21. use of the employer's materials and equipment for the job;
22. the way the worker presents him/herself to third parties (e.g. business card, user of paper letterhead of the employer).

On the other hand, the following indicia were seen as a show of independence and hence a self-employed relationship:

23. obligation to achieve a particular result ("obligation de résultat");
24. right to organise his work and working hours freely;
25. absence of obligation to justify his absences;
26. no minimum of working hours;
27. no internal control and sanction system;
28. possibility to work for several clients and customers (no exclusivity);
29. freedom to determine prices;
30. participation in the profit and losses of the company;
31. professional investments;
32. right of substitution or to have personally recruited personnel;

33. freedom to accept or refuse the work;
34. remuneration agreed upon between the parties;
35. variable salary without guarantee of minimum income;
36. invoicing;
37. absence of reimbursement of business expenses;
38. use of own working equipment;
39. to act as a self-employed person or as a company towards third parties.

2. Recent case-law of the Supreme Court

The Belgian Supreme Court has clearly reacted against the tendency in lower court case law to consider a number of factual indicia in the area of economic subordination, also as proof of the existence of legal subordination, required for the existence of an employment contract.

The Supreme Court in a case of 23 December 2002 ruled that when the parties labelled their contract, this label prevails and the judge cannot relabel it when the factual characteristics are not incompatible with the label.

It considered the following factual characteristics not to be incompatible with the label of independence that the parties had attached to their contract :

1. although it was not formally prohibited to the mechanic to have his own clients, he did not have the time to do so considering the services that were expected from him by the principal (8 to 9 hours/day);
2. the principal determined the price of services towards the clients;
3. there was no indication of management autonomy or ownership of business assets (the mechanic performed his activity at the principal's premises with the principal's equipment);
4. the mechanic did not run any economic or financial risk;
5. the termination of his contract put an end to the mechanic's professional activity.

In the meanwhile the Supreme Court has reiterated its position in a number of cases.

2.2 Recent case-law of the lower courts

The recent case law of the Supreme Court has already been followed by several lower employment courts, which have confirmed that the parties' will should only be questioned if factual elements are incompatible with the parties' label. The number of cases in which courts are likely to relabel a contract will

most likely decrease in the future, provided at least that there is no legislative intervention in the area.

3. Social security consequences in case of relabelling

If a court would rightfully and in line with the above quoted Supreme Court case law consider an agreement to be an employment contract instead of a contract for independent collaboration, such relabelling effort will have important consequences in the area of social security. Social security contributions will have to calculated on a different basis. The Social Security Act of 27 June 1969 determines for subordinate workers that the calculation basis for the social security contributions are the monies and the advantages in kind that can be monetarily valued and to which the subordinate worker is entitled because of his/her employment relationship.

In the annotated case the worker and his contract party had agreed to an hourly remuneration of 700.-BEF gross (approximately 17.35 Euro). The parties had set up their working relationship as a relationship between independently operating agents. The court first relabelled the relationship. It then had to decide on which basis the social security contributions for employees had to be calculated.

The social security authorities had argued that the amount that the parties had agreed upon in their original agreement had to be considered as the basis for the calculations. They argued that the hourly wage of the now subordinate worker was 17.35 Euro per hour. The social security authorities argued that there was no reason to deviate from the rule that the agreement between the parties had to be respected. The fact that comparable workers in the same sector of industry made quite a bit less per hour, so the social security authorities argued, is no reason to deviate from the explicit contract stipulation.

The Supreme Court did not agree. It held that in the contract for the self-employed delivery of services, the fees as agreed between the parties could have been determined by taking into account the social security costs the self-employed worker was supposed to cover personally. The part of the fees that is supposed to cover this cost, so the Court stated, is not to be considered as wages to which the employee is entitled because of the employment relationship.

The Supreme Court thus stated that, in case of relabeling of a collaboration agreement into an employment contract, the contractual fee is not necessarily to be considered the employee's wages for social security purposes. The court did not answer the question though what the exact basis for the calculations should be. Are any other costs, besides the social security costs for self-employed workers, taken into account? Should they be deducted from the overall pay the

worker received in order to arrive at the sum that the same worker receives as a relabeled employee? Should one take into account the amount that comparable workers in the sector of industry earn? Or should one look at the individual situation of the worker concerned and look at his/her net income as a pretend self-employed and copy that into the system of subordinate employees?

All these questions remain unanswered by the latest Supreme Court decision. Further decisions have to be awaited in order to be able to give an answer to the questions raised.

POLAND

Supreme Court
Judgment of 27 October 2004, I PK 666/03

Freedom of parties to fix remuneration – court´s competence to question the upper limit of remuneration – public sector

Facts

Henryka T. (the claimant) claimed a compensation (golden handshake) equivalent to nine months of her salary for early termination of employment and a compensation for six months based on the no-competition clause in the contract, which altogether amounted to PLN 168,544.44, interests and charges included. Her employer, the defendant, KGHM Polska Miedź Spółka Akcyjna (KGHM Polish Copper Joint Stock Company) asserted that the employment contract was invalid in its part relating to the compensation for early termination, and considered the benefit unreasonable and contrary to principles of community life.

The District Court found the claim admissible. The evidence confirmed that the claimant had an employment contract – a management contract as the head of the Personnel and Administration Department with monthly remuneration of PLN 14,045.37. She was not a member of the company's Board. The employment contract was signed for a fixed period of time from 1 August 2000 until the date of the General Assembly of shareholders authorised to approve the balance sheet for 2001; not longer, however, than until 30 June 2002. The parties provided for a possibility for any of them to terminate the contract upon notice. The period of notice was specified as six months for the employer and one month for the claimant. In the case of early termination of the contract, the claimant was entitled to nine months compensation.

In January 2002 the claimant was given notice of termination with six months period of notice. During the period of notice she had no obligation to work. The employer in his letter of 29 July 2002 informed the claimant that he annulled the declaration of will and its consequences, meaning the nine months compensation would not be paid. After the employment contract

was terminated the claimant received also retirement compensation of PLN 49,000 (net amount).

Decision

The Supreme Court dismissed the employee's request for cassation of the judgment of the Court of Appeal. It decided that the inclusion of a compensation (golden handshake) clause in the event of early termination of the employment contract by the employer is not unlawful. However, under given circumstances invoking the clause may be challenged as the abuse of law (Art. 8 of the Labour Code).

Law Applied

ART. 8 OF THE LABOUR CODE:

The law shall not be applied in a way incompatible with its social and economic purpose or with principles of community life. Any such act or negligence by an authorised person shall not be considered law enforcement and shall not be protected.

ART. 33 OF THE LABOUR CODE:

When an employment contract is concluded for a fixed period exceeding six months, the parties may provide for its early termination giving a two-week notice.

ART. 300 OF THE LABOUR CODE:

To matters not regulated by the labour law, the provisions of the Civil Code apply as long as they are compatible with the rules of labour law.

ART. 58 § 2 OF THE CIVIL CODE:

A legal action incompatible with principles of community life is invalid.

ART. 353 (1) OF THE CIVIL CODE:

Parties to a contract may shape their legal relations in accordance with their will as long as the contents or the objective of the said contract are compatible with the nature of these relations, the law and principles of community life.

JUDGMENT

The District Court declared all the provisions of the employment contract valid, including the right to nine months compensation for early termination of the contract.

The Court of Appeal, however, took account of the employer's appeal, modified the ruling in question and dismissed the case. In the opinion of the

court of second instance the defendant was right to conclude that the provisions of a contract which made the claimant eligible for nine months compensation for early termination of contract were invalid. Granting a compensation is contrary to the statutory structure and the objective to be achieved by a contract for a fixed period of time. Such a contract can be easily terminated as there is no need to justify the termination and because of the short term of notice (Art. 33 of the Labour Code). It is also terminated when the period for which it was concluded expires. The Court of Appeal did not share the view that because in the preceding period the parties had been linked by a contract for a non-specified period of time, the provisions of the contract for a fixed period were designed to compensate the change of the nature of contract. The Court went on to say that even if the claimant had been employed for a non-specified period, she would not have been protected against the termination of the contract. Common labour law does not provide for the right to (a golden handshake) compensation for early termination of employment relations.

The Court of Appeal decided that the protection and benefits guaranteed to the claimant in the contract for fixed period of time were far reaching even without the right to receive compensation. The above is confirmed by an extended six month term of notice in the course of which the claimant was not obliged to work and the right to compensation resulting from the no-competition clause. The Court also stressed that the claimant was covered by the company collective labour agreement which did not provide for the right to compensation. The fact that one Board of the company concluded such a contract with the claimant while their successors declared the terms of the said contract invalid is irrelevant as it is the company as an employer, not its Board, who is the party to both the contract and the dispute.

The Supreme Court dismissed the employee's request for the cassation of the judgment of the Court of Appeal. It underlined that the principle of freedom to conclude contracts is not of absolute nature and covers civil contracts as well as employment contracts to which, pursuant to Art. 300 of the Labour Code, Art. 53 of the Civil Code applies. In line with Art. 58 para. 2 of the Civil Code, an act in breach of principles of community life is invalid. An employment contract may provide an employee with a benefit which goes beyond the level provided for in the labour law. The parties to the contract may also provide for benefits nonexistent in the labour law. In principle, in accordance with Art. 351(1) of the Civil Code, the parties may shape their legal relations in accordance with their own will as long as the contents or objectives are not incompatible with the qualities (nature) of these relations, the law or principles of community life. The above includes the clause on

compensation paid to the employee in the event of early termination of an employment contract mutually agreed by the parties. However, the execution of a particular right under given circumstances may not deserve protection when it is incompatible with principles of community life or the social and economic objective of the law itself.

Under Art. 8 of the Labour Code, the ´abuse of law´ clause means that in employment relations what counts is not just the letter of law but also other rules referred to in this Article as principles of community life. The concept of the abuse of law outlined in this provision is of a unique nature and calls for considering the circumstances. Principles of community life are not specified in the Labour Code. The theory of law and the views of the judiciary define these norms as moral and customary rules normally observed in relations with other people. The same is true of employment relations. Principles of community life include the principle of fair treatment which in employment relations cannot apply exclusively to the acts by the employer but also covers employee's behaviour and the way he/she takes advantage of his/her rights. The claimant benefited from a very favourable six months term of notice for the employment contract concluded for a fixed period of time. The original contract was extended in order to ´match´ the deadline of its termination with her retirement. Against a general rule that remuneration is due only for the work actually done, Henryka T. was freed from the obligation to work during the term of notice. Thus the compensation would be an unjustified, additional and sizable material benefit. During the term of notice, the claimant, although she did not work, would be receiving her salary and the second ´remuneration´, i.e. the compensation for early termination of her employment contract. Hence the payment of the compensation in question would be in breach of principles of community life expressed in Art. 8 of the Labour Code.

ANNOTATION

In this judgment the Supreme Court once again expressed its views on the admissibility of interference by the Court with the level of remuneration for work or like benefits shaped by the will of the parties involved. Typically the problem concerns employees at senior management positions, whose terms of remuneration were decided by the former Board and are questioned by new corporate management. In the case at hand, the claimant occupied a senior management position in a huge company owned by the State Treasury. Nevertheless, she was not covered by the provisions of the special

Act of 3 March 2000 on the remuneration of managers in certain legal entities (Dz. U. – Official Journal No. 26, item 306), which limits, among others, the salaries of members of Board in companies with majority shareholding of the State Treasury or in local government units, called ´the Chimney Act´.

Generally, it is assumed that, without prejudice to the principle of equal treatment in employment and the above 'Chimney Act´, nothing prevents from including in employment contracts provisions which are more favourable than those provided for in the labour law. The above assumption derives from the principle of privileged treatment of employees (non-regression principle) based on which provisions of the employment contract less favourable than those provided for in the labour law are invalid and immediately replaced by the respective provisions of the labour law (Art. 18 para. 2 of the Labour Code).

However, with the exception of the above exemptions, full discretion to decide the remuneration in a more favourable way has been weakened by decisions of the Supreme Court, including this one. The tendency was delineated by the ruling of the Supreme Court of 7 August 2001 (I PKN 563/00). In this case the managing director of a public sector insurance company signed an agreement amending his employment contract. The term of notice for termination was extended for both parties to 6 months and the claimant was not obliged to work in this period. Moreover, in the same period the claimant was guaranteed a company car and a PC. Besides, he was also entitled to a compensation equivalent of his three months remuneration including all elements of pay in return for not being engaged in any business competitive to that of his employer. Similar contracts were signed with seven other people from the top management. Modifications were introduced when it was already clear that the persons in question may loose their posts as the Board was due to change. Indeed the new Board notified the claimant of their intention to terminate his employment contract and refused to comply with obligations resulting from the amended employment contract. When repealing the judgment of the Court of Appeal which took account of the claimant´s demands, the Supreme Court stated that such a beneficial treatment of an employee may not be justified by simply invoking Art. 18 para. 1 of the Labour Code (privileged treatment of an employee). This provision only specifies *a contrario* that terms of contracts more favourable than provided for in the labour law rules remain valid. The admissible limit of this favourable approach may not, however, be subject to a dispute and the view that there is no such a limit is erroneous. Pursuant to Art. 353(1) of the Civil Code parties to a contract may shape their legal relations in accordance

with their will as long as the contents or the objective of these relations is compatible with its nature, legal acts and social rules. The same applies to fixing remuneration in an employment contract. The Supreme Court decided that the risk of abuse is especially high when privileges are granted to management staff in the public sector. Finally the Court concluded that the provisions of an employment contract relating to remuneration for work and other benefits resulting from employment in public sector companies may, based on principles of community life, be found invalid in their part exceeding the level of fair pay (Art. 18 in relation with Art. 13 of the Labour Code).

Similar rulings, accompanied by similar justification, were handed down in other cases involving public sector companies. In particular in the judgment of 7 September 2005 (II PK 296/04) the Supreme Court stressed that by concluding a no-competition agreement together with a fixed time employment contract for four years without any possibility for its early termination, the parties to the employment relation sought to create barriers preventing or discouraging the dismissal of the claimant in question in view of expected changes in management. The Court highlighted that after the employment relations have been terminated the no-competition agreement bore the features of a collusion and by that mere fact infringed principles of community life and as such was invalid based on Art. 58 para. 2 of the Civil Code in relation with Art. 300 of the Labour Code and did not deserve the protection by the labour law (Art. 8 of the Labour Code).

The judgment of 27 October 2004 discussed here reinforces the above idea of the court's interference with the freedom to decide additional financial remuneration for employees of public sector companies.

When it comes to the same type of interference in private companies, the position of the Supreme Court is more cautious. In its judgment of 11 May 2005 (III PK 27/05) the Court stated that a no-competition agreement legally concluded with a private company in accordance with principles of community life and specifying the amount of compensation (Art. 101(1) of the Labour Code) is valid. Hence, a former employee is entitled to the agreed compensation even if the court finds it excessive. Restricting the ceiling of remuneration is provided for only with respect to public sector employers covered by the Act of 3 March 2000 ("Chimney Act"). When a company represented by its authorised body grants high benefits to its employee we should assume they reflect the value of his/her work. However, the above does not preclude any possibility to seek protection against employee's unreasonable demands based on a contract concluded with the company. Also a private company may accuse its employees of infringing Art. 353(1) of

the Civil Code leading to partial or complete invalidity of the agreement based on Art. 58 para. 2 or 3 of the Civil Code. The challenge, however, may not be grounded solely on the issue of remuneration. It must also invoke specific circumstances in which the agreement was signed and which indicate that its objective was not to protect the employer against employee's competition after the employment has been terminated but to give unreasonable benefits to the employee. What is meant here is the possible collusion of the representative of the company and the interested employee resulting, directly and indirectly, in benefits to both of them. In this particular case the court declared the employee was right. Nevertheless, there are also rulings which recognise the rights of private employers and follow the reasoning outlined above (e.g. the ruling of the Court of Appeal in Bialystok, III APa 5/03).

In principle, the above judgments have been approved by legal analysts. Already in the past the doctrine represented the view that provisions of an agreement resulting from the concerted practices followed by the parties to employment relations can be challenged. Besides, there was pointed out a possibility to declare the provisions favourable to an employee invalid if they were incompatible with the law, designed to circumvent it or incompatible with the nature of the employment relation. In an annotation to the judgment by the Supreme Court of 7 August 2001 we can read that the method to identify the limits of remuneration for managers applied in this case applies also to a certain extent to the private sector. As the ownership of many private companies is fragmented and distributed among thousands of small shareholders it makes them public, so to say, by nature and at the same time offers possibilities to managers to abuse their powers at the expense of small investors. Neither Art. 353(1) and 58 of the Civil Code nor any other provisions invoked by the Supreme Court lead us to conclude that they apply only to the public sector. Likewise constitutional duties of the courts in their judicial function are identical in the public and private sectors. Nevertheless, undoubtedly most examples in which assets of the company are used in the private interest of managers come from the public sector.

SPAIN

Supreme Court (Social Chamber)
Decision of 11 April 2005

Homework contract of employment – employees cannot be obliged to accept it either by collective agreement or by section 41 of the Workers' Statute Act – differences with telework

HEADNOTES

Facts

The company "Telefónica Publicidad e Información"(TPI) signed an agreement with the workers'representatives of the Central Enterprise Committee in order, inter alia, to create a so-called "Virtual Office" (VO) within the company. The creation of such VO would imply a new organization of the company resources in order to improve its competitive position on the market. Following the agreement all the employees working at the company's Direct Selling Channel (Canal de Venta Directa), i.e., vendors and selling chiefs, being affected by new technologies should thenceforth do all the auxiliary administrative work connected with their main selling duties not at the company premises as they did before, but at their own homes as teleworkers, using the informatic and telephonic equipment and devices provided by the company. Such employees would also be allowed a single payment of 1.200 euros as a compensation for being transformed into homeworkers.

The Trade union CCOO did not accept the agreement and brought what we call a *collective conflict* action before the Social Chamber of the Audiencia Nacional asking the Tribunal to declare the agreement to be nul and void. The action was dismissed by resolution of 31 May 2004.

CCOO fought that decision before the Supreme Court (Social Chamber) through a so-called *recurso de casación*. CCOO mainly alleged that the modification of the employment conditions of the employees within the scope of the agreement signed by TPI and the Central Enterprise Committee was in violation of section 41 of the Workers' Statute Act 1995 (WSA). In CCOO's

view the agreement had modified, without the individual employees'will, their ordinary contracts of employment into homework contracts of employment, such change being beyond the powers conferred to the employer by section 41 WSA to modify working conditions and also beyond the scope of capabilities legally accorded to collective agreements.

Decision

The Supreme Court (Social Chamber) partly held the appeal brought in by CCOO. The Supreme Court reversed therefore the *Audiencia Nacional* (Social Chamber) decision of 30 May 2004 and declared nul and void the agreement signed between TPI and the Central Enterprise Committee in so far as it compulsorily changed the ordinary employment contracts of the employees within its scope into homework contracts of employment.

Law applied

SPANISH CONSTITUTION 1978, SEC. 18

"The personal domicile is inviolable. No authority can trespass or search it without the owner's permission, unless a judicial warrant is issued or in case of flagrant criminal offence".

WORKERS' STATUTE ACT 1995

Sect. 13. "Homework contract of employment".

"Shall be considered as homework contract of employment any labour contract according to which the employee's services are performed at his/her own domicile or in another place of work that he/she may freely choose out from the employer's control".

Sect. 41. "Substantial modifications of employment conditions".

"Provided the existence of economic, technological or organizational reasons is duly proved, employers may accord substantial modifications of employment conditions. Shall be considered as substantial modifications of employment conditions, inter alia, those affecting the following matters:

a) Length of daily work.
b) Working time.
c) Shift working.
d) Payment conditions.
e) Working and productivity measuring systems.
f) Occupation assigned to workers, if beyond the limits stated by section 39 of this Act to occupational mobility.

The reasons referred to in this section shall be deemed to exist when the adoption of the intended measures could help to improve the competitve situation on the market of the employer's undertaking through a better organization of its resources or a better adaptation of the enterprise to the exigencies of demand".

CIVIL CODE 1889

Sect. 1256.

"The performance and validity of contracts cannot be left to the sole free-will of one of the parties".

JUDGMENT

En la Villa de Madrid, a once de abril de dos mil cinco.

Vistos los presentes autos pendientes ante esta Sala en virtud del recurso de casación interpuesto por la Federación de Comunicación y Transporte de Comisiones Obreras, representada y defendida por la Letrada Sra. San Vicente Leza, contra la sentencia de la Sala de lo Social de la Audiencia Nacional, de 30 de mayo de 2004, en autos núm. 207/03, seguidos a instancia de dicha recurrente contra Telefónica Publicidad e Información, SA, la Federación de Servicios de la Unión General de Trabajadores (FES-UGT), Confederación de Trabajadores Independientes y Comité Intercentros, sobre conflicto colectivo. Han comparecido ante esta Sala en concepto de recurridos la Federación de Servicios de la Unión General de Trabajadores (FES-UGT), representada y defendida por el Letrado Sr. Prieto Nieto, Telefónica Publicidad e Información, SA, representada y defendida por el Letrado Sr. Garrido Palacios.

Es Magistrado Ponente el Excmo. Sr. D. Aurelio Desdentado Bonete.

ANTECEDENTES DE HECHO

(….)

FUNDAMENTOS DE DERECHO

PRIMERO La dirección de la empresa Telefónica Publicidad e Información y el comité intercentros de esta empresa firmaron en octubre de 2003 un pacto para la implantación de la llamada oficina virtual, que ha sido impugnado en este proceso por la Federación de Comunicación y Transportes

de Comisiones Obreras El acuerdo impugnado tiene por objeto regular las condiciones en virtud de las cuales el personal del canal de ventas directamente afectado por la implantación de nuevas tecnologías pasará a prestar servicios en su propio domicilio, adoptando además una serie de medidas sobre el que se denomina «resto del personal afectado por la reorganización», que deberá optar por trasladarse a las cabeceras de gerencia, acceder a la categoría de vendedor u ocupar las vacantes que se produzcan en los servicios centrales. La sentencia recurrida ha desestimado la demanda. En primer lugar, argumenta que, al no regular el acuerdo de forma específica el control del empresario sobre la prestación de trabajo que ha de cumplirse en el domicilio del trabajador, limitándose a indicar que se asegurará «la correcta conciliación de la vida familiar y laboral», no hay ninguna infracción de los derechos del trabajador a la intimidad y a la inviolabilidad de su domicilio. En segundo lugar, señala también la sentencia recurrida que el pacto se ajusta a las previsiones del artículo 41 del Estatuto de los Trabajadores.

SEGUNDO El primer motivo del recurso se formula al amparo del artículo 205.d) de la Ley de Procedimiento Laboral y propone incorporar en el texto del acuerdo que reproduce el hecho probado primero de la sentencia recurrida un párrafo omitido en el apartado c) de la segunda parte del mencionado acuerdo («Resto del personal afectado») del siguiente tenor literal: «si el trabajador no optare por alguna de estas tres fórmulas, los firmantes del presente acuerdo estiman que procede llevar a cabo su desvinculación». La omisión que se denuncia es cierta, pero se trata de un mero error de trascripción, pues no cabe duda de que lo que se da por probado es el texto del acuerdo que obra a los folios 240 y siguientes de las actuaciones y en ello hay acuerdo de las partes, como se advierte en los escritos de impugnación, que reconocen el mencionado error de trascripción.

TERCERO El segundo motivo del recurso denuncia la vulneración de los artículos 20 y 41 del Estatuto de los Trabajadores, argumentando que a la vista del contenido del Pacto de la Oficina Virtual, es claro que no nos encontramos ante una modificación de condiciones de trabajo de las contempladas en el artículo 41 del Estatuto de los Trabajadores, pues existe, por una parte, una novación contractual, por la que se transforma sin el consentimiento del interesado un contrato común en un contrato a domicilio, y, por otra, un régimen de traslados con cambio de domicilio y hasta un régimen de extinciones para los administrativos no adscritos a la gerencia que no ejerciten las opciones previstas en el Pacto. De ahí que, según el motivo, el acuerdo impugnado aborde la regulación de materias que exceden del marco del artículo 41 del Estatuto de los Trabajadores para entrar en el de los artículos 40 y 51 de dicho texto legal, mientras que, por otra parte, contiene

una modificación en una materia no disponible, como es la transformación de un común contrato de trabajo en contrato de trabajo a domicilio. En segundo lugar, se alega también que la empresa no ha invocado ninguna causa económica, técnica, organizativa o productiva que justifique las modificaciones que se han establecido. Por último, se dice, con cita de la sentencia de esta Sala de 4 de diciembre de 2000, que por la heterogeneidad de su contenido el Pacto de la Oficina Virtual no constituye un acuerdo de los previstos en el artículo 41 del Estatuto de los Trabajadores, sino un convenio colectivo que sería nulo por no haberse negociado conforme a las reglas del artículo 87 del Estatuto de los Trabajadores y por no haberse publicado en el Boletín Oficial del Estado. En el motivo tercero vuelve a denunciarse la infracción de los artículos 20 y 41 del Estatuto de los Trabajadores en relación con el artículo 13 del mismo texto legal y con el artículo 1204 del Código Civil. En este motivo la parte reitera, con cita de algunas sentencias, su tesis de que un acuerdo colectivo, como el que se ha pactado en el presente caso, no puede transformar un contrato de trabajo de régimen común en un contrato a domicilio, citando en este sentido el Acuerdo Marco Europeo sobre teletrabajo, que, según la parte recurrente, se habría incorporado a nuestro ordenamiento a través del Acuerdo Interconfederal de Negociación Colectiva de 2003 (Boletín Oficial del Estado de 24 de febrero de 2003, prorrogado para el año 2004 (Boletín Oficial del Estado de 31 de diciembre de 2003). El motivo cuarto denuncia, por último, la infracción del artículo 18.2 de la Constitución por entender que el pacto suscrito es nulo, dado que las partes que lo acordaron no tienen poder de disposición sobre el domicilio de los trabajadores afectados.

El planteamiento del recurso es complejo y en el motivo segundo se acumulan de forma desordenada denuncias de infracciones de distinto signo, por lo que es necesario comenzar realizando algunas precisiones. La primera consiste en señalar que en el segundo motivo ha quedado sin fundamentar por completo la pretendida infracción del artículo 20 del Estatuto de los Trabajadores, y por esa falta de fundamentación ha de desestimarse sin más, aparte de que es obvio que no estamos ante un ejercicio unilateral del poder de dirección o del ius variandi empresarial, sino ante un acuerdo colectivo. De las restantes infracciones que se proponen en el motivo segundo hay que descartar las que se refieren a la impugnación de las previsiones sobre los traslados y los cambios de categoría y la que alega la nulidad del acuerdo como convenio colectivo estatutario por no haber sido objeto de publicación y por falta de legitimación. Se rechazan estas denuncias, porque ninguna de estas causas de impugnación se ha alegado en la instancia y su planteamiento ahora constituye una cuestión nueva que no puede plantearse en un recurso

extraordinario, como es el de casación. Hay que aclarar además que en el acuerdo impugnado no se acuerdan traslados, ni cambios de categoría para el personal administrativo, sino que se conceden determinadas opciones para este personal ante la eventualidad de la aplicación de otras medidas de regulación de empleo. Lo mismo hay que decir de la mención a las desvinculaciones. El párrafo ya mencionado en el fundamento segundo de esta sentencia dice efectivamente que «si el trabajador no optase por alguna de estas tres fórmulas, los firmantes estiman que procede llevar a cabo su desvinculación». Pero, al margen de la consideración que pueda merecer la incorporación de este tipo de admoniciones en un acuerdo colectivo, lo cierto es que no estamos, como dice la parte recurrente, ante la autorización de unas extinciones que deberían de haberse tramitado por la vía del artículo 51 del Estatuto de los Trabajadores o, en su caso, por la del artículo 52.c) del mismo texto legal, sino simplemente ante la expresión de una opinión de las partes, que para el supuesto de producirse esa eventualidad consideran que habrá que recurrir a una extinción de los contratos.

CUARTO Las denuncias restantes se refieren a dos problemas que es necesario delimitar: 1º) que el acuerdo colectivo impugnado no se ha atenido a las reglas del artículo 41 del Estatuto de los Trabajadores, pues ni se ha alegado por la empresa la causa de la modificación, ni se ha deliberado sobre ella en el procedimiento previsto en este artículo y 2º) que el acuerdo no puede adoptar una medida de transformación del contrato, como la que se pretende, que tampoco está amparada por el artículo 41 del Estatuto de los Trabajadores. La primera denuncia carece de apoyo fáctico. En el hecho probado tercero consta que la iniciación de las negociaciones en el acta de 8 de junio de 2003 se vinculó a la implantación del teletrabajo, lo que obviamente alude a una causa técnica u organizativa a los efectos del artículo 41 del Estatuto de los Trabajadores. En el mismo sentido en el acta de 7 de julio de 2003 se menciona expresamente como objeto de las negociaciones la implantación de la oficina virtual y en el propio acuerdo impugnado se recoge que «la implantación de la denominada oficina virtual... conllevará una nueva organización de recursos, favoreciendo su posición competitiva en el mercado». La parte recurrente no justifica por qué a la vista de las distintas reuniones entre la empresa y la representación de los trabajadores sostiene que no se ha seguido el procedimiento del artículo 41 del Estatuto de los Trabajadores.

QUINTO En cuanto a la transformación del contrato de trabajo, hay que señalar que, el punto 2 del acuerdo impugnado establece que «el personal del Canal de Venta Directa (Vendedores y Jefes de Ventas) afectado por la implantación de las nuevas tecnologías y sistemas de información» (...) «pasa

a realizar su labor administrativa, auxiliar de la principal que es la venta, desde su propio domicilio». Para la parte recurrente esto supone una transformación del contrato de trabajo que de ser un contrato común pasaría a ser un contrato a domicilio, lo que excedería de lo que permite el artículo 41 del Estatuto de los Trabajadores y quedaría además fuera del poder regulador de la autonomía colectiva, aparte de vulnerar la garantía de la inviolabilidad del domicilio del trabajador que establece el artículo 18.2 de la Constitución.

Es obvio que no hay vulneración del artículo 18.2 de la Constitución. Este precepto contiene, según la doctrina constitucional, dos garantías: la primera y más general supone que el domicilio, como espacio privado, debe resultar «inmune a cualquier tipo de invasión o agresión exterior de otras personas o de la autoridad pública, incluidas las que puedan realizarse sin penetración física en el mismo, sino por medio de aparatos mecánicos, electrónicos u otros análogos» y la segunda consiste en una aplicación concreta de la primera garantía y «establece la interdicción de la entrada y el registro domiciliar», de forma que «fuera de los casos de flagrante delito, sólo son constitucionalmente legítimos la entrada o el registro efectuados con consentimiento de su titular o al amparo de una resolución judicial» (STC 22/2003 y las sentencias que en ella se citan). Pues bien, el acuerdo colectivo impugnado no contiene la habilitación de ninguna acción que pueda ser calificada como una invasión del domicilio. Lo que se reprocha al acuerdo es otra cosa: que los negociadores hayan pactado una obligación de prestar el trabajo en el propio domicilio del trabajador; algo que, según la parte recurrente, excede de sus facultades de disposición. Pero el que pueda producirse esta actuación ultra vires no significa en absoluto que el simple hecho de obligarse a trabajar en el domicilio «sin más precisiones» pueda configurase como una infracción de la inviolabilidad del domicilio.

SEXTO La otra denuncia es más compleja y para examinarla hay que comenzar realizando algunas precisiones. En primer lugar y frente a lo que se afirma de contrario, hay que señalar que el acuerdo impugnado sí que establece la obligación de prestar el trabajo en el propio domicilio de los trabajadores y ello, aunque con una finta retórica, se haya partido de que los trabajadores ya «han pasado» a realizar su labor administrativa en sus domicilios para regular los derechos, obligaciones y compensaciones correspondientes. El acuerdo lo que establece es la obligación principal de realizar el trabajo administrativo en el domicilio con «los equipos informáticos y telefónicos» y, como consecuencia de este cambio -antes el trabajo administrativo se realizaba en los locales de la empresa-, se determinan los «derechos, obligaciones y compensaciones» correspondientes. En segundo lugar, es cierto, como pone de relieve el Letrado de la empresa

recurrida en su cuidado y exhaustivo escrito de impugnación, que no se trata de una transformación completa del régimen contractual, por la que se haya pasado de un contrato común ejecutado en los locales de la empresa a un contrato a domicilio ejecutado a través del teletrabajo. El personal afectado por el cambio es personal de ventas, que lógicamente desarrollaba su trabajo comercial mediante contactos con los clientes fuera de los centros de trabajo, aunque se realizaba el trabajo administrativo en esos centros, y lo que se cambia es únicamente ese trabajo, que «pasa» ahora a realizarse en el domicilio de los trabajadores. La sentencia recurrida no ha delimitado la importancia de este trabajo administrativo dentro del conjunto de la prestación de trabajo, pese a que la prueba pericial practicada a instancia de la empresa demandada (folios 376-385) muestra alguna evidencia de interés en este punto. Pero parece claro que, tratándose de un personal de ventas, el trabajo administrativo debe ser complementario del comercial. No puede aceptarse, por tanto, la tesis de la parte recurrente de que lo que existe es un cambio completo de modalidad contractual en la medida en que de un contrato de trabajo común se ha pasado a un contrato a domicilio. Sin embargo, aunque no sea así tampoco es aceptable la posición de la empresa recurrida que considera que estamos ante una modificación del sistema de trabajo -«de la herramienta o medio de trabajo empleado»- que afecta a un elemento no esencial de la prestación.

En realidad, lo que hay es un cambio en el régimen contractual, aunque este cambio sólo afecta a una parte del contenido de la prestación de trabajo. Para establecer el alcance de este cambio es necesario referirse, aunque sea brevemente, al contrato de trabajo a domicilio y a sus relaciones con el teletrabajo. El contrato de trabajo a domicilio se define en el artículo 13 del Estatuto de los Trabajadores como aquél en el que la prestación de trabajo de la actividad laboral se realiza en el domicilio del trabajador o el lugar libremente elegido por éste y sin vigilancia del empresario. Por su parte, el teletrabajo es «una forma de organización y/o de realización del trabajo, con el uso de las tecnologías de la información, en el marco de un contrato o de una relación de trabajo, en la que un trabajo, que hubiera podido ser realizado igualmente en los locales del empleador, se efectúa fuera de estos locales de manera regular» (punto 2 del Acuerdo Marco Europeo sobre Teletrabajo). No se trata de conceptos coincidentes, porque el teletrabajo puede prestarse en lugar no elegido por el trabajador y distinto de su domicilio y porque además puede haber formas de teletrabajo en la que exista una vigilancia empresarial (algunas manifestaciones de trabajo «on line»), aunque este elemento del control pudiera ser hoy menos decisivo en orden a la calificación y en cualquier caso las formas de control a través de las tecnologías informáticas

no siempre son equiparables a la vigilancia tradicional, que es la que menciona el artículo 13 del Estatuto de los Trabajadores por referencia a los tipos también tradicionales del trabajo industrial a domicilio. Pero hay formas de teletrabajo que se ajustan al modelo de trabajo a domicilio y en este sentido la doctrina se refiere a un «nuevo» contrato a domicilio vinculado a las nuevas tecnologías frente al «viejo» contrato a domicilio. Este es, sin duda, el caso del supuesto aquí analizado, pues, a partir del texto del acuerdo impugnado, no consta el establecimiento de técnicas específicas de control informático de la prestación laboral. En este sentido puede afirmarse que hay un cambio parcial del régimen contractual, pues al menos una parte de la actividad laboral va a realizarse «a domicilio» y sin vigilancia del empresario. Y este cambio excede del ámbito de las modificaciones del artículo 41 del Estatuto de los Trabajadores, porque este precepto se refiere a las modificaciones sustanciales que se produzcan en el marco de un determinado contrato de trabajo, pero no a las condiciones que puedan determinar un cambio de régimen contractual, como muestra la regla del apartado d) del artículo 12 del Estatuto de los Trabajadores para el contrato a tiempo parcial, y tampoco sería posible autorizar el cambio de una relación indefinida por una temporal o de una relación común por una especial. La doctrina científica ha resaltado que el artículo 41 del Estatuto de los Trabajadores se aplica a «las condiciones de trabajo», entendidas como los aspectos relativos a la ejecución de la prestación de trabajo y sus contraprestaciones, pero que no alcanza a «las condiciones de empleo», que se proyectan sobre la propia configuración de la relación laboral y sus vicisitudes. Pero es que además el desplazamiento del lugar de la ejecución del contrato del centro de trabajo empresarial al domicilio del trabajador tiene otras implicaciones sobre la esfera personal de éste, que exceden no sólo del ámbito del artículo 41 del Estatuto de los Trabajadores, sino del propio poder de disposición de la autonomía colectiva. En el fundamento jurídico anterior ya se ha razonado que el establecimiento de una cláusula sobre la realización del trabajo en el domicilio del trabajador no constituye un supuesto que entre dentro de la garantía constitucional de la inviolabilidad del domicilio. Pero eso no significa que ese tipo de cláusulas sea indiferente en orden a la esfera de la intimidad personal del trabajador, porque cuando se convierte el domicilio en lugar de trabajo se está obligando al trabajador a poner a disposición del empleador algo más que la fuerza de trabajo, pues se convierte en centro de trabajo, en lugar de producción, el propio espacio donde se desarrolla la vida privada del trabajador y esto no sólo supone un coste adicional, que puede quedar sin retribución, como en el caso de que haya que destinar al trabajo lugares que antes se destinaban a otros usos familiares, sino que también puede tener consecuencias de otro

orden en la convivencia en el hogar o en la vida personal del trabajador, que deben quedar al margen tanto de las modificaciones unilaterales del artículo 41 del Estatuto de los Trabajadores, como también de las decisiones de la autonomía colectiva, que han de operar sobre las materias colectivas (sentencias de 11 de abril de 2000, 30 de abril de 2002 y 20 de octubre de 2004), pero no sobre aquellas que pertenecen a la vida privada del trabajador. Así lo reconoce el Acuerdo Marco Europeo sobre el teletrabajo cuando en su punto 3 insiste en el carácter voluntario de trabajo y prevé que «si el teletrabajo no forma parte de la descripción inicial del puesto de trabajo, y el empleador hace una oferta de teletrabajo, el trabajador puede aceptar o rechazar la oferta», añadiendo que «si un trabajador expresa su deseo de optar a un teletrabajo, el empleador puede aceptar o rechazar la petición». Es cierto que el Acuerdo no es aplicable todavía en nuestro ordenamiento, pues su publicación como Anexo del Acuerdo Interconfederal para la Negociación Colectiva no equivale a una recepción en Derecho interno a través de la negociación colectiva, al tener el mencionado Acuerdo Interconfederal sólo una eficacia obligacional para las partes que lo suscriben en orden al respeto de las orientaciones y criterios que han de seguirse en la negociación, y en esta materia las organizaciones empresariales y sindicales firmantes sólo se comprometen «a promover la adaptación y el desarrollo» del Acuerdo Marco Europeo «a la realidad española». Pero el carácter voluntario para el trabajador de la aceptación del teletrabajo a domicilio se deriva en nuestro Derecho de lo que establece los artículos 1091, 1204 y 1256 del Código Civil en relación con lo ya indicado sobre la imposibilidad de utilizar en esta materia la vía del artículo 41 del Estatuto de los Trabajadores y de los límites de regulación aplicables a la autonomía colectiva, que no puede entrar a regular aquellas materias que afectan a la esfera personal de los trabajadores.

Debe, por tanto, estimarse el recurso para casar la sentencia recurrida y estimar parcialmente la demanda con el alcance que se deriva de los razonamientos anteriores. La Sala considera que basta anular el acuerdo en cuanto establece con carácter obligatorio la aplicación del teletrabajo a domicilio para el personal del canal de venta directa, sin perjuicio de que este personal pueda voluntariamente aceptar ese cambio en las condiciones que establece el acuerdo y sin perjuicio también de que en su caso puedan aplicarse las medidas previstas para el resto del personal. No obstante, hay que aclarar que este pronunciamiento no impide que cualquiera de las partes firmantes del acuerdo pueda denunciar el mismo, si la anulación que se decreta aquí rompe el equilibrio contractual alcanzado. Conforme a lo dispuesto en el artículo 233.2 de la Ley de Procedimiento Laboral, no procede la imposición de costas.

Por lo expuesto, en nombre de SM El Rey y por la autoridad conferida por el pueblo español.

LA SALA ACUERDA:

Estimamos el recurso de casación interpuesto por la Federación de Comunicación y Transporte de Comisiones Obreras, contra la sentencia de la Sala de lo Social de la Audiencia Nacional, de 30 de mayo de 2004, en autos núm. 207/03 (AS 2004, 2637), seguidos a instancia de dicha recurrente contra Telefónica Publicidad e Información, SA, la Federación de Servicios de la Unión General de Trabajadores (FES-UGT), Confederación de Trabajadores Independientes y Comité Intercentros, sobre conflicto colectivo. Casamos la sentencia recurrida, anulando sus pronunciamientos, y con estimación parcial de la demanda anulamos el punto 4 del acuerdo suscrito el 23 de octubre de 2003 por la empresa Telefónica Publicidad e Información SA y el Comité Intercentros de esa empresa en cuanto establece con carácter obligatorio la aplicación del teletrabajo a domicilio para el personal del canal de venta directa. Desestimamos la demanda en lo que excede del anterior pronunciamiento. Sin imposición de costas.

Así lo acordamos, mandamos y firmamos.

ANNOTATION

1. Leaving aside some procedural objections alleged by CCOO at the written complaint, which are not important for this brief summary, the core of the case relies on the plaintiff's allegation that the agreement signed by TPI and its Central Enterprise Committee was nul and void. As we have said, CCOO based its petition of nullity on the fact that the agreement had reversed the ordinary contracts of employment of the employees within its scope into homework contracts of employment without taking into account for that reversal the individual employees' will. In the plaintiff's opinion the TPI agreement was unlawful for three reasons. First of all, it was an agreement beyond the powers conferred on the employer by section 41 WSA to modify working conditions and was also beyond the scope of capabilities legally accorded to collective agreements. Second, the TPI agreement was in violation of the European Framework Agreement on Telework, which CCOO understood to have been received into Spanish domestic Law through the Interconfederal Agreement on Collective Bargaining 2003. Third, according to the plaintiff's opinion the agreement reached by TPI and its Central Enterprise Committee

was in violation of section 18.2 of the Spanish Constitution, which states the inviolability of the personal domicile.

2. As regards the last of the alleged reasons, the Supreme Court clearly states that in the case there was no violation of section 18.2 of the Spanish Constitution. The agreement signed by TPI and the employees' representatives does not allow, for the Court, any conduct that may be considered as an unlawful trespass of the employees personal domicile. On the contrary, for the Court it seems plainly obvious that agreeing that some employees should in the future work as homeworkers, even if the agreement were ultra vires as CCOO denounced, it does not imply by itself any violation of section 18.2 of the Spanish Constitution. The Constitution protects the inviolability of domiciles at two levels. First, against any unlawful trespass or searching that might be done either by any individual or a public authority without a judicial warrant, unless in cases of flagrant criminal offences. And second, against any trespass that might be done through the unlawful intrusion into the personal dwellings of any kind of audiovisual devices that may be used in detriment of the owner's privacy. None of those unlawful conducts may be said to be allowed by TPI agreement.

3. As regards the alleged violation of section 41 WSA we have to make two precisions. First, the plaintiff denounced that the TPI agreement had not followed the legal proceedings being established for the modification of labour conditions. The Tribunal dismissed this allegation because in the Audiencia Nacional's resolution being fought it was plainly proved that the agreement to create a Virtual Office within the company relied on the basis of technological reasons and was signed after a long negotiation with the company's Central Enterprise Committee. Both the technological reasons alleged for signing the agreement and its negotiation with the workers' representatives thoroughly accord with section 41 WSA.

Second, for CCOO the TPI agreement could not lawfully modify ordinary labour contracts into homework contracts as that modification is beyond the powers conferred to the employer by section 41 WSA to modify working conditions. For the Tribunal this last allegation is more complex and difficult to deal with. It is obvious, said the Court, that the TPI agreement does oblige all the employees included within its scope to do a precise kind of homework as teleworkers. On the other hand it is also true that the employees'ordinary labour contracts were not transformed into homework contracts as a whole but only as regards the future performance of some of the employees' ancillary administrative duties.

What in fact exists for the Tribunal is a change of the contractual regime of the labour relationships of the employees included within the TPI agreement,

although this modification only partly has effects on the employees' duties. In order to state the real scope of these effects, the Supreme Court analyses whether there are differences between the legal concepts of homework labour contract and telework..

4. A homework contract of employment is defined by section 13 WSA as any labour contract according to which the employee's services "are performed at his/her own domicile or in another place of work that he/she may freely choose out from the employer's control". On the other hand, telework is defined by the European Framework Agreement on Telework (point 2), as "a form of organisation and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could be also performed at the employers premises, is carried out away from those premises on a regular basis".

For the Court, both homework and telework are not coincident legal models. Telework may be performed out from the employee's domicile at a place chosen by the employer and there are forms of teleworking that as a regular basis are under the employer control (some kinds of on line teleworking, for instance). The Supreme Court nevertheless points out that the control test might nowadays be of relative importance to establish a clear difference between homework and telework, as existing ways of technological control are not always comparable to the traditional employer's control referred to by sect. 13 WSA when defining a homework contract of employment.

But for the Court there are certainly some kinds of telework that basically accord to the the legal model of a homework labour contract, which as we have said, is performed out from any kind of employers'control. Thus, scholars do often refer to telework as a "new homework contract" that appears deeply linked to new technologies, in order to oppose it to the "old model of homework contracts".

As the Court points out, this is what happens in the present case. Within the TPI agreement there was no reference to any kind of employer's informatic control over the work to be done by the employees at their own dwelling premises. So, the conclusion reached is that in the case the agreed teleworking duties to be performed at home should be considered as a kind of homework labour contract. Precisely for that the modification introduced by the TPI agreement is beyond the powers conferred to the employer by section 41 WSA to modify labour conditions. As scholars point out sect. 41 WSA only authorises the modification of existing labour conditions but it does not allow any change of existing labour contracts. Consequently as the TPI agreement did modify existing ordinary labour contracts into homeworking contracts it clearly acted beyond the limits established by section 41 WSA.

5. Furthermore, the modification in the place of work operated by the TPI agreement is also beyond the scope of capabilities legally accorded to collective autonomy. In the Court's reasoning, wherever the place of work is the employee's own domicile, employees involved in homeworking become obliged not only to put at the employers' disposal their working capabilities (as in ordinary labour contracts) but also some part of their own private sphere of life. In so far as private life is thus partly involved, reversal of ordinary contracts of employment into homework contracts is necessarily aside from the scope of collective autonomy. That is being affirmed by the consolidated doctrine of the Supreme Court (as stated, for instance, in its decision of 11 April 2000) and is also recognized by the European Trade Agreement on Telework, that states (point 3) the voluntary character of telework, expressing that if telework is not part of the initial job description (as it happened in the present case), when the employer makes an offer of telework, "the worker may accept or refuse this offer". Although the European Trade Agreement on Telework has not yet been received into Spanish domestic law (against the criterion sustained by the plaintiff), the voluntary character of telework may be based on section 1256 of the Civil Code in connection with its sections 1091 and 1204.

For all these reasons the Supreme Court partly upheld, as we have said, the plaintiff's appeal and declared nul and void the agreement signed between TPI and the Central Enterprise Committee in so far as it compulsorily changed the ordinary employment contracts of the employees within its scope into homework contracts of employment.

AUSTRIA

Administrative Court, 23 February, 2005
2002/08/0200, Administrative Court

Minimum wage rate – relation to collective bargaining – employment in households

HEADNOTES

Facts

The Gymnastic Association X employed four cleaners, three of them for 40 hours and one for twenty hours per week. Besides cleaning activities, the employees had also to sell and control tickets, keep lost things, and close the wardrobes on several occasions. Until 1994 the "Minimum wage rate for domestic workers in Styria" had been applied to their employment relationships. In 1995 and 1996 it was agreed upon that a certain payment would be granted (especially a 13th and a 14th monthly salary per year, the so-called "holiday pay" and "Christmas pay") and that the employment contracts were not covered by any collective agreement.

In 2001 a contribution audit by the health insurance agency was carried out. The decision held that the minimum wage rate should have applied all the time, according to which the employees would have gained additional holiday pay (a so-called "15th monthly salary").

The employee protested against the decision. According to the employer's pleadings the employees do not (only) carry out works in the sense of the "Domestic Workers Statute"; furthermore the Association is "capable of/competent to do collective bargaining" (*kollektivvertragsfähig*) because it is the biggest of its kind in Graz due to its 2500 members. Minimum wage rates only apply in case of a lack of employers' associations capable of collective bargaining.

The sued authority (Styrian governor) did not allow the protest.

The Association X appealed against this decision. The sued authority brought in refutation and requested dismissal with costs.

Decision

The Administrative Court rejected the appeal.

Law Applied

ARBVG (ARBEITSVERFASSUNGSGESETZ - LABOUR CONSTITUTION ACT)
§ 22

Para.1: On application of an employees' association the Federal Conciliation Board has to determine minimum wages and minimum compensation for expenses, if the requirements of para. 3 are fulfilled. The minimum wages and minimum compensation for expenses named in such a statement are referred to as minimum wage rate.

Para. 3: A minimum wage rate may only be determined for groups of employees, in favour of whom a collective bargaining agreement cannot be concluded,

1) because associations capable of collective bargaining do not exist and

2) if/provided that a "Satzung" has not already been declared applicable for these employees".

JUDGMENT

It is litigious whether the four employees have a claim to more payment (namely the 15th salary) than laid down in their contracts, which would change the contribution assessment for the social insurance. According to § 49 ASVG (General Act on Social Insurance) the relevant wages (for social insurance) include every payment in money or in kind which the employee is entitled to, or the actual payment, if this amount is higher than the "owed" payment. The question, whether and to which amount such a claim exists, must be considered according to Civil Law (Labour Law) principles. Therefore employees for the favour of which a minimum wage rate exists have to be paid at least the amount laid down in the rate. Specific agreements (*e.g.* employment contracts) are only available, if they provide better entitlements than those in the rate. (…)

Minimum wage rates are directives (deriving directly from law, set by administrative bodies such as ministries) in which minimum wages are laid down unless rules in statutes, collective bargaining agreements or Satzungen exist. (…)

The scope of the Styrian minimum wage rates lays down:

(a) territorial: Styria
(b) personal: employees covered by the 1st part of the ArbVG, and who are

aa) covered by the Domestic Workers' Act;

bb) who are not covered by the Domestic Workers' Act, but are carrying out appropriate works at an employer's, for whom no association capable of collective bargaining exists or who is not capable of collective bargaining him/herself (…).

Altogether the Court held that the Domestic Workers' Act applies in case of "households", no matter whether they are kept by a natural or a juristic person. Yet, concerning juristic persons the application is even more restrained, for the Domestic Workers' Act only applies, if the employment relationship is not covered by a collective bargaining agreement. That is why point bb) can only comprise those employees carrying out services usual in a household (such as cleaning, tidying up, washing), but working for employers not having a household but dealing with some other kind of business yet needing services comparable to those that are necessary in a household. Another requirement is that for the employer no association capable of collective bargaining exists. (…)

Concerning the question of the capability/competence of collective bargaining it has to be stressed that the size or importance of the enterprise is not the relevant argument, but only the juristic act of the certification of the capability by the Bundeseinigungsamt (Federal Conciliation Board).

The Gymnastic Association X has failed in giving evidence to the illegality of the appealed decision and the appeal is to be rejected. (…)

[Sources (journals): Arbeitsrechtlicher Dienst (ARD) 5601/7/2005. The decision is also available on publicly accessible websites such as http://ris.bka.gv.at/vwgh/ under the citation of its date or its number (2002/08/0200)]

ANNOTATION

The current case allows a good survey both of the Austrian area of collective bargaining and the minimum wage idea. Generally, in Austria there is, unlike other members of the EC, no legally laid down minimum wage. Traditionally this area is completely left to the social partners (industry-wide level, for the whole of Austria or one of several Federal regions) and the collective bargaining agreements. Conscious of the fact that even this "perfect scheme" might fail in some cases, the lawmaker provided further instruments to regulate terms and conditions of employment, especially concerning wages. Besides the collective bargaining agreement (Kollektivvertrag – Tarifvertrag), other (however administrative) instruments such as the Satzung, the minimum wage rate

(Mindestlohntarif) and the apprentices' payment (Lehrlingsentschädigung) are major parts of Austrian wage policy and are important in securing minimum standards in certain areas. Altogether about 90% of employment contract relationships are covered by the various minimum wage instruments.

Unlike collective agreements such as the wider collective bargaining agreement and the works agreement, the minimum wage rate (the Satzung and the apprentices' payment) is not negotiated by the social partners or partners in the business, but is determined by an administrative body (*i.e.*, the Bundeseinigungsamt - Federal Conciliation Board - situated at the Ministry of Economics and Labour) upon the application of the employees' (or employers') representative. Similar to a collective bargaining agreement, the minimum wage rate (Satzung, Lehrlingsentschädigung) affects each employment contract within the business and the wage level cannot be reduced (obligatory effect). The Satzung is the result of a collective agreement of which the scope has been extended by the Bundeseinigungsamt on application of an employers'/employees' association, so that it applies to employees carrying out works of similar type, but whose employers otherwise would not have to obey the collective agreement because of not being member of the concluding employers' association (comparable to the German "Allgemeinverbindlicherklärung"). Yet, the case under consideration deals with the minimum wage rate, therefore more about this instrument and its development in recent years.

The minimum wage rate's legal compliance is directly connected to the provision of other collective labour law instruments and its commitments to an adequate employers' association. Therefore, the consideration of the special role of the minimum wage rate and of its legal structure must incorporate also the tensions between the "freedom of association" and the administrative regulation of employment standards. § 22 ArbVG lays down that "the minimum wage rate may only prescribe a minimum payment for employees, in favour of whom a collective bargaining agreement cannot be concluded, firstly because associations capable of collective bargaining do not exist, and secondly if/provided that a Satzung has not already been declared applicable for these employees".

The wording and the context of this rule (going back to 1951) make clear that as a principle, in the Austrian labour law system, administrative acts should be the "last resort", whereas enforcement of autonomous associations and their agreements must take precedence. The current main scope of the minimum wage rate beyond any dispute comprises the areas in which (still) no employers' associations capable of collective bargaining exist; its range includes employees in private educational and nursing institutions (*e.g.*, kindergartens, language schools), as well as housekeepers and domestic help. In the meanwhile, special emphasis must be placed on the employees of the "social services institutions"

(including physicians and caregivers). Due to the constitution of the "Organisation of Employers in Health and Social Services" (BAGS) and its conclusion of a collective agreement, questions of collision and crossover in many areas arise and must be clarified.

Especially, there can be detected a certain trend in jurisdiction extending the range of the minimum wage rate. The legal background: collective bargaining agreements can only be concluded by associations being adjudicated this capability by law (e.g., the chambers) or by the Bundeseinigungsamt, the latter relating to the voluntary trade organisations in case they fulfil the legally laid down requirements such as economic strength in a certain industry, number of members in relationship to the non-organised, etc. As can be seen from the examples above, there still exist branches where employers' interests obviously differ too much to be united in an organisation at all. Yet, there are other branches in which some employers have founded an association and other employers (not necessarily all) have joined.

The organisation has to be recognised as having the status of an organisation capable of collective bargaining. Provided that an employer is not obligatorily a member of the chamber of commerce, he/she can choose whether to become a member of the voluntary association, if such an organisation exists.

Can there be determined a minimum wage rate by the Bundeseinigungsamt for those employers who could be member of a voluntary organisation (depending on the range in the rate), but do not want to join for whatever reason? According to the words of the § 22 ArbVG the rate cannot be established any more because an organisation is in existence. Obviously the existence of the organisation that could conclude an agreement is regarded to be sufficient. Against this wording, court decisions in the last few years added a possibility to determine a minimum wage rate: a rate may also be constituted if an employers' association exist but the concrete employer has not become a member yet. The courts' main explanatory reason against the interpretation that the mere existence of an organisation could obviate the rate was the protection of the employees and to provide the employees' adequate payment further on. In continuing this reasoning it could be considered that there are hints that the lawmaker certainly wanted to create a comprehensive system of minimum wages (employment terms) for every branch and all employees with as much protection as possible, which certainly would be opposed by the possibility of inhibiting a minimum wage by simply founding an organisation in order to being certified the capability of collective bargaining, but without any regard whether that organisation actually concludes any agreement in favour of the employees in future. As another reason for a wider understanding of the phrase "lack of employers' associations", it could be considered that there already have been determined several

minimum wage rates (which are still in effect) laying down in their personal scopes that the particular minimum wage rate applies to employees of such employers, too, who "are not member of an organisation capable of collective bargaining". Furthermore it had to be considered that the wording might not be complete, for it lays down that in case of non-existence "of employers' associations" a minimum wage cannot not be established anymore. But of course the rule would be senseless if the lawmaker meant a general lack of any employers' associations. Therefore the meaning must be reduced to "appropriate" employers' associations, comprising only those which the particular employer could be member of. And if the rule has to be added up concerning this point, other aspects of it might require such an approach, too.

Which arguments speak against the establishment of a minimum wage rate by the Bundeseinigungsamt in favour of employees despite the existence of an association competent to collective bargaining, but of which the employer has not – for what reason ever – become a member yet? Again, a most considerable argument is the wording of § 22 ArbVG. Though there can be noted some inadequate linguistic constructions ("…groups of employees in favour of whom a collective agreement cannot be concluded 1. *because* employers' associations do not exist and 2. *if* a Satzung has not been constituted) which derive from various amendments, the wording is clear and concise in one aspect: it relates to the mere existence of employers' associations fulfilling the requirement "capability of collective bargaining", but it does not directly require actual bargaining or even a collective agreement. In contrast, other rules do so explicitly, *e.g.* the apprentices' payment, the application of which depends on the "effectiveness" of a collective agreement (see the wording in § 26 ArbVG).

As indicated above, jurisprudence is of the opinion that the mere existence of the employers' association is not sufficient to avert the determination of a minimum wage rate. The main argument (employees' protection) is comprehensible and certainly in the lawmaker's sense, too. Historical analysis of the legal and also the sociological situation at the time when the instrument "minimum wage rate" was introduced might support such a view. Nevertheless it will be discussed and considered more intensively whether there are not any other alternatives within the balanced system of the collective bargaining area providing and securing employees their rights (*e.g.*, what exactly are the requirements of administrative derecognising the capability of collective bargaining? Can they apply in case of the associations' not acting? In other words: to what extent can an association be forced to bargaining at all, etc?). For sure, further interesting jurisprudence and literature concerning the minimum wage rate is to be expected.

JAPAN

Supreme Court (Third Petty Bench)
Keisuke Yawata v. Chief of Arakawa Regional Tax Office

Benefits from stock option regarded as a part of salary – taxing profits on stock option as salary income under Income Tax Act

HEADNOTES

Facts

The plaintiff was a President of the Japanese unit of Applied Materials Inc. whose head quarter was located in USA from January 1995 to January 1997. U.S. chip maker Applied Materials Inc. had a rule to give the right of stock option to certain executive members of board and hard workers. The right of stock option can be exercised only for ten years when they could get it. The right cannot be granted to other persons. They must work at the company for at least 6 months if they are granted the right of stock option. When they would retire, they can exercise the right for only 15 days after their retirement. And the right can be exercised by only them during their lives.

The plaintiff was given the right of stock option under the above-mentioned rule. The plaintiff exercised his right from 1996 to 1998. He could get profits: 40594875 yen in 1996, 155228062 yen in 1997 and 163720875 yen in 1998. He reported the profits as occasional income under the Income Tax Act to Arakawa Regional Tax Office. But the Tax Office said that the profits of stock option should be treated as salary income subject to a higher tax. The Tax Office imposed him to pay a higher rate tax to the total amount of income, 360 million yen, generated from his sale of stocks. But the plaintiff declared that a lower tax rate should be applied to the profits because they were occasional income under the Income Tax Act.

The Tokyo District Court judged in August 26, 2003 that the stock option income should be treated as occasional income subject to a lower rate tax. The reason was the following. The plaintiff was a president of Japanese unit, so he had not concluded a labour contract with the U.S. Applied Materials Inc. The income was not be found as remuneration for labour paid by the U.S. company.

Rather it could be treated as the occasional income because the proceeds from such sale were decided by the contingent factor of stock prices.

The Tokyo High Court overturned the ruling in February 19, 2004, saying that the right of stock option was intended to motivate employees and executive members to continue diligent works at the company. Therefore the profits from stock option should be treated as salary income because they were compensation for labour and services.

Decision

The Supreme Court affirmed the High Court's decision.

Law Applied

INCOME TAX ACT

Article 28, section 1: Salary income shall be defined to include money and other economic benefits received by an employee as compensation for services rendered to an employer.

Article 34, Section 1: Occasional income shall be defined to include incidental income which is not included in any of the categories of interest income, dividend income, income from immovables, business income, salary income, retirement allowance income, forest income or transfer income, and which does not accrue from continuing or repeated activities for profit and does not have the nature of income as compensation for services or for transfer of property.

LABOUR STANDARDS ACT

Article 11: In this Law, wage shall mean the wage, salary, allowance, bonus and every other payment to the worker from the employer as remuneration for labour, regardless of the name by which such payment may be called.

JUDGMENT

The plaintiff was granted the right of stock option by U.S. Applied Materials Inc. But Japan Applied Materials Inc. was organized and controlled by U.S. Applied Materials Inc. Japan Applied Materials Inc. of course was a member of U.S. Applied Materials Inc. group. The president of Japanese Applied Materials was controlled by U.S. company. So the plaintiff executed his job under the direction of U.S. company.

Stock option system had an intention to motivate certain executive members and workers of U.S. Applied Materials group. The Court implied that there was a special contract between the plaintiff and U.S. company, declaring that he was

granted the stock option as the compensation for work at the Japanese unit. Therefore, the plaintiff was given the right of stock option as compensation for labour and services rendered. The proceeds from exercising stock option should be regarded as a part of salary income and subject to a higher tax rate than for occasional income under the Income Tax Act.

[Source：Case No. (gyou hi) 141 of 2004, decided on January 25, 2005: Rodo -hanrei 885-5]

ANNOTATION

In Japan stock option system was permitted by the Amendment of Commercial Code in 1997.

Before that, executive members and hard workers had been compensated mainly by salaries and bonuses. So incentives to work was weak in Japanese corporations' compensation structure. Under the amendment of Commercial Code, the company must gain approval at the shareholders meetings in order to grant stock option. After gaining the approval, the company must disclose the information on eligible stock option holders, the method of determining stock price, the exercise time and so on at the annual report. Within one year from the approval, the company can actually grant stock option to executive members and workers. But in this case, U.S. company granted the right of stock option to the plaintiff. So the rule of granting stock option is outside the scope of the Commercial Code.

There are at present about 100 similar lawsuits. Most cases are concerned with the stock option given to employees of Japanese units of foreign companies. This first judgment of the Supreme Court will influence another 100 lawsuits pending.

The tax rule to stock option is important. In Japan stock option holders shall pay taxes once on the capital gains at the date of selling the stocks proceeded through the exercise of the options. In this case, it was disputed whether the stock option income should be treated as salary income or occasional income under the Income Tax Act because tax rate was different between both income. The Supreme Court ruled that the stock option income should be regarded as a part of salary because it was compensation for labour and services rendered. Therefore the crucial point was whether the stock option should be compensation for labour such as the definition of salary or wages provided under Article 11 of the Labour Standards Act.

In this judgment there are two problems. The plaintiff did not conclude the labour contract directly with U.S. Applied Materials Inc. The plaintiff was a president of Japanese unit controlled by U.S. Applied Materials Inc. as the parent company. From this fact, the Supreme Court implied that there was a special contract between the plaintiff and the parent company, saying that he was granted the stock option as compensation for work and services rendered at the Japanese unit. As the background, the Japanese unit was a member of group of U.S. Applied Materials Inc. The plaintiff' s work had relation to the achievements of the parent company. So the parent company had granted the stock option to the president of subsidiary company. From these facts the Supreme Court implied a special contract on the stock option.

Another problem is that the amount of compensation should depend on the stock option holder's decision. Stock transactions are determined by the contingent factor of stock prices. The stock option holder, of course, should try to sell the stock at the highest price. So the amount of salary shall be decided by stock holder's option. The Supreme Court decided that this fact did not contradict with the salary income because it was implied under the contract that the stock holder was allowed to sell shares at the market price.

SPAIN

Supreme Court (Social Chamber)
Decision of 20 April 2005

Different system of calculation of the pay supplement based on seniority set by Collective Agreement on the ground of the employees' date of recruitment

HEADNOTES

Facts

In the context of an economic crisis at the company Transportes Generales Comes, SA, took place the negotiation of the Collective Agreement between the above-mentioned firm and the workers' representatives (*Comité intercentros*), for the period 1997-1999. Clause 10 of the Collective Agreement established two different pay supplements linked to length of service, based on the date of recruitment of the employees.

Thus, the mentioned clause maintained the reward of seniority (*premio de antigüedad)* provided by the former Collective Agreement, for those who were working in the company before the date at which the new one came into force. The referred allowance was a percentage of the worker's basic wage (i.e. the retribution excluding allowances, bonuses, overtime, etc), with the limit of 50 % of that basic wage. However, those who were already receiving a superior amount, they would continue receiving it as a personal allowance.

Whereas, the allowance aimed to remunerate the period of service of those employees who came in the undertaking after that date, it received another designation and had to be calculated in a different way. The so-called reward of linkage (*premio de vinculación*) was a fixed amount of money which increased every five years of employment relationship as follows: for five years in the firm, the worker would receive 5.000 pts (30 €) per month; for ten years, 10.000 pts (60 €) per month; for fifteen years, 15.000 pts (90 €); and from twenty years onwards, 20.000 pts (120 €).

In spite of the fact that the firm had overcome the economic crisis, even obtaining profits from year 1999, the subsequent Collective Agreement for 2000-2002 kept such different scales of payment based on the date of recruitment, even though bringing the above-mentioned amounts up to date.

In 2002, the trade union *Confederación General del Trabajo de Andalucía* brought a claim before the High Court of Justice of Andalucía, seeking a declaration that the Article 10 of the Collective Agreement was null and void insofar as it established a different allowance for the employees contracted from 1 January 1997 onwards, breaching the principle of equal treatment set by Article 14 of Spanish Constitution.

In its Decision of 27 November 2003, the High Court of Justice of Andalucía, upheld the claim, stating that the mentioned provision was void. The undertaking appealed then to the Supreme Court (Social Chamber).

Decision

The Supreme Court's Decision of 20 April 2005 (rec. 51/2004), dismisses the appeal and confirms the prior High Court's Decision.

Law Applied

SPANISH CONSTITUTION OF 27 DECEMBER 1978 (CE)

Art. 14. "The Spanish are equal before the law, without any discrimination on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance".

Art. 37.1. "The Act guarantees the right to collective bargaining among the workers and employers' representatives, as well as the binding effect of Collective Agreements."

WORKERS' STATUTE (CONSOLIDATING TEXT APPROVED BY ROYAL LEGISLATIVE DECREE 1/1995 OF 24 MARCH) (WS)

Art. 3.1. "The duties and obligations concerning the employment relation are regulated:

a) By statute law and statutory instruments.

b) By collective agreements". (…)

Art. 25.1. "The employee, in view of the work carried out, may have the right to an economical promotion in the terms fixed by Collective Agreement or individual contract of employment".

2. "What is stated in the prior paragraph is to take account without prejudice of the acquired rights or in course of acquisition in the correspondent period of time".

Art. 82. 3. "The Collective Agreements regulated by this Act are obligatory binding for all the employers and employees included in their field of application and during all the time that it is in force (…)".

4. "The Collective Agreement that replaces a prior one may dispose of the rights provided in that one. In this case, what is stipulated in the new Agreement will be of application in its integrity".

JUDGMENT

ANTECEDENTES DE HECHO
(…)

FUNDAMENTOS DE DERECHO
(…)

TERCERO: (…) Al entrar en el examen de este único motivo de casación propuesto por la empresa recurrente, es conveniente señalar, como ya así se hizo en nuestra sentencia de 25 de julio de 2002 (RJ 2002, 9904) , que a partir del Convenio Colectivo de empresa suscrito por las partes hoy litigantes y con vigencia desde el 1 de enero de 1997 al 31 de diciembre de 1999, se vino introduciendo, en el artículo, relativo a antigüedad, un sistema distinto de pago de la misma que es el reflejado en el art. 10 del Convenio Colectivo, con vigencia para los años 2000 a 2002, ya transcrito, que se impugna en el presente proceso de índole colectiva, postulándose la nulidad del mismo.

CUARTO: En orden a las infracciones jurídicas que se denuncian por la parte recurrente, es de reiterar aquí, a fin de no incurrir en ociosas reiteraciones, los razonamientos contenidos en nuestra ya mencionada sentencia de 25 de julio de 2002 (RJ 2002, 9904).

Al respecto, decíamos entonces: «es de significar que esta Sala, en sus sentencias de 18 de septiembre de 2000 (RJ 2000, 7645) y de 17 de junio de 2002 (RJ 2002, 7909) , en un asunto idéntico al actual, referido, en la primera de ellas, al Convenio Colectivo del Sector de Tracción Mecánica de la provincia de Barcelona del año 1998 a 2000 y, en la segunda, al Convenio Colectivo para las empresas de Transportes Mecánicos de Viajeros de la provincia de Barcelona, correspondiente al año 2000, se pronunció en el sentido de desestimar el similar recurso de casación propuesto contra la sentencia de instancia que era estimatoria de la demanda.

Asimismo, son de citar las sentencias de esta Sala de 22 de mayo (RJ 1991, 6826) , de 22 de julio y de 28 de septiembre de 1991, de 14 de octubre de 1993

(RJ 1993, 8051) , de 7 de julio de 1995 (RJ 1995, 5483) y de 22 de enero de 1996 (RJ 1996, 479) , entre otras, todas las que, siguiendo el criterio mantenido en las sentencias del Tribunal Constitucional 171/89 (RTC 1989, 171) , 76/90 (RTC 1990, 76) , 28/92 (RTC 1992, 28) y 117/93 (RTC 1993, 117) , establecen que se produce violación del principio de igualdad constitucional en aquellos casos en los que la diferencia de trato laboral no encuentra una explicación razonable y objetiva, como puede ser el que se establezca diferente retribución en razón al carácter temporal o indefinido del contrato que liga al trabajador con la empresa, siempre que se trate de la realización de una idéntica actividad laboral.

Como se dice en la mencionada sentencia de esta Sala, de 3 de octubre de 2000 (RJ 2000, 8659) con cita de la sentencia del Tribunal Constitucional 2/98 de 12 de enero (RTC 1998, 2) : «El art. 14 de la CE no impone en el ámbito de las relaciones laborales una igualdad de trato en sentido absoluto, pues la eficacia en este ámbito del principio de la autonomía de la voluntad dejan margen en el que el acuerdo privado o la decisión unilateral del empresario en ejercicio de sus poderes de organización en la empresa, puede libremente disponer la retribución del trabajador, respetando los mínimos legales o convencionales. En la medida pues, en que la diferencia salarial no tenga un significado discriminatorio por incidir en alguna de las causas prohibidas por la Constitución o el Estatuto de los Trabajadores no puede considerarse como vulneradora del principio de igualdad. El Convenio Colectivo aunque ha de respetar ciertamente las exigencias indeclinables del derecho de igualdad y la no discriminación, ésta no puede tener aquí el mismo alcance que en otros contextos, pues en el ámbito de las relaciones privadas en el que el Convenio Colectivo se incardina, los derechos fundamentales y entre ellos el de igualdad, han de aplicarse matizadamente, haciéndolo compatible con otros valores que tienen su origen en el principio de la autonomía de la voluntad (SSTC 177/1988 [RTC 1988, 177] , 171/89 [RTC 1989, 171] , 28/92 [RTC 1992, 28] entre otras)».

A la vista de los términos en los que, conforme a la expuesta doctrina del Tribunal Constitucional y a la jurisprudencia de esta Sala, se ha de enmarcar el respeto al principio de igualdad en el ámbito del Derecho Laboral y, muy especialmente, cuando el mismo se rige por el Convenio Colectivo, fruto de la autonomía de las partes, es de significar que se produce una violación del principio de igualdad constitucional cuando las diferencias en el tratamiento retributivo de los trabajadores carecen de una justificación objetiva y razonable en situaciones que pueden y deben considerarse iguales.

Por otra parte, no ha de perderse de vista que el Convenio Colectivo tiene un valor normativo y de eficacia general que le constituye en una de las fuentes del Derecho de Trabajo, a tenor de lo previsto en el art. 3.1.b) del Estatuto de los Trabajadores y al ser esto así es evidente que todo lo regulado en él debe

ajustarse a los principios constitucionales y que, en el caso concreto de establecer diferencias en el trato de los trabajadores, dichas diferencias han de ser razonables, equitativas y proporcionadas.

Si bien es cierto que en el Convenio Colectivo se pueden establecer determinadas diferencias en función de las distintas actividades laborales y de las peculiaridades de cada una de éstas, sin embargo, cuando se trata de la retribución salarial por trabajos iguales es obvio que el principio general debe ser el de que «a igualdad de trabajo igualdad de retribución», por lo que resulta carente de toda fundamentación razonable el establecer una diferencia retributiva en función de la fecha de contratación por cuanto esto rompe el principio del equilibrio entre retribución y trabajo».

Si la diferencia retributiva por el concepto de antigüedad que se pactó en el art. 10 del Convenio Colectivo de la empresa Transportes Generales Comes, SA hubiera tenido una justificación distinta a la que se invoca, cual es la fecha de ingreso en el trabajo, podría admitirse la constitucionalidad de dicho precepto paccionado, pero, cuando como aquí ocurre, el único elemento de diferenciación se halla en la fecha de incorporación del trabajador a la empresa hay que entender que, pese a la desregulación producida por la Ley 11/94 de 19 de mayo y a las posibilidades conferidas al respecto a la autonomía de las partes del contrato de trabajo, no cabe considerar como razonable la diferencia de retribución que se establece entre unos y otros trabajadores, simplemente por el hecho de haber ingresado en la empresa en una fecha distinta.

Si en la norma paccionada en cuestión se hubiera suprimido de futuro el complemento de antigüedad para todos los trabajadores del sector, reconociendo, únicamente, como derecho adquirido, el consolidado por los trabajadores hasta el 31 de mayo de 1995, nada habría que objetar, pero lo que no resulta aceptable es el que, en función simplemente de la fecha de ingreso en la empresa, se establezca una diferente modalidad de abono del complemento de antigüedad con muy gravosas consecuencias económicas para los trabajadores ingresados con posterioridad al 1 de junio de 1996.

QUINTO: Aduce la parte recurrente, como argumento nuclear de su impugnación de la sentencia de instancia y en acoplamiento a la doctrina constitucional y a la jurisprudencia de esta Sala que invoca en apoyo de su tesis, la pretérita situación de crisis económica por la que atravesó dicha empresa, hoy demandada-recurrida, y que determinó extinciones de contrato de trabajo mediante expedientes de regulación de empleo y, al propio tiempo, la actuación de dicha empresa convirtiendo en fijos de plantilla a un determinado número de trabajadores temporales e, incluso, la nueva contratación de personal laboral con carácter de fijeza.

Todas estas circunstancias concurrentes que no se ignoran por la sentencia recurrida, cuyo relato de hechos probados se mantiene intacto y no ha sido objeto de variación alguna en esta vía casacional, son, de por sí, insuficientes a la hora de legitimar el régimen de desigualdad retributiva de la antigüedad establecida en el art. 10 del Convenio Colectivo, cuya nulidad, ahora, se insta como discriminatoria por falta de justificación objetiva y por atentatoria al principio fundamental de igualdad establecido en el art. 14 de la Constitución Española . Al respecto, es de significar, en primer término, que nada se dice en el vigente Convenio Colectivo en trance de impugnación, ni de sus antecedentes o exposiciones negociadoras cabe inducir que el acuerdo adoptado respecto a la desigualdad retributiva de la antigüedad tuviera su razón de ser en las causas que, ahora, se esgrimen por la empresa recurrente.

En otro aspecto, conviene poner de relieve que la pasada situación de crisis empresarial padecida por la empresa en años anteriores, -1995, 1996 y 1997- aparece ya, claramente, superada desde hace varios años -concretamente desde al año 1998- y, por supuesto, ya no existe para nada en el período de tiempo al que se extiende la vigencia del Convenio Colectivo cuya nulidad parcial se pretende en el proceso impugnatorio.

Como claramente se infiere del apartado 6º del relato histórico probado de la sentencia recurrida, desde el año 1999, con anterioridad por tanto, a la suscripción y vigencia del Convenio Colectivo hoy en trance de impugnación, la situación de la empresa ha experimentado en línea progresiva unos resultados, manifiestamente, positivos, por lo que no cabe invocar con éxito aquella anterior y coyuntural situación de crisis económica para justificar el actual trato retributivo distinto previsto en el art. 10 del vigente Convenio Colectivo para los años 2000 a 2002, en orden al abono de la antigüedad según se trate de personal fijo de la empresa con anterioridad al año 1996 o de personal temporal o convertido en fijo a partir de la indicada fecha.

No puede constituir, a estas alturas del tiempo, argumentos convincentes en orden a la justificación de la cuestionada medida de desigualdad establecida en el Convenio Colectivo que parcialmente se impugna, el hecho de las reducciones de plantilla fija efectuadas, en su día, mediante expedientes de regulación de empleo ni, tampoco, la simultánea o ulterior actitud adoptada por la empresa que, ahora recurre, en orden a la conversión de contrataciones temporales en fijas o en la concertación de nuevas contrataciones laborales con este último carácter, pues si parte de esas medidas se hicieron con la finalidad de reflotar la empresa -lo que cierta y afortunadamente se consiguió- es evidente que en la suscripción de Convenio Colectivo para los años 2000-2002, actualmente en trance de discusión judicial, para nada se mencionaron ni tuvieron en cuenta como base del clausulado que se pretende impugnar en el presente proceso

judicial, resultando manifiesto, por otra parte, que alguna de esas medidas adoptadas por la empresa son exponentes, precisamente, de una buena situación económica de la misma que se revela muy alejada, en tiempo y en contenido de la actual fase de prosperidad de la empresa.

SEXTO: Por todo lo que se deja razonado y de conformidad con el dictamen del Ministerio Fiscal, el recurso debe ser desestimado con pérdida del depósito constituido para recurrir y sin hacer expresa imposición de costas, conforme a lo previsto en el art. 233.1 del Texto Refundido de la Ley de Procedimiento Laboral.

Por lo expuesto, en nombre de SM El Rey y por la autoridad conferida por el pueblo español.

FALLAMOS

Desestimamos el recurso de casación interpuesto por el Letrado D. José Miguel Caballero Real, en nombre y representación de la entidad Transportes Generales Comes, S.A, contra la sentencia dictada por la Sala de lo Social del Tribunal Superior de Justicia de Andalucía, de fecha 27 de noviembre de 2003, en autos núm. 6/03, seguidos a instancia de la Confederación General del Trabajo de Andalucía, contra la empresa Transportes Generales Comes, Sección Sindical De CC.OO. y Sección Sindical de U.G.T. en la empresa, sobre IMPUGNACIÓN DE CONVENIO COLECTIVO. Se decreta la pérdida del depósito constituido para recurrir, sin hacer expresa imposición de costas.

Devuélvanse las actuaciones al Órgano Jurisdiccional correspondiente, con la certificación y comunicación de esta resolución.

Así por esta nuestra sentencia, que se insertará en la COLECCIÓN LEGISLATIVA, lo pronunciamos, mandamos y firmamos.

VOTO PARTICULAR

Voto Particular Que Formula el Magistrado Excmo. Sr. Don Antonio Martin Valverde a la sentencia dictada en el recurso núm. 51/2004, y al que se adhiere el Excmo. Sr. Don Gonzalo Moliner Tamborero

ÚNICO: Discrepamos respetuosamente de la sentencia acordada por la mayoría, aun compartiendo buena parte de las premisas en las que se apoya. A nuestro entender, la diferencia de trato en la liquidación del complemento de antigüedad de los trabajadores veteranos (los que tenían la condición de fijos a la entrada en vigor del convenio colectivo suscrito en 1997) y de los trabajadores nuevos (los incorporados a partir de tal fecha) prevista en dos sucesivos

convenios colectivos de la empresa Transportes Comes, SA (de 1997 y de 2000) no es contraria al principio de igualdad, en cuanto que está basada en un criterio de distinción objetivo y razonable.

El punto de partida de nuestro razonamiento se refiere a la naturaleza del complemento de antigüedad. Es éste un concepto salarial vinculado por una parte a la experiencia en el trabajo y por otra a la pertenencia a la empresa del trabajador durante un tiempo pasado, que le ha obligado a compartir las vicisitudes venturosas o desfavorables de la misma. En cuanto concepto salarial está sometido desde luego a la norma básica de igualdad de trato. Lo que quiere decir, y en ésto coincidimos con el criterio mayoritario, que en principio no cabe para su liquidación una «doble escala» o conjunto de reglas de cálculo, que utilice como punto temporal de referencia una determinada fecha bien de ingreso en la empresa, bien de incorporación a su plantilla de trabajadores fijos.

Pero sucede en el caso, y en ésto sí discrepamos de la sentencia aprobada, que no hay en los convenios colectivos cuestionados de 1997 y 2000 una verdadera doble escala del complemento de antigüedad. La escala del denominado «premio de vinculación» (para los trabajadores de nueva incorporación) es única, y se ha actualizado en el paso del convenio de 1997 al convenio de 2000. En cambio, el «premio de antigüedad» (para los trabajadores veteranos), al menos tal como resulta de la redacción de los convenios colectivos aplicables (hecho probado 1º), que es el objeto de impugnación en el recurso, se mantiene inmóvil en los dos factores determinantes de su cuantía, que son la base reguladora (la vigente en diciembre de 1996) y el porcentaje a aplicar sobre la misma en función de la permanencia en la empresa. Se trata, en suma, no de una segunda escala con valores dinámicos, sino de una situación de conservación «ad personam» de un complemento retributivo que era el percibido por los veteranos en un momento anterior de la vida de la relación contractual de trabajo.

La descrita diferencia de trato que establecen los convenios colectivos impugnados se basa, además, en un criterio objetivo que parece razonable. A diferencia de los trabajadores de reciente incorporación, los trabajadores veteranos han compartido y padecido en la empresa una situación de crisis económica surgida en 1996, ampliamente documentada en los hechos probados, contribuyendo con su aportación de trabajo a la superación de la misma. Por otro lado, el sistema de cálculo de la antigüedad que se les ha reconocido a los veteranos no es nuevo, sino el que había regido con anterioridad sus contratos de trabajo; circunstancia que, por hipótesis, no concurre en los trabajadores de incorporación más reciente. No consta en fin en la sentencia recurrida que la diferencia salarial resultante de la conservación del complemento de antigüedad por los trabajadores veteranos haya sido excesiva o desproporcionada, resultado

que sin duda podría producirse, pero que no cabe tampoco dar por supuesto en una regulación establecida mediante un convenio colectivo de trabajo suscrito por la representación mayoritaria de los trabajadores (comité intercentros en el caso).

En conclusión, las cláusulas convencionales impugnadas no debieron ser anuladas, y el recurso de casación interpuesto debió ser estimado.

(…)

[Source: ARANZADI, Repertorio de Jurisprudencia 2005/5401]

ANNOTATION

The Supreme Court Decision of 20 April 2005 addresses, once more, the application of the principle of equal treatment to working conditions, in particular, with regard to a Collective Agreement's clause providing two different systems of payment of the supplement linked to the length of service in the firm.

Before considering the judgement's reasoning, it is worth noting that the situation dealt with by this Decision is the consequence, in the first place, of the mechanism and effects of the succession of Collective Agreements, given that under Spanish labour law (Article 82.4 WS), the Collective Agreement which replaces a former one may change its provisions, even if it is to worsen the working conditions provided by the previous one. In addition, by virtue of the amendment of Article 25 WS in 1994, the employers are no longer obliged by Act to pay a reward of seniority (it does not constitutes a statutory duty), except when the employees' right to perceive it is established by Collective Agreement or contract of employment. It must be also borne in mind that the affected employees cannot prevent the application of the new clauses, for the provisions set by the new Collective Agreement are automatically incorporated to the employment contracts of all the employees within its field of application, regardless of their affiliation or not to the unions who signed it. This is because of the binding and normative effec of Collective Agreements (Article 37.1 CE), as long as they comply with any formal (capacity to contract, bargaining rules, majority to agree, etc.) and substantial requirements set by the Workers' Statute (Articles 3.1.b and 82.3 WS).

In periods of economical crisis and high levels of unemployment, some employers and their representative associations have made use of this legal framework when bargaining new Collective Agreements, in order to introduce worse working conditions than those provided in previous Agreements, in exchange for compromises to avoid collective redundancies, to increase the staff or to

transform temporary contracts into indefinite ones. A good example of this situation would be the case of the reward of seniority, which in many cases has been replaced by lower pay supplements or even has been eliminated for workers recruited after the new Collective Agreement came into force, whereas old employees have kept it as provided by the former Agreement.

As a result, the new Collective Agreement creates a double system of retribution of the length of service, which distinguishes not only the name of the allowance but also the way of calculation of its amount, depending on the date of recruitment. The validity of such provision in the light of the principle of equal treatment established by Article 14 of the Spanish Constitution is elucidated by the Supreme Court Decision reported here and the ones of 17 June of 2002 [RJ 2002, 7909] and 18 September 2000 [RJ 2000, 7645], dealing with similar cases.

By means of this Decision, the General Social Chamber of the Supreme Court incorporates its previous doctrine (set by Decisions of 25 July 2002 [RJ 2002, 9904] and those above-mentioned), as well as the doctrine of the Constitutional Court on the interpretation of the said Article of the Spanish Constitution (summarised in its Decisions num. 2/1998, of 23 January and num. 27/2004, of 4 March).

The quoted doctrine has maintained that Article 14 proclaims the principle of equal treatment, and the prohibition of discrimination on certain grounds. However, the claim does not refer to the prohibition of discrimination stated by Art. 14 CE, given that it does not contain a free-standing prohibition on discrimination, it regards the different treatment on grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance. The right invoked in the present case is, thus, the general principle of equal treatment before the law, which requires that identical situations are treated in the same way, so that, in order to introduce a different treatment between them, there must exist a well founded and reasonable justification (in accordance with generally accepted criteria), and its result must be proportionate.

In this sense, the Supreme Court holds that since the employees performed equal work, they must perceive equal pay, unless there is an objective and reasonable circumstance that justifies a different treatment. Consequently, the first step for the Court to take is to determine whether the date of recruitment, should be deemed as a reasonable justification to establish a different pay. With regard to this question, the Supreme Court (as well as the Constitutional Court Decision of 4 March 2004) considers that the mere date of recruitment does not constitute *per se* a reasonable justification of the different system of calculation of the reward related to length of service. Nevertheless, the Court concedes that, according to Article 25.2 WS, the Collective Agreement could have abolished the reward of seniority for all workers, maintaining only the acquired rights of

those employed before the 31 May 1995, date in which the amendment of that Article came into effect.

On the other hand, the Supreme Court finds that there is no other justification for the different treatment. In fact, the situation of economic crisis argued by the employer had been overcome in 1999, year in which the company began to earn profits. As regards a possible promise to increase the staff, alleged by the employer as consideration in return for the prejudice caused to new workers - which, according to Constitutional Court Decision of 4 March 2004, could have validated the difference of treatment - such compromise neither appeared in the Collective Agreement for 1997-1999, nor in the subsequent Agreement for 2000-2002. Furthermore, the recruitment of new employees could be interpreted as the mere consequence of a better economic situation.

In the absence of other justification for the different pay, the Supreme Court concludes that clause 10 of the Collective Agreement is contrary to the principle of equal treatment and, therefore, confirms the Decision of the High Court of Andalucía which deemed it void.

* * *

Even though the reported judgment contains the approach adopted by the majority of the Social Chamber, there were two votes against it (*votos particulares*). The dissenting Magistrates argued that clause 10 of the Collective Agreement was not contrary to the principle of equality, given that this provision did not contain a real double scale of payment. From 1997 there was a sole bonus related to the length of service for all workers, the so-called reward of linkage (*premio de vinculación*). The reward of seniority (*premio de antigüedad*) had been eliminated, and only maintained *ad personam* for old workers who "had shared and suffered the situation of economic crisis with the firm, contributing with their work to the surmounting of it".

The second objection to the judgment was that, it was far from clear that the difference of earnings resulting between old and new workers were excessive or disproportionate. In their view, such a disproportionate difference ought to have been proved, for it cannot be presumed with respect to a Collective Agreement signed by the majority representation of workers. In conclusion, the Collective Agreement provision should not have been declared void and null and the Supreme Court should have upheld the appeal.

UNITED STATES OF AMERICA

Federal Supreme Court
Alvarez v. Barber Foods

Fair Labor Standards Act of 1938 – compensability of time employees spend walking to their work stations after putting on protective clothing, and walking to their lockers to take off protective clothing , and time spent waiting to put on protective clothing

Facts

The federal Fair Labor Standards Act of 1938 requires employers to pay their employees specified minimum wages per hour of work, and one and one-half times their regular pay ("overtime pay") for work in excess of 40 hours in any "workweek". The terms "work" and "workweek" are not defined by the statute, except that a 1947 amendment known as the "Portal-to-Portal Act" provides that walking on the employer's premises to and from the location of the employee's "principal activity or activities", and other activities that are "preliminary or postliminary" to the employee's "principal activity or activities" do not constitute compensable work time.

In *Steiner v. Mitchell*, 76 S.Ct. 330 (1955), the Supreme Court had held that under the Portal-to-Portal Act, an employee's 'principal activity or activities' includes all activities which are "an integral and indispensable part of the principal activities", including the donning and doffing of specialized protective gear before or after the regular work shift.

In *Alvarez*, employees who worked in a meat processing facility, and employees who worked in a poultry processing facility, were required to wear protective clothing. The employees "donned" the clothing (put it on) in a locker room before they went to their work stations, and "doffed" the clothing (took it off) in the locker room when they returned. The principal question in *Alvarez* was whether the time they spent walking back and forth from the locker room to their work stations was compensable work time. In the case of the meat processing facility, the Ninth Circuit Court of Appeals held that it was. In the case of the poultry processing facility the First Circuit Court of Appeals held that it was not. The First Circuit found that *Steiner* was distinguishable on the ground that because donning is not the "principal activity" that starts the workday, walking

which occurs immediately after donning and immediately after doffing is not compensable. The Supreme Court granted *certiorari* in both cases in order to resolve the conflict and consolidated them for hearing. A secondary issue in the poultry processing case was whether time spent in the locker room *waiting* to don the protective clothing was compensable work time; the First Circuit held it was not.

Decision

The Ninth Circuit was correct in holding that time employees spent in donning and doffing protective clothing, and in walking to an from their work stations, was compensable time under the Fair Labor Standards Act. Because donning and doffing gear that is "integral and indispensable" to employees' work is a "principal activity" under the statute, the continuous workday rule mandates that the time the employees spend walking to and from the production floor after donning and before doffing, as well as the time spent waiting to doff, are not affected by the Portal-to-Portal Act. The First Circuit's reasoning, which in effect created a third category of activities – those that are "integral and indispensable" to a "principal activity" but not in themselves "principal activities" – constitutes a misreading of the statute. The First Circuit was correct, however, in holding that time spent in the locker room waiting to don the protective clothing was not compensable work time. The Ninth Circuit's judgment is affirmed; the First Circuit's judgment is affirmed in part and reversed in part.

Law Applied

See Judgment.

JUDGMENT

Justice STEVENS delivered the opinion for a unanimous Court.

* * *

I

As enacted in 1938, the FLSA, required employers engaged in the production of goods for commerce to pay their employees a minimum wage of "not less than 25 cents an hour," and prohibited the employment of any person for workweeks in excess of 40 hours after the second year following the legislation "unless such employee receives compensation for his employment in excess of [40] hours ... at a rate not less than one and one-half times the regular rate at which he is employed". Neither "work" nor "workweek" is defined in the statute.

Our early cases defined those terms broadly. In Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 64 S.Ct. 698, (1944), we held that time spent traveling from iron ore mine portals to underground working areas was compensable; relying on the remedial purposes of the statute and Webster's Dictionary, we described "work or employment" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." The same year, in Armour & Co. v. Wantock, 65 S.Ct. 165 (1944), we clarified that "exertion" was not in fact necessary for an activity to constitute "work" under the FLSA. We pointed out that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." Two years later, in Anderson v. Mt. Clemens Pottery Co., 66 S.Ct. 1187(1946), we defined "the statutory workweek" to "include all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." Accordingly, we held that the time necessarily spent by employees walking from time clocks near the factory entrance gate to their workstations must be treated as part of the workweek.

The year after our decision in Anderson, Congress passed the Portal-to-Portal Act, amending certain provisions of the FLSA. Based on findings that judicial interpretations of the FLSA had superseded "long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation"; it responded with two statutory remedies, the first relating to "existing claims," and the second to "future claims". Both remedies distinguish between working time that is compensable pursuant to contract or custom and practice, on the one hand, and time that was found compensable under this Court's expansive reading of the FLSA, on the other. Like the original FLSA, however, the Portal-to-Portal Act omits any definition of the term "work."

With respect to existing claims, the Portal-to-Portal Act provided that employers would not incur liability on account of their failure to pay minimum wages or overtime compensation for any activity that was not compensable by either an express contract or an established custom or practice. With respect to "future claims," the Act preserved potential liability for working time not made compensable by contract or custom but narrowed the coverage of the FLSA by excepting two activities that had been treated as compensable under our cases: walking on the employer's premises to and from the actual place of performance of the principal activity of the employee, and activities that are "preliminary or postliminary" to that principal activity.

Other than its express exceptions for travel to and from the location of the employee's "principal activity," and for activities that are preliminary or

postliminary to that principal activity, the Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the terms "work" and "workweek," or to define the term "workday." A regulation promulgated by the Secretary of Labor shortly after its enactment concluded that the statute had no effect on the computation of hours that are worked "within" the workday. That regulation states: "[T]o the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of section 4 have no application". Similarly, consistent with our prior decisions interpreting the FLSA, the Department of Labor has adopted the continuous workday rule, which means that the "workday" is generally defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." These regulations have remained in effect since 1947, and no party disputes the validity of the continuous workday rule.

In 1955, eight years after the enactment of the Portal-to-Portal Act and the promulgation of these interpretive regulations, we were confronted with the question whether workers in a battery plant had a statutory right to compensation for the "time incident to changing clothes at the beginning of the shift and showering at the end, where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law requires their employers to provide. ..." Steiner v. Mitchell, 76 S.Ct. 330 (1956). After distinguishing "changing clothes and showering under normal conditions" and stressing the important health and safety risks associated with the production of batteries, the Court endorsed the Court of Appeals' conclusion that these activities were compensable under the FLSA.

In reaching this result, we specifically agreed with the Court of Appeals that "the term 'principal activity or activities' in Section 4 [of the Portal-to-Portal Act] embraces all activities which are an 'integral and indispensable part of the principal activities,' and that the activities in question fall within this category." Thus, under Steiner, activities, such as the donning and doffing of specialized protective gear, that are "performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)."

The principal question presented by these consolidated cases – both of which involve required protective gear that the courts below found integral and indis-

pensable to the employees' work – is whether postdonning and predoffing walking time is specifically excluded by section 4(a)(1). We conclude that it is not.

II

Petitioner in No. 03-1238, IBP, Inc. (IBP), is a large producer of fresh beef, pork, and related products. At its plant in Pasco, Washington, it employs approximately 178 workers in 113 job classifications in the slaughter division and 800 line workers in 145 job classifications in the processing division. All production workers in both divisions must wear outer garments, hardhats, hairnets, earplugs, gloves, sleeves, aprons, leggings, and boots. Many of them, particularly those who use knives, must also wear a variety of protective equipment for their hands, arms, torsos, and legs; this gear includes chain link metal aprons, vests, plexiglass armguards, and special gloves. IBP requires its employees to store their equipment and tools in company locker rooms, where most of them don their protective gear.

Production workers' pay is based on the time spent cutting and bagging meat.

Pay begins with the first piece of meat and ends with the last piece of meat. Since 1998, however, IBP has also paid for four minutes of clothes-changing time. In 1999, respondents, IBP employees, filed this class action to recover compensation for preproduction and postproduction work, including the time spent donning and doffing protective gear and walking between the locker rooms and the production floor before and after their assigned shifts.

After a lengthy bench trial, the District Court for the Eastern District of Washington held that donning and doffing of protective gear that was unique to the jobs at issue were compensable under the FLSA because they were integral and indispensable to the work of the employees who wore such equipment. Moreover, consistent with the continuous workday rule, the District Court concluded that, for those employees required to don and doff unique protective gear, the walking time between the locker room and the production floor was also compensable because it occurs during the workday. The court did not, however, allow any recovery for ordinary clothes changing and washing, or for the "donning and doffing of hard hat[s], ear plugs, safety glasses, boots [or] hairnet[s]."

The District Court proceeded to apply these legal conclusions in making detailed factual findings with regard to the different groups of employees. For example, the District Court found that, under its view of what was covered by the FLSA, processing division knife users were entitled to compensation for between 12 and 14 minutes of preproduction and postproduction work, including 3.3 to 4.4 minutes of walking time.

The Court of Appeals agreed with the District Court's ultimate conclusions on these issues, but in part for different reasons. After noting that the question whether activities " 'are an integral and indispensable part of the principal activities' " within the meaning of Steiner, is "context specific," the Court of Appeals endorsed the distinction between the burdensome donning and doffing of elaborate protective gear, on the one hand, and the time spent donning and doffing nonunique gear such as hardhats and safety goggles, on the other. It did so not because donning and doffing nonunique gear are categorically excluded from being "principal activities" as defined by the Portal-to-Portal Act, but rather because, in the context of this case, the time employees spent donning and doffing nonunique protective gear was " 'de minimis as a matter of law.'"

IBP does not challenge the holding below that, in light of Steiner, the donning and doffing of unique protective gear are "principal activities" under section 4 of the Portal-to-Portal Act. Moreover, IBP has not asked us to overrule Steiner. Considerations of stare decisis are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades. Thus, the only question for us to decide is whether the Court of Appeals correctly rejected IBP's contention that the walking between the locker rooms and the production areas is excluded from FLSA coverage by section 4(a)(1) of the Portal-to-Portal Act.

IBP argues that the text of section 4(a)(1), the history and purpose of its enactment, and the Department of Labor's interpretive guidance compel the conclusion that the Portal-to-Portal Act excludes this walking time from the scope of the FLSA. We find each of these arguments unpersuasive. . . . We hold that any activity that is "integral and indispensable" to a "principal activity" is itself a "principal activity" under section 4(a) of the Portal-to-Portal Act. Moreover, during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of that provision, and as a result is covered by the FLSA.

IBP correctly points out that our decision in Steiner held only that the donning and doffing of protective gear in that case were activities "integral and indispensable" to the workers' principal activity of making batteries. In IBP's view, a category of "integral and indispensable" activities that may be compensable because they are not merely preliminary or postliminary within the meaning of section 4(a)(2) is not necessarily coextensive with the actual "principal activities" which the employee "is employed to perform" within the meaning of section 4(a)(1). In other words, IBP argues that, even though the court below concluded that donning and doffing of unique protective gear are "integral and indispensable" to the employees' principal activity, this means only that the

donning and offing of such gear are themselves covered by the FLSA. According to IBP, the donning is not a "principal activity" that starts the workday, and the walking that occurs immediately after donning and immediately before doffing is not compensable. In effect, IBP asks us to create a third category of activities – those that are "integral and indispensable" to a "principal activity" and thus not excluded from coverage by section 4(a)(2), but that are not themselves "principal activities" as that term is defined by section 4(a)(1).

IBP's submission is foreclosed by Steiner. As noted above, in Steiner, we made it clear that section 4 of the Portal-to-Portal Act does not remove activities which are " 'integral and indispensable'" to " 'principal activities'" from FLSA coverage precisely because such activities are themselves "principal activities." While Steiner specifically addressed the proper interpretation of the term "principal activity or activities" in section 4(a)(2), there is no plausible argument that these terms mean something different in section 4(a)(2) than they do in section 4(a)(1). This is not only because of the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning. It is also because section 4(a)(2) refers to "said principal activity or activities." The "said" is an explicit reference to the use of the identical term in section 4(a)(1).

Indeed, IBP has not offered any support for the unlikely proposition that Congress intended to create an intermediate category of activities that would be sufficiently "principal" to be compensable, but not sufficiently principal to commence the workday. Accepting the necessary import of our holding in Steiner, we conclude that the locker rooms where the special safety gear is donned and doffed are the relevant "place of performance" of the principal activity that the employee was employed to perform within the meaning of section 4(a)(1). Walking to that place before starting work is excluded from FLSA coverage, but the statutory text does not exclude walking from that place to another area within the plant immediately after the workday has commenced.

Purpose

IBP emphasizes that our decision in Anderson v. Mt. Clemens Pottery Co. may well have been the proximate cause of the enactment of the Portal- to-Portal Act. In that case we held that the FLSA mandated compensation for the time that employees spent walking from time clocks located near the plant entrance to their respective places of work prior to the start of their productive labor. In IBP's view, Congress' forceful repudiation of that holding reflects a purpose to exclude what IBP regards as the quite similar walking time spent by respondents before and after their work slaughtering cattle and processing meat.

Even if there is ambiguity in the statute, we should construe it to effectuate that important purpose.

This argument is also unpersuasive. There is a critical difference between the walking at issue in Anderson and the walking at issue in this case. In Anderson the walking preceded the employees' principal activity; it occurred before the workday began. The relevant walking in this case occurs after the workday begins and before it ends. Only if we were to endorse IBP's novel submission that an activity can be sufficiently "principal" to be compensable, but not sufficiently so to start the workday, would this case be comparable to Anderson.

Moreover, there is a significant difference between the open-ended and potentially expansive liability that might result from a rule that treated travel before the workday begins as compensable, and the rule at issue in this case. Indeed, for processing division knife users, the largest segment of the work force at IBP's plant, the walking time in dispute here consumes less time than the donning and doffing activities that precede or follow it. It is more comparable to time spent walking between two different positions on an assembly line than to the prework walking in Anderson.

Regulations

[The Court proceeds to hold that regulations adopted by the Secretary of Labor under the Fair Labor Standards Act are consistent with its statutory analysis].

For the foregoing reasons, we hold that any activity that is "integral and indispensable" to a "principal activity" is itself a "principal activity" under section 4(a) of the Portal-to-Portal Act. Moreover, during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of that provision, and as a result is covered by the FLSA.

III

Respondent in No. 04-66, Barber Foods, Inc. (Barber), operates a poultry processing plant in Portland, Maine, that employs about 300 production workers. These employees operate six production lines and perform a variety of tasks that require different combinations of protective clothing. They are paid by the hour from the time they punch in to computerized time clocks located at the entrances to the production floor. …[The District Judge assigned the case to hearings before a Magistrate]. [T]he Magistrate rejected petitioners' claims for compensation for the time spent before obtaining their clothing and equipment.

Such time, in the Magistrate's view, "could [not] reasonably be construed to be an integral part of employees' work activities any more than walking to the cage from which hairnets and earplugs are dispensed . . . ." Accordingly, Barber was "entitled to summary judgment on any claims based on time spent walking from the plant entrances to an employee's workstation, locker, time clock or site where clothing and equipment required to be worn on the job is to be obtained and any claims based on time spent waiting to punch in or out for such clothing or equipment." . . .

Petitioners argued in the Court of Appeals [among other things] that the waiting time associated with the donning and doffing of clothes was compensable. The Court of Appeals disagreed, holding that the waiting time qualified as a "preliminary or postliminary activity" and thus was excluded from FLSA coverage by the Portal-to-Portal Act. Our analysis in Part II, supra, demonstrates that the Court of Appeals was incorrect with regard to the predoffing waiting time. . . .The time spent waiting to don – time that elapses before the principal activity of donning integral and indispensable gear – presents the quite different question whether it should have the effect of advancing the time when the workday begins. . . .[U]nlike the donning of certain types of protective gear, which is always essential if the worker is to do his job, the waiting may or may not be necessary in particular situations or for every employee. It is certainly not "integral and indispensable" in the same sense that the donning is. It does, however, always comfortably qualify as a "preliminary" activity.

We thus do not agree with petitioners that the predonning waiting time at issue in this case is a "principal activity" under section 4(a). As Barber points out, the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are "integral and indispensable" to a "principal activity" under Steiner. For example, walking from a time clock near the factory gate to a workstation is certainly necessary for employees to begin their work, but it is indisputable that the Portal-to-Portal Act evinces Congress' intent to repudiate Anderson's holding that such walking time was compensable under the FLSA. We discern no limiting principle that would allow us to conclude that the waiting time in dispute here is a "principal activity" under section 4(a), without also leading to the logical (but untenable) conclusion that the walking time at issue in Anderson would be a "principal activity" under section 4(a) and would thus be unaffected by the Portal-to-Portal Act.

The Government also relies on a regulation promulgated by the Secretary of Labor as supporting petitioners' view. That regulation, 29 CFR section 790.7(h) (2005), states that when an employee "is required by his employer to report at a particular hour at his workbench or other place where he performs his principal

activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities." That regulation would be applicable if Barber required its workers to report to the changing area at a specific time only to find that no protective gear was available until after some time had elapsed, but there is no such evidence in the record in this case.

More pertinent, we believe, is the portion of section 790.7 that characterizes the time that employees must spend waiting to check in or waiting to receive their paychecks as generally a "preliminary" activity covered by the Portal-to-Portal Act. See section 790.7(g). That regulation is fully consistent with the statutory provisions that allow the compensability of such collateral activities to depend on either the agreement of the parties or the custom and practice in the particular industry.

In short, we are not persuaded that such waiting – which in this case is two steps removed from the productive activity on the assembly line – is "integral and indispensable" to a "principal activity" that identifies the time when the continuous workday begins. Accordingly, we hold that section 4(a)(2) excludes from the scope of the FLSA the time employees spend waiting to don the first piece of gear that marks the beginning of the continuous workday.

IV

For the reasons stated above, we affirm the judgment of the Court of Appeals for the Ninth Circuit in No. 03-1238. We affirm in part and reverse in part the judgment of the Court of Appeals for the First Circuit in No. 04-66, and we remand the case for further proceedings consistent with this opinion.

It is so ordered.

[Source: 126 S.Ct. 514]

ANNOTATION

The Fair Labor Standards Act (FLSA) often presents the courts with issues that are highly fact-specific and narrow in scope. The *Alvarez* case is an example. In 1946, the Supreme Court had held in *Anderson v. Mt. Clemens Pottery* that employees who were required to "punch" in and out of work at a time clock were entitled to compensation for time spent in walking to and from the time clock and their respective work stations.

Congress reacted to that decision the following year by adopting the Portal-to-Portal Act, which amended the FLSA to provide, among other things, that walking on the employer's premises to and from the actual place of performance of the "principal activity" of the employee, and activities that are "preliminary or postliminary" to that principal activity, are not compensable under the FLSA.

The Supreme Court, in turn, reacted to the Portal-to-Portal Act by giving it a narrow interpretation: In *Steiner v. Mitchell* it held that time employees who worked in a battery plant, and required for safety reasons to change clothes and shower in employer-provided facilities, were entitled to compensation for doing so. The Court reasoned that such activities, because required as part of the job, constituted an "integral and indispensable part" of the activities for which the employees were hired, and thus were within the scope of the employees' "principal activities" as that term is used in the Portal-to-Portal Act.

The employers in *Alvarez* accepted that the *Steiner* reasoning applied equally to time spent in "doffing and donning" protective clothing required for safety reasons, but they argued that the time employees spent in *walking* to and from the lockers where the clothing was kept and their respective work stations was governed by the Portal-to-Portal Act's provisions, and its rejection of *Anderson*. The Supreme Court disagreed, reasoning that for the employees in *Alvarez* the work day started with the donning of the protective clothing as an "integral and indispensable part" or the employee's "principal activities".

The Court did agree, however, that time spent *waiting* to doff protective clothing was not compensable, as the work day had not yet begun. The answer would be different, the Court suggested, if the employees were required to be at a specific location in order to don their protective clothing at a specified time but the clothing was not yet ready to be donned, but those were not the facts.

The case, apart from its holding, illustrates the sort of interaction that may occur among the three branches of government. The relevant agency within the executive branch – in this case the Department of Labor and its Secretary – typically has authority to interpret ambiguous statutory language through regulations, and the courts will typically defer to those regulations to the extent they are consistent with the statute. In this case, the Supreme Court found support for its interpretation of the FLSA in the regulations that had been issued. But the courts may, and often do, override agency regulations which they find to be contrary to the language of the statute, and Congress, as the ultimate law-making body, may override both agency regulations and Supreme Court interpretations – as Congress did when it enacted the Portal- to-Portal Act, and as it could do with the *Alvarez* decision if it were to disagree with the Court's interpretation. Given the narrowness of the issue, however, it is unlikely that will occur.

EUROPEAN COMMUNITIES

Court of Justice
Bernhard Pfeiffer et al v. Deutsches Rotes Kreuz

Protection of the health and safety of workers – Directive 93/104/EC – scope – emergency workers – definition of "road transport" – maximum weekly working time – direct effect

HEADNOTES

Facts

Mr. Pfeiffer and the other claimants in the main proceedings work or used to work as emergency workers with the German Red Cross in its land-based emergency service in part of the *Landkreis* of *Waldshut*. Emergency workers are required to be available for duty ("*Arbeitsbereitschaft*" – duty time), which means when they are not responding to calls for emergency services, they must wait at the Red Cross station where they are employed.

The parties to the main proceedings had agreed in their various contracts of employment that the provisions of the "Red Cross collective agreement" would apply. According to this collective agreement, the average working time is 49 hours per week. A 49-hour week exceeds the maximum 8-hour day mandated by the German Law on Working Time, but is permissible under the Law's paragraph 7(1)(i)(a), which permits collective agreements to extend the working day up to 10 hours, in cases where working time regularly includes a significant period of time spent on duty.

Two claimants sought payment for overtime while the others sought confirmation of their right not to work more than 48 hours per week. The claimants in the main proceedings argued that the weekly working time of 49 hours infringes Directive 93/104 by providing for working time in excess of 48 hours per week,

and that to the extent the German Law on Working Time permits such a derogation from the 48-hour rule, it incorrectly implements the Directive.

The German Labour Court in Lorrach stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

1. (a) Is the reference in Article 1(3) of Directive 93/104…to Article 2(2) of directive 89/391, under which [those] directives are not applicable where characteristics peculiar to certain specific activities in the civil protection services inevitably conflict with their application, to be construed as meaning that the claimants' activity as emergency workers is caught by this exclusion?
   (b) Is the concept of road transport in Article 1(3) of Directive 93/104 to be…taken to include the activity of land-based emergency services, which comprises at least in part the driving of emergency vehicles and attendance on patients during the journey?
2. …[I]s Article 18(1)(b)(i) of Directive 93/104 to be construed as meaning that consent given individually by a worker may…also reside in the worker's agreeing with the employer, in the contract of employment, that working conditions are to be governed by a collective agreement which itself allows working time to be extended to more than 48 hours on average?
3. Is Article 6 of Directive 92/104 in itself unconditional and sufficiently precise to be capable of being relied on by individuals before national courts where the State has not properly transposed the directive into national law?

Decision

1. (a) Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work and Article 1(3) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time must be construed as meaning that the activity of emergency workers, carried out in the framework of an emergency medical service, such as that at issue before the national court, falls within the scope of the directives.

(b) On a proper construction, the concept of road transport' in Article 1(3) of Directive 93/104 does not encompass the activity of an emergency medical service, even though the latter includes using a vehicle and accompanying a patient on the journey to hospital.

2. The first indent of Article 18(1)(b)(i) of Directive 93/104 is to be construed as requiring consent to be expressly and freely given by each worker individually

if the 48-hour maximum period of weekly working time, as laid down in Article 6 of the directive, is to be validly extended. In that connection, it is not sufficient that the relevant worker's employment contract refers to a collective agreement which permits such an extension.

3. Article 6, point 2, of Directive 93/104 must be interpreted, in circumstances such as those in the main proceedings, as precluding legislation in a Member State the effect of which, as regards periods of duty time completed by emergency workers in the framework of the emergency medical service of a body such as the German Red Cross, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded;

Article 6(2) of Directive 93/104 fulfils all the conditions necessary for it to have direct effect.

Law Applied

See Judgment.

JUDGMENT

…

Question 1(a)

48 … it must be borne in mind at the outset that Article 1(3) of Directive 93/104 defines the scope of the directive by referring expressly to Article 2 of Directive 89/391. Therefore, before determining whether an activity such as that of emergency workers in attendance in an ambulance or emergency medical vehicle in the framework of a service run by the Deutsches Rotes Kreuz falls within the scope of Directive 93/104, it is first necessary to examine whether that activity is within the scope of Directive 89/391 (see the judgment in Simap, Case C-303/98, paragraphs 30 and 31).

49. By virtue of Article 2(1) of Directive 89/391, the latter applies to all sectors of activity, both public and private, which include service activities as a whole.

50. However, as is clear from the first subparagraph of Article 2(2), the directive is not applicable where characteristics peculiar to certain specific activities, particularly in the civil protection services, inevitably conflict with it.

51. It must none the less be held that the activity of emergency workers in attendance in an ambulance or emergency medical vehicle in the framework of an

emergency service for the injured or sick, run by a body such as the Deutsches Rotes Kreuz, is not covered by the exclusion referred to in the preceding paragraph.

52. It is clear both from the purpose of Directive 89/391 (encouraging the improvement of the health and safety of workers at work) and from the wording of Article 2(1) thereof that the directive must be taken to be broad in scope. It follows that the exclusions from its scope provided for in the first subparagraph of Article 2(2) must be interpreted restrictively (see the judgment in Simap, paragraphs 34 and 35).

53. Furthermore, the first subparagraph of Article 2(2) of Directive 89/391 excludes from the directive's scope not the civil protection services as such but solely certain specific activities of those services, whose characteristics are such as inevitably to conflict with the rules laid down by the directive.

54. This exclusion from the broadly-defined field of application of Directive 89/391 must therefore be interpreted in such a way that its scope is restricted to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect.

55. In that regard, the exclusion in the first subparagraph of Article 2(2) of Directive 89/391 was adopted purely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in cases, such as a catastrophe, the gravity and scale of which are exceptional and a characteristic of which is the fact that, by their nature, they do not lend themselves to planning as regards the working time of teams of emergency workers.

56. However, the civil protection service in the strict sense thus defined, at which the provision is aimed, can be clearly distinguished from the activities of emergency workers tending the injured and sick which are at issue in the main proceedings.

57. Even if a service such as the one with which the national court is concerned must deal with events which, by definition, are unforeseeable, the activities which it entails in normal conditions and which correspond moreover to the duties specifically assigned to a service of that kind are none the less capable of being organised in advance, including, in so far as they are concerned, the working hours of its staff.

58. The service thus exhibits no characteristic which inevitably conflicts with the application of the Community rules on the protection of the health and safety of workers and therefore is not covered by the exclusion in the first subparagraph of Article 2(2) of Directive 89/391, the directive instead applying to such a service.

59. It is apparent from the wording of Article 1(3) of Directive 93/104 that it applies to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391, with the exception of certain specific activities which are exhaustively listed.

60. None of those activities is relevant in relation to a service such as the one at issue in the main proceedings. In particular, it is clear that the activity of workers who, in the framework of an emergency medical service, attend on patients in an ambulance or emergency medical vehicle is not comparable to the activity of trainee doctors, to which Directive 93/104 does not apply by virtue of Article 1(3) thereof.

61. Consequently, an activity such as that with which the national court is concerned also falls within the scope of Directive 93/104.

62. As the Commission rightly pointed out, further support is lent to that finding by the fact that Article 17(2), point 2.1(c)(iii), of Directive 93/104 expressly refers to, *inter alia*, ambulance services. Such a reference would be redundant if the activity referred to was already excluded from the scope of Directive 93/104 in its entirety by virtue of Article 1(3). Instead, that reference shows that the Community legislature laid down the principle that the directive is applicable to activities of such a kind, whilst providing for the option, in given circumstances, to derogate from certain specific provisions of the directive.

63. In those circumstances, the answer to be given to Question 1(a) is that Article 2 of Directive 89/391 and Article 1(3) of Directive 93/104 must be construed as meaning that the activity of emergency workers, carried out in the framework of an emergency medical service such as that at issue before the national court, falls within the scope of the directives.

…

Question 1(b)

66. In its judgment in Case C133/00 Bowden and Others [2001] ECR I7031, the Court ruled that on a proper construction of Article 1(3) all workers employed in the road transport sector, including office staff, are excluded from the scope of that directive.

67. Since they are exceptions to the Community system for the organisation of working time put in place by Directive 93/104, the exclusions from the scope of the directive provided for in Article 1(3) must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which the exclusions are intended to protect.

68. The transport sector was excluded from the scope of Directive 93/104 on the grounds that a Community regulatory framework already existed in that sector, which laid down specific rules for, *inter alia*, the organisation of working

time on account of the special nature of the activity in question. That legislation does not apply, however, to transport for emergencies or assistance.

69. Furthermore, the judgment in Bowden is based on the fact that the employer belonged to one of the transport sectors specifically listed in Article 1(3) of Directive 93/104 (see paragraphs 39 to 41 of the judgment). However, it can hardly be argued that when the Deutsches Rotes Kreuz operates an emergency medical service such as that at issue in the main proceedings its activity pertains to the road transport sector.

70. The fact that that activity includes using an emergency vehicle and accompanying the patient on his journey to hospital is not decisive, since the main purpose of the activity concerned is to provide initial medical treatment to a person who is ill or injured and not to carry out an operation relating to the road transport sector.

71. Furthermore, it is necessary to bear in mind that ambulance services are specifically included in Article 17(2), point 2.1(c)(iii), of Directive 93/104. Their inclusion, which is intended to enable there to be a derogation from certain specific provisions of the directive, would be redundant if such services were already excluded from the field of application of the directive in its entirety pursuant to Article 1(3) thereof.

72. In those circumstances, the concept of road transport in Article 1(3) of Directive 93/104 does not encompass an emergency medical service such as that at issue in the main proceedings.

…

Question 2

79. In particular, the first indent of Article 18(1)(b)(i) requires that working time should not exceed 48 hours over a 7-day period, calculated as an average for the reference period referred to in point 2 of Article 16 of Directive 93/104, the worker none the less being able to agree to work more than 48 hours per week.

80. In that regard, the Court has already held, in paragraph 73 of the judgment in Simap, that, as is apparent from its actual wording, the first indent of Article 18(1)(b)(i) of Directive 93/104 requires the consent of the individual worker.

81. In paragraph 74 of Simap, the Court concluded that the consent given by trade-union representatives in the context of a collective or other agreement is not equivalent to that given by the worker himself, as provided for in the first indent of Article 18(1)(b)(i) of Directive 93/104.

82. That interpretation derives from the objective of Directive 93/104, which seeks to guarantee the effective protection of the safety and health of workers by

ensuring that they actually have the benefit of, *inter alia*, an upper limit on weekly working time and minimum rest periods. Any derogation from those minimum requirements must therefore be accompanied by all the safeguards necessary to ensure that, if the worker concerned is encouraged to relinquish a social right which has been directly conferred on him by the directive, he must do so freely and with full knowledge of all the facts. Those requirements are all the more important given that the worker must be regarded as the weaker party to the employment contract and it is therefore necessary to prevent the employer being in a position to disregard the intentions of the other party to the contract or to impose on that party a restriction of his rights without him having expressly given his consent in that regard.

83. Those considerations are equally relevant so far as the situation described in the second question is concerned.

84. It follows that, for a derogation from the maximum period of weekly working time laid down in Article 6 of Directive 93/104 (48 hours) to be valid, the worker's consent must be given not only individually but also expressly and freely.

85. Those conditions are not met where the worker's employment contract merely refers to a collective agreement authorising an extension of maximum weekly working time. It is by no means certain that, when he entered into such a contract, the worker concerned knew of the restriction of the rights conferred on him by Directive 93/104.

86. The answer to the second question must therefore be that the first indent of Article 18(1)(b)(i) of Directive 93/104 is to be construed as requiring consent to be expressly and freely given by each worker individually if the 48- hour maximum period of weekly working time, as laid down in Article 6 of the directive, is to be validly extended. In that connection, it is not sufficient that the relevant worker's employment contract refers to a collective agreement which permits such an extension.

…

Question 3

87. By its third question, the national court is essentially asking whether, if Directive 93/104 has been implemented incorrectly, Article 6(2) thereof may be taken to have direct effect.

88. As is clear both from its wording and from the context in which it occurs, there are two aspects to that question: the first concerns the interpretation of Article 6(2) of Directive 93/104 for the purpose of enabling the national court to decide whether the relevant rules of national law are compatible with the requirements of Community law, whilst the second concerns whether, if the

Member State concerned has transposed Article 6(2) into national law incorrectly, that provision satisfies the conditions which would enable an individual to rely on it before the national courts in circumstances such as those in the main proceedings.

89. Those two issues must be examined in turn.

The import of Article 6(2) of Directive 93/104

…

92. Thus, Directive 93/104 imposes more specifically (in Article 6(2)) a 48-hour limit for the average working week, a maximum which is expressly stated to include overtime.

93. In that context, the Court has already held that on-call time (Bereitschaftsdienst), where the worker is required to be physically present at a place specified by his employer, must be regarded as wholly working time for the purposes of Directive 93/104, irrespective of the fact that, during periods of on-call time, the person concerned is not continuously carrying on any professional activity.

94. The same must be true of periods of duty time (Arbeitsbereitschaft) completed by emergency workers in the framework of an emergency service, which necessarily entails periods of inactivity of varying length in between calls.

95. Such periods of duty time must accordingly be taken into account in their totality in the calculation of maximum daily and weekly working time.

96. Furthermore, it is evident that under the system established by Directive 93/104, although Article 15 allows generally for the application or introduction of national provisions more favourable to the protection of the safety and health of employees, only certain specifically mentioned provisions of the directive may form the subject-matter of derogations by the Member States or social partners.

97. However, in the first place, Article 6 of Directive 93/104 is referred to only in Article 17(1) and it is undisputed that the latter provision covers activities which bear no relation at all to those carried out by emergency workers such as the claimants in the main proceedings. By contrast, Article 17(2), point 2.1(c)(iii), refers to activities involving the need for "continuity of service", including in particular "ambulance services", but this provision gives scope for derogating from only Articles 3, 4, 5, 8 and 16 of the directive.

98. In the second place, Article 18(1)(b)(i) of Directive 93/104 provides that the Member States have the right not to apply Article 6 provided that they observe the general principles of protection of the safety and health of workers and that they satisfy a number of conditions set out cumulatively in Article

18(1)(b)(i), but it is not disputed that the Federal Republic of Germany has not availed itself of that option to derogate (see Jaeger, paragraph 85).

99. Moreover, by virtue of the Court's case-law the Member States cannot unilaterally determine the scope of the provisions of Directive 93/104 by attaching conditions or restrictions to the implementation of the workers' right under Article 6(2) of the directive not to work more than 48 hours per week (see, to that effect, Jaeger, paragraphs 58 and 59). Any other interpretation would misconstrue the purpose of the directive, which is intended to secure effective protection of the safety and health of workers by allowing them to enjoy minimum periods of rest (see Jaeger, paragraphs 70 and 92).

100. In those circumstances, it must be concluded that, in view of both the wording of Article 6(2) of Directive 93/104 and the purpose and scheme of the directive, the 48-hour upper limit on average weekly working time, including overtime, constitutes a rule of Community social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his safety and health, and therefore national legislation, such as that at issue in the main proceedings, which authorises weekly working time in excess of 48 hours, including periods of duty time (Arbeitsbereitschaft), is not compatible with the requirements of Article 6(2) of the directive.

…

The direct effect of Article 6(2) Directive 93/104 and the ensuing consequences in the cases before the national court

102. Since, in circumstances such as those in the main proceedings, the relevant national legislation is not compatible with the requirements of Directive 93/104 as regards maximum weekly working time, it remains to be considered whether Article 6(2) of the directive fulfils the conditions for it to have direct effect.

103. In that regard, it is clear from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly.

104. Article 6(2) of Directive 93/104 satisfies those criteria, since it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it, which provides for a 48-hour maximum, including overtime, as regards average weekly working time.

105. Even though Directive 93/104 leaves the Member States a degree of latitude when they adopt rules in order to implement it, particularly as regards the reference period to be fixed for the purposes of applying Article 6 of that directive, and even though it also permits them to derogate from Article 6, those factors do not alter the precise and unconditional nature of Article 6(2). First, it is clear from the wording of Article 17(4) of the directive that the reference period can never exceed 12 months and, second, the Member States' right not to apply Article 6 is subject to compliance with all the conditions set out in Article 18(1)(b)(i) of the directive. It is therefore possible to determine the minimum protection which must be provided in any event.

106. As a consequence, Article 6(2) of Directive 93/104 fulfils all the conditions necessary for it to produce direct effect.

107. It still remains to determine the legal consequences which a national court must derive from that interpretation in circumstances such as those in the main proceedings, which involve individuals.

108. In that regard, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual.

109. It follows that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.

110. However, it is apparent from case-law which has also been settled since the judgment of 10 April 1984 in Case 14/83Von Colson and Kamann [1984] ECR 1891, paragraph 26, that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.

111. It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.

112. That is *a fortiori* the case when the national court is seized of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned.

113. Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of

a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC.

114. The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it.

115. Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive.

116. In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.

117. In such circumstances, the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive.

118. In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 93/104 is fully effective, in order to prevent the maximum weekly working time laid down in Article 6(2) of the directive from being exceeded.

…

120. In view of all the foregoing reasoning, the answer to the third question must be that:

– Article 6(2) of Directive 93/104 must be interpreted, in circumstances such as those in the main proceedings, as precluding legislation in a Member State the effect of which, as regards periods of duty time (Arbeitsbereitschaft) completed by emergency workers in the framework of the emergency medical service of a body such as the Deutsches Rotes Kreuz, is to permit, including by means of a collective agreement or

works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded;
- the provision fulfils all the conditions necessary for it to have direct effect;
- when hearing a case between individuals, the national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded.

[Source: Case C-397/01 Bernhard Pfeiffer v. Deutsches Rotes Kreuz]

ANNOTATION

This judgment builds on prior cases concerning the application of Directive 93/104 to the medical services sector and the extent to which workers can agree to waive their rights under the Directive. In addition to confirming prior case law, the judgment provides clear guidance on the scope of exclusions for civil protection services and road transport from Directive 93/104 and holds that the Directive's Article 6(2) is directly effective.

First, the Court holds that the activity of emergency workers in attendance in an ambulance or emergency medical vehicle is not covered by the exclusion in Article 2(2) of Directive 89/391, which Article 1(3) of Directive 93/104 incorporates by reference. The exclusion applies to certain specific activities of civil protection services, whose characteristics are such as inevitably to conflict with the rules laid down by the directive. The Court explains that the exclusion is only meant to ensure the proper operation of emergency services essential for the protection of public health, safety and order in exceptional cases, such as natural catastrophes, that by their nature do not lend themselves to planning the working time of teams of emergency workers. The Court finds further support for including emergency medical services within the scope of Directive 93/104 in its Article 1(3), which states that the directive applies to all sectors of activity with the exception of certain specific activities, which are exhaustively listed in the

Directive. The closest related activity in that list is that of trainee doctors, but the Court finds that the activity of emergency medical workers is not comparable. Therefore the activities of emergency medical services workers must fall within the scope of Directive 93/104.

Second, the Court notes that the transport sector was excluded from the scope of Directive 93/104 because Community rules for the organisation of working time in that sector already existed. However, those rules do not apply to transport for emergencies or assistance. Furthermore, the Court asserts that the main purpose of the activity in this case is to provide initial medical treatment to a person who is ill or injured – not to carry out an operation relating to road transport.

Third, the Court confirms earlier case law holding that Article 18(1)(b)(i) of Directive 93/104 exceeding the 48-hour limit on weekly working time requires the consent of the worker himself, and that consent given by trade-union representatives is not sufficient. In this case the Court goes further and holds that not only must the worker's consent be given individually, but also expressly and freely. These conditions are not met where the worker's employment contract merely refers to a collective agreement authorising an extension of maximum weekly working time.

Fourth, the Court addresses the question of direct effect by first establishing that national legislation, such as Germany's, which authorises weekly working time in excess of 48 hours, including periods of duty time, is not compatible with the requirements of Article 6(2) of the directive. This ruling follows directly from previous case law on the question of duty time. Such legislation is permissible only if the Member State has availed itself of the option to derogate from Article 6 as provided in Article 18(1)(b)(i). The judgment notes that Germany has not availed itself of that option. Thus, its legislation obviously infringes Directive 93/104.

Finally, While the ECJ finds that Article 6(2) fulfils all the conditions necessary for it to produce direct effect as against the State, this is a case between individuals, in which the Directive cannot be given direct effect. Thus, the national court is required, according to the principle of interpretation in conformity with Community law, to do whatever lies within its jurisdiction to ensure the full effectiveness of Directive 93/104 in order to prevent the 48-hour maximum weekly working time laid down in Article 6(2) from being exceeded.

AUSTRIA

Austrian Supreme Court, 27 May 2004
8 Ob A 13/04a, Supreme Court

Paid leave due to health problems – termination of the employment contract during illness

HEADNOTES

Facts

The plaintiff had worked in the café of the defendant from 28 March 2002 as a waitress (1410 € gross per month incl. overtime premium for ten hours). On Monday, 2 September 2002, the plaintiff carried out her usual work. That night she fell ill (dysentery and vomiting). Tuesday morning she went to the doctor, who found her ill and ordered her to go to an examination by the head physician on 9 September 2002. The plaintiff sent her eldest daughter to her superior with the sick certificate and the gains of the day before. In a letter of 4 September 2002 the waitress was given notice by her employer. On 8 September 2002 (Sundays are free) she felt better and would have restarted work on Monday, 9 September, 2002. On the occasion of a suddenly necessary toilet walk the plaintiff stumbled across the staircase on 8 September 2002 and hurt her muscle of the right calf. Therefore she was unfit for work from the 8 September 2002 until 17 November 2002.

The plaintiff requests 2.657,23 € gross consisting of wage continuation and paid leave for September 2002 as well as paid leave from 1 October until 12 November 2002, and remaining aliquot grants (for holidays and Christmas, the so-called 13th and 14th monthly salary per year). Basing on the fact that the notice was given during the employee's illness the defendant employer replied that the period of the first illness had not lasted until 17 November 2002, and that the notice was given before the second period of illness had started.

The first instance allowed the plaintiff's claim. The defendant appealed against the first instance's decision. The Court of Appeals approved the decision

of the first instance. The defendant appealed against the Court of Appeals' decision.

The Supreme Court stated that the appeal is available and rightful.

Decision

The defendant's extraordinary appeal against the Court of Appeals judgment is available and rightful.

Law Applied

EFZG (Entgeltfortzahlungsgesetz – Continuation of Payment Act)

§ 2 para. 1: An employee who is incapable of working due to sickness or accident which was neither caused intentionally nor by gross negligence remains entitled to payment of his/her full remuneration for a term of six weeks. The claim increases to eight weeks after five years of employment, to ten weeks after 15 years and to twelve weeks after 25 years of employment. In all of these cases additional four weeks of 50% of the payment are granted.

Para. 4: In case of repeated incapability due to illness or accident within a year, the claim only remains as long as the claim according to para. 1 is not exhausted.

§ 5: If an employee is given notice, being dismissed from his/her position without a reason (…), he/she remains entitled to payment according to the rules of the EFZG, even if the employment relationship ends before the incapabiliity is over.

JUDGMENT

If an employee is given notice or dismissed from his/her position without a reason during an incapability caused by an illness (or accident), according to § 2 EFZG the entitlement for payment remains for the period which is laid down by law, even though the employment relationship is already over. The "telos" of this rule is to secure the employee's claims despite the end of the contract, and to prevent employers from terminating contracts because of health reasons. Therefore the employment relationship may be terminated but the entitlement for payment continues beyond the end.

If the termination is given before the employee becomes incapable, the claim for paid leave ends at the moment that the contract ends. Thus, it makes a great difference at which moment the notice is given, during or before the illness.

In the current case the question is, whether "an" incapability of working is still on the hand, when after the notice a further incapability occurs.

According to the telos of § 5 EFZG the interpretation saying that "an" incapability in the sense of § 5 EFZG is only "the" incapability that is already in existence at the moment that the notice is being given. An exception should be made if the second incapability could be regarded (at least partly) as the consequence of the first one (complications or bad healing of the first illness, etc which cause another illness).

But this is not the case: the plaintiff's injury caused by her fall is not directly connected to the precedent illness. And the gastro-intestinal diseases would in any case have been healed by the end of the termination (19 September 2002).

Therefore it has to be stated that the plaintiff's claim for paid leave from 1 October 2002 until 12 November 2002 is not to be acknowledged in the requested amount, and the claim has to be rejected.

[Sources (journals): Arbeitsrechtlicher Dienst (ARD) 5526/3/2004; Arbeits- und Sozialrechtskartei (ASoK) 2005, p. 27; Information aus dem Arbeits- und Sozialrecht (Ïnfas) 2004, nr. A 81.

ANNOTATION

The case discussed deals with the so called "paid leave" in Austrian labour law. The employment contract is – like purchase, barter and tenancy – among a specific type of agreements. The obligation of each side derives from a unitary act, and they are connected by the common genesis and purpose; they share the same legal fate. Therefore usually the employee is entitled to remuneration only if he/she does work for the employer. The reasons why work cannot be carried out may be divided into three groups: the reasons within the responsibility of the employer, those within the neutral sphere and those within the employee's sphere. In connection with the sphere and the type of reasons, there exist exceptions from the above mentioned principle, and payment has to be given to the employee despite his/her not working. In the sphere of the employee two large groups of inability may be divided: temporary incapability due to illness or accident, *i.e.*, health problems in a wider sense (affecting physical as well as psychological defects caused by inner or outer factors), including stays at a health resort, consultation of doctors and other kinds of therapies (physiotherapies, massages, rehabilitation), and any form of inability due to "other in the person of the employee seated" reasons (family support and religious duties such as

marriages, funerals, sick-nursing; real estoppels such as late trains, weather catastrophes; public duties such as voting rights, being a juror at court etc.).

Another principle of Austrian labour law says that the employee keeps his/her entitlement to payment during terms of temporary illness, etc. according to mandatory rules in the ABGB, the EFZG and the AngG. They cannot be waived (downgraded) by collective or factory agreements or by the employment contract. In case of temporary incapability due to health problems, the employer has to continue payment, though the employee does not carry out his/her duties laid down in the contract. To reduce the employer's financial risk due to the employees' longer absences, rules in the accident insurance sphere were laid down saying that the employers get back 50% of the payment granted to the employee in cases of illness. Yet, these measures only apply to small and medium-sized enterprises (SMEs), because the legal definition (comprising employers who have engaged maximum 50 employees) scarcely looks to European fundamentals such as the Commission Recommendation (EC) Nr. 2003/361 concerning the definition of SME or the Commission Regulation (EC) Nr. 70/2001 on the application of Articles 87 and 88 of the EC Treaty on state aid to small and medium-sized enterprises. Larger enterprises are considered to be able to bear the risk of employees' absences rather on their own.

Another point of general interest concerning the "paid leave" has to be emphasized: As already indicated in preceding annotations Austria's legal system still differs between blue-collar-worker and white-collar-workers (see Austrian Contribution in ILLR, Vol. 24, p.37 [2005]). Beside notice of termination and the organisation of workforce the main differences can be found in the case of "paid leave" due to temporary health problems. Despite the great adjustment in 2000 which cleared out major differences, some of them still remain; especially the terms of payment during incapability vary hugely.

If the EFZG applies, within a year the incapable blue-collar-worker keeps his/her entitlement to full payment for six weeks (8, 10 or 12 weeks: this period increases depending on the term of preceding employment, "principle of rewarding long employment", see Law Applied) and to half payment for four weeks, *i.e.*, altogether per year every employee incapable due to health reasons must be paid for a maximum of ten weeks (or 12, 14, 16 weeks) by the employer despite his/her not working. Longer terms of incapability due to illness or accident within a year need not be paid by the employer. (Social security measures commence after the claim towards the employer is exhausted). In such cases a new claim of 10 (12, 14, 16) weeks does not arise before the beginning of the following year. If the AngG (Angestelltengesetz – Salaried Employees Act) applies, the base claim for paid leave is the same: 6 (8, 10, 12) weeks of full payment plus 4 weeks of 50% payment. But additionally the white-collar-worker

keeps his/her entitlement for another term of 6 (8, 10, 12) weeks plus 4 weeks, yet "only" to half extent (*i.e.*, 6 [8, 10, 12] weeks of half payment plus 4 weeks of 25% payment) within six months. In the area of the AngG all sorts of incapability (illness, accident, cure, occupational accidents, etc.) are added up, whereas according to the EFZG and ABGB occupational accidents and industrial disease cause an "extra" claim of maximum 8 (10) weeks per incident, which applies in addition to other terms of absence due to illness or accident.

Being conscious of the huge financial burdens which could make employers give notice to their employees due to longer absences, the lawmaker laid down special rules for various forms of termination. According to § 5 EFZG (§ 9 AngG; § 1156 2nd phrase ABGB) even in case of illness a notice or a dismissal without a ground by the employer or the justified resignation of the employee make the employment contract end at the intended moment. But if the illness lasts longer than the employment relationship, the entitlement to payment continues till the (former) employee is healthy again. The employer is to be deprived from the power of getting rid of employees on arbitrary terms. Therefore the type of "termination" as well as the moment of giving notice is of great relevance for the consequences.

According to the rules, specific forms of termination "during the incapability" cause the consequences described above. In the current case there was no doubt that the termination happened "during" or on the occasion of the first period of incapability, but it was followed by a second and actually they in some way "merged". Thus, were they to be regarded as one incapability or as two separated? Two aspects have to be considered: the rule aims at "punishing" the employer, if he/she absconds from the legally laid down purposes by terminating the relationship. Yet, the purpose can be sufficiently fulfilled by regarding the termination as "during" the first period. The employer had no possibility to influence the duration of illness in any way and bears the specific risk of the illness that he/she was aware about.

Further, the natural course of incidents has to be considered. To burden the employer with every kind of risk or incident is not within the purpose of this rule. Therefore, in general daily actions (such as showering, cooking, toilet etc) which take place without any specific connection to the incapability are to be neglected, whereas apparently – according to the Court – acts arising directly from the incapability and causing incapability should be regarded (such as going to the doctor's, pharmacy, therapy etc). Yet, despite a not deniable measure of coherence (dysentery/vomiting and walk to the toilet), which goes beyond natural course, for the Court the connection between the two reasons of incapability was not specific enough.

Therefore two periods and reasons of illness (accident), though following strictly each other, can be treated like two separate ones, and if the termination is given during the first one, the occurrence of another does not extend the term of paid leave.

AUSTRALIA

High Court of Australia
Amcor Ltd v Construction, Forestry, Mining and Energy Union

Redundancy – whether employees entitled to redundancy payment in event of business restructure

HEADNOTES

Facts

Amcor Limited (Amcor) is a major producer of paper and packaging products. In 1999 it sold a number of its businesses to a wholly-owned subsidiary, Paper Australia Pty Ltd (Paper Australia). Amcor remained the employer of those employees who worked in the Paper Australia business, and continued to discharge its obligations to those employees under the Australian Paper/Amcor Fibre Packaging Agreement 1997 (Agreement), which had been certified by the Australian Industrial Relations Commission in 1998.

In early 2000 Amcor decided upon a "demerger", the effect of which was that it would become a purely packaging business, whilst its printing operations would be carried on by PaperlinX Ltd. 83% of the shares in this entity were initially to be owned by the shareholders of Amcor, with the remaining 18% being held by Amcor itself.

This demerger meant that it was no longer appropriate that the employees engaged in the paper-making and recycling business should be employed by Amcor. Accordingly, Amcor gave notice to the affected employees to the effect that they would cease to be employees of Amcor with effect from 31 March 2000. At the same time all of the affected employees were offered employment by PaperlinX on identical terms and conditions to those they had formerly enjoyed with Amcor, and with full recognition of continuity of service for all employment-related purposes. Acceptance of this offer was to be signified by reporting for work on 1 April 2000. All, or nearly all, of the affected employees did so.

The Construction, Forestry, Mining and Energy Union then initiated proceedings in the Federal Court of Australia claiming that the former Amcor em-

ployees were entitled to receive redundancy payments under the relevant provision (clause 55.1.1) of the Agreement.

The Union's claim was upheld by Finkelstein J at first instance, and on appeal by the Full Court of the Federal Court. Amcor, supported by the Minister for Employment and Industrial Relations, then appealed to the High Court of Australia.

Decision

The High Court unanimously determined that the positions of the affected employees did not become redundant as a result of the demerger, with the consequence that the Union's claim must fail.

Law Applied

Clause 55.1.1 of the Agreement was applied on its terms.

JUDGMENT

[Gleeson CJ and McHugh J delivered a joint opinion, whilst Kirby and Callinan JJ delivered separate concurring opinions. The following extract is taken from the joint opinion of the remaining members of the Court, Gummow, Hayne and Heydon JJ:]

Clause 55.1.1 of the Agreement

The central issue in the matter is whether, in the events that have happened, cl 55.1.1 of the Agreement was engaged. That clause was one of several grouped under the heading "Severance Payments". It provided:

Should a position become redundant and an employee subsequently be retrenched, the employee shall be entitled to the following payments:

(a) All accumulated sick leave credits;
(b) All accumulated annual leave credits;
(c) Pro-rata long service leave if the employee concerned has five or more [years'] continuous service with the Company;
(d) Three weeks' pay at the employee's ordinary weekly wage rate for each full year of service and prorata for part years provided that this amount does not exceed the amount the employee would have received up to nominal retirement age.

It will be noticed that the clause speaks of a "position becom[ing] redundant" and an "employee subsequently be[ing] retrenched". How are those expressions to be understood?

The competing contentions

The union contended that cl 55.1.1 was engaged if, because the employer no longer had a need for the work that the employee was performing, the employee was no longer required by that employer to do work or perform duties of a particular kind. It followed, so the Union contended, that upon Amcor ceasing to carry on this part of its business, and terminating its contracts of employment with the employees, cl 55.1.1 required Amcor to make the payments for which the clause provided, regardless of whether the employees were offered and at once took up work with another company.

Amcor contended that cl 55.1.1 was not engaged unless a "position in the business" was abolished and that the identity of the employer of the person occupying that position was irrelevant. It submitted that the positions in the business remained unaffected by the various transactions that occurred. The Minister's submissions were to generally the same effect.

Neither side's contentions attached significance to whether an employee took up the offer made by Paper Australia. The Union on the one hand, and Amcor and the Minister on the other, submitted, for different reasons, that this was irrelevant. The Union submitted that it was irrelevant because all that was material was whether the particular employer any longer required employees to do work or perform duties of the kinds they had undertaken before termination. Amcor and the Minister submitted that it was irrelevant because, regardless of who filled the position, the position in the business remained unaffected by the transactions that had occurred.

Clause 55.1.1 must be read in context. It is necessary, therefore, to have regard not only to the text of cl 55.1.1, but also to a number of other matters: first, the other provisions made by cl 55; secondly, the text and operation of the Agreement both as a whole and by reference to other particular provisions made by it; and, thirdly, the legislative background against which the Agreement was made and in which it was to operate.

[Having examined the other provisions made by clause 55 and the text and operation of the Agreement as a whole, their Honours continued:]

The legislative background

Three features of the legislative background to the Agreement must be noticed. First, there is the background provided by the introduction, by the Commission's predecessor (the Australian Conciliation and Arbitration Commiss-

ion), of awards prescribing the entitlements of employees upon redundancy. Applicable standards were identified in the *Termination, Change and Redundancy Case* (1984) 8 IR 34. Secondly, some account must be taken of the provisions of Div 3 of Pt VIA of the Act regulating the minimum entitlements of employees on termination of employment. Those provisions evidently reflect general standards of the kind identified in the *Termination, Change and Redundancy Case*. Thirdly, the Act provides (s 170MB) that certified agreements made about industrial disputes or industrial situations are to bind not only the particular employer with whom the agreement is made but also successor employers.

The legislative background – awards and redundancy

In 1981, the Australian Council of Trade Unions made claims that led, ultimately, to the making of awards providing terms governing the termination of employment, providing for consultation about major changes likely to have significant effects on employees, and providing for terms governing what was to happen in cases of redundancy. The Commission first published reasons determining issues of principle. Having heard further submissions from the parties, the Commission then published a supplementary decision in which it settled the form of order to be made.

The Commission said, in its supplementary decision, that it had "some difficulty in finding a suitable expression" to make its intention clear about what constituted "redundancy". In its earlier decision, it had referred to a number of definitions of redundancy. Chief among those was the decision by Bray CJ in *R v Industrial Commission (SA); Ex parte Adelaide Milk Supply Cooperative Ltd* (1977) 16 SASR 6 (at 8) which was understood as emphasising that redundancy refers "to a job becoming redundant and not to a worker becoming redundant".

For present purposes, what is important is that the Commission appears to have been seeking a form of words that would accommodate two features. First, as was said in the Commission's supplementary decision, it "did not intend the redundancy provisions to apply where an employee is dismissed for reasons relating to his/her performance, or where termination is due to a normal feature of a business". Secondly, the Commission did not intend redundancy provisions to be engaged by the transmission of a business. In its earlier decision, the Commission had emphasised that it did "not envisage severance payments being made in cases of succession, assignment or transmission of a business". That is, the Commission regarded termination of employment by a particular employer as not sufficient to engage the redundancy obligations, even if that employer was ceasing any participation in the particular business. The focus of the provision was upon the work undertaken by the employee (the "job"), not upon the iden-

tity of either the employee or the employer. The relevant inquiry was whether employment in a particular kind of work then being undertaken was to come to an end. If that employment was to come to an end, it was necessary to consider why that was to happen. Was it because the employer no longer wanted the job, then being done by the employee, done by anyone? Or was it "due to the ordinary and customary turnover of labour"? And, as the Commission's evident concerns about drafting show, these alternatives were not, and are not to be, understood as exhausting the cases that might have to be considered.

The legislative background — the Act and termination of employment

The provisions of Div 3 of Pt VIA of the Act (ss 170CA–170HC) established procedures for conciliation and arbitration in relation to certain matters relating to the termination or proposed termination of an employee's entitlement in certain circumstances. Many of the provisions were directed to cases where it was alleged that the termination was harsh, unjust or unreasonable and those provisions do not bear upon the issues in these appeals. Two provisions do.

First, as has already been noted, s 170CL obliged an employer to notify the [former] Commonwealth Employment Service [now Centrelink] if it intended to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature. Secondly, s 170CM provided for the required period of notice of termination to be given by an employer. The period of notice depended upon the employee's period of continuous service with the employer. The section provided that regulations might exclude from the operation of the section terminations of employment "occurring in specified circumstances that relate to the succession, assignment or transmission of the business of the employer concerned". Division 1 of Pt 5A of the Workplace Relations Regulations (regs 30A–30CD) included such a provision. Regulation 30CD excluded from the operation of s 170CM a termination of employment that occurred because of the succession, assignment or transmission of the business of an employer if certain conditions were met. The detail of those conditions is not relevant to the present issues. What is important is that the Act provided certain minimum conditions that were to apply where there was a termination of employment. Those conditions could be engaged where there was a termination because the employer no longer wanted the job that an employee was doing to be done by anyone. But the Act also recognised (in s 170CM) that succession cases may require different treatment.

The legislative background — succession provisions

As is apparent from what has already been said, the Act provided for cases where a new employer was a successor, transmittee or assignee of the whole or a

part of the business of an employer bound by a certified agreement. Section 170MB provided that if the application for certification of the agreement stated that it was made under Div 3 (concerning agreements about industrial disputes and industrial situations) the new employer was bound by the certified agreement "to the extent that [the agreement] relates to the whole or the part of the business".

Amcor did not contend in these appeals that s 170MB applied. It will be necessary later to say something further about this aspect of the matter. What is presently important is that, regardless of the terms of a certified agreement, the agreement binds any new employer who is the successor, transmittee or assignee of the whole or a part of the business concerned. Obviously, if an agreement is drafted … in terms that are specific to a particular employer, there may be some question about how provisions of that kind are to be applied if there is a succession. But these are difficulties that would have to be solved. Their existence does not deny the operation of s 170MB.

There is a further point that follows from s 170MB. If the section is engaged, and a new employer becomes bound by the certified agreement, those provisions of the agreement which depend for their operation upon the length of an employee's service (like provisions for leave) may well have to be construed as depending upon the combined length of service with both the old and the new employer. That is, it may well be that the certified agreement would be construed, in such circumstances, as neither permitting nor requiring differentiation between service with one employer and service with the other. These, however, are questions which were not pursued in argument and need not be decided.

The construction of cl 55.1.1

The expression "[s]hould a position become redundant and an employee subsequently be retrenched" can be construed properly only if due account is taken of each of the matters we have mentioned: the other provisions found in cl 55 and elsewhere in the Agreement, and the matters of legislative background to which we have referred.

The succession provisions of the Act show that if an employer sells its business to another, and the former employer no longer carries on that kind of business, a certified agreement will continue to regulate the relations between the new employer and its employees to the extent to which the agreement relates to the whole or part of the business to which the new employer is successor. This requires the conclusion that the reference in cl 55.1.1 to "a position [becoming] redundant" cannot be read, as the Union contended, as requiring no more than

that the particular employer no longer has a need for any employee to perform tasks of the kind undertaken by the employee.

Reading the phrase as satisfied by those circumstances alone would give no sufficient content to "position". "Position" was not used in the Agreement as a legal term of art. It was used in a colloquial sense. In the collocation of words found in cl 55.1.1 (when understood against the background of the various considerations earlier mentioned) "position" refers to a position in a business – a business to or of which another employer may be successor, transmittee or assignee (whether immediate or not). If, for example, there had been some change in the terms and conditions offered by the new employer from those offered by Amcor, or there had been some change in the tasks to be undertaken by the employee, there may have been some question about whether the "position" continued. Issues of that kind do not arise in the present matter.

This conclusion about the meaning of "position" is reinforced by a number of other considerations. First, there is the treatment, in cl 55.1.1, of retrenchment as a further necessary element for it to be engaged, and there are those other provisions of cl 55 which are engaged only if the employee concerned is no longer employed in the business. These provisions suggest that a "position" is to be identified in relation to a business rather than identified by reference to employment by a particular employer.

Secondly, reading the provisions as focusing upon a position in a business is consistent with the approach to redundancy taken by the Commission in the *Termination, Change and Redundancy Case*. There, as already noted, the emphasis was upon a "job" becoming redundant rather than a worker becoming redundant. As the Commission pointed out, the definition of "redundancy" which it adopted from the *Adelaide Milk Supply Co-operative Case* recognised that "redundancy situations may not necessarily involve dismissals" and emphasised that the job or work had disappeared through no fault on the part of the employee. To find that a position is redundant whenever an employer leaves an industry (regardless of whether another employer continues to operate the business concerned) would give insufficient emphasis to the need to identify whether a "job" had become redundant.

No doubt, as the Union submitted, the clause now in question is different from the model clauses which the Commission adopted in its supplementary decision in the *Termination, Change and Redundancy Case*. It follows that what is said in the decisions in that case is not determinative of the present issue. Nonetheless, the clause now in question is informed by considerations similar to those which the Commission sought to reflect in the drafting it adopted. So much follows from the emphasis given, in cl 55.1.1, to the concept of "position".

The Court's decisions in *PP Consultants Pty Ltd v Finance Sector Union* (2000) 201 CLR 648 and *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 214 ALR 25 [included in this volume] deal with some of the difficulties that arise in identifying whether an employer is the successor, assignee or transmittee of the business of another employer. Those decisions, therefore, consider what is meant by the "business of an employer". The issue which arises in this case is related to, but is not identical with, the issues that were decided in those cases. The construction of cl 55.1.1 which we adopt construes "position" as referring to a "position in a business", a "job". …

Once Amcor sold its paper business to Paper Australia, Amcor's connection with the business of manufacturing paper was limited to the supply of the labour, which Amcor employed, to the company which owned the manufacturing plant and conducted the business of making and selling paper. … Neither the sale of assets by Amcor nor the later termination of employment by Amcor meant that the work then being undertaken by the employees was no longer required by the company which conducted the business in which the positions existed. The "job" of no employee was redundant. Clause 55.1.1 was not engaged.

[Source: (2005) 214 Australian Law Reports 56]

ANNOTATION

On any "commonsense" view, it would seem anomalous that the affected employees of Amcor should be entitled to receive a redundancy payment from their former employer in circumstances where they continued to work in their former jobs, on identical terms and conditions, with full recognition of past service, and with no break in continuity of service. Nevertheless, on the face of the Agreement, they did indeed appear to have such an entitlement.

The former Australian Conciliation and Arbitration Commission (now Australian Industrial Relations Commission) recognised the potential anomalies that could arise in a situation such as this when it observed in the original *Termination, Change and Redundancy Case* (1984) 8 IR 34 (at 75) that "we do not envisage severance payments being made in cases of succession, assignment or transmission of a business". To that end the Commission included in the standard Termination, Change and Redundancy clause provision to the effect that:

> An employer, in a particular redundancy case, may make application to the Commission to have the general severance pay prescription varied if he/she obtains acceptable alternative employment for the employee.

This qualifier was included in almost all of the TCR clauses that were inserted in Federal awards in the aftermath of the 1984 decision.

With the advent of enterprise bargaining from the late 1980s onwards, it became common for parties to agreements that made provision for redundancy payments also to include provision for application to the Commission to vary redundancy entitlements in situations where employers had obtained suitable alternative employment for employees whose positions had become redundant – for example where all or part of the employer's business had been transmitted to another employer who offered continuing employment on terms and conditions that were substantially identical to those observed by the transmittor. In other instances, the parties dispensed with the need to seek leave of the Commission by simply providing that employees were not entitled to receive redundancy payments where they had unreasonably refused an offer of "suitable" or "adequate" alternative employment, whether procured by the former employer or otherwise.

In a minority of cases the parties did not qualify the entitlement to redundancy payment by either express stipulation or by providing for reference to the Commission. Prima facie, the parties to the Amcor Agreement were among that minority, and with varying degrees of enthusiasm, the members of the Federal Court who were called upon to apply clause 55.1.1 determined that having made this particular bed, the parties, and especially Amcor, had to lie in it.

The High Court elected to try to find an alternative route. They did so by first considering the wording of clause 55.1.1, followed by the rest of clause 55, then the text and operation of the agreement as a whole, and finally: "the legislative background against which the Agreement was made and in which it was to operate".

On the basis of this review, the Court found that the reference to "position" in clause 55.1.1 encompassed a position in a "business" irrespective of who owned that "business". Their Honours did acknowledge that the situation might have been otherwise "if…there had been some change in the terms and conditions offered by the new employer from those offered by Amcor, or there had been some change in the tasks to be undertaken by the employee", but concluded that "issues of that kind do not arise in the present matter".

With respect, this is somewhat disingenuous. It can readily be seen that a change in the nature of the tasks an employee is required to perform could effect a change in the "position" in the business. But what if the position offered by PaperlinX was identical to that provided by Amcor in all respects save that it was offered on substantially less advantageous rates of pay? If changes in the terms and conditions attached to the position can change the character of the "position" then the logic of the focus on the "position in a business" as a means of

denying the affected Amcor employees access to redundancy payments is inevitably compromised.

It is also important to bear in mind that had the parties to the Agreement wanted to deny access to redundancy payments in the circumstances that arose in that case, it would have been easy for them to do so by making express provision to that effect. Indeed, it would have been normal industrial practice for them to do so. The fact that they did not, if anything, furnishes evidence of a contrary intent.

It seems clear, therefore, that the decision in *Amcor* was largely driven by the Court's desire to avoid what they considered to be an anomalous consequence of giving effect to the plain meaning of the words used by the parties to the Agreement. This is neatly illustrated by the following passage from the joint opinion of Gleeson CJ and McHugh J:

> There is no logically stringent process of reasoning which requires a construction of clause 55.1.1. that favours either side. The problem arises because the agreement is expressed in general terms that do not distinguish between the different circumstances which might arise in different cases. There is nothing unusual, or surprising, in that. In the industrial context, redundancy of position is not a concept of clearly defined and inflexible meaning. Whether cases of succession to a business following corporate restructuring are regarded as justifying an award of redundancy payments is dealt with "on the particular merits of the case rather than by way of broad prescription" [*Shop, Distributive & Allied Employees' Association (NSW) v Countdown Stores* (1983) 7 IR 273]. Here, however, it is necessary to apply an agreement that contains a "broad prescription", and the task is to decide how that broad prescription operates in the particular circumstances.
>
> Having regard to the industrial purpose of the agreement, and the commercial and legislative context in which it applies, it seems to us that the appellants have the better of the argument.

Clearly, the Court in *Amcor* did not lay down any principle of general application. Rather, the Court affirmed that determining whether employees are entitled to receive redundancy payments in the context of a business restructure is a question of fact and degree. What is perhaps unusual in this case is that the Court was so openly prepared to allow its sense of the lack of merit in the Union's claim to cause it to disregard the plain wording to the Agreement, and the fact that the parties to the agreement had elected not to use any of the established means of qualifying redundancy entitlements in the context of business restructures.

AUSTRALIA

High Court of Australia
Blackadder v Ramsey Butchering Services Pty Ltd

Reinstatement of unfairly dismissed employee – whether employer required to provide work

HEADNOTES

Facts

Blackadder had been employed as a meat boner at an abattoir in Grafton, in the State of New South Wales for a number of years. In April 1998 the abattoir was taken over by Ramsey. Blackadder continued to work in the abattoir under its new ownership, and his terms and conditions of employment were regulated by an Australian Workplace Agreement (AWA). In late September 1999 Ramsey directed Blackadder to perform "hot neck boning". This form of boning requires the worker to free the meat from the bones of the carcass from the neck to the ribs. It requires significantly more rotational force and effort than the work hitherto performed by Blackadder. He had never performed this work before, and had not been trained to do it. He was also concerned that doing this kind of work might exacerbate a pre-existing medial condition. He refused to perform the allocated task, and his employment came to an end.

Blackadder subsequently initiated proceedings under the *Workplace Relations Act 1996* (Cth) (WR Act) claiming that Ramsey's conduct constituted "constructive dismissal", and that his dismissal had been unlawful. Among other things, he alleged that the reason Ramsey had assigned him to undertake hot neck boning was because on the day prior to receiving the instruction he had given evidence in proceedings before the Australian Industrial Relations Commission (Commission) that was adverse to Ramsey's interests.

On 29 March 2000 Blackadder's complaint was upheld by Commissioner Redmond in the Commission, who ordered that Blackadder be "reinstated to the position in which he was employed prior to the termination of his

employment without loss of continuity of service or entitlements" within 21 days, and that he be "reimbursed for all lost salary and entitlements from the date of termination to reinstatement".

On 3 May 2000 Ramsey wrote to Blackadder advising him that he had been reinstated with effect from 20 April 2000, but that "until further notice you will not be required to report for work or otherwise perform work in order to be entitled to your wages or other remuneration". He was also directed to undertake a medical assessment by a company-nominated medical practitioner. This was stated to be because: "doubts exist as to your physical capacity to perform the duties of a boner not only in relation to the duties associated with Hot Necking on the Slaughterhouse Floor but more importantly your ability to bone in the Boning Rooms given the Osteoarthritis in your right elbow".

Blackadder refused to undertake the medical assessment, inter alia because "Commissioner Redmond's order was not conditional upon it and he was ready, willing and able to resume his pre-termination boning work".

In early June Ramsey advised Blackadder that payment of his wages would cease because of his failure to undertake the medical assessment. Shortly afterwards, Ramsey appealed against Commissioner Redmond's original decision. This appeal was dismissed by a Full bench of the Commission. In September 2000 Blackadder initiated proceedings in the Federal Court of Australia to enforce the original order that he be reinstated.

After a number of false starts, Blackadder underwent a medical examination in April 2001, and from that date Ramsey recommenced payment of his wages, but still would not allow him to work.

On 10 May 2002 Madgwick J in the Federal Court ordered that Blackadder be reinstated in his former position as "a boner performing chilled boning work in that part of …[Ramsey's] premises known as the big boning room", and that Ramsey "furnish [Blackadder]… with his usual work in such position, excepting in case of shortage of stock to slaughter".

This decision was reversed by a 2:1 majority of the Full Court of the Federal Court of Australia. [This decision is reported at 23 ILLR 291]. Blackadder then sought, and was granted, leave to appeal to the High Court of Australia.

Decision

The High Court unanimously upheld the appeal, and determined that "reinstatement" literally meant that Blackadder be put back in the place he occupied in the employer's commercial structure which he occupied before the termination. This included not just the pay and other benefits which the

employee might earn in a position but also the work to be performed by the person filling that position. Reinstatement is meant to "be real and practical, not illusory and theoretical".

Law Applied

WORKPLACE RELATIONS ACT 1996
Section 170CH
Remedies on arbitration

(1) Subject to this section, the Commission may, on completion of the arbitration, make an order that provides for a remedy of a kind referred to in subsection (3), (4) or (6) if it has determined that the termination was harsh, unjust or unreasonable.

(2) The Commission must not make an order under subsection (1) unless the Commission is satisfied, having regard to all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's undertaking, establishment or service; and

(b) the length of the employee's service with the employer; and

(c) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated; and

(d) the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination; and

(e) any other matter that the Commission considers relevant;

that the remedy ordered is appropriate.

(3) If the Commission considers it appropriate, the Commission may make an order requiring the employer to reinstate the employee by:

(a) reappointing the employee to the position in which the employee was employed immediately before the termination.

(b) appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination.

(4) If the Commission makes an order under subsection (3) and considers it appropriate to do so, the Commission may also make:

(a) any order that the Commission thinks appropriate to maintain the continuity of the employee's employment; and

(b) subject to subsection (5) — any order that the Commission thinks appropriate to cause the employer to pay to the employee an amount in respect of the remuneration lost, or likely to have been lost, by the employee because of the termination.

JUDGMENT

[The following extract is taken from the joint opinion of Callinan and Heydon JJ. McHugh, Kirby and Hayne JJ delivered concurring opinions]:

In its appeal to the Full Court of the Federal Court, the respondent challenged the orders for the reinstatement of the appellant and submitted that an order for reinstatement simply revived the contract of employment. It submitted that as an employee does not have a right or entitlement to do actual work under a contract of employment, an order cannot be made in exercise of a power to order reinstatement, conferring such a right on the employee and imposing a corresponding duty on the employer to provide it.

The Full Court upheld the appeal in part on 21 February 2003 (Tamberlin and Goldberg JJ, Moore J dissenting). In doing so the majority reviewed the position at common law by which they were obviously influenced, and found that there is no obligation upon an employer to provide work to an employee unless the contract of employment specifically requires that it be provided, or where it was necessary for an employee, an actor for example, to continue to be employed in order to maintain a profile, or where the employee's career and future prospects depended upon the employee working in a particular way, or where the employee's remuneration depended upon the amount of actual work performed by the employee. Their Honours said:

> We consider the emphasis on appointing the employee to a "position" demonstrates that it is the contractual position which is either to be restored in its earlier terms or in equivalent terms. By using the terminology of "appointing" as opposed to "re-employing" for example, there is indicated a legislative intention to re-establish rights or equivalent rights which were destroyed by the wrongful termination. The language does not indicate a legislative intention to provide more than that to which the employee was entitled prior to the wrongful termination.
>
> In our opinion, where a person is reinstated by appointment to a position in which he or she was acting at the time of dismissal pursuant to s 170CH(3)(a), then that provision requires that the person should be restored to all the contractual entitlements which applied in respect of that position at the time of the wrongful dismissal so far as possible, but should not be given any additional entitlement which the person did not previously have under the relevant terms of the person's employment.

Moore J dissenting said:

> Many of the cases concerning what an order for reinstatement comprehends, at least in the context of New South Wales industrial laws, were

> considered by the Industrial Commission of New South Wales in Court Session in *Retail Traders Association (NSW) v Shop, Distributive and Allied Employees Association (NSW)*. In those authorities it is comparatively clear, to repeat some of the language used, that an order for reinstatement is not to achieve a notional or academic reinstatement but a practical one. It requires a re-establishment of the pre-existing employment relationship as a matter of reality and not in some notional or fictional way. The purpose of such an order is to place the dismissed employee in a position that he or she was in before the dismissal. It is to restore the status quo ante.

…

In my opinion, the power to make an order under s 170CH(3)(a) or (b) extends to making an order requiring the employer to permit the employee to take up the position formerly occupied by the employee, or another position, including performing the duties of that position and receiving the benefits from doing so.

…

The appeal to this Court

The first question which the appeal raises is whether, under s 170CH the Commission may make an order for reinstatement, the effect of which is to require an employer to provide the employee with work, and, if it may, whether the order that was made here was of such a kind. The next question is whether, if the Commission may, and has made such an order the Federal Court should have made an order for its enforcement. As will appear, each of these questions should be given an affirmative answer.

Section 170CH should not be read in the narrow fashion adopted by the majority in the Full Court of the Federal Court. To do so is to treat the word "position" as used in the Act as a formal position only, a title, or something in the nature of an office, entitling the person reappointed to it, to its emoluments and nothing else. Nor does anything turn on the use of the word "reappointing". An employee carrying out work of the kind being carried out by the appellant before his dismissal would not in ordinary language be regarded as undertaking work pursuant to an appointment.

All of the language of the relevant section must be given meaning. The use in s 170CH(3) of the word "reinstate" is significant. Section 170CH(3)(a) and (b) describe the way in which the reinstatement may be effected. "Reinstate" literally means to put back in place. To pay the appellant but not to put him back in his usual situation in the workplace would not be to reinstate him. The words "reappoint" and "position" should not be read in any restricted way. They are intended to apply to a very wide range of workplaces and certainly not to a particular officer or officers. It was therefore

within the power of the Commission to make such an order as would contemplate or require that the employer provide a reappointed or reinstated worker with actual work to do.

In our opinion it is also at least implicit in the reasons for the order of the Commission at first instance that the appellant would be provided with actual work for him to do. This appears from the passages which dealt with the appellant's fitness to perform the work, and the conclusion that the appellant could do that which he had been doing before his employment was terminated. … Before making an order the Commission has to be satisfied of the matters referred to in s 170CH(2). Those matters included the effects (in the future) on the viability on the employer's business if an order (for reappointment) be made (s 170CH(2)(a)), the remuneration that the employee would have received if his employment had not been terminated (s 170CH(2)(c)), and any other matters that the Commission might consider relevant (s 170CH(2)(e)). With respect to the first of these, the Commission made the relevant finding that the operational requirements of the respondent's business would not be affected by the restoration of the appellant to his previous position.

In any event it is almost unthinkable that the Commissioner would have made an order that the appellant be reappointed had he thought that the appellant would either not be able to perform, or would not be allocated actual work by the respondent for him to do. The order made by the Commissioner should be read as Moore J in dissent in the Full Court preferred to read it, as an order intending that the appellant be reinstated, and that he be given work to do of the kind which he had done in the past.

It is no answer, as the respondent submits, that the appellant may be unwilling to do hot boning work, or that he may lack the physical and other capacities to do it. … Commissioner Redmond has held, and it has not so far been controverted, that the appellant has not been trained, and is not fit, to do hot boning work. The Act empowers the Commission to reappoint an employee to the position in which he was employed immediately before his termination, or to another position, and this it did, by reappointing him to work in the chilled boning room. It is not for this Court to anticipate, by making an order in advance, what may follow from that. As Moore J in dissent in the Full Court said:

> That is not to say, however, that the employer would be precluded, thereafter, from lawfully altering the position of the employee by requiring the employee to perform other duties, standing down the employee or even dismissing the employee. An employer can. However, if these steps were taken capriciously or unreasonably it may be that they could be viewed as

> steps designed to nullify the effect of the reinstatement order. The order is intended to have the effect earlier described and, to that extent but only to that extent, overrides any contractual or other rights the employer may have.

There is no doubt that the order made by Madgwick J in the Federal Court was within power. …

The circumstances of this case are covered by the federal statutory regime established by the Act and the *Federal Court of Australia Act*. Decisions in other jurisdictions under other statutory regimes are of little assistance. Nor are the decisions of other courts or this Court at common law. It is accordingly unnecessary to consider whether the categories of cases in which at common law actual work must be provided for an unlawfully terminated employee or contractor, are closed, although one might question the current relevance of judicial pronouncements made more than 60 years ago in the United Kingdom as to the extent to which an employer might be obliged to dine at home in order to provide work for his cook [see *Collier v Sunday Referee Publishing Co* [1940] 2 KB 647]. It may be that in modern times, a desire for what has been called "job satisfaction", and a need for employees of various kinds, to keep and to be seen to have kept their hands in by actual work have a role to play in determining whether work in fact should be provided. Nor is it necessary to have regard to the fact, which appears to have been overlooked by the Full Court, that the appellant's remuneration here could be affected by the actual work that he did, a matter which might of itself at common law justify an order that he be provided with actual work to do. The order for enforcement of the order of the Commission for reinstatement should be understood in the way in which it has been explained in these reasons.

[Source: (2005) 215 Australian Law Reports 87].

ANNOTATION

It is clear from section 170CH(6) of the WR Act that reinstatement is meant to be the primary remedy in cases where an employer is found to have unfairly dismissed an employee. Compensation is intended to be payable only where the Commission considers that "reinstatement of the employee is inappropriate". In practice, reinstatement is very much the exception rather than the rule – for example, of the 56,755 cases lodged with the Commission between January 1997 and June 2004 reinstatement was

awarded in only 225 cases under the WR Act, whilst compensation was awarded in almost 1100 instances (see *Annual Report of the President of the Australian Industrial Relations Commission 1 July 2003 to 30 June 2004*, 18). For that reason, if no other, the decision in *Blackadder* constitutes a welcome reaffirmation of the primacy of reinstatement as the remedy for unfairly dismissed employees.

Moreover, the Court's decision clearly requires that reinstatement is to be a remedy in more than name. The Court expressly recognised that it was within the competence of the Commission and the Federal Court to make orders that had the effect that not only must the employee be "reinstated" in terms of being paid wages or salary, but also that they be provided with the opportunity actually to work and (a significant factor in *Blackadder*) to be able to enhance their earnings through productivity-related payments.

The decision of the High Court is also significant for the fact that Callinan and Heydon JJ clearly indicated that in applying the statutory unfair dismissal regime the courts and tribunals should not be inhibited by outmoded common law principles such as the presumption that, save for a small number of exceptional circumstances, employers are not required to provide their employees with work, provided they are prepared to pay their wages. As Asquith J famously put it (*Collier v Sunday Referee Publishing Co* [1940] 2 KB 647, 650): "Provided I pay my cook her wages regularly she cannot complain if I choose to take any or all of my meals out" (for comment on the effect of *Blackadder* in this context see Riley, 'Pensioning off Lord Asquith's Cook' (2005) 18 *Aust Journ Lab Law* 177)..

The Court in *Blackadder* clearly considered that the majority in the Full Court had been unduly influenced by these common law principles in determining that the reinstatement of Blackadder for purposes of the WR Act did not require that he be reinstated in his former position in the boning room. The unfair dismissal regime established under the WR Act stands on its own, and as Callinan and Heydon JJ pointed out, decisions in other jurisdictions, or at common law, are of limited assistance in giving effect to the legislative intent in relation to providing relief against arbitrary and unfair termination of employment. Indeed, although their Honours did not directly advert to the point, it was precisely because of the inadequacy of the common law in this area that it was necessary to establish the statutory regime in the first place.

It is important to bear in mind, however, that the Court did not, expressly or impliedly, overturn the established common law rules in this area. It did not recognise the existence of "a further exception to the common law rule in the case of employees who have been reinstated following unfair

dismissal, or who have been appointed to a position in consequence of a finding of unlawful discrimination" [23 ILLR, 302].

Regrettably, the Court also failed to give any consideration to whether the established common law rules could be sustained in the face of the emerging implied duty of good faith and confidence. In particular, the Court did not provide any indication as to whether directing an employee not to attend for work whilst continuing to pay their wages or salary – often termed "garden leave" – would constitute a breach of the employer's implied duty not to behave in a manner that was inconsistent with the mutual trust and confidence that is increasingly regarded as an essential element of the employment relationship.

CZECH REPUBLIC

Supreme Court
Jc 108/2005 21 Cdo 2098/2004, March 8, 2005

Notice of termination of employment – cumulation of grounds for termination

Facts

By a letter dated April 30, 2002, the Defendant notified the Plaintiff that the Plaintiff had been given a notice of employment termination "pursuant to section 46(1)(c) and (e) of the Labour Code". The ground for termination was that "on the basis of requirements of individual Ministry departments for language qualification in the field of translating and interpreting activities, the qualification requirements made on the employees of the translations department have been changed, commencing from August 9, 2001. English in combination with another language has become compulsory for the employees of this department." As "English is not the Plaintiff's specialization and the Defendant has not full use for the Plaintiff's language qualification" and as the Plaintiff refused three free working positions, the Defendant has neither any possibility to employ the Plaintiff under this situation "nor any possibility to offer her another suitable work, even after a previous training", and therefore, the Plaintiff was given the notice of termination "due to not fulfilling the qualification requirements made on the employees of the translating department, and due to redundancy" and "the Plaintiff's employment will terminate on expiry of the three-month notice period."

The Plaintiff sought determination of invalidity of the given notice. She reasoned her action mainly by stating she had been working for the Defendant since 1977; according to the last change of her employment contract dated August 30, 1997, she had the position "senior councillor" with working language Russian, French, Italian, English, and German. According to the Plaintiff's opinion, the notice "is not formulated unambiguously" and the said grounds for termination "are not in accordance with the facts" as before she started to work at the translating department, she had been using English commonly – Grade 3 of the ministerial classification – and, therefore, "she had fulfilled at that time already" the qualification requirements prescribed by the Defendant on August

9, 2001. Although the Defendant had not asked her for any perfection or increase of her qualification, the Plaintiff had been attending evening English classes since 2000 to deepen her knowledge; she had been continuing her studies on the day of the notice of termination receipt and in June 2002, she passed examination at the British Council, corresponding to the Grade 4 of the ministerial classification. There even "occurred no reorganization" of the Defendant's organization by which the Plaintiff's redundancy could be justified; and as to the three offered free working positions, the Plaintiff considers the offer only "formal" and "purposeful" as she had not the required qualification for any of them.

Decision

Notice of termination of employment given to an employee is not invalid only due to the fact that the employer used in it more grounds for termination stipulated in the provision of section 46(1) of the Labour Code. The said fact results in the necessity of separate investigation of individual grounds for termination in proceedings commenced on the employee's motion; their effects on further continuation of employment shall also be assessed separately. Should the employment be terminated upon one of them, other grounds for termination applied become obsolete.

Law Applied

LAW NO. 65/1965 COLL., THE LABOUR CODE
Section 45 Notice period
Section 46 Grounds for termination
Section 64 Invalidity of employment termination
Section 240 et seq. Legal acts essentials

JUDGMENT

… [T] District Court … charged the Defendant with the duty to pay CZK 1,000 to the Plaintiff to reimburse her proceeding cost. The first-instance court came to the conclusion that by giving two grounds for termination in the notice of employment termination, each of them having different notice period, the Defendant caused a situation "not envisaged by the provisions of the Labour Code; regarding the mandatory character of these provisions, we must consider such cumulation of grounds for termination impermissible" as "if there was not the ground for termination with a three-month notice period and if the notice of termination using the two-month ground for termination was valid, then if the employee continued working (after passing of the two-month notice period)

during the third month of the notice period, commencement of a new employment could be inferred from it." Therefore, the notice of employment termination dated April 30, 2002 is, "regarding these basic defects of form," an invalid legal act.

The Defendant appealed against the judgment and the regional court affirmed the first-instance court judgment ….

The Defendant applied for an appellate review … because, according to the Defendant's opinion, "neither the judicial decisions nor specialized literature have sufficiently, if ever, solved the legal issues of permissibility of a notice of employment termination in case there are two grounds for termination, and the possibility of application of different notice periods in a notice (notices) of termination, and the consequences of such act." The Defendant objected that if there was such situation when the Plaintiff was given two grounds for termination and "the Labour Code, using the principle *quae lex non prohibet, debent permissa videri*, does not prohibit application of two grounds for termination", the Defendant had the right to apply both grounds for termination.

…

The heard case must be assessed at present according to the law no. 65/1965 Coll., the Labour Code … in its reading effective June 30, 2002 (i.e. before the coming into effect of the law no. 202/2002 Coll. by which the law. No. 65/1965 Coll., the Labour Code, was amended) as the Defendant gave the notice of employment termination to the Plaintiff by means of a letter dated April 30, 2002 which was received by the Plaintiff on the same day.

Notice of employment termination is one of the ways of employment relationship termination (cf. the provision of section 42 of the Labour Code) which is applied by a party to a labour law relationship by means of a unilateral legal act addressed to the other party. Pursuant to the provisions of section 240(1) of the Labour Code, a legal act means manifestation of will aimed to formation, change, or termination of such rights or duties that are related to such manifestation in legal regulations. Although neither the Labour Code nor other legal regulations specify generally the essentials of the labour law acts, it may be inferred from the provisions of such acts invalidity [cf. especially the section 242(1)(a) to (e) of the Labour Code] that there are essentials related to the entity (individual), essentials of will, essentials of manifestation of will, and essentials of the subject matter of the legal act.

Legal possibility (permissibility) of a legal act is also an essential of the subject matter of the legal act (in addition to the physical possibility). Permissibility of a legal act means that the behaviour forming the subject matter of a legal act is not in contradiction with a legal regulation either by its content or purpose, and the legal regulation also does not circumvent any legal regulation or contravene public interest in any other way [cf. section 242(1)(a) of the Labour Code].

Existence of a law or any other generally binding legal regulation of mandatory character thus is the prerequisite for assessment of permissibility of the subject matter of the legal act. The legal act then can contravene the content or purpose of such law or legal regulation only if its does not correspond to the order or prohibition of a legal standard or if it does not follow the purpose expressed and (the only one) permitted.

Pursuant to the provision of section 44(1) of the Labour Code, both the employer and the employee may terminate the employment contract. The notice of termination must be in writing and delivered to the other party, otherwise it is not valid.

Pursuant to the provision of section 44(2) of the Labour Code, the employer may give notice of termination to his employee only for the grounds of termination explicitly stated in section 46(1) of the Labour Code; the ground for termination must be specified in such a way that it is not possible to replace it with other grounds; otherwise the notice of termination is not valid. The grounds for termination may not subsequently be changed.

It is evident from the cited provisions by which the formal essentials of a valid notice of termination have been determined that when using this kind of employment termination, the employer is, contrary to the employee, limited by permissibility of giving a notice of termination only for reasons stated expressly in the provisions of section 46(1) of the Labour Code which, in its letters a) to f) determines the individual elements enabling the notice of termination giving by the employer, e.g. organizational reasons, the employee's long-term health disability to perform his work, or breach of work discipline of certain intensity. All statutory grounds for termination by the employer stipulated in section 46(1) of the Labour Code are of equal importance and the employer is not limited in their choice (if application of more grounds for termination comes into consideration) ; the employer may apply any of the grounds for termination stipulated in the provisions of section 46(1) whose elements have been accomplished in the given case. As the Labour Code (and any of the other legal regulations) does not prohibit in any of its provisions termination of employment for more than one reason, giving a notice of termination for more reasons stipulated in the provisions of section 46(1) is not excluded, although the same notice period may not be related to them [cf. section 45(1) of the Labour Code]. Thus if the employer has the possibility to give the notice of termination for more reasons stipulated in the provisions of section 46(1) of the Labour Code, which can possibly have different notice period pursuant to section 45(1) of the Labour Code, it basically depends only on him whether he determines the ground for termination to correspond only to one element stipulated in the provisions of section 46(1) of the Labour Code, or he terminates the employment for other grounds as well if their elements have been accomplished in the given case as well. Therefore, we cannot

share the opinion of the Appellate Court (as well as of the first-instance court) that the given notice of employment termination given for grounds stipulated in the provisions of section 46(1)(c) and (e) of the Labour Code "stand up" because "cumulation of these grounds is not permissible due to the difference of the notice period duration [section 45(1) of the Labour Code] of the individual applied grounds for termination."

The fact that the employer used in his unilateral legal act aimed to termination of employment more reasons stipulated in the provisions of section 46(1) of the Labour Code, has the consequence that in the proceedings commenced on the employee's motion pursuant to the provision of section 64 of the Labour Code, individual grounds for termination must be examined separately and their effect for the employment continuation must be assessed separately as well. If the employment is terminated on the basis of one of them, other applied grounds become obsolete.

It follows from the fact that the court always assesses (is obliged to assess) the individual grounds for termination pursuant to the provision of section 46(1) of the Labour Code separately that compliance with the period of time stipulated in section 64 of the Labour Code must also be examined separately in relation to each applied ground for termination.

ANNOTATION

Pursuant to section 64 of the Labour Code, both employer and employee may assert before a competent court the invalidity of termination of an employment relationship by notice, by its immediate termination, by its termination during the trial period, or by agreement, but no later than two months after the day when the employment relationship should have ended as a result of such termination. Should the right pursuant to section 64 of the Labour Code be asserted after lapse of the prescribed time, the court shall take the extinguishment of the right into consideration although the party to the case does not object to it [cf. section 261(4) of the Labour Code].

It follows from the provision of section 64 that if an employer or an employee does not want the legal effects resulting from the employment termination to arise, he must file (within two months) an action to the court to declare invalidity of the legal act aiming to employment termination. The time for assertion of invalidity of employment termination commences to run pursuant to the provision of section 64 of the labour Code, i.e. on the day "when the employment relationship should have ended as a result of such termination." If a notice of termination was given, the commencement of this time running equals to the

lapse of the notice period as the law joins termination of employment with the moment of the notice period lapse [cf. section 45(1) first sentence of the Labour Code]. The two-month period pursuant to the provision of section 64 of the Labour Code is subject to lapse; by its lapse, the right for determination of invalidity of a legal act aimed to termination of employment shall extinguish and the employment termination, even though it was invalid, shall become effective. Extinguishment of the right pursuant to section 64 of the Labour Code must be taken into consideration by the court even though the party to the proceedings does not object to it [section 261(4) of the Labour Code]. Thus if the motion to determine invalidity of the legal act aimed to termination of employment was filed late (after the lapse of the two-month period pursuant to the provision of section 64 of the Labour Code), the court shall dismiss the motion even though the legal act was really invalid ….

As the Plaintiff in the assessed case seeks determination of invalidity of the notice of employment given to her by the Defendant by means of a letter dated April 30, 2002 for more (two) grounds stipulated in the provision of section 46(1) of the Labour Code, and as the individual grounds for termination – as given above – must always be assessed separately, it was the Court's duty to deal with the matter of compliance with the statutory period of time for the assertion of right pursuant to the provision of section 64 of the Labour Code in relation to each of the asserted grounds for termination [regardless of the fact whether or not both grounds were properly factually determined within the meaning of the provision of section 46(1) of the Labour Code]. However, it follows from the grounds for decision of judgments of courts of both instances that the first-instance court, led by an incorrect legal opinion, did not do that and the Appellate Court neither made it good in a way following from the provision of section 221 of the Code of Civil Procedure. If the court decided the case without determining, in accordance with the provision of section 120 of the Code of Civil Procedure, the circumstances decisive for the assessment of reality that the court is obliged to deal with *ex officio* (as it was in the heard case), the court would burden the proceedings with an error that could result in an incorrect decision of the case [section 241(2)(b) of the Code of Civil Procedure].

It follows from the above given text that the judgment of the Appellate Court is not correct. The Supreme Court of the Czech Republic thus dismissed it [section 243b(2 – the part of the sentence after the semicolon) of the Code of Civil Procedure] and as the reasons for which the judgment of the Appellate Court was dismissed are applied to the judgment of the first-instance court as well, the Supreme Court of the Czech Republic dismissed this decision as well and referred the case to the court of first instance [section 243b(3 – second sentence) of the Code of Civil Procedure].

INDIA

Supreme Court of India
Manager RBI, Bangalore v. S. Mani & others
C. A. No. 6306 – 6316 of 2003.

Temporary workers – termination – misconduct – entitlements

HEADNOTES

Facts

The Respondents herein were Ticca Mazdoors (temporary workers) working under the Appellant herein. Ticca Mazdoors are intermittently appointed by the Reserve Bank of India whenever absence of regular Class IV employees takes place. They are never regarded as regular Mazdoors. Two waiting lists are maintained by the Appellant. The first waiting list contains the names of such of them who may be appointed as regular Mazdoors whereas the second list is maintained for those who are to be engaged as Ticca Mazdoors. The name of the respondents figured in the second list. They were appointed in the said category as Ticca Mazdoor between the period 14 March, 1980 and 8 August, 1982 for the purpose of their possible appointment as regular Mazdoors. The Respondents herein were interviewed on different dates; during interview, they produced transfer certificates but their answers to the questions posed in this behalf were not in conformity therewith, where upon a verification was made and it was found that the said certificates were forged and fabricated.

Three first information reports were lodged for furnishing false certifications by the Respondents. In the criminal case, however, they were acquitted by three different judgments. Between October, 1987 and August, 1988, the Respondents submitted fresh school transfer certificates and requested the Appellant herein to re-employ them. As their request for re-employment was refused, an industrial dispute was raised resulting in a reference made by the Central Government for adjudication thereof to the Central Government Industrial Tribunal. Bangalore. The Industrial Tribunal by an award dated 18 December 1997 held that the Respondents having completed 240 days of service and their terminations having been brought about without complying with the provisions of Sec-

tion 25F of the Industrial Disputes Act and, thus, being illegal they were entitled to be reinstated in the Bank's services as per the prevailing rules and conditions of the service with full back wages.

The Appellant herein filed a Special Leave Petition against the said award which was dismissed as withdrawn with liberty to it to approach the High Court. The Appellant filed writ petitions before the Karnataka High Court; however the writ petitions were dismissed by the learned Single Judge. By reason of the impugned judgment dated 25 June 2002, the Division Bench allowed the said appeal in part modifying the award of the Tribunal as also the learned Single Judge to the effect that the back wages be paid from 23 July, 1993 instead of their respective dates of retrenchment. The Division Bench, however, gave liberty to the Appellant to hold domestic enquiry against the Respondents for the alleged misconduct. The Division Bench in issuing the aforesaid direction inter alia held that as the Respondents were not regularized in services for the alleged misconduct of producing false certificates, the same would amount to stigma and loss of confidence of the Appellant in them.

Decision

The impugned judgments, cannot be sustained which are accordingly set aside. The appeals are allowed.

Law Applied

INDUSTRIAL DISPUTES ACT, 1947.

Section 11-A- Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen

Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct re-instatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:

Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case maybe, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.

Section 25-F. Conditions precedent to retrenchment of workmen.

No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until –

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.

JUDGMENT

S. B. SINHA. J.

…

3. Mr. Mahendra Anand, learned senior counsel appearing on behalf of the Appellant would contend that as the Respondent herein did not report for duty between December, 1982 and March, 1987, they must be held to have abandoned their services.

4. The learned counsel would contend that the learned Tribunal committed a serious error of law insofar as it failed to take into consideration the fact that the Respondents were not able to prove that they had completed 240 days of service during a period of 12 months preceding the order of termination and in that view of the matter the question of compliance of Section 25F of the Industrial Disputes Act did not arise at all. Our attention was also drawn to the fact that during pendency of aforementioned industrial adjudication the management and the Union had arrived at a settlement pursuant whereto or in furtherance whereof all posts had been filled up. In any event, it was urged, only because the Respondents have allegedly completed 240 days of work, the same by itself would not confer any right on them to be regularized in service. Reliance in this connection has been placed on AIR 1994 Maharashtra State Co-operative Cotton Growers' Marketing Federation Ltd. and another v. Employees' Union and another [1994 Supp. (3) SCC 385 : AIR 1994 SC 1046].

5. The learned counsel would submit that no adverse inference could have been drawn for non-production of attendance register as sufficient explanation

therefor had been furnished. Reliance in this connection has been placed on Municipal Corporation, Faridabad v. Siri Niwas ((2004) 8 SCC 195 : AIR 2004 SC 4681).

6. It was further urged that the burden of proof in that behalf lay upon the Respondents and in support thereof reliance has been placed on M.P. Electricity Board.v. Hariram [(2004) 8 SCC 246 : AIR 2004 SC 4791].

7. The Tribunal, according to Mr. Anand, misdirected itself in passing the impugned award insofar as it considered irrelevant factors and failed to take into consideration the relevant facts. The learned counsel has further placed before us some school transfer certificates produced by some of the Respondents in December, 1982 and March, 1987 with a view to show that the action taken by the Appellant herein was not wholly arbitrary so as to justify a direction for reinstatement of the Respondents in service only on the ground that they stood acquitted in the criminal cases. The judgments of the criminal Court having been rendered by giving benefit of doubt to the Respondents herein, the learned counsel would submit, the same itself could not have been a ground for grant of relief. Reliance in this connection has been placed on Union of India and another v. Bihari Lal Sidhana ((1997) 4 SCC 385 : AIR 1997 SC 3659).

8. Mr. N.G. Phadke, learned counsel appearing on behalf of the Respondents, on the other hand, supported the award of the Tribunal and consequently the judgments of the learned Single Judge and the Division Bench of the Karnataka High Court contending that

(i) the Respondents' contentions that they continued in service, from March 1980 to August 1982 as disclosed in their pleadings and representations, having not been denied, the same must be held to have been admitted.

(ii) as the Appellant herein could not prove its case that the Respondents had abandoned their services, the Tribunal rightly placed the onus of proof on it;

(iii) as despite an order made in this behalf the Appellant did not produce attendance registers, the impugned award could have been passed upon drawing an adverse inference. Reliance in this behalf has been placed on H.D. Singh v. Reserve Bank of India and others [(1985) 4 SCC 201 : AIR 1986 SC 132].

(iv) in any event, the Appellant never raised a contention that the Respondents had not worked for more than 240 days during preceding 12 months.

(v) the order of the Division Bench being a consent order, no appeal lies there against.

(vi) although by reason of the Respondents' being reinstated in service, they would continue to have the status of Ticca Mazdoors, but having regard

to the intervening circumstances, viz., the settlement arrived at by and between the Appellant and the Union, they would be entitled to be regularized in services in terms of the decision of this Court in Chief General Manager, Reserve Bank of India v. General Secretary, Reserve Bank Workers Organisation (2001 (2) LLJ 487; and

(vii) Section 25F of the Industrial Disputes Act being mandatory in nature, the provisions thereof are required to be complied with even when the workmen were employed as Badli Workers or Ticca Mazdoors as daily wager. Reliance in this behalf has been placed [citing numerous cases].

STATUS OF TICCA MAZDOORS

9. As noticed hereinbefore, Ticca Mazdoors are not regarded as regular Mazdoors. Two waiting lists are maintained by the appellant. The first waiting list contains the names of such Mazdoors who may be appointed as regular Mazdoors whereas the second list is maintained for those who are to be engaged as Ticca Mazdoors.

10. The service of Ticca Mazdoors being not permanent in nature can be dispensed with subject to compliance of the statutory or contractual requirements, if any. Their status is not higher than that of a temporary workman or a probationer. …

EFFECT OF JUDGMENT OF ACQUITTAL

11. The Appellant's contention as regard holding of interview of the Respondents herein in December, 1982 and March, 1987 is not denied or disputed. It is also further not in dispute that their educational qualifications and other details were required to be verified. Institution of three criminal cases stands admitted. Before us a judgment passed in the criminal cases has been produced, from a perusal whereof it would appear that the contention raised by the Respondents herein that they had never produced any transfer certificate at the time of interview was not raised. If the contention of the Appellant as regard production of transfer certificates by the Respondents at the time of their interview finds acceptance, then concededly the said certificates vis-a-vis the certificates produced by the Respondents in the year 1987 are different in several respects, including the name of the father and name of the school, date of birth, etc. It is true that the certificates produced by them in 1987 were found to be genuine but the same by itself would not lead to a conclusion, as suggested by Mr. Phadke, that the Respondents themselves did not produce the said certificates before the interview board or the same were manufactured by the officers of the Reserve Bank of India.

12. It is trite that a judgment of acquittal passed in favour of the employees by giving benefit of doubt per se would not be binding upon the employer. The employer had no occasion to initiate departmental proceeding against the Respondents. They were not regularly employed. They, according to the Appellant, filed forged and fabricated documents and as such were not found fit to be absorbed in regular service. The effect of a judgment of acquittal vis-a- vis the alleged misconduct on the part of the workmen fell for consideration before this Court in Biharl Lal Sidhana … at wherein it was held:

> "5. It is true that the respondent was acquitted by the criminal court but acquittal does not automatically give him the right to be reinstated into the service. It would still be open to the competent authority to take decision whether the delinquent Government servant can be taken into service or disciplinary action should be taken under the Central Civil Services (Classification, Control & Appeal) Rules or under the Temporary Service Rules. Admittedly, the respondent had been working as a temporary Government servant before he was kept under suspension. The termination order indicated the factum that he, by then, was under suspension. It is only a way of describing him as being under suspension when the order came to be passed but that does not constitute any stigma. Mere acquittal of Government employee does not automatically entitle the Government servant to reinstatement. As stated earlier, it would be open to the appropriate competent authority to take a decision whether the enquiry into the conduct is required to be done before directing reinstatement or appropriate action should be taken as per law, if other wise, available. Since the respondent is only a temporary Government servant, the power being available under Rule 5(1) of the Rules, it is always open to the competent authority to invoke the said power and terminate the services of the employee instead of conducting the enquiry or to continue in service a Government servant accused of defalcation of public money. Reinstatement would be a charter for him to indulge with impunity in misappropriation of public money."

13. Recently in KrishnakalI Tea Estate v. Akhil Bharatiya Chah Mazdoor Sangh and Another[(2004) 8 SCC 2001, one of us, Santosh Hegde, J., speaking for a 3-Judge Bench observed:

> "25. The next contention addressed on behalf of the respondents is that the Labour Court ought not to have brushed aside the finding of the criminal Court which according to the learned Single Judge "honourably" acquitted the accused workmen of the offence before it. We have been taken through the said judgment of the criminal Court and we must record that there was such "honourable" acquittal by the criminal Court. The acquittal by the criminal Court was based on the fact that the prosecution did not produce sufficient material to establish its charge which is clear from the following observations found in the judgment of the criminal court: "Absolutely in the evidence on record of the

prosecution witnesses I have found nothing against the accused persons. The prosecution totally fails to prove the charges under Sections 147,353, 329 IPC."

26. Learned counsel for the respondents in regard to the above contention relied on a judgment of this Court in the case of Capt. M. Paul Anthony. In our opinion, even that case would not support the respondents herein because in the said case the evidence led in the criminal case as well as in the domestic enquiry was one and the same and the criminal case having acquitted the workmen on the very same evidence, this Court came to the conclusion that the finding to the contrary on the very same evidence by the domestic enquiry would be unjust, unfair and rather oppressive. It is to be noted that in that case the finding by the Tribunal was arrived at in an ex-parte departmental proceeding. In the case in hand, we have noticed that before the Labour Court the evidence led by the management was different from that led by the prosecution in the criminal case and the materials before the criminal Court and the Labour Court were entirely different. Therefore, it was open to the Labour Court to have come to an independent conclusion dehors the finding of the criminal Court …"

It was observed:

"From the above, it is seen that the approach and the objectives of the criminal proceedings and the disciplinary proceedings are altogether distinct and different. The observations therein indicate that the Labour Court is not bound by the findings of the criminal Court."

14. In Cholan Roadways Limited v. G. Thirugnanasambandam [2004 (10) SCALE 578 : AIR 2004 sc 570], this Court held:

"19. It is further trite that the standard of proof required in a domestic enquiry vis a-vis a criminal trial is absolutely different. Whereas in the former 'preponderance of probability' would suffice; in the latter, proof beyond all reasonable doubt' is imperative."

15. The contention that the Respondents had not produced such certificates or the same have been fabricated at the instance of some officers of the Reserve Bank of India, therefore, does not find our acceptance. It is rejected accordingly.

SECTION 25-F OF THE INDUSTRIAL DISPUTES ACT

16. The provisions contained in Section 25-F of the Industrial Disputes Act are required to be complied with if the workman concerned had completed 240 days of service in a period of 12 months preceding the order of termination. The Tribunal admittedly based its decision on the following:

(i) The Appellant did not produce the attendance register.

(ii) There was circumstantial evidence to show that the Respondents herein had made several representations between March, 1987 and April, 1990.

(iii)The witness examined on behalf of the Appellant MW3 conceded that the workman had worked for 240 days.

17. The workmen raised a contention of rendering a continuous service between April, 1980 to December, 1982 in their pleadings and representations. Admittedly, the Appellant herein in their rejoinder denied and disputed the said facts stating:

> "i) as regards paragraph 1, it is denied that the I Party has worked continuously from April, 1980 to December, 1982. The factual position is that the I party was engaged off and on from August 1980 to January 1983 depending upon the availability of casual vacancies on various dates and the need for engaging ticcas."

18. The concerned workmen in their evidence did not specifically state that they had worked for 240 days. They merely contended in their affidavit that they are reiterating their stand in the claim petition.

19. Pleadings are no substitute for proof. No workman, thus, took an oath to state that they had worked for 240 days. No document in support of the said plea was produced. It is, therefore not correct to contend that the plea raised by the Respondents herein that they have worked continuously for 240 days was deemed to have been admitted by applying the doctrine of non-traverse. In any event the contention of the Respondents having been denied and disputed. It was obligatory on the part of the Respondents to add new evidence. The contents raised in the letters of the Union dated 30th May, 1988 and 11th April, 1990 containing statements to the effect that the workmen had been working continuously for 240 days might not have been replied to, but the same is of no effect as by reason thereof, the allegations made therein can be said to have been proved particularly in view of the fact that the contents thereof were not proved by any witness. Only by reason of non-response to such letters, the contents thereof would not stand admitted. The Evidence Act does not say so.

20. The Appellant, therefore, cannot be said to have admitted that the Respondent had worked for more than 240 days.

NON-PRODUCTION OF THE DOCUMENTS

21. It is no doubt true that the industrial tribunal by an order dated 12th May, 1993 inter alia directed the Appellant to produce register of workmen for the period between April, 1980 and December, 1982 in respect of the first party workmen and attendance register. The Tribunal, however, in its award noticed the explanation of the Appellant that the attendance registers being old and hence could not be produced holding:

> "Of course, it is true that the 2nd party had given an explanation namely those attendance registers are very old and hence could not be produced. But this ex-

planation cannot be acceptable, because as I pointed out earlier, apart from the attendance registers, there may be other relevant records to show that the 1st parties either worked continuously as alleged by the 1st parties or only during the leave vacancy with break of service."

22. The learned Tribunal further held:

"Therefore, the materials placed before this Tribunal lead to the only conclusion that the 2nd party is not in a position to prove their case namely the concerned first parties I to 11 had abandoned themselves without any proper reasons."

23. An adverse inference, therefore, was drawn for non-production of the attendance register alone, and not for non-production of the wage-slips. Reference to 'other relevant documents' must be held to be vague as the Appellant herein had not been called upon to produce any other document for the said purpose.

24. It appears that the learned Tribunal considered the matter solely from the angle that the Appellant has failed to prove its plea of abandonment of service by the Respondents.

25. The question came up for consideration before this Court recently in Siri Niwas … wherein it was held:

"15. …A Court of Law even in a case where provisions of the Indian Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against his contentions. The matter, however, would be different where despite direction by a Court the evidence is withheld. Presumption as to adverse inference for non-production of evidence is always optional and one of the factors which is required to be taken into consideration in the background of facts involved in the list. The presumption, thus, is not obligatory because notwithstanding the intentional non-production, other circumstances may exist upon which such intentional non-production may be found to be justifiable on some reasonable grounds."

26. Referring to the decision of this Court in Indira Nehru Gandhi v. Raj Narain [1975 Supp SCC 1 : AIR 1975 SC 2299], this Court observed:

"19. Furthermore a party in order to get benefit of the provisions contained in Section 114(1) of the Indian Evidence Act must place some evidence in support of this case. Here the Respondent failed to do so.",

27. In Hariram (supra), this SC Court observed:

"11. The above burden having not been discharged and the Labour Court having held so, in our opinion, the Industrial Court and the High Court erred in basing an order of reinstatement solely on an adverse inference drawn erroneously."

28. As noticed hereinbefore, in this case also the Respondents did not adduce any evidence whatsoever. Thus, in the facts and circumstances of the case, the Tribunal erred in drawing an adverse inference.

BURDEN OF PROOF

29. The initial burden of proof was on the workmen to show that they had completed 240 days of service. The Tribunal did not consider the question from that angle, it held that the burden of proof was upon the Appellant on the premise that they have failed to prove their plea of abandonment of service stating:

> "It is admitted case of the parties that all the 1st parties . . . have been appointed by the 2nd party as Ticca mazdoors. As per the 1st parties, they had worked continuously from April, 1980 to December, 1982. But the 2nd party had denied the above said claim of continuous service of the 1st parties on the ground that the 1st parties has not been appointed as regular workmen but they were working only as temporary part time workers as Ticca mazdoor and their services were required whenever necessity arose that too on the leave vacancies of regular employees. But as strongly contended by the counsel for the 1st party, since the 2nd party had denied the above said claim of continuous period of service it is for the 2nd party to prove through the records available with them as the relevant records could be available only with the 2nd party."

30. The Tribunal, therefore, accepted that the Appellant had denied the Respondents' claim as regard their continuous service.

…

35. Mr. Phadke placed strong reliance on [the] H.D. Singh [case] to contend that adverse inference was drawn therein for non-production of certain documents. [That case] was rendered on its own fact. In that case, a Special Leave Petition was entertained by this Court directly from the Award passed by the Industrial Tribunal. Before this Court. both the parties filed affidavits and several documents. The workmen therein categorically disclosed the number of days they had worked in each year. In that case the name of the workman was struck off as he had allegedly concealed his educational qualification; purportedly on the basis of a confidential circular issued by the bank on June 27, 1976 to the effect that the matriculates will not be retained in the list. As the workman therein in reply to the letter of the Bank stated that he was not a matriculate in 1974 and he passed the examination only in 1975, he was not given any work even after July, 1976 without issuing any written notice terminating his services. Holding that the workman had been retrenched from service, as noticed hereinbefore, affidavits of the parties were filed and, thus, some evidence had been adduced. The number of actual days worked by the workman therein was also brought on records by the Respondent. The said decision, thus, having been

rendered in the fact situation obtaining therein does not constitute a binding precedent.

CIRCUMSTANTIAL EVIDENCE

36. The Tribunal also relied upon some purported circumstantial evidence to hold that the workmen had completed 240 days of work in the following terms:

> "That apart, the circumstantial evidence also would show that the plea of the abandonment had been taken by the 2nd party only for the sake of defence in this case and it is not a real one. In order to explain the same when we perused the admitted documents Exs. M-1 to M-7 together with the admitted evidence of MW-3 at para 5 of his deposition, we would see that from 3.3.87 till 11.4.90 . . . almost all the 1st parties before this Tribunal had continuously requested the management for their reinstatement alleging that they served in the 2nd party Bank continuously from April, 1980 to December, 1982. They also pleaded the same in their respective claim petitions before us. But the management as per Ex. M 8 dated 8.5.1991 had not denied the alleged claim of continuous service of the 1st parties of their earliest opportunity. But, on the other hand, Ex. M-8 would show that for absorption of the 1st parties the 2nd party had put some other conditions and demanded the 1st parties workmen for their signature if they agreed for those conditions. If that be the case, it could be seen that, at the earliest point of time, the 2nd party Bank had not denied the said claim of continue service made by 1st parties. Hence, the documents Exs. M- 1 to M-8 would also disqualify the 2nd party from claiming said plea namely since because the 1st parties had worked temporarily that too only on leave vacancy they are not entitled for any benefits under the provisions of the I.D. Act."

37. It is difficult to accept the logic behind the said findings.

38. Only because the Appellant failed to prove their plea of abandonment of service by the Respondents, the same in law cannot be taken to be a circumstance that the Respondents have proved their case.

39. The circumstances relied upon, in our opinion, are wholly irrelevant for the purpose of considering as to whether the Respondents have completed 240 days of service or not. A party to the list may or may not succeed in its defence. A party to the list may be filing representations or raising demands, but filing of such representations or raising of demands cannot be treated as circumstances to prove their case.

ADMISSION BY MW-3

40. We have been taken through the deposition of Shri S. Nagarajan, MW-3. He was examined as a witness to prove production of the certificates by the Respondents. He had verified transfer certificates filed subsequently by the Respondents and the same were found to be all genuine. He did not make any

admission as regard the continuous working of the Respondents for a period of more than 240 days nor is there even a suggestion to that effect on behalf of the Respondents herein.

41. The Tribunal's findings are, thus, based on no evidence and must be held to be irrational.

JUDICIAL REVIEW

42. The findings of the learned Tribunal, as noticed hereinbefore, are wholly perverse. He apparently posed unto itself wrong questions. He placed onus of proof wrongly upon the Appellant. His decision is based upon irrelevant factors not germane for the purpose of arriving at a correct finding of fact. It has also failed to take into consideration the relevant factors. A case for judicial review, thus, was made out.

…

44. The Appellant in para 13.14 of the writ petition contended:

> 13.14 For that the Industrial Tribunal erred in holding that all the Ticca Mazdoors are workmen as they have completed 240 days of continuous service during the year 1980-1982, merely because the Petitioner could not produce the attendance registers for the relevant period as the same being old, and destroyed after expiry of its stipulated period of preservation of 5 years were not available with the Petitioner Bank."

45. Neither the learned Single Judge nor the Division Bench adverted to the said question at all. The learned Single Judge without considering the contentions raised by the Appellant held:

> "The Tribunal has extensively dealt with the points of dispute relating to justification of the Bank in terminating the services of the workmen. In paragraphs 16 to the Award of the Tribunal [it] has elaborately discussed facts, evidence and the material placed on record with reference to the case laws relating to 'retrenchment'. In this view of the matter, it is wholly unnecessary to refer Mr. Padke, learned counsel for respondents 1 to 11. The Tribunal has recorded a finding that the action of the Bank amounts to retrenchment as defined under Section 2(oo) of the Act and there is violation of mandatory requirement of Section 25-F of the Act. Therefore, this Court should not interfere with the findings of fact recorded by the Tribunal."

46. The Division Bench unfortunately in its judgment did not take into consideration the relevant questions. It proceeded on a presupposition that the Bank intended to reinstate the workmen. The Division Bench without any detailed discussion observed:

> "The submission of Mr. Kasturi, learned senior counsel for the Bank has some force in so far as both the order of the Tribunal and the learned Single Judge

proceeded on the footings that the termination was contrary to Section 25-F of the Industrial Dispute Act."

47. Laying emphasis on the alleged right of the Respondents to be regularized in their services and denial thereof by the Appellant herein, the Division Bench held that discontinuance of the workmen on the ground that they filed forged certificate cast a stigma and, on that ground, it upheld the award of the learned Industrial Tribunal as also the judgment of the learned Single Judge.

48. The Division Bench, however, relying on or on the basis of, the decision of this Court in Chief General Manager, Reserve Bank of India …directed that the back-wages shall be paid only from 23-7-1993.

EFFECT OF THE ORDER OF REINSTATEMENT

49. The terms and conditions of settlement by and between the Reserve Bank of India and the Reserve Bank Workers Federation although not produced before us, the same appear in a judgment of this Court in M.G. Datania and others v. Reserve Bank of India and another (Civil Appeal No. 7407 of 1994, disposed of on 28th November, 1995); the relevant portion whereof is as under:

"Terms of Settlement

(i) The existing arrangement or practice of engaging persons on daily wages purely on temporary and ad-hoc basis in Class IV in various cadres shall be discontinued forthwith.

(ii) The leave reserve in the case of mazdoors employed in Cash Department shall be increased from the existing level of 15% to 25%.

(iii) The leave reserve in other categories in Class IV shall be increased from the existing level of 15% to 20%.

(iv) The Additional posts that may be created or may arise as a consequence of paragraphs (ii) and (iii) above, together with existing vacancies, if any, shall be utilized for giving (a) full time employment to part-time employees to the extent possible and (b) regular full-time or part-time employment, as the case may be, to the ticcas who have rendered continuous service of three years or more as on 19th November, 1992. However, if the number of available vacancies at a particular centre is less than the number of such ticcas at that centre to be given regular full-time/part-time appointments, the ticcas in excess of the available vacancies at that centre shall have to move at their own cost to another centre where vacancies are available after absorbing eligible ticcas at that centre on a returnable basis as and when vacancies arise in the parent centre. Such repatriation being in the nature of request transfer shall be at their own cost and also subject to usual terms and conditions prescribed in respect of request transfers. Such of the ticcas who are not willing to the above arrangements shall have no claim to be absorbed in the Bank.

(v) The Federation shall not under any circumstances insist on engagement of ticcas on daily wage basis for carrying out Bank's work smoothly and without any hindrance or disturbance in any Section/Department including Cash Department of the Bank irrespective of number of employees absent for any reason whatsoever. In other words, notwithstanding any absenteeism in Class IV cadre (any group), the work of the Bank shall be carried on by and with the assistance of the employees present on any given day. If, however, there is an increase in the Bank's normal work on a long term basis it would review the overall strength in Class IV cadre at the centre concerned in the normal course."

50. One of the terms, therefore, postulates that regular full time or part time Ticcas whether in regular full time or part time employment who have rendered continuous service of three years or more as on 19th November, 1992 were entitled to be considered for absorption in the additional posts that were required to be created by reason of such settlement. Such settlement had been arrived having regard to the fact that the same Ticca Mazdoors had been working for a long time.

51. Absorption of the Ticca Mazdoors in the services of the appellant was not automatic. The concerned workmen were required to fulfill the conditions laid down therefor.

52. Would by reason of the order of reinstatement the status of the Respondents change is the question.

53. In law, 240 days of continuous service by itself does not give rise to claim of permanence. Section 25-F provides for grant of compensation if a workman is sought to be retrenched in violation of the conditions referred to therein.…

54. In A. Umarani (supra) this Court held:

37. "Regulation, in our considered opinion, is not and cannot be the mode of recruitment by any "State" within the meaning of Article 12 of the Constitution of India or any body or authority governed by a Statutory Act or the Rules framed there under. It is also now well settled that an appointment made in violation of the mandatory provisions of the statute and in particular ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation ….

55. Yet again, in Executive EngIneer, ZP Engg. Divn. And another vs. Digambara Rao and others ((2004) 8 SCC 262) this Court held:

"It may not be out of place to mention that completion of 240 days of continuous service in a year may not by itself be a ground for directing an order of regularization. It is also not the case of the Respondents that they were appointed in accordance with the extant rules. No direction for regularization of their services, therefore, could be issued."

56. Furthermore, a direction for reinstatement for non-compliance of the provisions of Section 25-F of the Industrial Disputes Act would restore to the workman the same status which he held when terminated. The Respondents would, thus, continue to be Ticca Mazdoors, meaning thereby their names would continue in the second list. They had worked only from April, 1980 to December, 1982. They did not have any right to get work. The direction of continuity of service per se would not bring them within the purview of terms of settlement. Even in the case of a statutory corporation in S.G. Kotturappa (supra), this Court observed :

> "It is not a case where the Respondent has completed 240 days of service during the period of 12 months preceding such termination as contemplated under Section 25-F read with Section 25-B of the Industrial Disputes Act, 1947. The Badli workers, thus, did not acquire any legal right to continue in service. They were not even entitled to the protection under the Industrial Disputes Act nor the mandatory requirements of Section 25-F of the Industrial Disputes Act were required to be complied with before terminating his services, unless they complete 240 days' service within a period of twelve months preceding the date of termination."

57. It was further held:

> "The terms and conditions of employment of a Badli worker may have a statutory flavour but the same would not mean that it is not otherwise contractual. So long as a worker remains a Badli worker, he does not enjoy a status. His services are not protected by reason of any provisions of the statute. He does not hold a civil post. A dispute as regard purported wrongful termination of services can be raised only if such termination takes place in violation of the mandatory provisions of the statute governing the services. Services of a temporary employee or a Badli worker can be terminated upon compliance of the contractual or statutory requirements."

58. Mr. Phadke, as noticed hereinbefore, has referred to a large number of decisions for demonstrating that this Court had directed reinstatement even if the workmen concerned were daily wages or were employed intermittently. No proposition of law was laid down in the aforementioned judgments. The said judgments of this Court, moreover, do not lay down any principle having universal application so that the Tribunals, or for that matter the High Court, or this Court, may feel compelled to direct reinstatement with continuity of service and back-wages. The Tribunal has some discretion in this matter. Grant of relief must depend on the fact-situation obtaining in a particular case. The industrial adjudicator cannot be held to be bound to grant some relief only because it will be lawful to do so.

59. In Haryana State CO-op. Land Dev. Bank vs. Neelám (JT SCW 1439 2005 (2) SC 600), this Court observed:

> "It is trite that the courts and tribunals having plenary jurisdiction have discretionary power to grant an appropriate relief to the parties. The aim and object of the Industrial Disputes Act may be to impart social justice to the workman but the same by itself would not mean that irrespective of his conduct a workman would automatically be entitled to relief. The procedural laws like estoppel, waiver and acquiescence are equally applicable to the industrial proceedings. A person in certain situation may even be held to be bound by the doctrine of Acceptance Sub Silentio."

OTHER CONTENTIONS

60. We have noticed hereinbefore that the Appellant herein raised a specific plea denying or disputing the claim of the Respondents that they had completed 240 days of work. Such a plea having been raised both before the Industrial Tribunal as also before the High Court, we cannot accept that the Appellant had abandoned such a plea. Even if this Special Leave Petition, it is contended:

> "(3) For that the High Court ought to have held that the disengagement of the Ticca Mazdoors (Respondents) who were daily wage casual workers, did not involve any retrenchment and as such there was no question of reinstatement of Respondents with full back-wages from 23-7-1993."

61. The contention of Mr. Phadke that they have abandoned the said plea cannot be accepted. Similarly, the contention of Mr. Phadke raised before us that the order passed by the Division Bench was a consent order is unacceptable. The Division Bench does not say so. Such a contention has been raised only on the basis of a statement made by the Respondents in the counter-affidavit wherein the reference had been made to one order of the Division Bench asking the parties to make endeavour for settlement. The Respondents contend that the order of the Division Bench is virtually a consent order. No settlement admittedly had been arrived at. A party to the cause in absence of a statutory interdict, cannot be deprived of his right of appeal. The High Court has passed the judgment upon consideration of the rival contentions raised at the Bar. It arrived at specific findings on the issues framed by it. It has, for the reasons stated in the impugned judgment, affirmed the findings of the Industrial Tribunal as also the learned single Judge. The impugned order of the Division Bench, in our opinion, by no stretch of imagination, can be said to have been passed with consent of the parties. However, we agree with the opinion of the Tribunal that the plea of abandonment of service by the Respondents in the facts and circumstances of the case was wholly misconceived.

62. CONCLUSION

For the reasons aforementioned, the impugned judgments, cannot be sustained which are accordingly set aside. The appeals are allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

ANNOTATION

Here the Appellant is the Reserve Bank of India, which is the apex institution of the country controlling and monitoring of finance; therefore its smooth functioning is utmost important. Ticca Mazdoors (Temporary workers) are intermittently appointed by the Reserve Bank of India whenever absence of regular Class IV employees takes place The Respondents were not regularized in services for the alleged misconduct of producing false certificates, the same would amount to stigma and loss of confidence of the Appellant in them. The aim and object of the Industrial Disputes Act may be to impart social justice to the workman but the same by itself would not mean that irrespective of his conduct a workman would automatically be entitled to relief.

EUROPEAN COMMUNITIES

Court of Justice
Irmtraud Junk v Wolfgang Kühnel

Directive 98/59/EC – collective redundancies – consultation with workers' representatives – notification to the competent public authority – concept of "redundancy" – time at which redundancy takes effect

HEADNOTES

Facts

Mrs. Junk was employed as a care assistant and domestic carer by the company AWO Gemeinnutzige Pflegegesellschaft Sudwest mbH (AWO). AWO had approximately 430 employees and was engaged in the supply of domestic care services. A works council had been established in the company.

On 31 January 2002, AWO lodged a request for the opening of insolvency proceedings on grounds of financial difficulties. With effect from February 2002, it released all of its employees from their obligation to work and did not pay them any remuneration for January 2002. The insolvency proceedings were opened on 5 February 2002, which were followed by the liquidation proceedings beginning on 1 May 2002. Mr. Kühnel was appointed liquidator.

By letter of 19 June 2002, which was received the same day, Mr. Kühnel informed the chairman of the works council that, as a consequence of the closure of the company, he intended to terminate all remaining contracts of employment, including that of Mrs. Junk, in compliance with the maximum three-month period of notice laid down in the insolvency proceedings, that is to say, with effect from 30 September 2002, and to carry out a collective redundancy. The chairman of the works council responded with a letter dated 26 June 2002 in which he informed the liquidator that the council was also eager to see the matter resolved swiftly.

Mr. Kühnel had previously concluded with the works council, on 23 May 2002, a compensation agreement in respect of the cessation of AWO's activities

and a social plan as required by the Law on the Organisation of Businesses (Betriebsverfassungsgesetz).

By letter of 27 June 2002, which Mrs. Junk received on 29 June 2002, Mr. Kühnel terminated her contract of employment, with effect from 30 September 2002, on grounds relating to the business.

Mrs. Junk challenged that redundancy by application lodged with the Arbeitsgericht (Labour Court) Berlin on 17 July 2002.

By letter of 27 August 2002, MR. Kuhnel notified the labour office that 172 employees were to be made redundant with effect from 30 September 2002, in accordance with the Law on Employment Protection (Kundigungsschutzgesetz), which governs collective redundancy procedures.

The Arbeitsgericht Berlin decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

1. Are Articles 2 to 4 of Directive 98/59/EC to be construed as meaning that the event constituting redundancy consists of the expression by the employer of his intention to put an end to the contract of employment or of the actual cessation of the employment relationship on the expiry of the period in the notices of redundancy?
2. Is an employer entitled to carry out collective redundancies before the end of the consultation procedure set out in Article 2 of the directive and of the notification procedure set out in Articles 3 and 4 of the directive?

Decision

1. Articles 2 to 4 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies must be construed as meaning that the event constituting redundancy consists in the declaration by an employer of his intention to terminate the contract of employment.

2. An employer is entitled to carry out collective redundancies after the conclusion of the consultation procedure provided for in Article 2 of Directive 98/59 and after notification of the projected collective redundancies as provided for in Articles 3 and 4 of that directive.

Law Applied

See Judgment.

JUDGMENT

. . .

32. According to the information provided by that court, the term "Entlassung" used in the German-language version of the directive refers, in German law, to the actual cessation of the employment relationship and not to the expression by the employer of his intention to put an end to the contract of employment.

33. It must be borne in mind in this regard that, according to settled case-law, the necessity for uniform application and accordingly for uniform interpretation of a Community measure makes it impossible to consider one version of the text in isolation, but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light, in particular, of the versions in all languages.

34. With regard to the directive, it should be pointed out that, in its versions in languages other than German, the term used in the place of 'Entlassung' either covers at the same time both of the events referred to by the Arbeitsgericht or refers rather to the expression by the employer of his intention to terminate the contract of employment.

35. Next, it must be noted that Article 2(1) of the directive imposes an obligation on the employer to begin consultations with the workers' representatives in good time in the case where he is contemplating collective redundancies. Article 3(1) requires the employer to notify the competent public authority of any projected collective redundancies.

36. The case in which the employer is contemplating collective redundancies and has drawn up a project to that end corresponds to a situation in which no decision has yet been taken. By contrast, the notification to a worker that his or her contract of employment has been terminated is the expression of a decision to sever the employment relationship, and the actual cessation of that relationship on the expiry of the period of notice is no more than the effect of that decision.

37. Thus, the terms used by the Community legislature indicate that the obligations to consult and to notify arise prior to any decision by the employer to terminate contracts of employment.

38. Finally, this interpretation is confirmed, in regard to the procedure for consultation of workers' representatives, by the purpose of the directive, as set out in Article 2(2), which is to avoid terminations of contracts of employment or to reduce the number of such terminations. The achievement of that purpose would be jeopardised if the consultation of workers' representatives were to be subsequent to the employer's decision.

39. The answer to the first question must therefore be that Articles 2 to 4 of the directive must be construed as meaning that the event constituting redundancy consists in the declaration by an employer of his intention to terminate the contract of employment.

The second question

40. By its second question, the Arbeitsgericht is seeking to ascertain whether an employer is entitled to carry out collective redundancies before the end of the consultation procedure set out in Article 2 of the directive and of the notification procedure set out in Articles 3 and 4 of the directive.

41. It follows already from the answer to the first question that an employer cannot terminate contracts of employment before he has engaged in the two procedures in question.

42. With regard to the consultation procedure, this is provided for, within the terms of Article 2(1) of the directive, with a view to reaching an agreement. According to Article 2(2), this procedure must, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures.

43. It thus appears that Article 2 of the directive imposes an obligation to negotiate.

44. The effectiveness of such an obligation would be compromised if an employer was entitled to terminate contracts of employment during the course of the procedure or even at the beginning thereof. It would be significantly more difficult for workers' representatives to achieve the withdrawal of a decision that has been taken than to secure the abandonment of a decision that is being contemplated.

45. A contract of employment may therefore be terminated only after the conclusion of the consultation procedure, that is to say, after the employer has complied with the obligations set out in Article 2 of the directive.

46. So far as concerns the procedure for notifying the competent public authority, it must be remembered that, in accordance with Article 3 of the directive, the employer is required to notify the competent authority of any projected collective redundancies.

47. Under Article 4(2) of the directive, notification has the purpose of allowing the competent authority to seek solutions to the problems raised by the projected collective redundancies.

48. Article 4(2) states that the competent authority must use the period provided for in Article 4(1) for the purpose of seeking such solutions.

49. The period in question is one of at least 30 days following notification. Under the conditions laid down in the second subparagraph of Article 4(1) and in Article 4(3) of the directive, Member States may grant the competent public authority the power to reduce or extend that period.

50. Under the first subparagraph of Article 4(1) of the directive, collective redundancies, that is to say, termination of the contracts of employment, may take effect only after expiry of the period applicable.

51. That period consequently corresponds to the minimum period which must be available to the competent authority for the purpose of seeking solutions.

52. By setting out an express proviso in regard to provisions governing individual rights with regard to notice of dismissal, the first subparagraph of Article 4(1) of the directive is necessarily contemplating a situation in which contracts of employment have already been terminated, thereby setting such a period in motion. The proviso in regard to the expiry of a period of notice differing from that provided for by the directive would make no sense if no period of notice had started to run.

53. In those circumstances, it must be held that Articles 3 and 4 of the directive do not preclude termination of the contracts of employment during the course of the procedure which they institute, on condition that such termination occurs after the projected collective redundancies have been notified to the competent public authority.

54. The answer to the second question must therefore be that an employer is entitled to carry out collective redundancies after the conclusion of the consultation procedure provided for in Article 2 of the directive and after notification of the projected collective redundancies as provided for in Articles 3 and 4 of that directive.

ANNOTATION

In this case the European Court of Justice determines at what point in time a redundancy can be taken to occur for purposes of determining when the duties of consultation and notification are triggered under the provisions of Directive 98/59/EC and at what point in relation to the duties to consult and notify an employer is entitled to carry out collective redundancies. The judgment represents an important clarification given that the directive fails to indicate the event triggering redundancy or to refer in this regard to the laws of the Member States.

The Court interprets the relevant provisions in light of the Directive's purpose: to avoid terminations of contracts of employment or to reduce the number of such terminations. The Court finds that the achievement of that purpose would be jeopardised if the consultation of workers' representatives were to be subsequent to the employer's decision. Accordingly, the Court construes Article 2(1), which imposes an obligation on the employer to begin consultations with the workers' representatives in good time in the case where he is contemplating collective redundancies, and Article 3(1), which requires the employer to notify the competent public authority of any projected collective redundancies as meaning that the event constituting redundancy consists in the declaration by an employer of his intention – not his decision – to terminate the contract of employment.

With regards to when the employer is entitled to carry out collective redundancies, the Court notes that Article 2 of the directive imposes an obligation to negotiate regarding ways and means of avoiding collective redundancies or reducing the number of workers affected. Accordingly, the effectiveness of this obligation would be compromised if an employer were entitled to terminate contracts of employment during the course of the consultation procedure. Collective redundancies may be carried out only after the employer has complied with the consultation obligations set out in Article 2 of the directive. In contrast, the Court does not find that the employer has any duty to negotiate with the competent authority. The employer must merely notify the competent authority. Accordingly, the employer can give the employees notices of termination before the period available to the competent authority expires on condition that the projected collective redundancies have been notified to the competent public authority. Further, the notice periods must not expire, that is the employment contracts may not actually terminate, before the expiration of the period granted to the competent authority after notification. This decision clearly places the burden of solving the problems of redundant workers on the public authorities.

INDIA

Supreme Court of India
Management of Krishnakali Tea Estate v. Akil Bharatiya
Chah Mazdoor Sangh & anr.
C. A. No. 2194 of 2001

Dismissal for misconduct – "gherao" – disciplinary proceedings – relevance of criminal proceedings

HEADNOTES

Facts

The respondent workmen were in the employment of the appellant-management which was managing a Tea Estate. It is the case of the management that in pursuance to a demand for bonus of 20% made by the workmen which was not acceded to by the management, certain workers came in a mob on the night of 12th-13th of October, 1980 to the bungalow of Manager of the Tea Estate, armed with lethal weapons and they gheraoed (surrounded the manager with evil intent and threatened him) the Manager and others and by threat demanded bonus at the rate of 20% as against 8.33% offered by the management. It is also alleged that the mob consisting the workmen became violent and damaged the bungalow and other property of the Estate. It is also alleged that during the wrongful confinement of the Manager, he was compelled to sign a document, agreeing to pay 20% bonus. It is based on the above allegations, a domestic enquiry was instituted against the concerned workmen and after the enquiry, on the report of the Enquiry Officer, the workmen concerned were dismissed from service. Under Section 33(2)(b) of the Industrial Disputes Act seeking approval of the Labour Court of the action of the management for dismissing the concerned workmen was filed. The Labour Court at Gauhati approved the action of the management.

Nearly 7 years after the order of dismissal i.e. on 4-3-1987 a reference under Section 10 of the Act was made by the concerned Government referring a dispute to adjudication to the Industrial Tribunal, Assam (Labour Court). The said

dispute pertained to the justification of the dismissal of the concerned workmen and the question of entitlement of the workmen for re-instatement with full back wages in the event of the Labour Court coming to the conclusion that the dismissal was not justified.

The Labour Court while considering the preliminary issue 'whether the domestic enquiry was fair and proper' held that the same was not fair and proper, therefore parties were given opportunities to produce evidence on merits. Labour Court also noted the fact that the charge framed against the workmen in the enquiry was that:

> "on 12th and 13-10-1980 you entered inside the Manager's bungalow from 8.30 PM to 3.00 AM with lethal weapons in hand along with others in the riotous manner and damaged company's property and illegally confined the Manager and others inside the Manager's bungalow."

Workmen in their written statement contested it.

The Labour Court after considering the material produced by the parties came to the conclusion that the allegations of wrongful confinement and extortion of the documents stood proved and the defence of the workmen that the Manager had assaulted the workers Benja and Suko consequent to which a group of workmen entered the Estate to provide treatment to them was not accepted. The Labour Court also noticed the fact that out of the 29 dismissed workmen, some had settled the dispute with the management and have accepted the compensation offered by the management and had left the services of the management. The Court also took note of the fact that the criminal case filed as against some of the workmen in the criminal court, ended in acquittal but held that the order of the criminal Court had no bearing on the case before it, hence based on the material produced it upheld the dismissal of the workmen and rejected the prayer of the workmen for reinstatement with full back wages.

Being aggrieved by the said award of the Labour Court, the respondent herein preferred a writ petition before a learned single Judge of the Gauhati High Court who after hearing the parties came to the conclusion that the finding of the Labour Court that there was extortion of documents by the workmen concerned was contrary to the charge-sheet which did not contain such an allegation. It came to the conclusion that allegation of extortion was an afterthought. The single Judge came to the conclusion that the Labour Court did not appreciate the material on record properly and passed the order justifying the dismissal which is disproportionate to the offence alleged. It also held that the workmen who were tried before the criminal Court were honourably acquitted by the criminal Court and the departmental enquiry held by the management was faulty. On the said basis it set aside the award and directed the management to (i) reinstate the surviving workmen who have not attained the age of super-

annuation with compensation of Rs. 15,000/- to each of them in lieu of back wages; (ii) to pay compensation of Rs. 30,000/- to each of the workers who have superannuated during the pendency of the proceedings.

An appeal filed against the said Judgment and order of the learned single Judge before the Division Bench of the same Court came to be dismissed. It upheld the learned single Judge's conclusion that the punishment of the dismissal of the workmen was disproportionate to the offence actually alleged against the workmen.

Then the appellant management appealed against the order of High Court before Supreme Court.

Decision

The appeal succeeds and the order of High Court set aside and the order of Labour Court restored.

Law Applied

INDUSTRIAL DISPUTES ACT, 1947.

10(1) Reference of disputes to Boards, Courts or Tribunals

…

11-A 1 Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen

Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct re-instatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:

Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter.

JUDGMENT

…

3. Nearly 7 years after the order of dismissal i.e. on 4-3-1987 a reference under Section 10 of the Act was made by the concerned Government referring a

dispute to adjudication to the Industrial Tribunal, Assam (Labour Court). The said dispute pertained to the justification of the order of the management in dismissing the concerned workmen as also to the question of entitlement of the workmen for re-instatement with full back wages in the event of the Labour Court coming to the conclusion that the dismissal was not justified.

…

6. Workmen in their written statement contended that on the night of 12-10-1980 the Manager of the Estate by name Shri D. K.Ghosh and one Shri Ratan Babu met some of the workers including one Benja Lohar being armed with guns. It is stated that the Manager on seeing the workmen got furious and hit Benja with the butt of his gun on the left side of his head and Ratan Babu hit the other workmen by name Suko on her right hand, Benja fell unconscious and on hearing the scream of Suko other workmen came to the aid of the injured workmen and they took them to the garden seeking first aid to the said injured persons. It is further contended that police personnel guarding the Manager's bungalow allowed the workmen to enter because of the injuries suffered by Benja and all the workmen only wanted treatment of the said Benja and the other injured co-worker. They contended that they were not armed with any lethal weapons nor did they create any untoward incident. It is due to ulterior motive with a view to get rid of the workmen who were not to the liking of the Manager, the management had initiated the domestic enquiry. They also contended that no opportunity was given to the workmen to produce evidence or to defend themselves in the domestic enquiry. They denied that they ever damaged the property of the Estate or illegally confined the Manager and others inside the Manager's bungalow. They contend that the enquiries by the domestic Tribunal was vindictive, capricious.

PRELIMINARY ISSUE

7. The Labour Court while considering the preliminary issue 'whether the domestic enquiry was fair and proper' held that the same was not fair and proper, therefore parties were given opportunities to produce evidence on merits. Labour Court also noted the fact that the charge framed against the workmen in the enquiry was that:

> "on 12th and 13-10-1980 you entered inside the Manager's bungalow from 8.30 PM to 3.00 AM with lethal weapons in hand along with others in the riotous manner and damaged company's property and illegally confined the Manager and others inside the Manager's bungalow."

8. It is relevant to mention at this stage that in regard to the incident which was the subject-matter of the domestic enquiry, the police had initiated criminal

proceedings and in the said proceeding the accused persons were acquitted for lack of evidence.

LABOUR COURT FINDINGS

9. The Labour Court after considering the material produced by the parties came to the conclusion that the allegations of wrongful confinement and extortion of the documents stood proved and the defence of the workmen that the Manager had assaulted the workers Benja and Suko consequent to which a group of workmen entered the Estate to provide treatment to them was not accepted. The Labour Court also noticed the fact that out of the 29 dismissed workmen, some had settled the dispute with the management and have accepted the compensation offered by the management and had left the services of the management while others who did not accept the settlement were alone proceeded against. The Court also took note of the fact that the criminal case filed as against some of the workmen in the criminal court, ended in acquittal but held that the order of the criminal Court had no bearing on the case before it, hence based on the material produced it upheld the dismissal of the workmen and rejected the prayer of the workmen for reinstatement with full back wages.

10. Being aggrieved by the said award of the Labour Court, the workmen-Union, the first respondent herein preferred a writ petition before a learned single Judge of the Gauhati High Court who after hearing the parties came to the conclusion that the finding of the Labour Court that there was extortion of documents by the workmen concerned was contrary to the charge-sheet which did not contain such an allegation. It came to the conclusion that allegation of extortion was an afterthought. It also accepted the defence of the workmen that they entered the Estate only to obtain treatment of the injured workmen who were assaulted by the Manager of the Estate. It also held that the Labour Court did not apply its mind to the vital facts and circumstances of the case as alleged by the learned counsel for the workmen who appeared in the said writ petition. On that basis the learned single Judge came to the conclusion that the Labour Court did not appreciate the material on record properly and passed the order justifying the dismissal which is disproportionate to the offence alleged. It also held that the workmen who were tried before the criminal Court were honourably acquitted by the criminal Court and the departmental enquiry held by the management was faulty. On the said basis it set aside the award and directed the management to (I) reinstate the surviving workmen who have not attained the age of superannuation with compensation . … (ii) to pay compensation … to each of the workers who have superannuated during the pendency of the proceedings upto that Court; and (iii) to fix lump sum compensation in consultation with the petitioner-Union which shall be paid to the actual heir (wife) of

the workmen who expired without getting any benefit. It directed the management to pay the said compensation within six weeks from the receipt of its judgment.

DIVISION BENCH FINDINGS

…

12. As stated above, it is against the said judgment of the High Court the appellant-management is before us in this appeal.

13. Shri K. R. Choudhary, learned Senior Counsel addressing arguments on behalf of the appellant contended that the Labour Court having permitted the parties to adduce evidence in justification or otherwise of the finding of the domestic Tribunal and having recorded evidence in this regard justly came to the conclusion the management has establish its case of misconduct against the workmen. He also contended that the finding in regard to the extortion of the documents was not actually a new charge but was in fact a part of the charge which referred to the wrongful confinement of the Manager and there being sufficient material before the Labour Court, both in regard to the long and, wrongful confinement of the Manager and other officials of the Estate as also in regard to the forceful extortion of a document agreeing to pay 20% bonus, the Labour Court was justified in coming to the conclusion that the workmen were also guilty of the said charge of extortion. He also contended, assuming for the argument sake that the Labour Court could not have gone into the question of extortion of the document, the original charge as framed by the domestic enquiry having clearly stated about the wrongful confinement of the Manager and others and the damage caused to the property of the Estate by a riotous mob of workmen, carrying deadly weapons, itself was sufficient to justify the punishment of dismissal. He submitted that the finding and evidence recorded by the criminal Court was not binding on the Labour Court, there was no obligation on the part of the Labour Court to have considered the evidence led in the said trial. At any rate, he submitted that the Labour Court had taken cognizance of the fact that there was a criminal case which came to be ended in an acquittal. He pointed out that the observations of the learned single Judge that the acquittal of the workmen by the criminal Court was 'honourable acquittal', is wholly erroneous. He also submitted that on facts and circumstances of the case it is established that the workmen have indulged in a serious unlawful act which justified the punishment of dismissal. …

14. Shri D. K. Aggarwal, learned Senior Counsel appearing for the respondent-Union contended that the finding of the Labour Court having gone beyond the charge framed by the management against the workmen in regard to the allegations of extortion, the same was justly reversed by the High Court. …

He next contended that the Labour Court ought not to have brushed aside the [decision] of the criminal Court and it was duty bound to have considered the same while appreciating the evidence adduced in the proceedings before it. . . He then contended that assuming for argument sake that the workmen did indulge in some sort of gherao since there is no evidence as to specific overt act assigned to the dismissed workmen, the punishment of dismissal was totally disproportionate to the misconduct alleged. He relied on a judgment of this Court in the case of M/s. Burn & Co. Limited v. Their Workmen and others, AIR 1959 SC 529.

15. Bearing in mind the arguments addressed before us and findings of the High Court, we will now consider the various arguments addressed before us in this appeal. In that process we will first take up the contention of the respondent that the finding of the Labour Court is vitiated by the fact that it took into consideration a misconduct which was not part of the charge memo issued to the workmen, and the Labour Court went beyond the charges framed therefore the conclusion of the Labour Court as to justification of the punishment is vitiated by irrelevant consideration and the High Court was justified in interfering with the said finding.

16. It is true in the charge memo issued to the concerned workmen extortion was not shown as one of the acts of misconduct. The original charge memo contained the following charge:

> "(1) On 12-10-80 / 13-10-80 you entered inside the Manager's bungalow from 8.30 PM to 3.00 AM with lethal weapons in hand along with others in a riotous manner and damaged company's property and illegally confined Manager and others inside the Manager's bungalow. You also used abusive language.
>
> (2) This if proved is an offence under Standing Orders 10(a)(7), 10(a)(8) and 10(a) 11 in force on this Estate."

17. The Labour Court in its award on a preliminary point held that the enquiry conducted by the management was not a proper enquiry hence based on the requests made in the statement filed before it, permitted the management to adduce evidence in support of its charge. In the proceedings before it and also permitted the workmen to adduce evidence in defence. In the course of the evidence adduced by the parties a specific allegation that the workmen demanded a promise in writing from the Manager of the Estate to give 20% bonus was in fact made and that one police officer having informed that it will not be possible to control the situation unless such a promise was given by the Manager in writing, a document to the effect was given by the Manager in writing … under threat and that only after receipt of the said document workers dispersed, at about 3.00 AM on 13th October 1980 . …The Labour Court having considered the evidence led by the Management in this regard as also the counter-evidence led by

the workmen came to the conclusion that such an extortion of letter under threat was actually obtained.

18. Learned counsel appearing for the respondent-workmen, relied upon the judgment of this Court in Laxmi Devi Sugar Mills Ltd. v. Nand Kishore Singh (1956 Vol. II LLJ 439) wherein it was held:

> "But in view of the fact that the concerned workman was charge-sheeted only for instigating his fellow-workmen to demand for removal of the General Manager and not for any other act of insubordination, the management could not be permitted to dismiss him. … The prayer of the management for permission to dismiss such workmen could not be allowed to be justified on any grounds or charges other than those mentioned in the charge-sheet. The concerned workman not having been charged with the act of insubordination which could have really justified the management in dismissing him, the employer could not take advantage of the same even though those acts could be brought home to him in proper proceedings."

19. Based on the above decision of this Court in the said case, an argument is addressed on behalf of the respondent-workmen that the Labour Court could not have justified the dismissal of the workmen on the basis of an allegation of extortion which was not a part of the charges framed.

20. It is to be noted herein that in the instant case in the statements filed by the management before the Labour Court, act of extortion was mentioned as one of the facts leading to misconduct which was supported by the evidence led by the management before the Labour Court. Though no specific charge/issue was framed in this regard against the concerned workmen but the workmen in their statement had denied the same. Therefore, the parties were well aware that the extortion of a letter promising 20% bonus from the Manager was one of the facts in the chain of events involved in the incident of 12th and 13th of October 1980. The Labour Court found, among other facts, this fact of extortion as also having been proved. The question then is can a finding of justification of a punishment awarded by the management based on an additional fact though proved by evidence but not mentioned in the charge can be maintained. It is well-settled that Rules of Procedure found in the Code of Criminal Procedure are not strictly applicable to the proceedings before the Labour Court but the Labour Court can always rely on legal principles found in the provisions of the Code to modulate its procedure. Section 215 of the Code of Criminal Procedure reads thus:

> "215. Effect of errors – No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the ac-

cused was in fact misled by such error or omission, and it has occasioned a failure of justice."

21. From the above, it is seen that even in a criminal trial if there are omissions to state a particular offence in the charge, that by itself does not occasion a failure of justice unless the accused satisfies the Court that by such omission he was in fact misled and the same has occasioned a failure of justice. In the instant case, as noted above in the statements filed by the Management before the Labour Court, this act of extortion is specifically alleged and in the reply statement of the workmen the same is specifically denied and parties have led evidence in regard to their respective cases on the question of extortion, therefore, it cannot be said that the workmen were misled by the omission to mention the charge of extortion. Having joined issue on this question of fact, they cannot also plead that they have been in any manner prejudiced by the said omission or misled by such omission nor can they contend that the said omission has occasioned a failure of justice.

22. Be that as it may since this Court in the case of Laxmi Devi Sugar Mills Ltd. has stated that the Management cannot be permitted to justify the punishment on grounds of charges other than those mentioned in the charge-sheet, we would leave this issue at that.

23. But what is stated by us hereinabove would not in any manner vitiate the ultimate justification of the dismissal order as held by the Labour Court. It is to be noticed that the charge memo issued to the workmen has in specific terms stated that the workmen concerned on 12th – 13th October, 1980 entered the Manager's bungalow, armed with deadly weapons, caused damage to the property of the estate and illegally confined the Manager and others between 8.30 p.m. on 12th October till 3 a.m. on 13th October, 1980. This allegation as found in the charge memo has also been found to be proved by the Labour Court. Therefore, the question for our consideration is whether this finding as alleged in the charge-sheet by itself is sufficient to justify the order of dismissal without the support of the allegation of extortion. On this aspect of the case the decision of this Court in Laxmi Devi Sugar Mills Ltd. … will not assist the respondents' case. In that case, the only charge against the workman was that he instigated the other workmen to [make] demand[s]…of the General Manager which was not proved in the enquiry; then management tried to justify the removal adducing evidence on other allegations regard to which there was no charge; in that factual situation this Court held such justifications based on an uncharged allegation was impermissible.

24. In the case in hand, the facts are different; the charge contained the allegation of riotous behaviour, causing damage to the property and wrongful confinement, these charges were held to be proved. [T]he additional fact of

extortion though factually proved was outside the charge, hence, we will have to consider whether charges proved, other than that of extortion, is sufficient to confirm the approval of dismissal of the workmen. From the facts noticed hereinabove, it is seen that on the night between 12th and 13th of October, 1980, concerned workmen entered the Estate armed with deadly weapon caused damage to the property of the Estate and wrongfully confined the Manager and others between 8.30 PM on l2th to 3.00 AM on l3th of next day. These facts which are mentioned in the Charge-Memo and held proved establishes misconducts alleged against the concerned workmen in the Charge-Memo, in this background even proceeding on the basis that the allegation of extortion has not been legally established and ought not to be considered as a misconduct, in our opinion, the other misconducts of causing damage to the property, Gherao and wrongfully confining the Manager and others for a long period are by themselves sufficient to come to the conclusion that the concerned workmen have indulged in misconduct punishable under the standing orders applicable to them. The allegation of extortion though being a part of the continuing act of misconducts is severable from the other allegations, on the basis of the finding of the Labour Court the allegations alleged the concerned workmen can be accepted with out reference to its finding on the allegation of extortion.

25. The next contention addressed on behalf of the respondents is that the Labour Court ought not to have brushed aside the finding of the criminal Court which according to the learned single Judge 'honourably' acquitted the workmen accused of the offence before it. We have been taken through the said judgment of the criminal court and we must record that there was such 'honourable' acquittal by the criminal court. The acquittal by the criminal court was based on the fact that the prosecution did not produce sufficient material to establish its charge which is clear from the following observations found in the judgment of the criminal court:

> "Absolutely in the evidence on record of the prosecution witnesses I have found nothing against the accused persons. The prosecution totally fails to prove the charges under Sections 147, 353, 329, IPC".

26. Learned counsel for the respondents in regard to the above contention relied on a judgment of this Court in the case of Capt. M. Paul Anthony .... In our opinion, even that case would not support the respondents herein because in the said case the evidence led in the criminal case, as well as in the domestic enquiry was one and the same and the criminal case having acquitted the workmen on the very same evidence, this Court came to the conclusion that the finding to the contrary on the very same evidence by the domestic enquiry would be unjust, unfair and rather oppressive. It is to be noted in that case the finding by the Tribunal was arrived in an exparte departmental proceeding. In

the case in hand, we have noticed before the Labour Court the evidence led by the management was different from that led by the prosecution in the criminal case and the materials before the criminal court and the Labour Court were entirely different. Therefore, it was open to the Labour Court to have come to an independent conclusion dehors the finding of the criminal court. But at this stage it should be noted that it is not as if the Labour Court in the instant case was totally oblivious of the proceedings before the criminal court. The Labour Court has in fact perused the order of the Judicial Magistrate and the exhibits produced therein and came to an independent conclusion that the order of the criminal case has no bearing on the proceedings before it which finding of the Labour Court, in our opinion, is justified. …

27. From the above, it is seen that the approach and the objectives of the criminal proceedings and the disciplinary proceedings are altogether distinct and different. The observations therein indicate that the Labour Court is not bound by the findings of the criminal court.

28. Even the reliance placed in the case of M/s. Burn & Co. … in our opinion, does not assist the workmen in this appeal. That was a case where this Court came to the conclusion that there was no dependable evidence against the individual workman who had incited the workers to participate in the strike. In such circumstances, the Court came to the conclusion that in the absence of any evidence individually implicating the workmen concerned an omnibus allegation against all workmen cannot be used to punish only some workmen. Such is not the situation in the facts of this case wherein we have noticed that the Tribunal has come to the conclusion that the concerned workmen had participated in the gherao armed with deadly weapons and caused damage to the property of the Estate and wrongfully confined the manager and others for nearly 8 hrs. Therefore, it found all those workmen who took part in the said incident guilty of the misconduct.

29. This leaves us to consider whether the punishment of dismissal awarded to the concerned workmen dehors the allegation of extortion is disproportionate to the misconduct proved against them. From the evidence proved, [we] find the concerned workmen entered the estate armed with deadly weapons with a view to gherao the Manager and others [and] in that process they caused damage to the property of the estate and wrongfully confined the Manager and [others] from 8.30 p.m. on 12th of October to 3 a.m. on the next day. These charges, in our opinion, are grave enough to attract the punishment of dismissal even without the aid of the allegation of extortion. The fact that the Management entered into settlement with some of the workmen who were also found guilty of the charge would not, in any manner, reduce the gravity of the misconduct in regard to the workmen concerned in this appeal because these workmen did not

agree with the settlement which others are agreed [and] instead chose to question the punishment.

30. For the reasons stated above, this appeal succeeds. The orders, of the High Court are set aside that of the Labour Court is restored. The appeal is allowed.

ANNOTATION

The approach and the objectives of the criminal proceedings and the disciplinary proceedings are altogether distinct and different.

ITALY

Court of Cassation – Labour Division
Decision n. 6957 of 4 April 2005
Soc. Kuwait v. A third party

Duty of loyalty – extension of the concept

HEADNOTES

Facts

An employee had been dismissed for a just cause in that having been given the job of supervising work contracted out to a third-party company, he had neglected to disclose to his employer the existence of conjugal or affinity relationships with staff members or associates of the contracting company. Following the notification of his dismissal the employee appealed against it.

Decision

The Court found in favour of the employer, accepting an extended notion of the duty of loyalty as provided by article 2105 of the Civil Code.

Law applied

ART. 2105 OF THE CIVIL CODE
Duty of loyalty
The employee must not carry out business on his or her own account or that of others in competition with the employer, nor divulge information about the organization and production methods of the enterprise or make use of such information in such a way as to prejudice the enterprise.

JUDGMENT

[…]

However, the objections regarding the deemed irrelevance of the conduct in conflict with the duties of diligence and loyalty are founded, given the restrictive interpretation of the regulations provided by articles 1175, 1375 and 2105 of the Civil Code, and as well as illogical and partly contradictory reasoning, the Neapolitan [lower] court, by merely acknowledging the particular job the anonymous third-party engineer had in relation to the work in which his spouse and brother-in-law both had interests, completely undervalued this aspect of the affair.

This court ruled that "the duty of loyalty – infringement of which can be taken as just cause for dismissal – is connected to the general principles of fairness and good faith provided for by articles 1175 and 1375 of the Civil Code and thus requires that the employee must refrain not only from any type of behaviour which is expressly forbidden by article 2105 of the Civil Code but also from any other type of conduct which, by its nature and possible consequences, may turn out to be in conflict with the duties connected with the employee's integration in the structure and organization of the employer's enterprise or which may create situations of conflict with regard to the aims and interests of the enterprise or which may in any case be able to do irreparable damage to the confidence on which the employment relationship is based" (decision no. 3719 of 1 June 1988 of the Court of Cassation).

With decision no. 7427 of 5 July 1995 the court then ruled that "the situations of incompatibility in which the employee may come to find himself due to legal relationships with third parties and which are able to cause conflicts between the employee's own interests or those of third parties and those of the employer may constitute infringement of the duty of loyalty provided for by article 2105 of the Civil Code", an infringement which is tantamount to a disciplinary offence, "which must be sanctioned with the proceeding provided by article 7 of law no. 300 of 1970, also with the aim of allowing the employee to end, wherever possible, the causes of incompatibility, given the relevance of such conduct in estimating the gravity of his breach of contract".

Similarly, the dominant opinion of legal commentators, given the divergence between the title of article 2105 ("duty of loyalty"), and its content, limited to only three hypotheses which are to be forbidden (competition, divulging or using secret information), maintains that such hypotheses are not exclusive and do not exhaust, therefore, the employee's duty of loyalty, a duty which is infringed by any type of behaviour which breaches the confidence of the employer, even when the damage is merely potential.

The transferee [lower] court, however, gave a restrictive interpretation of article 2105...

[...]

The judgment [below] thus violates articles 2105, 1175 and 1375 of the Civil Code, given that, as was recalled by decision no. 3719 of 1988, the connection of article 2105 with the general principles of fairness and good faith requires that the employee must refrain not only from . . . behaviour which is expressly forbidden by article 2105 of the Civil Code but also from any other type of conduct which, by its nature and possible consequences, may turn out to be in conflict with the duties connected with the employee's integration in the structure and organization of the employer's enterprise or which may create situations of conflict with regard to the aims and interests of the enterprise or which may in any case be able to do irreparable damage to the confidence on which the employment relationship is based.

Moreover, the appealed decision does not explain why failing to disclose to his employer the fact that work which had been left under his control as supervisor was being carried out by companies or enterprises in which members of his family were involved, does not constitute infringement of the duties of fairness, good faith and confidence, even if this fact leads to a "likely diminished trustworthiness" of his supervision.

[…]

The appealed decision has to be quashed […] and the case must be referred to another judge of the same instance […].

[Source: Massimario di Giurisprudenza del Lavoro, 2005, p. 550].

ANNOTATION

In the above judgment, the Court of Cassation was called upon to rule on whether there follows from the duty of loyalty, regulated by article 2105 of the Civil Code, a duty on the part of the employee to disclose to his employer the existence of a conflict of interests. In the case at hand such a conflict of interest derived from the existence of a conjugal or affinity relationship which the employee had with staff members or associates of a third-party company to which the employer had contracted out work and assigned its supervision to the employee himself.

Article 2105 of the Civil Code imposes two duties on the employee: the duty not to compete (that is, to not carry out business on his or her own account or that of others in competition with the employer) and the duty of professional

confidentiality (that is, to not divulge information about the organization and production methods of the enterprise or make use of such information in such a way as to prejudice the enterprise). These duties are ancillary with regard to the performance of the employment contract, belonging to the *genus* of the so-called duties of protection.

The regulation is dedicated to a generic duty of loyalty but its content is limited to the two aforementioned duties; hence the problem of whether the duty of loyalty should be limited to types of conduct mentioned by the regulation or whether it may also be extended to other types of damaging conduct.

According to a majority of legal commentators, article 2105 does not prescribe anything other than the duties which are stated therein, without extension to further types of conduct which are not envisaged by the regulation. Such a line of thought illustrates how a different reading of the regulation would produce an uncontrollable extension of the employee's contractual obligations.

The majority of the decisions of the courts have, however, accepted a broad notion of loyalty, considering the duties stated in the regulation as merely illustrative. These decisions extend the prohibition provided for in article 2105 to all types of conduct which "by their nature and their possible consequences" may turn out to be in conflict with "the aims and interests" of the enterprise, even if they might be only potentially damaging to them. Such an extension of the duty of loyalty is justified with reference to the notions of "collaboration", "loyalty", "confidence" or, as in the case at hand, "fairness" (article 1175 of the Civil Code) and "good faith" in the execution of the contract (article 1375 of the Civil Code).

The judgment in question follows this last direction and in so doing, rather than extending the scope of the application of article 2105, clearly puts a greater bearing on the duties of fairness and good faith.

SOUTH AFRICA

Labour Appeal Court of South Africa
Chemical Workers Industrial Union and others v
Latex Surgical Products (Pty) Ltd

Unfair dismissal – reinstatement – retrospectivity linked to period of compensation

HEADNOTES

Facts

Latex Surgical Products (Pty) Ltd dismissed the individual appellants, who are members of the Chemical Industrial Workers Union, from its employ on 16 February 1999. A dispute arose about the fairness of the dismissal. In due course that dispute was adjudicated by the Labour Court. The Labour Court found that there was a fair reason for the dismissal and that such dismissal was preceded by a fair procedure. It, accordingly, dismissed the appellants' claim with costs. The appellants appealed, with leave, against the whole of the judgment to the Labour Appeal Court.

Decision

The Labour Appeal Court found that the dismissal was substantively unfair. The LAC concluded that it was not competent to order a retrospective operation of a reinstatement order which is in excess of twelve months in an ordinarily unfair dismissal case such as this one or 24 months in the case of an automatically unfair dismissal.

Law applied

LABOUR RELATIONS ACT 66 OF 1995
Sections 193(2) and 194

JUDGMENT

ZONDO JP:

[97] In these circumstances I am of the view that the use of the two selection criteria rendered the selection criteria unfair and the dismissal substantively unfair. On this ground, too, I find that there was no fair reason for the selection of the individual appellants for dismissal and, ultimately, for their dismissal.

…

[98] … In the light of the conclusion I have reached above that the dismissal was without a fair reason, it is unnecessary for me to decide whether it was also procedurally unfair. It will make no practical difference to the outcome of the matter.

…

Relief

[103] The appellants seek reinstatement. The respondent did not in its heads of argument indicate what order should be granted if the Court came to the conclusion that there was no fair reason for the dismissal. If the finding of unfairness was limited to the procedure for the dismissal, reinstatement would not have been competent as a remedy. The respondent confined its submissions in the heads of argument to showing that the appeal should be dismissed and did not deal with the eventuality of what relief the Court should grant should the appeal be upheld.

[104] The finding that the dismissal of the individual appellants was unfair is based on the conclusion that there was no fair reason for their dismissal. The necessary implication of such a conclusion is that they should not have been dismissed in the first place either because there was no need for any employees to be dismissed or because, although there may have been a need for some employees to be dismissed, there was no fair reason for these particular employees to have been selected for dismissal. In either case such a finding means that the employees concerned should have been allowed for all the past years to continue to work and earn income in the respondent's employ.

[105] On the evidence that was led in the Court a quo, the only evidence that the respondent could possibly rely upon to argue that reinstatement should not be ordered is Mr Mhlawutshana's evidence that the respondent would have no work for the individual appellants if they were reinstated. Mr Mhlawutshana's evidence in this regard must be understood in its correct context. That context is that, soon after the individual appellants had been dismissed, the respondent employed more than 80 contract and casual

employees for work which was not shown to be work which the individual appellants had no skills or ability to do and to do satisfactorily. Indeed, those contract and casual employees were not subjected to scrutiny of any kind to determine whether they had better skills or abilities than the individual appellants.

[106] It is known that those contract and casual employees worked for at least eighteen months from the time of the dismissal of the individual appellants or from soon thereafter. It is not known what the respondent's position was from the expiry of that time to the date of the trial. What happened during that time was definitely within the knowledge of the respondent. If the respondent wanted to apprise the Court … of what its position was from the expiry of that 18 month period to the trial, it could have done so, particularly if its position was such that an order of reinstatement would not be appropriate. The onus is upon an employer, if it takes the view that its circumstances are such that an order of reinstatement should not be made against it, to place before the Court evidence to prove such circumstances. Where it does not do so, the Court may well have no reason not to order reinstatement, particularly because, as I said in my separate judgment in *Kroukam v S A Airlink (Pty) Ltd,* case no JA3/2003, as yet unreported, delivered on 16 September 2005, together with that of Davis AJA in which Willis JA concurred, sec 193(2) obliges an arbitrator, the Labour Court and, on appeal, this Court, to order reinstatement when an employee's dismissal has been found to be unfair for lack of a fair reason unless one or more of the situations provided for in sec 193(2) (a) – (d) exists. (see paragraphs 110, 114 – 118 of my separate judgment in Kroukam). This is not one of the points on which the majority and I could not agree in Kroukam. The majority did not deal at all with this question.

[107] I am of the view that none of the situations provided for in sec 193(2) (a) – (d) of the Act exists in this case. Mr Mhlawutshana's evidence that, if the individual appellants were reinstated, the respondent would not have work for them cannot be accepted ….

[108] In the light of all the circumstances I am of the view that I should order the respondent to reinstate the individual appellants. Whatever order I make must be an order which the Court a quo should have made as at the time when it delivered its own judgment. That was in June 2002. The next question that arises is whether, if the Court a quo had ordered reinstatement, as, in my view, it would have had to if it had come to the same conclusion that I have come to about the fairness of the dismissal, such order should have been one operating with retrospective effect and, if so, from what date. I turn to consider that question.

[109] In this matter Counsel for the appellants submitted that the reinstatement of the individual appellants should operate with limited retrospectivity. In this regard he did not indicate how limited that retrospective operation should be. I shall assume that he was leaving that issue in the hands of the Court. As already indicated above, Counsel for the respondent made no submissions whatsoever on what relief the Court should grant if it upheld the appeal. I also take it that he was leaving that issue in the hands of the Court.

[110] In considering the question whether or not reinstatement that is ordered should operate with retrospective effect and, if so, how much retrospective effect, the court exercises a discretion. It is required to exercise such discretion judicially and fairly to all parties concerned with due regard to the applicable principles, the evidence and all relevant circumstances.

[111] The individual appellants were dismissed with effect from the 16th February 1999 with payment of notice pay in lieu of notice. Such notice pay was indicated in the respondent's letter of the 16th February 1999 to the union to be notice pay in lieu of 14 days notice or notice in terms of the contract of employment. It would be fair to deal with the matter on the basis that such notice pay covered the period up to the end of February 1999. That would mean that the first month when the individual appellants were without pay from the respondent is March 1999.

[112] It is necessary to consider the question whether there is any limitation on how far retrospective the Court may order the operation of a reinstatement order because, obviously, an order of reinstatement with limited retrospective operation that the Court may make must still be one that is competent. This raises the question whether in a case where the dismissal is an ordinarily unfair dismissal (as opposed to an automatically unfair dismissal) it is competent for a court to order that the reinstatement order operate with retrospective effect for a period that is beyond twelve months from the date of the delivery of the order or judgment of the Labour Court backwards. This includes the question whether, where the period between the date of the order and the date of dismissal is in excess of twelve months, the reinstatement can competently be ordered to be with retrospective effect from the date of dismissal.

[113] I considered this question both in relation to an ordinarily unfair dismissal and in relation to an automatically unfair dismissal in Kroukam's matter. (see paragraphs 121-129 of my separate judgment in Kroukam). My view in this regard differed from that of Davis AJA with whom Willis JA agreed. However, both my and Davis AJA's dicta on this point were obiter because, in that case, being one relating to an automatically unfair dismissal, the period between the date of dismissal and the date of the delivery of the judgment of the Labour Court was less than 24 months and it was not necessary for purposes of

our respective judgments to decide that point. Accordingly, Davis AJA's and Willis JA's judgment on this point is not binding upon me as it was obiter. However, in this case it seems to me that I have to decide this point because I must consider whether the limited retrospective operation of the reinstatement order that I may be disposed to granting can be in excess of the 12 month period or whether it has to be 12 months or less.

[114] In regard to this question, I can do no better than adopt the view and reasoning that I expressed in Kroukam. I had the following to say in paragraphs 121-129 of my judgment in that case:

> "[121] Counsel for the appellant submitted that, if an order of reinstatement was made, it should operate with retrospective effect to the date of the appellant's dismissal, namely, the 11th May 2001. From that date to the 17th October 2002, which was the date of the delivery of the judgment of the Court a quo, it is just over seventeen months. As that period is below 24 months, the question whether it is competent to make a reinstatement order that operates with retrospective effect for a period longer than 24 months in the case of an automatically unfair dismissal and for a period longer than 12 months in all other unfair dismissal cases does not arise. The reference to 24 months and 12 months arises out of the fact that in terms of sec 194 of the Act compensation that is awardable to an employee whose dismissal has been found to be automatically unfair is capped at an amount equivalent to 24 months' remuneration and that of an employee whose dismissal has been found to be unfair for lack of a fair reason or because no fair procedure was followed in the employee's dismissal is limited to a maximum of 12 months remuneration.
>
> [122] Davis AJA has expressed the view in his separate judgment that it is competent for the Court to make an order of reinstatement that operates with retrospective effect up to the date of dismissal even if that goes beyond 24 months or 12 months retrospectively, as the case may be, because, particularly in a case such as the present one, the Court may wish to ensure in effect that an employer who has dismissed an employee for a reason that renders the dismissal automatically unfair is dealt with firmly to show that such conduct will not be tolerated by the Court. I am unable to agree with this reasoning. This proposition ignores the fact that, if one has regard to sec 194 of the Act, provision has already been made in the Act for an employer who is found to have dismissed an employee for a reason that renders the dismissal automatically unfair to be ordered to pay double the amount of compensation that an employer

who has unfairly dismissed an employee but not for such a reason may be ordered to pay.

[123] It can be argued that backpay which an unfairly dismissed employee gets paid when an order has been made for his reinstatement with retrospective effect constitutes in effect compensation for unfair dismissal in the same way as compensation provided for under sec 194 of the Act constitutes compensation for unfair dismissal to an unfairly dismissed employee who is awarded compensation under sec 194 of the Act. If that is so, thus would run the argument, a reinstatement order the retrospective operation of which goes beyond 24 months or 12 months, as the case may be, would amount to an award of compensation for unfair dismissal which exceeds the relevant maximum prescribed by sec 194. The argument would be that such a retrospective operation of an order of reinstatement would undermine the capping of compensation prescribed by sec 194 of the Act.

[124] It would further seem that the construction that the only limitation on the extent of the retrospective operation of an order of reinstatement is the date of dismissal ignores the purpose of sec 194. The purpose of sec 194 is to limit the financial risk that an employer has when involved in an unfair dismissal claim. To secure organised labour's agreement to the limitation of such financial risk, employers made a concession at NEDLAC when the Labour Relations Bill was negotiated, that reinstatement would be the primary remedy in unfair dismissal cases. As already stated above, sec 193 gives effect to that agreement as far as reinstatement being the primary remedy in unfair dismissal cases is concerned. Sec 194 gives effect to that agreement in so far as it relates to ensuring that the employer's financial risk in terms of payment to the employee is limited to either 24 months' remuneration or 12 months' remuneration, as the case may be.

[125] If it is accepted, as I think it should be, that at least part of what the retrospective operation of a reinstatement order means is that the employer must pay the employee backpay for the period covered by such retrospective operation and that in a case where the arbitrator or the Court awards a dismissed employee compensation under sec 194, such compensation is or at least part of such compensation is backpay, then the proposition that an order of reinstatement can operate retrospectively to the date of dismissal even if this goes beyond 24 months or 12 months retrospectively, as the case may be, would not only undermine but would also defeat the whole purpose of sec 194 of the Act. I am unable to see what purpose of the Act would be served by a construction to the effect

that, if an employee is granted reinstatement, there is no limitation to the employer's financial risk in terms of backpay, but, if the same employee is awarded compensation and is not granted reinstatement, the employer's financial risk is limited to 24 months remuneration or 12 months' remuneration, as the case may be. I prefer the view that the employer's financial risk is limited in either case.

[126] One way in which sec 194 would be undermined if an order of reinstatement which operates with retrospective effect beyond 24 months or 12 months, as the case may be, was made would be this one. An employee who no longer wants to be reinstated but only wants to be paid compensation would indicate that he wants to be reinstated with retrospective effect to the date of dismissal which would go beyond 24 months or 12 months, as the case may be. After the Court has granted him a reinstatement order with such retrospective effect and he has been paid his backpay covering the period of retrospectivity going beyond 24 months or 12 months, he would resign. In that way he would have been able to get paid what in effect would be compensation for unfair dismissal that would be in excess of the relevant maximum prescribed by sec 194. It seems to me that sec 193 should be construed to mean that an order of reinstatement can operate retrospectively to the date of dismissal or up to 24 months or 12 months backwards, as the case may be, whichever is the earlier. This construction will harmonise the provisions of sec 193 and 194. It would seem to me that that is the correct construction of sec 193. The two sections must be construed in such a way that the one does not undermine the other or defeat the purpose of the other.

[127] I do not think that sec 195 of the Act changes any of the above. Sec 195 of the Act reads: "An order or award of compensation made in terms of this chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment" It seems to me that the backpay which flows from the retrospective operation of an order or award of reinstatement does not constitute an amount that such employee can be said to be entitled to in terms of any law, collective agreement or contract of employment as provided for in sec 195. In our law an employee is not entitled to have the Labour Court or an arbitrator order that the reinstatement order (in his favour) operate with retrospective effect. There is no such right. Once the Labour Court or an arbitrator has decided to order the employee's reinstatement, it or he has a discretion whether to order that the reinstatement order operate with retrospective effect. In the exercise of that discretion, the Court or the arbitrator may

decide that such reinstatement order should or should not operate with retrospective effect to the date of dismissal or might order a limited retrospective operation of the reinstatement order or might order no retrospective operation of the reinstatement order at all.

[128] In the light of all this it seems to me that, prior to the Court or an arbitrator ordering that a reinstatement order made in favour of an employee shall operate with retrospective effect in favour of the employee, the employee has *no right* to, and therefore, cannot be said to be *entitled* to, any amount in that regard in terms of any law, collective agreement or contract of employment. What the employee is entitled to is to make an application to the Court or the arbitrator to exercise its or his discretion in favour of ordering that the reinstatement be with retrospective effect. Once an order has been made, the employee becomes *entitled to* such amount in terms of an order of court or an arbitration award and not *in terms* of any law, collective agreement or contract of employment as contemplated by sec 195 of the Act. I am accordingly inclined to think that any backpay that an unfairly dismissed employee gets paid when there has been an unfair dismissal claim gets paid such amount not because he is entitled to it in terms of any law or any collective agreement or contract of employment but because he is entitled to it in terms of an order of Court or an arbitration award made in the exercise of a discretion.

[129] In the light of the above it would therefore seem that backpay flowing from the retrospective operation of an order of reinstatement made under sec 193 of the Act does not constitute an "amount to which the employee is entitled in terms of any law, collective agreement or contract of employment" as contemplated by sec 195 of the Act. It seems that the "amount that the employee is entitled to in terms of any law, collective agreement or contract of employment" that sec 195 refers to does not include an amount that the employee is entitled to in terms of an order of court or in terms of an arbitration award. It seems to relate to amounts such as unpaid wages for the period prior to the dismissal, notice pay, severance pay, pension or provident fund or amounts in terms of the unemployment insurance Act, 1996."

…

[116] In the light of all of the above I conclude that it is not competent to order a retrospective operation of a reinstatement order (even if limited) which is in excess of twelve months in an ordinarily unfair dismissal case. Accordingly, in this matter, retrospective operation of the order of reinstatement that I

propose to grant has to be 12 months or less but not more. That is part of the limitation on my discretion to order that the reinstatement of the individual appellants operate with retrospective effect.

[117] As the judgment of the Court a quo was delivered on the 19th June 2002, a period of 12 months from that date backwards would run from that date to 19 June 2001. Should the retrospectivity of the reinstatement order be for less than 12 months or 12 months from backwards to 19 June 2001? Even though in a case such as this one that it is not competent to make a reinstatement order that operates with retrospective effect beyond 12 months from the date of the delivery of the order of the Court a quo backwards, the fact that the individual appellants were without income during that period remains and must be taken into account in the exercise of the discretion. Their having been without income for that period was a direct consequence of the respondent's unfair conduct in dismissing them when they should not have been dismissed. In this case, as the reinstatement order can only operate with retrospective effect from the date of the order of the Court a quo to 19 June 2001, this means that the respondent keeps whatever money it otherwise may have had to pay the individual appellants were it not for the legal impediment relating to the period of 12 months. The respondent already benefited by a period of more than two years in this case in respect of which the law does not place an obligation upon it to pay backpay to the individual appellants even though it has been found that they should not have been dismissed in the first place. That is the period from March 1999 to June 2001. That is a period of over two years for which the individual appellants get penalised even if they are not in any way to blame for their dismissal.

…

[119] Another factor which must be considered relates to whether or not the individual appellants could have mitigated their losses. If they could have but did not do so, such a factor would be relevant and should be taken into account in the exercise of the Court's discretion. In this regard Ms Pule's uncontradicted evidence that anyone of the individual appellants could have continued to work for the respondent if he got himself employed by Workforce (Pty) Ltd is relevant. In her evidence Ms Pule did not specify what the terms and conditions were under which the individual appellants could have been employed by Workforce (Pty) Ltd and continue to work at the respondent. This omission on her part includes what the wage rate would have been for any individual appellant who chose to do so. This makes it difficult to say what income the individual appellants could have received in the interim if they had got themselves employed by Workforce. It, therefore, becomes difficult to say how

much should be deducted from the backpay that the individual appellants should otherwise get.

…

[121] What did Ms Pule's last statement in paragraph 11.1 of her letter of 16 February 1999 to the union mean? At first glance it seems to mean that the respondent would ensure that any affected employee who met the necessary criteria and expressed a willingness to work on the night-shift condom section would be guaranteed appointment. However, on closer examination of the statement it seems that what the respondent was giving an assurance of was that it would secure an interview of such employee by Workforce. The last portion of that statement refers to "*to acquire a position with [Workforce]*". Maybe it was an assurance that such an employee would definitely get appointed if he met the criteria. But, if such employee would be assured of appointment, what would be the purpose of the interview that the respondent would arrange for such employee. The interview could not have been for determining whether he met the criteria because such an employee would have had to meet the criteria and express a willingness to work before the respondent could arrange the interview.

[122] At any rate the respondent did not lead any evidence as to which of the individual appellants in this case met the criteria applicable to working on the night-shift condom section. It should have done this because it is only in respect of those individual appellants that it could be said that they could have but did not mitigate their losses by taking up the respondent's offer, if it was an offer, contained in this regard. However, it is strange that the union and the individual appellants did not, after this letter of the 16th February 1999, approach the respondent to discuss possible utilisation of the individual appellant's services even if this was to be under protest pending the outcome of the litigation. This should count against the appellants. The union and the individual appellants simply showed no interest whatsoever.

[123] Ordinarily I would have taken the view that the retrospective operation of the reinstatement order in this case should operate from the 19 June 2001 which would have given a 12 months retrospective operation from the date of the judgment of the Court a quo. However, in the light of the appellants' failure to approach the respondent to discuss the utilisation of the individual appellants' services pending the outcome of the litigation, I propose to reduce the period by half. The result is that the reinstatement order that I propose to make is one the retrospective operation of which will commence from the 19th December 2001.

…

[125] In the premises I make the following order:

1. The appeal is upheld with costs;

2. The order of the Labour Court is set aside and replaced with the following one:

(a) The second and further applicants' dismissal is hereby declared to have been without any fair reason.

(b) Subject to (c) below, the respondent is ordered to reinstate the second and further applicants in its employ with retrospective effect from the 19th December 2001.

(c) With regard to individual applicants E. Sobane and I. Dondolo the order of reinstatement in (b) operates with effect from the 19th June 2002.

(d) The respondent is ordered to pay the applicants' costs.

Mogoeng JA and Jafta AJA concurred in the judgment.

ANNOTATION

Reinstatement has been the preferred remedy for unfair dismissals in South Africa since the concept of an unfair labour practice was introduced in 1982 and jurisdiction conferred on the Industrial Court to adjudicate on dismissal disputes. The conventional view was that reinstatement orders were retrospective in effect unless the court ordered otherwise. This view persisted under the Labour Relations Act 66 of 1996 which entrenched reinstatement as the primary remedy for unfair dismissal. This Act also capped the compensation payable for unfair dismissal, where reinstatement was not ordered, to 12 months in the case of an ordinary unfair dismissal and 24 months in the case of an automatically unfair dismissal (unfair discrimination etc). In *Kroukam v S A Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) Zondo JP, in a minority judgment, first articulated the view that there was also a limit on the retrospectivity of a reinstatement order. The issue surfaced again in the case under review. This time the Labour Appeal Court unanimously adopted the view that a reinstatement order could not lawfully exceed 12 months in an ordinarily unfair dismissal case or 24 months in the case of an automatically unfair dismissal. The reinstatement may, however, even be shorter as the court deciding the dispute may, in its discretion, reduce the period by taking into account that the employee found alternative employment.

UNITED STATES OF AMERICA

Supreme Court of Vermont
LoPresti v. Rutland Regional Health Services, Inc.

Termination of employment contract for reasons violating physician's ethical responsibilities when making patient referrals

HEADNOTES

Facts

A primary care physician was employed by a physicians' group under a written contract that specified that, with 180 days' advance notice, he could be terminated with or without cause. The compensation of the physicians employed by the group was dependent, in part, on the number of patients they treated. The primary care physician's employment was terminated without explanation. However, the dismissed physician often had complained that the employer expected primary care physicians to see daily an unreasonably large number of patients. Also, based on his assessment of the quality of care given by certain specialists employed by the group, the dismissed primary care physician had reduced and eventually discontinued referring his patients to these specialists and, instead, referred them to specialists outside the group in which he was employed.

Another primary care physician who worked for the group in the same facility was not dismissed although she was junior to the dismissed physician, saw fewer patients than he did, and had not received recognition he had received as a result of high evaluations from patients. In addition, the dismissed physician also had carried other responsibilities not given to his counterpart who was retained by the employing group at the facility. Finally, the primary care physician who was not dismissed regularly referred patients to all specialists employed by the employing group.

The issue in this case is: If a physician's employment contract states that, with 180 days' advance notice, the employment may be terminated with or without cause, may a dismissed physician recover damages when terminated because of unwillingness to refer patients to specialists employed by the same

employer based on the dismissed physician's assessment that the quality of care by those specialists was seriously deficient?

Decision

A claim for relief is stated by allegations that an employee, who by contract could be dismissed without cause, was dismissed for adhering to accepted rules of medical ethics requiring a physician to place a patient's sound medical treatment above the financial interests of the treating physician, his employer, or his associates.

Law Applied

See judgment.

JUDGMENT

Before: DOOLEY, JOHNSON and SKOGLUND, JJ., and GIBSON, J. (Ret.), Specially Assigned.

JOHNSON, J.

Plaintiff, Dr. Leigh LoPresti, appeals from the superior court's summary judgment in favor of defendant, Rutland Regional Physician Group, Inc. (Physician Group), his former employer. Dr. LoPresti claims he was fired for his refusal to refer patients to certain other Physician Group doctors whom he believed provided substandard and unnecessary care to his patients. Dr. LoPresti claims that by firing him for this reason Physician Group violated compelling Vermont public policy and the implied covenant of good faith and fair dealing. Alternatively, he seeks damages under a promissory estoppel theory. Physician Group argued, and the trial court agreed, that because the written employment contract allowed for termination "with or without cause" after 180-day notice, the reasons for the firing were immaterial as a matter of law. The court granted summary judgment on all counts. We affirm the court's judgment on the implied covenant and promissory estoppel counts, but reverse and remand for further development and consideration of the public policy count.

In July 1994, Dr. LoPresti entered into a "Physician Employment Agreement" with Physician Group, a "Vermont Non-Profit Corporation … rendering professional services through those of its employees who are duly licensed to practice medicine in the State of Vermont." Physician Group is not a hospital; it is a business arrangement among a group of doctors. Physician Group employ-

ees receive a base salary plus incentive payments, group liability insurance, accounting, administrative and marketing services, support staff and office facilities. In exchange, Physician Group collects and retains the fees that patients pay to the doctors it employs.

Dr. LoPresti's contract was to continue until terminated in accordance with § 1.2 of the agreement. Notwithstanding any provision to the contrary, § 1.2 set out a number of different circumstances under which the agreement could be terminated. Section 1.2(c)(ii) states that the agreement could be terminated "one hundred eighty (180) days after written notice of termination with or without cause from either party to the other." The agreement also provides that Dr. LoPresti would render medical services primarily at the Manchester Family Health Center, "and at such other locations as mutually agreed between [Dr. LoPresti] and [Physician Group]."

As a primary care physician, Dr. LoPresti often had to refer patients to specialists for further care, and, as part of his referral responsibility, he would follow up with patients to assess their status after receiving specialized treatment. Dr. LoPresti began practicing in the Rutland area in 1991. In his affidavit, Dr. LoPresti stated that, after several years in the area, he had familiarized himself with the practices of many area specialists. During the course of his practice with Physician Group, Dr. LoPresti developed concerns about the quality of care that some of his patients were receiving from particular Physician Group specialists. Dr. LoPresti alleged that one Physician Group doctor, Orthopedic Surgeon Doe, was "performing unnecessary procedures unnecessarily hospitalizing patients." Dr. LoPresti also concluded that two other Physician Group specialists, Obstetrician Doe and Surgeon Doe, were "providing clearly substandard care" that had "actually harmed more than one patient." Though he routinely referred patients to other doctors within Physician Group, Dr. LoPresti greatly reduced the number of referrals he was making to the three specialists or stopped referring patients to them altogether. At one point, Physician Group's President, Thomas Huebner, apparently told Dr. LoPresti that Orthopedic Surgeon Doe was complaining about the small number of cases that Dr. LoPresti had been referring to him.

In 1998, Physician Group officials, including Mr. James Hagen, Dr. Robert Cross, and President Huebner, informed Dr. LoPresti that the Manchester office, where he worked with one other primary care physician, Dr. Leffel, might be closed due to insufficient revenue. Dr. LoPresti did not agree with Physician Group's revenue conclusions and proposed course of action. He requested, and was granted, a meeting with President Huebner and Physician Group's Medical Practice Committee (MPC).

At the July 1998 MPC meeting, Dr. LoPresti made a detailed presentation on the Manchester office revenue situation with suggestions for how it could be improved. After his presentation, Dr. LoPresti was asked to leave so that the MPC could meet in executive session. As a result of the July meeting, the MPC decided to move Dr. Leffel to another office, close the Manchester office, and terminate Dr. LoPresti's contract. The day after the MPC executive session, Huebner gave Dr. LoPresti written notice of termination pursuant to § 1.2(c)(ii) of his contract. Consistent with the terms of the contract, the letter of termination provided no explanation as to why Dr. LoPresti was being fired except to say that the decision was made "after seeking input from the Medical Practice Committee as well as the Board of Directors."

Despite its decision to terminate Dr. LoPresti, Physician Group did not ultimately close the Manchester office. Dr. LoPresti asserts that he was more senior than Dr. Leffel, was seeing more patients than she was, and that he participated on three Physician Group committees while Dr. Leffel did not serve on any. In addition, of all the Physician Group primary care physicians, Dr. LoPresti had received the highest satisfaction ratings from his patients. Thanks to Dr. LoPresti's high ratings, Physician Group received a financial award from the HMO Kaiser Permanente. Dr. Leffel had not received any comparable recognition. Dr. Leffel had, however, been making regular referrals to the Physician Group specialists that Dr. LoPresti avoided using.

Unsatisfied with the circumstances of his termination, Dr. LoPresti filed suit in July 2001 alleging breach of contract based on the implied covenant of good faith and fair dealing, wrongful discharge in violation of public policy, and promissory estoppel. Initially, Dr. LoPresti alleged that Physician Group retaliated against him for his frequent complaints regarding proposed benchmarks for physician profitability related to the number of patients a Physician Group doctor should see in one day.

… [Upon] deposing Dr. Cross, one of the physicians present during the MPC executive session when the MPC decided to terminate Dr. LoPresti, the doctor learned that there was perhaps another reason why he was terminated: his referral practices.

Of the Physician Group personnel who were at the MPC executive session and were deposed by Dr. LoPresti, only Dr. Cross could remember details of the one and one-half hour conversation that took place. Dr. Cross stated that the MPC "talked about Leigh's style of practice, Leigh's style of interacting with specialists in the area. And the feeling - and his interaction with other members of [Physician Group], and the feeling was that he hadn't created the relationship with the specialists to be optimistic that it would grow into the future." Dr. Cross also indicated that physicians from other offices lacked enthusiasm about

the prospect of Dr. LoPresti joining them in the event that the Manchester office was closed. Dr. Cross testified that this feeling was "mostly … based on that Leigh had created a lot of - I guess had created a lot of lack of support by the specialists in the Rutland area. As the person to lead that practice, there were a number of specialists that thought Leigh ought not to be the head of the practice there." When asked to describe the nature of the concern raised by the specialists, Dr. Cross responded in part by stating that "he [Dr. LoPresti] could have consulted and utilized the specialists more for patient benefit." Prior to the MPC executive session, Dr. Cross had also heard complaints from certain specialists about the lack of referrals from Dr. LoPresti. Dr. Cross summed up the situation as one of "frustration and dissatisfaction among the specialists."

… Dr. LoPresti sought to amend his complaint to incorporate the allegations that his termination was related to his referral practices. Specifically, he alleged that his referral practices had been guided by both the American Medical Association's Principles of Medical Ethics (AMA Principles) and Physician Group's own internal Code of Ethics. He claimed that the implied covenant of good faith and fair dealing prohibited Physician Group from firing him for these reasons because doing so would undermine the parties' reasonable expectations about the contract's common purpose. Further, he claimed that clear and compelling public policy restrained Physician Group from firing him over his referral practices. He argued that his obligation to abide by the ethical code of his profession, thereby protecting his patients, took precedence over Physician Group's conflicting demands. [The court's discussion regarding the timeliness of the proposed amendment of pleadings has been deleted. –Ed.]

Physician Group moved for summary judgment on July 15, 2002. In its memorandum of law accompanying its motion, Physician Group argued that the contract provision requiring 180- day notice prior to no-cause termination controlled the dispute absolutely. Accordingly, it argued that its reasons for termination were immaterial as a matter of law, notwithstanding the implied covenant of good faith and fair dealing or public policy restraints on contracts. It argued that no compelling public policy supported Dr. LoPresti's theory that Physician Group should have been prohibited from firing him because of his resistance to proposed benchmarks requiring Physician Group doctors to see a certain number of patients per day, or his ethical concerns about referring patients to certain specialists. Physician Group also argued that Dr. LoPresti's promissory estoppel claim must fail because that theory is unavailable when there is a written contract between the parties, as there was in this case. Further, in its reply memorandum to Dr. LoPresti's memorandum in opposition to summary judgment, Physician Group argued that "plaintiff has not produced

admissible evidence of specific facts to show a genuine issue for trial as to the alleged reason for termination."

After hearing oral argument from the parties, the trial court granted Physician Group summary judgment. In its opinion and order, the court concluded that Dr. LoPresti's assertions regarding the causal connection between his discharge and his refusal to refer to specialists based on professional ethical objections were immaterial and did not alter the right of either party to terminate the agreement for any reason. The only facts that the court considered relevant were the written contract between the parties containing the "with or without cause" termination clause and Physician Group's compliance with the clause's terms when it terminated Dr. LoPresti. The court ruled that the reasons why Physician Group terminated Dr. LoPresti were "moot, as a matter of law." The court also noted that Dr. LoPresti's complaint had been filed more than one and one-half years earlier, and on summary judgment, "other than Dr. LoPresti's conclusory allegations, there [was] no evidence of bad faith in [Physician Group]'s utilization of the explicit termination clause of the employment contract." For the reasons set forth below, we disagree in part with the trial court's ruling, and so reverse and remand for further proceedings.

We review a trial court's decision on summary judgment de novo, applying the same standard as the trial court. *White v. Quechee Lakes Landowners' Ass'n*, 170 Vt. 25, 28, 742 A.2d 734, 736 (1999). Summary judgment is appropriate only when there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. *Id*.

* * *

… We will abide by the stipulation reached by the parties and limit ourselves, as the trial court largely did, to the issues of law raised by Dr. LoPresti's amended complaint. Accordingly, we have assumed the truth of Dr. LoPresti's allegations as they pertain to his claims. As we discuss below, we affirm the trial court's ruling on the doctor's promissory estoppel and breach-of-the-implied-covenant-of-good-faith claims as a matter of law, but we reverse and remand for further proceedings on his claim of wrongful discharge in violation of public policy.

I. Wrongful Discharge in Violation of Public Policy

For purposes of our de novo summary judgment review, defendant has provisionally agreed that the Court may assume as true Dr. LoPresti's allegation that he was terminated because he refused to refer patients to certain physicians whom he believed provided substandard care to his patients and in some cases

performed unnecessary invasive procedures. Dr. LoPresti claims that his decision not to refer patients to these specialists was guided heavily by Vermont's prohibition on unprofessional conduct contained in 26 V.S.A. §§ 1354, 1398, and by numerous provisions of the AMA Principles. Dr. LoPresti asserts that his employers wanted him to make the referrals for financial reasons, notwithstanding the prohibition of such practices contained in the aforementioned ethical codes. He alleges that a discharge based on these grounds violates compelling public policy that restricts an employer's otherwise unfettered discretion to discharge employees. *See Payne v. Rozendaal*, … 520 A.2d 586, 588 (1986) (recognizing public policy limits on employer discretion in discharging employees). The trial court summarily rejected this argument because, in its view, this case was clearly governed by the termination clause in Dr. LoPresti's employment contract. Without analysis, the trial court also cited our decision in *Dulude v. Fletcher Allen Health Care, Inc.*, … 807 A.2d 390 (2002), as additional, alternative support for its conclusion that no public policy prohibited Dr. LoPresti's firing, even if it were for the reasons that he alleged.

A.

As an initial matter, we cannot accept the trial court's apparent holding that the existence of and adherence to a "with or without cause" termination provision of an express contract is sufficient to insulate an employer from a claim that it discharged an employee for reasons that violate public policy. In the employment context, Vermont law has long recognized that, under an at-will employment contract, "an employee may be discharged at any time with or without cause, 'unless there is a clear and compelling public policy against the reason advanced for the discharge.'" *Payne*, … 520 A.2d at 588 (quoting *Jones v. Keogh*, … 409 A.2d 581, 582 (1979)). Clause 1.2(c)(ii) of the "Physician Employment Agreement" states that, notwithstanding any provision to the contrary, the "Agreement shall terminate … One Hundred Eighty (180) days after written notice of termination with or without cause from either party." As Physician Group argues, this clause afforded Dr. LoPresti the security of six months in which to close out his practice and make arrangements to find new employment. This distinguishes the doctor's contract from the typical at-will employment relationship that is terminable immediately. *See Sherman v. Rutland Hosp., Inc.*, 146 Vt. 204, 207, 500 A.2d 230, 232 (1985) (at-will employment agreement can be terminated at any time with or without cause). Nonetheless, the agreement still left the employer with the power to fire him "with or without cause." Such employer discretion is the defining characteristic of the at-will relationship. *See Payne*, … 520 A.2d at 588. Accordingly, the distinction that Physician

Group draws between the contract provision at issue in this case and at-will agreements controlled by Payne is immaterial.

In Payne, we expressly recognized that an employer's contract rights with regard to terminating an employee "are not absolute," and must yield to public policy considerations. Id. While we have not expressly extended this principle to written employment contracts that require a notice period before no-cause termination, we see no reason why it does not apply in such cases. Vermont law has long held that courts have the power to void written contract provisions that violate public policy in either their terms or contemplated performance. *See Baldwin v. Coburn*, 39 Vt. 441, 444-46 (1867) (voiding written contract between liquor commissioner and agents he appointed as against public policy). Such contract terms can be voided as against public policy only when "it could be said that they were injurious to the interests of the public or contravened some established interest of society." *State v. Barnett*, 110 Vt. 221, 232, 3 A.2d 521, 526 (1939).

Without analysis or citation to Payne, the trial court "refused to treat this discharge as a violation of public policy" because it "is clearly governed by the termination clause." Defendant amplified this position by pointing out that the six-month provision evidences the doctor's substantial bargaining power in the contract and argues that the Court, "as conscience of the community, does not have to supply terms to protect the doctor." This argument fails to grasp the nature of public policy restraints on contract, which are enforced to protect community norms for the benefit of the public at large, as well as the individual employee. *Rocky Mtn. Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 525 (Colo. 1996) ("Public policy must concern behavior that truly impacts the public in order to justify interference into an employer's business decisions."). In his amended complaint, Dr. LoPresti claims that he was fired for his refusal to potentially violate state law and his professional ethical code by referring patients to doctors whom he believed were "providing improper care, potentially jeopardizing the physical well-being of his patients." Assuming that he can prove these allegations, the enforcement of public policy here would have a tangible connection to the protection of health care consumers. Therefore, Dr. LoPresti's claim is consistent with our view that compelling public policy is intended to prevent injuries to the public - especially in matters of public health. *See Payne*, 147 Vt at 492, 520 A.2d at 588 ("[public policy] may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like." (quotation and citation omitted).

Our law specifically recognizes public policy limits on employer discretion in at-will situations. And it recognizes that, in the appropriate case, all written con-

tract provisions may be voided as against public policy if the terms as written or actually performed could be injurious to the public. Accordingly, the trial court erred in concluding that the written contract provision in this case insulated the employer from Dr. LoPresti's claim that the termination decision violated public policy.

B.

Having decided that the existence of the written employment contract in this case will not, as a matter of law, preclude a determination that Physician Group wrongfully terminated Dr. LoPresti in violation of public policy, we must now assess whether Dr. LoPresti has identified clear and compelling public policy to support his claim. In *Payne*, we recognized that public policy in the employment context may be found in sources other than statutes and constitutions. *Id*. at 493-94, 520 A.2d at 589 (rejecting notion that public policy exception to at-will employment must be legislatively defined). Other jurisdictions recognize that professional ethical codes can be an important source of public policy in employment matters involving employees who are subject to the mandates of such codes. *Mariani*, 916 P.2d at 524-25 (relying on state professional accountancy ethical codes as source of public policy in wrongful discharge case); *Pierce v. Ortho Pharm. Corp.*, … 417 A.2d 505, 513-14 (N.J. 1980) (accepting professional codes of ethics as source of public policy, but rejecting wrongful discharge claim of doctor who failed to prove that conduct requested by employer would lead to an ethical violation). In Pierce, the New Jersey Supreme Court observed that "employees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers." 417 A.2d at 512; *see also Mariani*, 916 P.2d at 525 ("Ethical codes are central to a professional employee's activities, there may be a conflict at times between the demands of an employer and the employee's professional ethics.").

We agree, as a general matter, with those courts that accept professional ethical codes as potential sources of public policy. Nonetheless, employees who invoke such codes, as Dr. LoPresti has, still bear the burden of demonstrating that such codes are "clear and compelling" in their mandates to employees who claim that their professional ethical obligations supersede those owed to their employers. *Payne*, … 520 A.2d at 590. Specifically, employees must show that the ethical provisions relied on are "sufficiently concrete to notify employers and employees of the behavior [they require]," and the code provision being applied must be primarily for the benefit of the public as opposed to the interests of the profession alone. *Mariani*, 916 P.2d at 525; accord Pierce, 417 A.2d at 512. The employee must show that he had an objective, good faith belief that the

conduct requested by the employer would violate an ethical rule that satisfies the preceding definition. To succeed, an employee cannot rely on his or her personal moral beliefs, or on an overly cautious reading of the mandates in a particular code. *Pierce*, 417 A.2d at 512 ("An employee should not have the right to prevent his or her employer from pursuing its business because the employee perceives that a particular business decision violates the employee's personal morals, as distinguished from the recognized code of ethics of the employee's profession.").

Moreover, in a case like this one, a professional employee must show that the specific provisions contained in the ethical code relied upon apply in the particular professional context in which the employee is working. Here, for example, Dr. LoPresti relies on Principle E-8.132 among others. By its terms, Principle E-8.132 governs a central issue in this case: referral practices of physicians. Much of its operative language, however, specifically addresses the financial pressures that a physician faces when dealing with patients who belong to Preferred Provider Organizations (PPO) and Health Maintenance Organizations (HMO). As the Court understands it, Physician Group is neither a PPO, nor an HMO. Principle E-8.132 specifically references "referral to outside specialty services," as opposed to those available within the PPO or HMO. Because the court summarily rejected Dr. LoPresti's public policy claim without examining or applying this and other ethical provisions in question, the record and briefing contain very little detail about the organizational structure of Physician Group and its expectation of employees as they pertain to referrals. Without knowing how Physician Group handled referrals, it is difficult for this Court to apply an ethical provision, most of which is addressed to physicians working within the constraints of an HMO or PPO.

On remand, Dr. LoPresti must carry the foregoing burdens with respect to the AMA Principles he relies on, and then must show that he can satisfy the elements of wrongful discharge in violation of public policy as they are set out below.

In Mariani, the Colorado Supreme Court held that an employee's wrongful discharge claim could be based on public policy found in professional ethical codes. 916 P.2d at 525. The court set out four elements of the prima facie case for such claims. Id. at 527. The employee must show that (1) the employer directed the employee to perform an illegal or unethical act as part of the employee's duties; (2) the action directed by the employer would violate a statute or clearly expressed public policy; (3) he or she was terminated as a result of refusing to perform the requested act in violation of public policy; and (4) "the employer was aware or should have been aware that the employee's refusal was

based upon the employee's reasonable belief that the act was illegal" or in violation of the employee's professional ethical code. *Id.*

C.

Despite the trial court's citation to it, our holding in *Dulude v. Fletcher Allen Health Care* is addressed to a situation that is materially different from the present case, and thus is not an obstacle to Dr. LoPresti's claim. In Dulude, we held that, as a matter of law, a nurse's professional disagreements with the employer hospital's narcotics practices were insufficient to support a public policy claim. *Dulude*, … 807 A.2d at 397. Prior to her ultimate termination, nurse Dulude's discretion in dispensing narcotics to patients had been curtailed significantly in response to patient complaints and an internal audit indicating that her medication practices were aberrant. *Id*… . 807 A.2d at 393. The nurse was under strict supervision, and was required to obtain approval from a support person prior to administering any controlled substance. *Id*. Multiple letters of understanding between the nurse and the hospital clearly indicated that any deviation from the hospital's pain medication policies would result in her termination. *Id*. 807 A.2d at 393-94. Despite these warnings, the nurse deviated from the hospital pain medication policy several times and on occasion failed to obtain necessary approval from a support person. Id. Under these circumstances, we refused to accept the plaintiff's claim that public policy prevented the hospital from lawfully firing her, even though she had repeatedly violated hospital policy set by her supervisors.

In reaching our conclusion that public policy would not prevent the employer's termination decision, we emphasized that "as a licensed hospital in Vermont, FAHC has the ultimate responsibility to provide for, and protect, its patients, and to set its own standards for safeguarding the life and health of the people of this state." *Id*… . 807 A.2d at 397. We also cited to *Aiken v. Employer Health Serv., Inc.*, 1996 U.S. App. LEXIS 6060, No. 95-3196, 1996 WL 134933, at *6 (10th Cir. March 23, 1996), for the proposition that there is no "public policy which prohibits an employer from terminating a health care employee over a disagreement or difference of professional judgment where the judgment of each is within the bounds of reasonable care." *Id*. (internal quotations omitted). This is not the case here.

The substantial difference in professional status between the nurse in Dulude and Dr. LoPresti distinguishes the two cases. The nurse in Dulude worked as a hospital employee under the direct supervision of other licensed medical professionals - a status that afforded her less discretion over patient care decisions than that required of Dr. LoPresti, a primary care physician. Her job was to execute policies established by supervisors. *Dulude*, … 807 A.2d at 393. Time and

again, she proved herself incapable of abiding by specific pain-medication-administration plans and directives from her supervisors. By contrast, as a primary care physician, Dr. LoPresti was solely responsible for deciding which of the various area specialists would best treat his patients. Nothing in the record before us indicates that he was expected or required to receive approval from supervisors before making referrals.

Moreover, Dr. LoPresti has alleged more than a " 'difference of professional judgment where the judgment of each [party] is within the bounds of reasonable care.' " *Id*.... 807 A.2d at 397 (quoting Aiken, 1996 U.S. App. LEXIS 6060, 1996 WL 134933, at *6). Dr. LoPresti claims that specific provisions of the AMA Principles set strict guidelines governing physician referral practices. Dr. LoPresti believes that he will be able to prove, with additional discovery, that his refusal to violate the codified ethical standards of his profession solely for the financial benefit of his employers led to his discharge. The nurse in Dulude made no claim that her aberrant medication practices were mandated by any professional ethical code. Id. Instead, she was following nothing more than her own personal philosophy of pain-medication administration, and the appellate record revealed that her practices were the source of numerous patient complaints. *Id*... . 807 A.2d at 392-94.

* * *

Due to the undeveloped state of the record as it pertains to this claim, we express no opinion as to Dr. LoPresti's ability to satisfy the elements articulated above. At this stage, we acknowledge only that, contrary to the trial court's legal conclusions, Dr. LoPresti's amended complaint has stated a claim upon which relief can be granted, assuming that he can support it with admissible evidence.

Dr. LoPresti has also alleged that the conduct that Physician Group required of him would have violated Vermont law regulating the practice of medicine. Specifically, Dr. LoPresti relies on 26 V.S.A. §§ 1354(a)(7), 1398. Section 1354(a)(7) [which] states that unprofessional conduct includes "conduct which evidences unfitness to practice medicine." Section 1398 allows the Board of Medical Practice to suspend or revoke licenses of doctors who engage in unprofessional conduct. Dr. LoPresti argues that a violation of a professional ethical code, like the AMA Principles, can amount to "unfitness to practice medicine." *See, e.g., Shea v. Bd. of Med. Exam'rs*, ... 146 Cal. Rptr. 653, 662 (Ct. App. 1978) (unfitness to practice medicine is evidenced by "conduct which breaches the rules or ethical code of [doctor's] profession"). Dr. LoPresti cites no case in which the Vermont Board of Medical Practice has actually interpreted the statutory language as he does. The board is entrusted with enforcing the statute in the first instance, and it does so in the context of cases where the specific facts

amounting to allegedly unprofessional conduct are before it. We are, therefore, hesitant to usurp the board's role by issuing an advisory opinion on the type of conduct that would not be "unprofessional" as that term is used in the statute. While we are allowing further proceedings in which Dr. LoPresti will have the chance to prove that the AMA Principles, standing alone, are clear and compelling public policy that controlled the employer's termination decision, we decline Dr. LoPresti's invitation to incorporate the AMA Principles into 26 V.S.A. § 1354(a)(7).

Finally, we reject the aspect of Dr. LoPresti's public policy claim that relies on certain provisions of Physician Group's own "Code of Ethics." Our review of the policy provisions that Dr. LoPresti relies on leads us to the conclusion that they are "broad hortatory statements of policy that give little direction as to the bounds of proper behavior," and thus do not comply with the public policy standards we set out above. *Mariani*, 916 P.2d at 525.

II. Implied Covenant of Good Faith and Fair Dealing

Dr. LoPresti also claims that, notwithstanding the express "with or without cause" termination clause of his written contract, the implied covenant of good faith and fair dealing (the covenant) imposes limits on both the reasons and process for terminating an employee in his position. In Vermont, the covenant of good faith and fair dealing is implied in every contract. *Carmichael v. Adirondack Bottled Gas Corp.*, … 635 A.2d 1211, 1216 (1993); see also Restatement (Second) of Contracts § 205 (1981) (stating that the covenant is implied in every contract). Dr. LoPresti's theory has both a substantive and a procedural component which we will deal with separately.

A. Substantive Protection of the Implied Covenant of Good Faith and Fair Dealing

"'Good faith' is a concept that 'varies … with the context' in which it is deemed an implied obligation." *Carmichael*, .. . 635 A.2d at 1216 (quoting Restatement (Second) of Contracts § 205 cmt. a (1981)) (omission in original). The covenant's purpose is to ensure "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Restatement (Second) of Contracts § 205 cmt. a (1981). Here, we are asked to imply the covenant in the context of an express physician's employment agreement allowing for termination on notice from either party "with or without cause."

As Dr. LoPresti views it, the agreed common purpose of the physician's employment contract was providing the highest possible quality of patient care. He argues that "[a] jury would be entitled to find that firing a doctor because he had

upheld the ethical standards of his profession by taking reasonable steps to protect his patients from harm violates the covenant," as it applies to the agreed common purpose he posits. In this respect, his claim based on a violation of the covenant is practically indistinguishable from his public policy claim discussed above. This point is illustrated by the following statements Dr. LoPresti's counsel made at the oral argument on summary judgment in the trial court:

> The covenant of good faith and fair dealings is a very strong part of Vermont law that stands on equal footing with FEPA [the Vermont Fair Employment Practices Act]. There's some protections for the public that really the contracts can['t] outweigh. Our argument about the compelling public interest, the compelling public policy is pretty much the same. I wouldn't make the argument if what Dr. LoPresti did was just to protect his own rights or his own interests… .

In the employment termination context, some courts have also recognized the difficulty of distinguishing between violations of the covenant and wrongful termination in violation of public policy. For example, in the seminal case of Monge v. Beebe Rubber Co., the New Hampshire Supreme Court applied the covenant and held that an employer had violated it by terminating an at-will employee who refused to date her foreman… . 316 A.2d 549, 551-52 (N.H. 1974). The court stated that "termination by the employer of a contract of employment at will which is motivated by bad faith or malice … constitutes a breach of the employment contract." *Id*. at 551. In a subsequent case, however, the court clarified that Monge applied "only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn." *Howard v. Dorr Woolen Co.*, … 414 A.2d 1273, 1274 (N.H. 1980). In concurring with the Idaho Supreme Court's decision to recognize the applicability of the covenant in the at-will employment context, Associate Justice Huntley discussed the interplay of the covenant and public policy as he saw it:

> When the contract is "at will," the employer need not show good cause for the termination. However, the "at will" employer may not terminate an employee for bad causes or reasons, i.e., those contrary to public policy, because such terminations are made in bad faith, and as such, are in contravention of [the covenant].

Metcalf v. Intermountain Gas Co., … 778 P.2d 744, 752 (Idaho 1989) (Huntley, J., concurring) (emphasis added). We see no reason, in the context of this case, to blur the distinction between harms for which the covenant provides a remedy and harms for which public policy provides a remedy. We will not, therefore, allow Dr. LoPresti's claim for breach of the covenant, as he has fashioned it, to go forward.

More importantly, we have already held that the covenant does not apply to at-will employment agreements when the plaintiff's argument amounts to no

more than an objection to the other party's freedom to avail itself of the at-will arrangement by terminating the agreement for reasons that the other party does not accept. *Dicks v. Jensen*, … 768 A.2d 1279, 1285-86 (2001). While the agreement at issue here is not truly at-will in the sense that there is a written contract that requires a notice period before no-cause termination, we have treated them as equivalents for the reasons stated supra. Accordingly, the rationale behind our rejection of the employer's claim in Dicks applies here.

Though writing in the context of classic at-will employment arrangements, the Supreme Court of Connecticut summarized what is our essential position in this case:

> Although we endorse the applicability of the good faith and fair dealing principle to employment contracts, its essence is the fulfillment of the reasonable expectations of the parties. Where employment is clearly terminable at will, a party cannot ordinarily be deemed to lack good faith in exercising this contractual right. Like other contract provisions, which are unenforceable when violative of public policy, the right to discharge at will is subject to the same restriction. We see no reason presently, therefore, to enlarge the circumstances under which an at-will employee may successfully challenge his dismissal beyond the situation where the reason for his discharge involves "impropriety … derived from some important violation of public policy."

Magnan v. Anaconda Indus., Inc., … 479 A.2d 781, 788-89 (Conn. 1984) (internal citation omitted).

Above and beyond the allegations that Physician Group fired him in violation of public policy, Dr. LoPresti also claims that he was fired because he demanded a higher standard for patient care than Physician Group was interested in providing. His specific allegations were related not only to the referral issue, but also to clashes he had with management over the number of patients a Physician Group doctor would be required to see in a day. He claims that termination for this reason was inconsistent with his justified expectations under the contract that incorporated the notion, contained in Physician Group's own code of ethics, that "care of the sick" was the physician's "first responsibility" and "sacred trust." *See Carmichael*, 161 Vt. at 208, 635 A.2d at 1216 (covenant emphasizes " 'consistency with the justified expectations of the other party' ") (quoting Restatement (Second) of Contracts § 205 cmt. a (1981)). Assuming that Dr. LoPresti can prove this allegation, as a matter of law, the covenant still will not provide a remedy where the express contract makes both parties aware that either party can terminate the agreement, upon proper notice, for any reason. Putting aside the public policy aspect, Dr. LoPresti's claim under the covenant is based on his not unwarranted dissatisfaction with the reasons he believes were behind his firing. We cannot recognize this as an acceptable ground on which to

challenge employer personnel decisions that are based on freely negotiated "with or without cause" termination clauses, because to do so would essentially render such clauses meaningless.

We note, however, that our holding in this case will not necessarily preclude the covenant's application in the employment termination context when a plaintiff's claim for damages is based on "accrued benefits" and not solely on implied tenure, i.e., permanent employment until just cause for termination arises. *See Ross v. Times Mirror, Inc.*, … 665 A.2d 580, 586 (1995) (reserving judgment on whether Court would recognize the covenant in the context of nontenure terms of at-will contract). Even when the employment arrangement gives the employer absolute discretion to terminate the contract without cause, courts have held employers liable for breaching the covenant where the termination was based on the employer's desire to avoid paying the employee benefits earned under the contract. *See, e.g., Fortune v. Nat'l Cash Register Co.*, … 364 N.E.2d 1251, 1255-57 (Mass. 1977) (notwithstanding written contract allowing either party to terminate the contract on written notice, employer violated implied covenant of good faith and fair dealing by terminating employee in order to avoid paying him commissions and bonuses to which he would have been entitled but for the termination); *see also Magnan*, 479 A.2d at 787-88 (expressing a willingness to accept employee claims based on implied covenant of good faith and fair dealing when the employer's termination decision has the effect of "depriving the employee of compensation that is clearly identifiable and is related to the employee's past service.") (internal quotation marks omitted). Such cases are based on the principle that "any action by either party which violates, nullifies or significantly impairs any benefit of the employment contract is a violation of the implied-in-law covenant of good faith and fair dealing." *Metcalf*, 778 P.2d at 750; see also Restatement (Second) of Contracts § 205 cmt. a (1981) (covenant emphasizes "consistency with the justified expectations of the other party").

Dr. LoPresti's claim does not require us to apply the covenant to restore accrued benefits that were lost as a result of his being fired. He cannot claim that Physician Group deprived him of any benefit of the employment contract by terminating him when it did. The contract required only that Dr. LoPresti be given written notice of termination six months in advance, and the opportunity to work for the contracted salary during the period following the notice until the date of termination. He does not dispute that he was given this notice, nor does he dispute that he was paid for all the services he rendered. Moreover, in light of the freely negotiated "with or without cause" termination clause, lifetime employment was clearly not a benefit of the contract.

B. Procedural Protection of the Implied Covenant of Good Faith and Fair Dealing

Dr. LoPresti's claim that Physician Group breached the covenant by employing a bad faith process in firing him is similarly unavailing. To the extent that Physician Group provided him with a reason for his termination …, ostensibly that the office where he worked was being closed, he argues that this was a pretext for the real reason he was terminated - failure to refer patients to certain specialists. He argues that this alleged subterfuge "deprived him of the opportunity to protect his rights," because he would have made a greater effort to explain his referral practices in hopes of reversing Physician Group's decision to terminate him. The flaw in this argument lies in Dr. LoPresti's suggestion that he had the "right" to permanent employment absent just cause for termination. The contract makes clear that he had no such right.

In Carmichael, we accepted the Restatement's view that " 'subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified.' " … 635 A.2d at 1217 (quoting Restatement (Second) of Contracts § 205 cmt. d (1981)). Again, we stress that the covenant's application varies with the context. *Dicks v. Jensen*, … 768 A.2d at 1285-86; Carmichael, … 635 A.2d at 1213. As a general matter, we discourage any subterfuge and evasion in employer/employee relations. Nonetheless, when, as here, the employer has no duty to provide the employee with any reason why he or she is being fired, subterfuge and evasions, though they may be reprehensible, are not actionable. Dr. LoPresti could have negotiated for terms that would have required Physician Group to provide him not only with notice prior to termination under § 1.2(c)(ii), but also with the reason for the termination decision. In fact, under Dr. LoPresti's physician's agreement § 1.2(c)(i), either party could terminate the agreement ninety days after providing the other party notice of a material breach. In that case, the alternative termination clause contemplates that, after receiving notice of a material breach, the other party will work to cure it. If the breaching party can cure the breach within thirty days, then the contract will not terminate. The bargain Dr. LoPresti struck with Physician Group left both parties with the choice of at least two means to terminate the contract. Physician Group cannot be penalized for exercising its choice as it did, even when doing so deprived Dr. LoPresti of the opportunity to change the minds of Physician Group's decisionmakers.

While public policy could supersede the written termination provision in this employment contract, the implied covenant of good faith and fair dealing, as Dr. LoPresti has invoked it, will not. As we noted above, public policy restrictions on an employer's personnel decisions protect the public from conduct that transgresses widely held community values. Though the effect of its enforce-

ment may be to protect a specific employee, its purpose is to deter conduct that is also directly or indirectly injurious to the public. To the extent that Dr. LoPresti invokes the implied covenant of good faith and fair dealing to perform a like function in this case, we decline to write this redundancy into the law. If Dr. LoPresti falls short of carrying his burden on the public policy theory, we will not accept his invitation to apply the covenant as a remedy for what he sees as the unduly harsh operation of a freely bargained contractual term; in this case, the arms-length bargaining process between professionals delivered sufficient protection.

* * *

[The court's discussion of the promissory estoppel claim is omitted. –Ed.]

Our resolution of the legal issues involved in Dr. LoPresti's public policy claim makes clear that the contract does not permit Physician Group to require Dr. LoPresti to subjugate patient care to financial considerations when doing so would result in a violation of law or the AMA Principles. On the other hand, when viewed objectively, a reasonable person would have understood that the "with or without cause" termination provision in the contract allowed Physician Group to discharge Dr. LoPresti for failure to comply with employer practices even if those practices compromised his personal standards of patient care, but were otherwise ethical and lawful. Moreover, the termination clause also allowed Dr. LoPresti the freedom to leave Physician Group, after appropriate notice, if he did not agree with its practices. We decline, therefore, to hold that there was a defect in formation of the contract between the parties.

* * *

The superior court's judgment as to Dr. LoPresti's claim of wrongful termination in violation of public policy is reversed and the case is remanded for additional proceedings consistent with the views expressed herein.

[Source: 865 A.2d 1102 (2005).]

ANNOTATION

Most medical treatment in the United States is provided by licensed private physicians with whom the patient contracts directly or through a private employer of the physician, or through a private insurance arrangement.

The American Medical Association (AMA), the largest professional organization of licensed physicians in the United States, has adopted a set of Principles

of Medical Ethics and an accompanying Code of Medical Ethics which provides more detailed guidance. The Principles and Code are generally used as the primary guide for disciplinary actions by state medical licensing agencies, by hospitals and other medical care facilities in determining whether to revoke a physician's privilege of treating patients at that facility, and by medical insurers in determining whether to pay a physician's charges for treatment of insured persons.

Principle VIII of the AMA's Principles of Medical Ethics states: "A physician shall, while caring for a patient, regard responsibility to the patient as paramount." Provision E-8.132 of the AMA Code of Medical Ethics is titled "Referral of Patients: Disclosure of Limitations". Although it contains some specific references to health care plans that, for a set annual fee, undertake to provide all medical treatment from within its employed or affiliated group of physicians and allied health care workers (HMOs, IPAs, and PPOs—Health Maintenance Organizations, Individual Practice Associations, and Preferred Provider Organizations), the Code provision does not confine itself to those financial or organizational formats of physician affiliation. Thus, the language of E8.132 appears to cover, as well, entities in which physicians are partnered with or are employed by other physicians, and includes the statement: "In determining whether treatment or diagnosis requires referral to outside specialty services, the physician should be guided by standards of good medical practice. Physicians must not deny their patients access to appropriate medical services based upon the promise of personal financial reward, or the avoidance of financial penalties."

The reviewing court states that when the case is tried, Dr. LoPresti will have to prove that he had an objective, good faith basis for concluding that particular colleagues lacked competence or were unethical in their conduct toward patients. On the other hand, the state appellate court's discussion of the *Dulude* case, in which it rejected a nurse's assertions of ethical prerogatives, indicates that a physician may not be protected in following his own referral evaluation of the competence of specialists where the group practice includes a supervisory hierarchy with express responsibility to make decisions regarding patient care based on a managing physician's judgment or based on some form of group oversight of competence and ethical behavior. For example, included in the cited medical ethics rule is the statement: "Physicians must assure disclosure of any financial inducements that may tend to limit the diagnostic and therapeutic alternatives that are offered to patients or that may tend to limit patients' overall access to care. Physicians may satisfy this obligation by assuring that the health care plan makes adequate disclosure to enrolled patients. Physicians should also promote an effective program of peer review to monitor and evaluate the quality of the patient care services within their practice setting." Arguably, if a peer re-

view group has judged a specialist to be competent, public policy would not be violated if a group dismissed one of its primary care physicians who refused to make referrals to that specialist.

The court's decision describes the surviving claim as based on "wrongful discharge in violation of public policy," a phrase often used by courts and commentators in identifying this basis for relief. A more descriptive phrase is "interference with the exercise of a publicly significant legal privilege or legal responsibility."

Courts generally treat this claim for relief as a tort. As such, damages arguably can be recovered regardless of the claimant's efforts to mitigate damages, could include emotional injury, and, if willful, could include punitive damages. Accordingly, the remedy is potentially considerably more generous to the injured party than would be a breach of contract remedy. In contrast, a breach of the implied covenant of good faith and fair dealing is a contract cause of action. Since a claimant in a contract action has a duty to mitigate damages, that claim (had the court found it applicable under the facts of this case) would not have held much promise for a substantial recovery since, under his employment contract, Dr. LoPresti had 180 days notice before the termination became effective and one would expect a licensed physician to be able to find comparable employment during the course of almost a half year.

In making his claim, Dr. LoPresti did not assert that the patient load about which he had complained was so excessive as to prevent him from fulfilling his ethical responsibilities to his patients. Had he done so, that basis for relief likely would have survived under the court's discussion of the "public policy" claim. On the other hand, in order to prove the claim, he probably would have had to show that in fact he had not provided adequate treatment for at least some of his patients, a contention he no doubt would be very reluctant to make.

NORWAY

Supreme Court
Rt. 2005 p. 826

Employment contract – work on call – indeterminate or fixed term contract

HEADNOTES

Facts

Kjell Braaten AS (Braaten) is an import and wholesale firm supplying dry-food and non-food products to the grocery trade. Goods arrive from abroad by container, the great majority of which – some 400-500 per year – is transported to Braaten's warehouse where they are emptied. In the years 2001-2002 Braaten had some 25 employees on regular, indeterminate employment contracts, 7-8 of whom were working in the warehouse. In addition, the firm had a number of "extra hands" working in the warehouse and, also, on particular occasions further extra help was hired in, e.g., the form of "work parties".

Ole H was working at Braaten's from 1 December 2001. He was working in the warehouse emptying containers and packing and repacking goods to be shipped out. It was only in October 2002 that Ole received a written contract of employment (which is the form applicable under WEA § 55 B et seq. for information in writing on terms and conditions in pursuance of Directive 91/533/EEC). In that contract, the starting date of the employment relationship was set at 1 December 2001, Ole's position was described as "extra hand when needed", and the duration of the employment relationship as well as his working hours were stated as being "need-based". Pay was by an hourly wage and in the space for notice period in case of termination it said "one month".

In fact, Ole H essentially worked every day of a regular working week from 1 December 2001 until 12 November 2002, with the exception of Christmas 2001, Easter 2002, and 5-6 weeks during the summer of 2002, i.e., somewhat but not much more than annual holiday time. Also, when on the job he worked practically full time every day, and he was at work without being "booked" or called upon each time.

By letter of 11 November 2002 to his employer Ole H raised certain issues pertaining to the working environment in the undertaking, which in Ole's view did not conform to requirements set out in laws and regulations. This brought on an incident the next day, which led to the employer asking Ole H to leave the workplace. Subsequently, he was not given any more work at Braaten's and he did also not receive any form of pay from the employer, e.g., wages during a notice period or similar.

In April, 2003, Ole H filed suit in the City Court for compensation on the grounds that he had been hired on a temporary contract in violation of WEA § 58 A and that he had been subject to an unlawful summary dismissal. The first instance court however found for the employer. On appeal, the points at issue were restricted to whether Ole had been hired on a temporary contract in violation of WEA § 58 A and therefore was entitled to compensation pursuant to § 58 A No. 4. The Court of Appeals found for Ole H on both counts, considering his employment contract with Braaten as a "temporary contract" but as such unlawful based on a review of how the employment relationship has actually operated, the employer's manpower needs, etc. The Court thus rejected Braaten's argument that the employment contract must be deemed an indeterminate contract and hence not within the scope of § 58 A. On further appeal this was made the key point. Before the Supreme Court the case was again trimmed down; the parties agreed that *if* the Court held the employment contract to be a temporary one it was common ground that the lawfulness requirements of WEA § 58 A were not complied with. Hence, the key issue before the Supreme Court was how to classify the employment contract in terms of the WEA dismissal protection rules.

Decision

The Supreme Court held in favour of Ole H. Even if at the outset the employment contract had the appearance of an indeterminate contract, in substance it did not provide the kind of employment security at which the WEA dismissal protection rules aim. In reality, the contract amounted to a circumvention of the strict restrictions on temporary hiring laid down in WEA § 58 A and thus had to be similarized to a temporary contract. The Court of Appeals' compensation award, in the amount of NOK 150 000 (€ 22 000), was accordingly upheld.

Law applied

WORKERS' PROTECTION AND WORKING ENVIRONMENT ACT (WEA), 1977 (as amended)

§ 58 A Temporary hiring

1. Contracts of employment for a fixed time period or for specific work of a temporary nature (temporary contracts) may only be lawfully concluded

a) when warranted by the nature of the work and the work differs from that which is ordinarily performed in the enterprise,

b) …

2. Temporary contracts of employment shall terminate when the agreed period of time expires, or when the specific work is completed, unless otherwise agreed in writing or stipulated by collective agreement.

…

4. … If the court finds that the temporary contract was in violation of § 58 A, subsection 1, the Court, if so requested by the employee . . ., shall give a decision that that the employment relationship is still in force. In special cases the court may however, in response to a request from the employer, decide that the employment relationship shall terminate if, after weighing the interests of the respective parties, the court finds that a continuation of the employment relationship would be clearly unreasonable. If a temporary contract has been in violation of § 58 A, subsection 1, the employee may claim compensation. Compensation shall be stipulated in accordance with § 62, second paragraph, second sentence.

JUDGMENT

Mr. Justice Flock delivered the opinion of the unanimous Court: …

(24) … Sec. 58 A of the WEA regulates contracts of temporary hiring, this being contracts of employment "for a fixed time period or for specific work of a temporary nature". The provision lays down strict restrictions on the right to conclude contracts of this kind. If hired in contravention of § 58 A the employee as a rule is entitled to demand that the employment relationship is one of indeterminate duration to which the ordinary rules of the WEA on notice periods and substantive dismissal protection apply; see, e.g., the Supreme Court decision in Rt. 1989, p. 1116. In addition the employee is entitled to demand compensation, cf. § 58 A No. 4. It is the latter provision that comes to the fore in the present case.

(25) … the main point in issue is whether the employment contract amounted to a contract of indeterminate duration and whether the employer thereby avoids the conditions for lawfully hiring on a temporary contract set out in § 58 A.

(26) At the time Ole H was employed by Kjell Braaten AS, Braaten had about 25 employees on regular, indeterminate employment contracts, of whom 7-8

were working in the warehouse. In addition, the firm had a number of "extra hands" working in the warehouse and, also, on particular occasions further extra help was hired, e.g. in the form of "work parties". Ole H worked practically full time. The firm's need for manpower at the warehouse was to an extent variable due, i.a., to its receiving containers for unloading at somewhat uneven intervals. Still, the situation unquestionably was beyond the scope of such circumstances as under § 58 A would have allowed Braaten to employ Ole H on a temporary contract.

(27) The written contract of employment contained no provision limiting its duration. And with the clause on a mutual right of termination with a one month notice period the contract seemingly implied substantive dismissal protection for the employee. This can however not be sufficient for the contract to elude the reach of § 58 A.

(28) When the contract stated working hours to be "need-based" this referred solely to the needs of the employer. This way, the contract stipulated merely a framework whilst providing it with content was up to the employer. Ole H was afforded prospects of work and income all depending on the employers' needs and willingness to make use of him. This means that in reality, his situation was far removed from that of an employee on a contract of indeterminate duration.

(29) The provision of WEA § 58 A on the right to hire on temporary contracts have as their background, i.a., the legislator's wish that employees have a reasonable degree of security – encompassing also predictability – in their job situation. … Thus, [in the preparatory work to the 1995 amending Act] in Innst. O. No. 2 (1994-95), p. 29, the Parliament standing committee majority expressed "concern with developments in the labour market, where seemingly there is an ever-increasing use of temporary hiring, short term employment contracts, hiring on a project basis, labour only contracting, the transition of employees into independent contractors, etc." In the committee majority's view this "might result in undertakings gradually cutting back on the number of staff on indeterminate contracts, down to a certain 'core staff', while the remaining need for manpower is accommodated by way of other forms of affiliation to the enterprise". In the majority's opinion the WEA should not contribute to this kind of development.

(30) On a purely literal construction the employment contract at issue in the present case falls outside the scope of § 58 A in that its duration in time is not limited, the contract is not "temporary". However, the contract is devoid of the security for the employee that ensues from, i.a., the WEA provisions on dismissal protection applicable to contracts for indeterminate employment, in addition to the fact already pointed to that the contract on the whole affords the

employee modest security with regard to actually getting work and thereby having an income. The way it reads I cannot but find that the contract implies a circumvention of the WEA's strict regulation of the right to conclude temporary employment contracts. This being the case, I have come to the conclusion that the contract must be similarized with an unlawful temporary employment contract and that consequently, the relationship between Kjell Braaten AS and Ole H is subject to WEA § 58 A.

(31) Braaten has submitted in argument that in practical working life there is a need to be able to have recourse to such a form of loose affiliation between undertaking and employee, so that the undertaking has employees who can be called upon when there is a need – as substitute workers or as extra help. In my view, the use of this kind of an arrangement must be assessed in the individual case relative to the bounds to temporary hiring that must be held to ensue from WEA § 58 A. The way the contract between Braaten and Ole H was functioning it was however clearly beyond the limits of the law.

…

[Source: *Norsk Retstidende*, 2005, p. 826.]

ANNOTATION

The above decision presents a novel approach to the assessment of work-on-call contracts in respect of temporary hiring and dismissal protection law. A point of importance at the outset is that the right to hire on temporary contracts is quite tightly restricted by the WEA statutory provisions in § 58 A. Those provisions apply to all undertakings regardless of size and also cover, largely, all categories of employees. Their main objective is two-pronged, as cursorily pointed to by the Court. In part, it is the aim – in line with the overriding aim of the WEA and its dismissal protection regulation – to provide stability and security of employment for those in employment. Coupled with this, the purpose of § 58 A is also to counteract circumvention and thus the undermining of the protection implied in the rules on security of employment applicable to indeterminate contracts. This applied to the initial 1977 provisions and was reinforced with the amendments to the WEA enacted in 1995. Put very briefly, and thus simplified, an employer is not entitled to hire on a temporary contract unless there is a strong, weighing reason for doing so, essentially pertaining to a situation deviating from the ordinary, day-to-day operations of the undertaking.

The Supreme Court has previously held that a temporary contract for what was termed "on call substitute work" may be at variance with WEA § 58 A; see

Rt. 1989, p. 1116. While temporary contracts may be used to hire workers to substitute for regular employees who are temporarily absent on sick leave, vacation, etc., the situation in that case was somewhat different. The employer was running a business in the offshore petroleum industry. Due to absences on grounds of health, schooling, etc., there was a permanent need for extra workers at an average level of some 15 % of the regular workforce. The Court held that the use of temporary contracts to cover a manpower need at such a rate was not permissible under § 58 A. Consequently, the worker concerned was considered as being employed on an indeterminate contract. She was however not awarded compensation, on the ground that no economic loss was incurred by not having been called upon to work inasmuch as pursuant to the contract she had no specific entitlement to having work. This decision was widely construed to imply that an indeterminate contract might stipulate on call work, in the form of no specific right to work and no duty to accept when called upon, without this being incompatible with WEA § 58 A.

The above 2005 decision clearly departs from this. The question remaining is, to what extent. One point of departure may be the Court's emphasizing how the contract *reads* (para. 30 of the judgment, *supra*). When the contract then in the very same sentence is classified as a "circumvention" of the statutory provision, this invites the interpretation that it is the form and wording of the contract which by itself is decisive. This might be viewed as being substantiated by the subsequent statement, "this being the case …", which appears to refer back to how the contract reads as its premise for adjudging it an "unlawful temporary employment contract".

It appears both strange and strained, however, to hold form alone to be decisive. The same is true should the applicability of § 58 A be considered conditional on the contract being "unlawful" in terms of § 58 A. The Court's reasoning needs to be untangled, and the line of reasoning that suggests itself from dissection may be sketched as follows.

At the outset, a distinction may be made between the (analysis of) the contract and the situation or purpose for which it is employed.

First, as regards the contract as such the issue is whether, according to its content – i.e., essentially, here, the way it is worded, the contract is sufficiently precise or is undetermined with regard to the employee's right to work and thus to an income. If the contract is "open", or undetermined, in the sense that the right of work of the employee is dependant on the needs and the willingness of the employer to call upon him, within the meaning of WEA hiring and dismissal protection rules the contract must be deemed a temporary contract regardless of whether it is formally framed as an indeterminate contract.

If so, WEA § 58 A *is* applicable.

Then, second, the question is *whether* the contract is lawful or not lawful in terms of § 58 A. This can be fairly drawn from the Court's observation in para. 31 of the judgment where it is also pointed out that where goes the dividing line is situated is an issue that cannot be decided in the abstract. It is a matter that can only be properly addressed in the circumstances of a given case; the legality of "an arrangement" must be assessed in the individual case.

The above decision gives ample ground to conclude on such a two-faceted approach in principle. It provides little guidance, however, on when an on call contract – the way it "reads" – albeit formally indeterminate will fall into the category of "temporary contracts". It also offers little guidance on when a situation may run afoul of the legality requirements of WEA § 58 A. In essence, that is nothing different from what is commonly the case with case law. Also, even if the suggested two-faceted approach may be soundly based in principle, analytically, in the practical application of law it can easily be expected that the two facets interact when it is to be decided how the respective borderlines should be drawn in the individual case. These questions remain important. Forms of on call work contracts are traditional and are in current use to no negligible extent in certain trades, perhaps predominantly but – as the above decision illustrates – not solely in the service sector.

PART FIVE

COLLECTIVE LABOUR RELATIONS

AUSTRALIA

High Court of Australia
Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd

Effect of industrial awards or agreements – transmission of business – whether awards or agreements can become binding upon successor service providers

HEADNOTES

Facts

Region Dell Pty Ltd (Region Dell) operated a number of medical clinics in the Melbourne metropolitan area. One of these was located at the suburb of Moorabbin. Region Dell had a practice of licensing part of its premises to other parties to provide radiology services. Region Dell supplied the radiology equipment, but the radiology practice had responsibility for providing staff, consumables and spares.

Up until 31 August 1997 Region Dell had granted a license at the Moorabbin clinic to Southern Radiology Pty Ltd. Between 1 September 1997 and 31 August 1999 it had granted a licence to Melbourne Diagnostic Imaging Group (MDIG), and from 1 September 1999 to Gribbles Radiology Pty Ltd (Gribbles). Some 12 months later Gribbles stopped providing radiology services at the Moorabbin clinic, and terminated the employment of the staff it had engaged at that location.

Gribbles was not bound by any industrial award or agreement. However, both Southern Radiology and MDIG were named as respondents to the Health Services Union of Australia (Private Radiology – Victoria) Award 1993 (Award).

Following the cessation of Gribbles' operations at the Moorabbin clinic, the Health Services Union of Australia (HSU) initiated proceedings in the Federal Court of Australia alleging that Gribbles had breached the Award by not making redundancy payments to a number of radiologists whose employment it had terminated when it closed its Moorabbin operation.

For the HSU's application to succeed it had to be shown that Gribbles was bound by the Award by virtue of the fact that it was "successor, assignee or transmittee" to all or part of the business of either or both of Southern Radiology or MDIG within the meaning of section 149(1)(d) of the *Workplace Relations Act 1996* (WR Act).

The HSU was successful both at first instance, and on appeal. Gribbles, and the Minister for Employment and Workplace Relations then sought, and were granted, leave to appeal to the High Court of Australia.

Decision

By a majority of 4:1, the High Court determined that the mere fact that a successor employer carried on an identical business activity to a predecessor employer did not necessarily mean that there had been a transmission of business in the relevant sense. For that to occur the new employer must "enjoy" a part of the business that was once "enjoyed" by its predecessor. That in turn will normally involve identification of the particular activity that was pursued by the two entities, and the assets (tangible and intangible) that were used in that pursuit.

Law Applied

WORKPLACE RELATIONS ACT 1996

Section 149

1. Subject to any order of the [Australian Industrial Relations] Commission, an award determining an industrial dispute is binding on:

> d. any successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer…

JUDGMENT

[The following extract is taken from the joint reasons of the majority (Gleeson CJ, Hayne, Callinan and Heydon JJ. Kirby J dissented on the basis of his reading of the purpose and effect of section 149(1)(d).]

THE ACT

The outcome of these appeals depends upon the proper construction of s 149(1)(d) of the Act. That paragraph takes its place in a provision which identifies those persons who are bound by awards. Subject to any order of the Commission, an award determining an industrial dispute binds the parties to the industrial dispute who appeared or were represented before the Commission (s 149(1)(a)), those who were summoned or notified to appear as parties to the industrial dispute, whether or not they appeared (s 149(1)(b)), and those who, having been notified of the industrial dispute and of the fact that they were alleged to be parties to the industrial dispute, did not, within the time prescribed, satisfy the Commission that they were not parties to that dispute (s 149(1)(c)). In addition, an award determining an industrial dispute (subject to any order of the Commission) is binding on all organisations and persons on whom the award is binding as a common rule (s 149(1)(e)), and all members of organisations bound by the award (s 149(1)(f)).

The provisions of s 149(1)(d), dealing with successors, assignees and transmittees, derive from s 29(ba) of the *Conciliation and Arbitration Act* 1904 (Cth), a provision introduced into the 1904 Act by the *Commonwealth Conciliation and Arbitration Act (No 2)* 1914 (Cth). Although renumbered by a number of subsequent amendments to the 1904 Act, and amended in some respects, the provision remained in the legislation until the repeal of the 1904 Act in 1988 and the enactment of a similar provision by s 149(d) of the *Industrial Relations Act* 1988 (Cth), the immediate predecessor of the provision now under consideration.

The provision introduced in 1914, for awards to bind successors, assignees and transmittees of a business of a party bound by an award, was enacted against a background in which the Court's decisions in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 and *Australian Boot Trade Employés' Federation v Whybrow & Co* (1910) 11 CLR 311 loomed very large. The Court decided in the first *Whybrow* case that the only arbitral power which could validly be conferred on the Commonwealth Court of Conciliation and Arbitration, by a law made under s 51(xxxv) of the Constitution, was a power of judicial determination between the parties to an industrial dispute, and that accordingly those provisions of the 1904 Act which dealt with the regulation of industries generally were invalid. In the second *Whybrow* case, the Court decided that a federal award could not validly prescribe a common rule in any particular industry. …

As originally enacted, the succession provisions provided that a successor, assignee or transmittee of the business of a party bound by the relevant award

was also bound. In *Proprietors of the Daily News Ltd v Australian Journalists' Association* (1920) 27 CLR 532, it was held that the succession must follow and not precede the award. In 1921, therefore, the 1904 Act was amended to add reference to a successor, assignee or transmittee of a party *to the dispute* to the existing reference to a successor, assignee or transmittee of a party to the award.

As was pointed out in *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413, the legislative solution adopted to the problem revealed by the *Whybrow* cases was to fasten upon the relevant industrial dispute. The succession provisions now found in s 149 (and their legislative predecessors) extended the binding effect of awards made in settlement of an industrial dispute. Without succession provisions of this kind, an award would have bound only those who were the disputants and bound them in respect of the subjects with which the award dealt – typically the terms and conditions of employment in the particular industrial operations then being undertaken by employers who were parties to the dispute.

For present purposes, it is convenient to notice three particular aspects of the succession provisions. First, as the text of s 149 reveals, the succession provisions now seek to extend the identity of those who are to be bound by an award beyond those who are positively shown to have been actual parties to the relevant dispute. Section 149(1)(b) and (c) brings in those who were alleged to be parties and who did not show that they were not.

Secondly, like its legislative predecessors, s 149 binds parties to the dispute (formerly the award) in respect of what Isaacs J called ((1923) 32 CLR 413, 438) their "present and ... future industrial operations of the nature involved in the dispute". Parties are bound in relation to more than whatever may have been the particular operations in which each was engaged at the time of the dispute. If a party later undertakes similar "industrial operations" it is bound by the award in those new operations.

Thirdly, and of most significance in the present matter, since first enacted, the succession provisions have made a further extension to the binding effect of an award by fastening upon the "business" of the employer who was a party to the dispute. An employer who is a successor, assignee or transmittee to or of the business, or a part of the business, of an employer who was a party to the dispute determined by the award is bound by the award. …

The expression "business of an employer who was a party to the industrial dispute", and its legislative predecessors, expresses a compound conception. The "business" must be the business *of* the person identified in the succession provision. It is that "business" which provides the essential link between the industrial dispute which the award determined and the binding effect of the award upon an employer who was not a party to that dispute. Demonstrating no more

than that the two employers engage in identical business activities does not establish that link. It does not do so because it fails to address an important element of what we have identified as a compound conception. It fails to consider whether the "business", to or of which the new employer is a successor, assignee or transmittee, was the business of the employer who was a party to the relevant industrial dispute.

Section 149 must be read in a way that gives effect, so far as possible, to its legislative purpose. Plainly, the purpose of the section and its predecessor succession provisions is, and always has been, to extend the operation of awards beyond those who were parties to the dispute that the award determined. But identifying that purpose does not answer the question that arises in this matter – how far does the extension go? It is only if some a priori assumption is made about the intended reach of the provision that considering its purpose casts light on the question. To reason in that way begs the question. Rather, it is necessary to consider the words of the provision. It is there that the intended reach of the legislation is to be discerned.

In particular, it is necessary to notice that s 149(1)(d) provides for three different cases (successor, assignee or transmittee) concerning what, for present purposes, can be seen to be a single subject matter (the business or a part of the business of an employer who was a party to the industrial dispute determined by the award). This observation reveals why the "business of an employer" must be understood as a compound conception and cannot be understood as a reference to no more than a kind of business activity.

There can be no assignment or transmission of a *kind* of business activity. There can be an assignment or transmission of the whole or a part of a *particular* business. (The succession provisions fasten upon the business that an identified employer conducted.) It is only if considerable violence is done to the language of the provision that one can read it as providing for a case of succession to a *kind* of business activity. So to read the provision would require at least two steps. First, it would require reading "successor" as meaning simply "a person who follows". Perhaps that reading is open; perhaps the better view is that it refers only to a person who follows *according to applicable legal principle*. It is not necessary to resolve that question. The second step that would have to be taken is to read "the business of an employer who was a party to the industrial dispute" as having a different meaning in cases of succession from the meaning it has in cases of assignment or transmission. That step cannot be taken without violence to the words. There is no reason to give such a differential operation to the expression "business of an employer who was a party to the industrial dispute". Yet, as these reasons later demonstrate, that reading of the provision underpinned much of the argument advanced by the HSU.

Was Gribbles a successor to or of any part of the business of MDIG? It was not disputed that MDIG was a party to the industrial dispute determined by the Award. As noted earlier, it was not submitted that Gribbles was an assignee or transmittee of any part of the business of MDIG. …

Gribbles a successor to the business of MDIG?

The HSU submitted that the combination of three facts required the conclusion that Gribbles was the successor to part of MDIG's business. It pointed, first, to the identity of business activity which each conducted at the Moorabbin Heritage Clinic; secondly, it pointed to the identity of the place at which and equipment by which that activity was conducted; and, thirdly, it pointed to the fact that nine out of the 10 radiographers who worked for MDIG at the Moorabbin Heritage Clinic took up employment with Gribbles. Gribbles, on the other hand, submitted that the absence of any nexus of any kind between MDIG and Gribbles necessarily denied the conclusion that Gribbles was a successor to any part of MDIG's business.

These submissions of the parties owed much to statements made in reported cases about the way in which the succession provisions of the Act, or its predecessor provisions, applied to the facts considered in those cases. Thus, Gribbles' submissions built upon what Piddington J had said, as president of the New South Wales Industrial Commission, in *Bransgrove v Ward and Syred* [1931] AR(NSW) 272, 277, that "[t]o constitute successorship there must be some definite legal nexus or privity between a respondent to the Federal award who is the predecessor, and a successor who then, by virtue of the Commonwealth statute, becomes bound by the award".

By contrast, the HSU submissions built upon what was said by the Full Court of the Federal Court in *North Western Health Care Network v Health Services Union of Australia* (1999) 92 FCR 477 [19 ILLR 457] that:

> … it is not necessary to search for some legal form of succession, assignment, transfer, corporate acquisition or takeover. What is necessary is to determine as a question of fact whether 'the business' understood in the wide sense so found has been transmitted to other hands. That does not require a search for some legal mechanism as a nexus between the pre and post transmission stage.

And both sides sought to draw support for their respective submissions from what was said by this Court in *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) 201 CLR 648.

It is essential, however, to begin the inquiry with the text of the provision rather than with the decided cases. The person who is to be bound must be a

successor, assignee or transmittee "to or of the business or part of the business of an employer".

"SUCCESSOR" AND "BUSINESS OF … A PARTY TO THE INDUSTRIAL DISPUTE"

The immediate focus in argument in these appeals was not upon what is meant by the "business" of the former employer. As three members of the Court pointed out in *Re Australian Industrial Relations Commission; Ex parte Australian Transport Officers Federation* (1990) 171 CLR 216, "the word 'business' is notorious for taking its colour and its content from its surroundings … Its meaning depends upon its context." Accordingly, the Court held in the *Transport Officers* case that the expression a "successor or assignee or transmittee of the business" of an entity could, and in that case did, extend to succession between two statutory authorities, neither of which carried on any commercial undertaking for profit, but both of which discharged governmental functions.

By contrast, the immediate focus in the present matters, in the courts below and in argument in this Court, was upon what is meant by "successor". No doubt that was because both MDIG and Gribbles carried on commercial undertakings. Nonetheless, to identify what must be shown to describe Gribbles as the "successor" to or of a part of the business of MDIG requires identification of the "business" of MDIG and of Gribbles. That is necessary because, in this case, s 149(1)(d) requires the identification of a part of the business of MDIG to or of which Gribbles was successor in its operations at the Moorabbin Heritage Clinic.

None of the parties to these appeals proffered any general definition of "successor". Nor did any seek to identify any set of general criteria against which the facts of a particular case should be judged. Rather, the HSU and Gribbles each sought to contend that the presence or absence of particular factual features of the case was sufficient to require the result at which it sought to have the Court arrive.

It is accepted that it would be wrong to attempt any general definition of the term. Whether one employer is the successor to another is a mixed question of fact and law, and "business" is a word that may have application in a wide variety of different circumstances. But to be a "successor" to the business or part of the business of a former employer, the new employer must enjoy some part of the "business" of the former employer. For the reasons given earlier, it will not suffice to show that the new employer pursues the same kind of business activity. If the new employer does not enjoy any part of the business of the former employer, it cannot be said to be a successor to or of that business, or a part of it.

At once it can be seen that this presents the difficulties that attend upon the use of the word "business". How is the "business" of the former employer to be identified? What is meant by saying that the new employer "enjoys" part of that "business"?

The "business" of an employer may be described in a number of ways. In many contexts it will suffice to describe the kind of activity conducted. A description like "manufacturing", "retailing" or the like may do. In other contexts more detail may be necessary, as, for example, "window frame manufacturing" or "toy retailing". In s 149(1)(d), however, more and different detail is necessary in order to decide whether one employer is the successor to or of the "business" or part of the "business" of another. So much follows inevitably from the need to consider whether the new employer is a successor to a *part* of the former employer's business. But more fundamentally than that, it follows from the fact that s 149(1)(d) focuses upon succession, assignment and transmission to or of a business which is identified as the business *of* an employer. That necessarily directs attention to what it is that the former employer had which is to be described as the "business" of that employer.

In many cases the answer to the questions just presented will be provided by looking at some transaction between the two employers. Where there has been some transaction between them, it will be possible to see whether the former employer transferred the whole, or part, of its business to the new employer. But in other cases there may be no transaction between the former employer and the employer alleged to be its successor. So, for example, in cases of inheritance between natural persons, there may be no transaction between the two employers but it may be clear that the new employer is the successor of the business of the former employer. Thus, the existence of some transaction between the two employers is not essential in order to show that one is the successor to the business of the other. Further, whether or not there was some transaction between the new employer and the former employer, there may be a real question about whether what the new employer enjoys is the whole or a part of the "business" of the former employer.

The "business" of an employer may be constituted by a number of different assets, both tangible and intangible, that are used in the particular pursuit, whether of profit (if the "business" is a commercial enterprise) or other ends (if the activity is charitable or the "business" of government). In the case of a commercial enterprise, identifying the employer's "business" will usually require identification both of the particular activity that is pursued and of the tangible and intangible assets that are used in that pursuit. The "business" of an employer will be identified as the assets that the employer uses in the pursuit of the particular activity. It is the assets used in that way that can be assigned or trans-

mitted and it is to the assets used in that way that an employer can be a successor.

The new employer *may* be a successor, assignee or transmittee to or of the business, or part of the business, of an employer who was a party to the relevant industrial dispute if the new employer, having the beneficial use of assets which the former employer used in the relevant pursuit, uses those assets in the same or a similar pursuit. The means by which the new employer came to have the beneficial use of those assets is not determinative of the question presented by s 149(1)(d). Whether the new employer is a successor, assignee or transmittee, will require examination of whether what the new employer has can be described as a part of the former employer's business. That may present difficult questions of fact and degree.

An employer, who has acquired the plant and premises with which, and at which, the former employer conducted part of its business, may well be the successor to that part of the business of the former employer. Yet, in other cases, acquisition of an item of plant used by an employer could not be said to make the acquirer the "successor" to any part of the business of the former employer.

A simple example may serve as a basis for illustrating the kinds of question that may arise. The buyer of a second hand motor vehicle sold by an employer would not ordinarily be said to be the successor to a part of that employer's business. More than the bare fact of acquisition of an item of plant used in the former employer's business would have to be shown to warrant the conclusion that one was the successor to a part of the business of the other. Showing that one engages in the same business activities as the other will not always suffice. To pursue the used motor vehicle example a little further, showing that the purchaser used that vehicle for the same kinds of purpose as the employer who sold it, would not, without more, warrant the conclusion that the purchaser was successor to or of a part of the business of the vendor. The purchaser would not enjoy any part of the "business" of the former employer.

The conclusion just reached about this example turns upon what is meant by the "business" of the former employer. It understands that word, at least when applied to a commercial venture, as a reference to the combination of the activities pursued in the business and the assets that are used in that business. The conclusion assumes that, either the asset in question (the motor vehicle) is not the sole or principal asset of the business, or that, if it is, it is replaced by another and similar asset which the former employer will use in the same way. That is, the conclusion assumes that the combination of activities and assets which together constitute the former employer's "business" continues largely unaffected by what has happened. There has been no succession because the former employer has not ceased to enjoy any part of its business.

The example we have given emphasises the need, when considering the application of s 149(1)(d), to do two things. First, it is necessary to identify exactly what is meant in the context of the particular case, by "the business or part of the business" of the former employer. Secondly, it is necessary to identify what part of that "business" the former employer once had which is now enjoyed by the person allegedly bound by the award.

THE APPLICATION OF S 149(1)(D) IN THIS MATTER

The HSU submission was that Gribbles was a successor to that part of MDIG's business constituted by the provision of services at the Moorabbin Heritage Clinic. That submission should be rejected. Gribbles, when operating at the Moorabbin Heritage Clinic, enjoyed no part of the business of MDIG; Gribbles was not a successor to or of any part of the business of MDIG.

Gribbles pursued the same business activity as MDIG. Both engaged in the pursuit of profit by conducting a radiology practice. But Gribbles did that at the Moorabbin Heritage Clinic without enjoying any part of the tangible or intangible assets that MDIG had deployed in pursuing its activity as a radiology practice, whether at that place or elsewhere.

It is convenient to seek to support that conclusion by considering the features of this case to which the HSU submissions gave chief emphasis – the same business activity conducted in the same place, using the same equipment and the same employees. Both Gribbles and MDIG pursued the same business activity. That activity could be described in a number of different ways. It could be described as providing radiology services or it could be described, with more particularity, as providing radiology services at the Moorabbin Heritage Clinic by employing radiographers to take medical images at that clinic. Nothing turns on the particularity of description. It may be accepted that each pursued the same activity.

But what asset of MDIG did Gribbles come to use when it began to pursue that activity at the Moorabbin Heritage Clinic? Both Gribbles and MDIG used the same equipment, but the equipment was Region Dell's. The place where they carried on this activity was not theirs. Each had a separate licence from Region Dell to occupy a part of the clinic premises but MDIG's licence had come to an end and a new licence had been granted to Gribbles. Both employed the same radiographers, but no employee is an asset in the employer's balance sheet to be bought or sold (*Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014).

It may be assumed that both Gribbles and MDIG traded at the Moorabbin Heritage Clinic in the hope or expectation that work would come from referrals by doctors working at the clinic or from patients who came to the premises. It

may be thought that this hope or expectation could constitute a form of goodwill. If that were so, it may be that the goodwill should have been reflected in the accounts of each. But there was no evidence and no argument advanced about the question of goodwill attaching to this aspect of the business of either MDIG or Gribbles. In particular, it was not suggested in argument, whether in the courts below or in this Court, that Gribbles had succeeded to that part of the business of MDIG which was constituted by MDIG's goodwill at the Moorabbin Heritage Clinic. Indeed, the absence of any dealing between the two (by which MDIG sought to realise some value attaching to such goodwill by exacting a price for it from Gribbles) would suggest very strongly that MDIG had no such goodwill. Be this as it may, the point does not arise.

In the end, then, the HSU contention that Gribbles was the successor to a part of the business of MDIG turned upon the bare fact that the business activity which each pursued was identical. For the reasons given earlier, we do not accept that this suffices to satisfy s 149(1)(d). That conclusion is reinforced when account is taken of the two *Whybrow* cases. Section 51(xxxv) of the Constitution does not support a law providing for the declaration of a common rule for an industry. Yet the HSU contention, if accepted, would read the Act as providing for the Award to operate as a common rule for private radiology practice in Victoria. So much must follow if identity of business activity is all that must be shown to engage the succession provisions of s 149. … Each appeal should be allowed.

[Source: (2005) 214 Australian Law Reports 24].

ANNOTATION

This is the second occasion in recent years upon which the High Court has been called upon to examine the meaning and effect of the transmission of business provisions under the WR Act. In the first, *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) 201 CLR 648, it determined that in deciding whether there has been a transmission of business for purposes of the WR Act it is necessary to adopt a three-stage process: first identify the business (or part of the business) that is alleged to have been transferred; second identify the character of the business in the hands of the new employer; and third compare the two. If this comparison shows that they bear the same character, the new employer can usually be regarded as the successor to the former employer in the relevant sense.

PP Consultants involved a situation where a pharmacy in a sea-side resort commenced operation of a "bragency" on behalf of a bank in premises which were next door to the pharmacy, and which had formerly been occupied by the bank. The union that represented the former employees of the bank, who were now employed by the pharmacy in the "bragency", claimed that those employees were entitled to the benefit of the award that had formerly applied to them when they were employed by the bank. At first instance, the Federal Court had determined that there had not been a transmission of business for purposes of section 149(1)(d). That decision was reversed by the Full Court of the Federal Court, which in turn was reversed by the High Court.

The Court's decision on the facts of the case may well be correct. However, it is unfortunate that the Court did not take the opportunity to provide any clear guidance as to how the three-part test was to be applied in practice, or as to whether, and to what extent, it was departing from the expansive approach adopted by the Full court of the Federal Court in the *North Western Health Care Case* in 1999 [see 19 ILLR 457].

In many respects, the decision in *Gribbles* represents a repeat performance. As a finding of fact, it is not unreasonable to suggest that Gribbles should not properly be seen to be the "successor" of MDIG or of Southern Radiology. It had no connection of any kind with either of these businesses, beyond the fact that it had, like them, entered into contractual relations with Region Dell. There was no evidence to suggest that Gribbles had in any meaningful sense "taken over" the business formerly carried on by MDIG, any more than there was evidence to suggest that MDIG had taken over a business formerly carried on by Southern Radiology. In such circumstances, it does seem counterintuitive to find that Gribbles was a successor to either entity for purposes of section 149(1)(d).

The problem is that, as in *PP Consultants*, the Court did not provide any reasoned case for its conclusion. With respect, the concept of "enjoyment" of the business of the putative transmittee does not provide any basis for predicting whether any future situation will, or will not, constitute a "transmission" in the relevant sense. In particular, it does not make it possible to determine whether a service-provider who takes over from another service-provider in providing service (such as cleaning staff, or labour hire) to a common principal can be said to "enjoy" the business of its predecessor.

The uncertainty that is inherent in the approach adopted by the Court in this instance is further compounded by the fact that it is clear both from the wording of the Act, and from the reasoning of the Court itself, that there does not have to be any kind of legal nexus between the putative transmittor and the putative transmittee. This means that in principle the second service-provider *could* be found to be the "successor" to a party with whom it had no legal or other con-

nection, if it could be said in some indefinable way to "enjoy" the business of the first provider.

It is also interesting to speculate as to how the approach adopted by the Court in *PP Consultants* and in *Gribbles* would have dealt with a situation where Region Dell had, at some point in the past, provided radiology services in its own right, and had then decided to outsource provision of that service to (say) MDIG, with MDIG using the same assets as Region Dell (bearing in mind that Region Dell did in fact own the equipment that was used by all three providers at the Moorabbin clinic), and perhaps even "enjoying" some of Region Dell's goodwill. Could it plausibly be said that the identity of the business in the hands of MDIG was the same as when it was in the hands of Region Dell? Assuming that it did, could it also be said that MDIG "enjoyed" the business of Region Dell when it took over the provision of radiology services? If it did, then Gribbles could clearly be said to be the "successor…(whether immediate or not)" to Region Dell for purposes of section 149(1)(d).

It appears that in terms of the reasoning of the High Court, these questions could equally well be answered in the affirmative or in the negative. That neatly encapsulates the failure of judicial technique that is evident in the decisions in *PP Consultants* and in *Gribbles*.

Since the decision in *Gribbles* was handed down, the transmission of business provisions of the WR Act have been radically overhauled. In particular, transmitted awards and agreements now bind transmittees only in respect of those of its employees who transferred with the business – whereas previously a transmitted instrument was binding upon all of the transmittee's employees who worked in the transmitted business (and indeed transmitted awards bound the transmittee in respect of all of its employees who were capable of falling within the scope of the award). Furthermore, transmitted instruments will now bind the transmittee only for a period of up to 12 months, and less than that if the employee becomes entitled to the benefit of a new (individual or collective) agreement during that period. Despite these radical changes, the legislature did not make any attempt to clarify what will constitute a transmission of business for purposes of the new regulatory regime. This means that the matter continues to be determined by reference to the somewhat opaque set of principles that emerge from *PP Consultants* and in *Gribbles*.

ITALY

Court of Cassation– Joint Sections
Decision no. 11325 of 30 May 2005
Rete Ferroviaria Italiana s.p.a. v. Cu. et al.

Collective agreement – enforceability after the agreement has expired – protection of remuneration according to article 36 of the Constitution

HEADNOTES

Facts

Two former employees of Ferrovie dello Stato [state railways] brought a legal action with the aim of making their former employer pay certain additional elements in the remuneration package, which a collective agreement from 1994 had annulled with effect from the 1 January 1993.

The "Pretore" for labour disputes found in favour of the employees and stated that the particular additional elements in the remuneration package should continue to apply, despite the fact that the previous collective agreement from 1990 which provided for them had expired. According to the judge of first instance, the expiry of the collective agreement does not cause the automatic termination of clauses relating to remuneration and the subsequent collective agreement cannot affect rights of employees which have already been acquired.

The judgment was upheld by the Court of Appeal.

The employer appealed to the Court of Cassation.

Decision

The Court of Cassation found in favour of the appellant.

Law applied

CIVIL CODE

Article 2074

The collective agreement, even when it has been repudiated, continues to be enforceable after it has expired, until superseded by a new collective regulation.

CONSTITUTION

Article 36, paragraph 1

Employees are entitled to remuneration that is proportional to the quantity and quality of their work, and in any case sufficient to provide them and their families with a free and dignified existence.

Article 39, paragraph 1

Trade union organisation is free.

JUDGMENT

[…]

2.1 […]

The plaintiff's objections regard both aspects examined in the appealed decision, and concern both identifying the grounds of the claim in the provisions set out in the national collective agreement of 1990, with the consequent recognition of rights which have already been acquired by the employees, as well as the applicability of a principle of enforceability of contractual clauses relating to wages even after the collective agreement has expired, on the basis of which the provision of the subsequent national collective agreement of 1994 – which established the annulment of the enforceability, dating from the 1 January 1993, of clauses regarding employee benefits – could not have any bearing on such subjective situations.

It would seem appropriate, first of all, to examine the second point of view, which is concerned with whether there has been contradiction in the judgments of this court.

According to a line of cases, the provision of article 2074 of the Civil Code – regarding the continued enforceability of the expired collective agreement, until it is superseded by new collective regulations – does not apply to post-corporative collective agreements which, constituting manifestation of private contractual autonomy, are regulated by the free will of the parties concerned and it is their decision only as to whether the enforceability of an agreement may extend beyond its expiry date [citing a large number of judgments of the Court of Cassation]; the termination of the enforceability of collective agreements, according to their contractual nature, therefore depends on the expiry of the fixed term stated therein (decision no. 6408 of 9 June 1993 of the Court of Cassation; decision no. 7818 of 24 August 1996 of the Court of Cassation). A right stemming from a collective regulation which no longer exists cannot be ruled to be a right definitively acquired by the employees, since collective regulation has expired or been superseded by a subsequent collective agreement: that

is because the provisions of collective agreements are not incorporated into the content of individual contracts, giving rise to vested rights being removed from the power of disposition of union organisations, but operate instead from the outside on individual employment relationships, so that, in the event of succession of collective agreements, the previous provisions cannot be maintained according to the principle of favour (which applies exclusively, according to article 2077 of the Civil Code, to the relationship between collective and individual agreement), because the conservation of the most favourable regulation is assigned to the freedom of bargaining of the collective stipulating parties [citing a large number of judgments].

Divergent from the view according to which collective clauses operate exclusively within the time limits agreed upon by the stipulating parties is decision no. 3899 of 21 April 1987 of the Court of Cassation, with which it was declared that the deadline inserted into a company-level collective agreement concerns the requirement (of a political rather than legal nature) to abstain from making further claims until the fixed term expires, but does not concern the duration of the rights, acquired by individual employees by application of the contract itself.

This view was seconded by decision no. 4563 of 22 April 1995 of the Court of Cassation, according to which the expiry of the contract does not bring about the automatic termination of the enforceability of clauses relating to remunerative content. The statement of such a principle is not based on the application of the provision set out in article 2074 of the Civil Code to the collective agreements concluded according to the principles of private law concerning contracts, nor on the theory of the collective agreement being incorporated into the individual agreement, but on the consideration that in the employment relationship the payment of remuneration assumes a constitutional value, in relation to the guarantee provided by article 36 of the Constitution; so that the quantity of remuneration agreed through the collective bargaining, representing an adequate amount of retribution according to the Constitution and ensuring a free and dignified existence, "becomes an objective entity which set apart from the normal series of effects pertaining to a common contract and takes on a sort of inviolability, which is not at the disposal of the parties concerned"; the enforceability of the agreement beyond the expiry of the contract depends therefore – according to this decision – on its inherence to a constitutional right.

The prevalent view has been subsequently confirmed by decision no. 4534 of 5 May 1998 of the Court of Cassation; decision no. 1298 of 5 February 2000 of the Court of Cassation; decision no. 1576 of 15 February 2000 of the Court of Cassation; decision no. 4534 of 10 April 2000 of the Court of Cassation; decision no. 7393 of 2 June 2000 of the Court of Cassation, and more recently by decision no. 668 of 17 January 2004 of the Court of Cassation; decision no. 16635 of 5

November 2003 of the Court of Cassation also confirms the fact that it is the contractual freedom of the stipulating parties concerned to determine which of the collective agreements is applicable in time.

However, in opposition to this line of cases, decision no. 4563 of 1995 of the Court of Cassation, and decision no. 5908 of 14 April 2003 of the Court of Cassation share the same view, which confirms the existence of a principle of enforceability of collective agreements after the contract has expired, based either on a regulation of "relative inviolability" of the economic level reached by the employee, or on the regulation function of a series of employment relationships, typical of the collective agreements concluded according to the principles of private law concerning contracts, which prevents the mere expiry of the term of enforceability from being able to cause a lack of provisions which is detrimental to the level of protection of the employment relationship already reached and damaging to the central position of the employee's human dignity.

2.2

The court rules that it has to confirm the prevalent view, recognizing that the enforceability of collective agreements is temporary in nature and corresponding to the expression of contractual autonomy. Given that well-established normal practice in industrial relations, characterized by the predetermination of the duration of collective agreements, is related to the provision reached during collective bargaining, it can also be ruled that even the annulment of certain elements of remuneration after a certain term could be recognised as corresponding to the interests of the stipulating parties, according to an evaluation reserved for the collective autonomy. As has been observed by decision no. 12751 of 1992 of the Court of Cassation … the very duration of a collective agreement is part of the disposable provision on the part of the union, because it is for the union to assess whether the contractual provision had corresponded to the interests of the associate employees and, should circumstances change, can decide not to retain the enforceability of the agreement for a further amount of time; moreover, the new collective agreement can turn out to be "detrimental" in certain aspects, but clearly in respect to a pre-existing situation, whilst the new regulation corresponds to the interests of the associates in respect to the new situation (at all times up to the collective autonomy to avoid unfavourable consequences for employees due to the succession of contracts).

In this system, the application of a principle of enforceability beyond the natural expiry of the collective agreement, at odds with the intent expressed by the stipulating parties, is presented as an objective limit to the freedom of collective bargaining, and does not comply with the guarantee set out by article 39 of the Constitution if the existence of a provision is established – according to the

view expressed by decisions no. 4563 of 1995 and 5908 of 2003 – in accordance with which the quantity of remuneration is not at the disposal of the stipulating parties reached through the collective bargaining, attributing to such an element an objective inviolability such as to be extended – as the second decision cited maintains – not only to the remuneration clauses, but also to all the contractual regulations.

It must be pointed out, however, that the protection deriving from article 36 of the Constitution – upon which this view is based – operates on the level of the individual agreement, and not on that of the collective agreement, in relation to which the issue of enforceability of the agreement beyond the expiry date is presented: and it is on this level, as has been accurately observed by legal commentators, that the question arises as to whether the employer, not as part of the individual relationship, but in as much as an adherent to the collective agreement, may be forced to respect the collective agreement beyond the agreed term of enforceability.

The view proposed by the line of cases which is not followed here would seem to presuppose that the expiry of the collective agreement, along with the lack of contractual binding of the retribution clauses, in itself brings about a violation of the protection of article 36 of the Constitution. On the contrary, it must be stated that such protection operates however within the bounds of the employment relationship, independently of the directly binding nature of the collective clauses (from the point of view of temporal enforceability just as that of subjective enforceability, in any case limited to the adherents of the stipulating unions).

[… O]n the level of the individual employment relationship, the salary enjoyed by the employee is guaranteed, and the employee can certainly claim breach of such protection, if salary levels were eventually reduced, indicating that the expired collective agreement can be considered a valid parameter for determining fair and sufficient remuneration; it is then up to the judge to establish, according to the well-known criteria by which the judge makes the remuneration adequate according to the constitutional provision, whether for such a purpose to take account of additional elements of the retribution provided by the collective agreement which is applicable.

3.

Examining the other aspect of the objection involves the application of a different principle of inviolability, which prevents the collective agreement (in the absence of a specific mandate, or subsequent ratification by the parties involved) from having any bearing on subjective rights already acquired by employees.

The appealed decision ruled that such a principle was operative in this case and that the right to the employee benefits had already been granted by the national collective agreement of 1990.

[…]

4.

In accepting the petition, the appealed decision has to be quashed, and the case be referred to another judge, who will hold a new inquiry into the content and binding effectiveness of the collective agreement to be applied in accordance with the following principle of law: "the collective agreements concluded according to the principles of private law concerning contracts are only enforceable within the temporal context fixed by the parties concerned, and constitute manifestation of the contractual autonomy of the stipulating parties; consequently, remuneration clauses within the collective agreement are not binding beyond the expiry of the contract, because the guarantee assured by article 36 of the Constitution operates only at the level of the individual employment relationship, according to which a violation of the constitutional guarantee can derive from a less favourable remuneration in respect to the level of remuneration previously enjoyed".

[…]

[Source: Massimario di giurisprudenza del lavoro, 2005, p. 590].

ANNOTATION

According to normal practice in Italian industrial relations, collective agreements generally have a deadline. They therefore provide for a fixed term.

The main legal problem with the enforceability of the collective agreement after it has expired lies in establishing whether the provisions of article 2074 of the Civil Code, enacted in 1942, may still be applied today. The article explicitly asserts the existence of such a principle of enforceability of the collective agreement after expiry.

The continuing applicability of the said regulation of the Civil Code is controversial. Indeed, after the 1948 Constitution came into effect, legal commentators and the courts had to deal with the question of whether the provisions relating to the collective agreement as outlined in the Civil Code should not be considered enacted only with reference to the so-called corporatist collective agreements: i.e. contracts drawn up in a historical and legal context – that of the corporative fascist state – within which the collective agreements were stipulated

by the only unions legally recognized, which were incorporated into the organization of the state.

The 1948 Constitution, on the contrary, considers the collective agreement as an expression of contractual autonomy deriving from a principle of freedom of organization and trade union pluralism, as enshrined in article 39, paragraph 1.

The majority of legal commentators, as well as a majority of the decisions of the courts, maintain that the said constitutional principles are incompatible with the 'old' provisions as set out in the Civil Code, which would therefore only refer to contracts drawn up during the corporative era.

From which the consequence would result that article 2074 cannot be applied, and that it must be ruled that collective agreements drawn up today are enforceable only in the temporal context desired by the stipulating parties concerned, in accordance with the principle of freedom of collective bargaining.

However, according to certain decisions of the Court of Cassation, the enforceability of remuneration clauses within the collective agreement would not automatically cease to apply merely due to the expiry of the contract; and as such this is in accordance with the aim of guaranteeing the employee a level of salary which is proportional and sufficient as set out in article 36 of the Constitution.

The intervention of the Joint Sections of the Court of Cassation which we comment on here is thus intended to bring the decisions of the courts into agreement, by denying the existence of any such principle of enforceability of the collective agreement after expiry. To rule that remuneration clauses in the collective agreement may still be enforceable beyond the expiry date of the contract would result in conflict with the principle of trade union freedom provided for by article 39 of the Constitution, which requires that contracting parties in the collective agreement be free to determine the content (as well as the duration in time) of the reciprocal obligations.

The court also states that the expired collective agreement could be used as a parameter for determining proportional and sufficient remuneration in accordance with article 36 of the Constitution. However, that does not mean that the judge must necessarily take account of the expired contract in a specific case.

Since there is no legislation regarding a minimum wage in Italy, article 36 of the Constitution, which states that employees are entitled to remuneration which is proportional to the quantity and quality of their work and in any case sufficient to provide them and their families with a free and dignified existence, has always been interpreted so as to enable the judge to determine just remuneration.

In the same way, it has always been interpreted that the judge is able to follow the provisions of collective agreements as a means by which to gauge his estimation.

The decision of the Court of Cassation merely confirms this position and states that the collective agreement is nothing more than a parameter for just remuneration.

INDIA

Supreme Court of India
K.M.E.Union v. Birla Cotton Spinning & Weaving Mills Ltd.
C. A. No. 3475 of 2003.

Labour dispute – conciliation – Industrial Tribunal – application for recall

HEADNOTES

Facts

This case begins with a dispute arising from the closure of some looms of the weaving section of the respondent's mill. The appropriate Government in exercise of it powers under section 10(1)(d) and 12(5) of the Industrial Disputes Act, 1947, referred the dispute to the Industrial Tribunal, Delhi. The terms of reference were the following:

"I. Whether the action of the Management in refusing duties to a large number of workers is illegal and /or unjustified, and if so, what directions are necessary in this regard?

II. Whether the Management is justified in closing down a large number of looms in the mill and if not to what relief the affected workers are entitled and what further directions are necessary in this respect?"

While the reference was pending, certain events took place which compelled the Deputy Labour Commissioner-cum-Conciliation Officer to intervene and bring the parties to the negotiating table and a settlement was arrived at between the parties. The reference of dispute led to further disputes and the workmen served a notice of strike with some more demands. In reply to the strike notice, management gave notice under section 25FFA of the Act, for closing the undertaking relating to the weaving mill on account of labour trouble resulting in huge financial losses.

As per the terms of the settlement both parties were to move an application before the Industrial Tribunal with a prayer that a fair settlement having being reached between the parties and the Industrial Tribunal may be pleased to give its award in terms of the settlement. The management had filed this application and this was opposed by the appellant Union on various grounds and the appel-

lant Union filed a writ before High Court of Delhi contending that the settlement was not a conciliation settlement binding upon all the workmen. The High Court held that the Award dated June 12, 1987 had effectively terminated the dispute referred to the Tribunal. The writ petition was dismissed by the High Court.

The matter was then brought before the Supreme Court by special leave petition and the same dismissed with following observations:

"... The Industrial Tribunal should dispose of the question as to the validity and binding nature of the settlement ..."

The Industrial Tribunal recorded the following conclusions:

> "I have carefully gone through the terms of the settlement. These are not only well bargained but quite detailed and very sound in the circumstances obtaining. It's various items made provision for meeting all the relevant problems of relief and rehabilitation of the affected workers because of the closure of weaving section of the mill and envisages an expert technical body for deciding on the possibility and extent of the revival of weaving work in the Mill, under the time bound schedule. I find the settlement fair and just."

On September 7, 1987 the appellant union filed an application before the Industrial Tribunal to the effect that the only question which had been argued before the Tribunal was in relation to the power and jurisdiction of the Conciliation Officer to record the settlement between the parties during the pendency of the disputes. The question as to whether the settlement was fair and just, and should be accepted by the Tribunal, was not argued since that required evidence. It was, therefore, understood that the said question will be decided later on in case the Tribunal held that the Conciliation Officer had jurisdiction to record the settlement. It was prayed that the Award may be recalled which was in fact an ex parte Award, and the question of fairness of the settlement be decided after providing an opportunity to the parties to produce evidence. This was strongly opposed by the respondent-Management but the successor Presiding Officer of Industrial Tribunal, allowed the application.

On perusal of the order dated 12 June, 1987, it was held that in the instant case no arguments were advanced and no finding was given as to whether the settlement was just and fair. In view of its finding that the Tribunal has power to review its Award even if the same is published in the Gazette, the Tribunal proceeded to exercise its power, to review its earlier order dated June 12, 1987. Accordingly by its order of February 19, 1990 the Industrial Tribunal decided to review its earlier order and framed an additional issue as under:

"Whether the settlement dated 17-5-1983 is just and fair and if so, is it not binding on the parties?"

The Management-respondent herein preferred a writ petition before the High Court of Delhi at New Delhi and sought quashing of the order dated February 19, 1990. The core question which arises for consideration is firstly – whether the Tribunal had jurisdiction to recall its earlier order which amounted virtually to a review of its earlier order; and secondly whether the Tribunal had no jurisdiction to entertain the application for recall as it had become fuctus officio. The High Court answered the first question in favour of the respondent -Management and the second in favour of the appellant.

Decision

The Supreme Court found no merit in the special leave petition and dismissed accordingly.

Law Applied

INDUSTRIAL DISPUTES ACT, 1947

Section10(1) *Reference of disputes to Boards, Courts or Tribunals*

… [(d) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication:

Provided that where the dispute relates to any matter specified in the Third Schedule and is not likely to affect more than one hundred workmen, the appropriate Government may, if it so thinks fit, make the reference to a Labour Court under clause (c).]

Provided further that where the dispute relates to a public utility service and a notice under section 22 has been given, the appropriate government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced:

[Provided also that where the dispute in the relation to which the Central Government is the appropriate Government, it shall be competent for the Government to refer the dispute to a Labour Court or an Industrial Tribunal, as the case may be, constituted by the State Government.]

Section12. *Duties of Conciliation Officer*

… (5) If, on a consideration of the report referred to in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, [Labour Court, Tribunal or National Tribunal], it may make such reference.

Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefore.

Section 17. *Publication of reports and awards*

(1) Every report of a Board or Court together with any minute of dissent recorded therewith, every arbitration award and every award of a Labour Court, Tribunal or National Tribunal shall, within a period of thirty days from the date of its receipt by the appropriate Government, be published in such manner as the appropriate Government thinks fit.

(2) Subject to the provisions of section 17A, the award published under subsection (1) shall be final and shall not be called in question by any Court in any manner whatsoever.

Section 17A. *Commencement of the award*

(1) An award (including an arbitration award) shall become enforceable on the expiry of thirty days from the date of its publication under section 17:

Provided that

(a) if the appropriate Government is of opinion, in any case where the award has been given by a Labour Court or Tribunal in relation to an industrial dispute to which it is a party; or

(b) if the Central Government is of opinion, in any case where the award has been given by a National Tribunal, that it will be inexpedient on public grounds affecting national economy or social justice to give effect to the whole or any part of the award, the appropriate Government, or as the case may be, the Central Government may, by notification in the Official Gazette, declare that the award shall not become enforceable on the expiry of the said period of thirty days.

Section 18. *Persons on whom settlements and awards are binding*

(3)1 A settlement arrived at in the course of conciliation proceedings under Act an arbitration award in a case where a notification has been issued subsection (3A) of section 10A or award, a Labour Court, Tribunal or National Tribunal] which has become enforceable] shall be binding on:

(a) all parties to the industrial dispute;

(b) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board, [arbitrator] [Labour Court, Tribunal or National Tribunal], as the case may be, records the opinion that they were so summoned without proper cause;

(c) where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates;

(d) where a party referred to in clause (a) or clause (b) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part.

Section 20. *Commencement and conclusion of proceedings*

(3) Proceedings 2 an arbitrator under section 1OA or before a Labour Court, Tribunal or National Tribunal] shall be deemed to have commenced on the date of the 3 of the dispute for arbitration or adjudication, as the case may be] and such proceedings shall be deemed to have concluded 4 the date on which the award becomes enforceable under section 17A.

Section 25FFA. *Sixty days' notice to be given of intention to close down any undertaking*

(1) An employer who intends to close down an undertaking shall serve, at least sixty days before the date on which the intended closure is to become effective, a notice, in the prescribed manner, on the appropriate Government stating clearly the reasons for the intended closure of the undertaking:

Provided that nothing in this section shall apply to

(a) an undertaking in which

(i) less than fifty workmen are employed, or

(ii) less than fifty workmen were employed on an average per working day in the preceding twelve months,

(b) an undertaking set up for the construction of buildings, bridges, roads, canals, dams or for other construction work or project.

(2) Not-withstanding anything contained in sub-section (1), the appropriate Government, may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like it is necessary so to do, by order, direct that provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order.

JUDGMENT

The appellant Kapra Mazdoor Ekta Union has preferred this appeal by special leave which is directed against the judgment and order of the High Court of

Delhi … whereby the writ petition preferred by the respondent-Management of M/s. Birla Cotton Spinning and Weaving Mills Limited was allowed and the order dated February 19, 1990 passed by the Presiding Officer, Industrial Tribunal No. II, Delhi was quashed. By the said order the Industrial Tribunal had in effect recalled its Award of June 12, 1987 and framed an additional issue to be tried by the Tribunal. The High Court held that the Award dated June 12, 1987 had effectively terminated the industrial dispute referred to the Tribunal by the appropriate Government on December 13, 1982.

2. With a view to appreciate the submissions urged before us it would be necessary to notice the factual background in which these questions have arisen.

[The Court then summarized the facts as set out above].

14. The core question which arises for consideration is whether the Industrial Tribunal was justified in recalling the earlier Award made on June 12, 1987 and in framing an additional issue for adjudication by the Tribunal. According to the appellant the recall of the order was fully justified in the facts of the case, while the respondents contend to the contrary. Two issues arise for our consideration while considering the legality and propriety of the Tribunal in recalling its earlier Award. Firstly – whether the Tribunal had jurisdiction to recall its earlier order which amounted virtually to a review of its earlier order; and secondly whether the Tribunal had no jurisdiction to entertain the application for recall as it had become fuctus officio. The High Court answered the first question in favour of the respondent-Management and the second in favour of the appellant.

15. We shall first take up the second question namely – whether the Tribunal was fuctus officio having earlier made an Award which was published by the appropriate Government. It is not in dispute that the Award was made on June 12 1987 and was published in the Gazette on August 10, 1987. Under subsection (1) of Section 17A of the Act an Award becomes enforceable on the expiry of 30 days from the date of its publication under section 17 of the Act. Thus the Award would have become enforceable with effect from September 7, 1987. However, the application for recalling the Award was made on September 7, 1987 i.e. 2 days before the Award would have become enforceable in terms of sub-section [1] of Section 17A of the Act. The High Court rightly took the view that since the application for recall of the order was made before the Award had become enforceable, the Tribunal had not become fuctus officio and had jurisdiction to entertain the application for recall. This view also find supports from the judgment of this Court in Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and other (AIR 1981 SC 606). This Court after noticing the

provisions of sub-section (3) of Section 20 of the Act which provides that the proceedings before the Tribunal would be deemed to continue till the date on which the Award become enforceable under Section 17A, held that till the Award becomes enforceable the Tribunal retains jurisdiction over the dispute referred to it for adjudication, and up to that date it has the power to entertain the application in connection with such dispute. The jurisdiction of the Tribunal had to be seen on the date of the application made to it and not the date on which it passed the impugned order. The judgment in Grindlays Bank Ltd. vs. Central Government Industrial Tribunal and others (supra) has been reiterated by this Court in [citing cases].

16. In the instant case as well we find that as on September 7, 1987 the Award had not become enforceable and, therefore, on that date the Tribunal had jurisdiction over the disputes referred to it for adjudication. Consequently it had the power to entertain an application in connection with such dispute. *The order of recall passed by the Tribunal on February 19. 1990, therefore, cannot be assailed on the ground that the Tribunal had become fuctus officio.*

17. The question still remains whether the Tribunal had jurisdiction to recall its earlier Award dated June 12, 1987. The High Court was of the view that in the absence of an express provision in the Act, conferring upon the Tribunal the power of review the Tribunal could not review its earlier Award. The High Court has relied upon the judgment of this Court in Dr. (Smt.) Kuntesh Gupta vs. Management of Hindu Kanya Maha Vidyalaya Sitapur (UP) and others (1987) 4 SCC 525 and Patel Narshi Thakershi and others vs. Pradyumansinghji Arjunsinghji AIR 1970 SC 1273 wherein this Court has clearly held that the power of review is not an inherent power and must be conferred by the law either expressly or by necessary implication. The appellant sought to get over this legal hurdle by relying upon the judgment of this Court in Grindlays Bank Ltd. vs. Central Government Industrial Tribunal and others (supra) . In that case the Tribunal made an ex parte Award. Respondents applied for setting aside the ex parte Award on the ground that they were prevented by sufficient cause from appearing when the reference was called on for hearing. The Tribunal set aside the ex parte Award on being satisfied that there was sufficient cause within the meaning of Order 9 Rule 13 of the Code of Civil Procedure and accordingly set aside the ex parte Award. That order was upheld by the High Court and thereafter in appeal by this Court.

18. It was, therefore, submitted before us relying upon Grindlays Bank Ltd. vs. Central Government Industrial Tribunal and others (supra) that even in the absence of an express power of review, the Tribunal had the power to review its order if some illegality was pointed out. The submission must be rejected as misconceived. The submission does not take notice of the difference between a

procedural review and review on merits. This Court in Grindlays Bank Ltd. v Central Government Industrial tribunal and others (supra) clearly highlighted this distinction when it observed:

> "Furthermore, different consideration arise on review. The expression 'review' is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the later sense that the court in Patel Narshi Thakershi case held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex-debita justitiae to prevent the abuse of its process, and such power inheres in every court or Tribunal."

19. Applying these principles it is apparent that where a Court or quasi judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court or the quasi judicial authority is vested with power of review by express provision or by necessary implication. The procedural review belongs to a different category. In such a review, the Court or quasi judicial authority having jurisdiction to adjudicate proceeds to do so, but in doing so commits a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the Court or quasi judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing are some illustrative cases in which the power of procedural review may be invoked. In such a case the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the Court or the quasi judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be re-heard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. In Grindlays Bank Ltd. v. Central

Government Industrial Tribunal and others (A 1981 SC 606), it was held that once it is established that the respondents were prevented from appearing at the hearing due to sufficient cause, it followed that the matter must be re-heard and decided again.

20. The facts of the instant case are quite different. The recall of the Award of the Tribunal was sought not on the ground that in passing the Award the Tribunal had committed any procedural illegality or mistake of the nature which vitiated the proceeding itself and consequently the Award, but on the ground that some matters which ought to have been considered by the Tribunal were not duly considered. Apparently the recall or review sought was not a procedural review, but a review on merits. Such a review was not permissible in the absence of a provision in the Act conferring the power of review on the Tribunal either expressly or by necessary implication.

21. Learned counsel for the appellant then sought to argue that there was no conciliation proceeding in progress when the alleged settlement is said to have been reached on May 17, 1983. The submission ignores the findings of fact recorded by the Tribunal in its order dated June 12. 1987 that while the reference was pending before the Tribunal certain events took place which compelled the Deputy Labour Commissioner-cum-Conciliation Officer to intervene. As noticed earlier a notice of strike was served on the Management on February 14, 1982 by one of the Unions. On the other hand the Management gave notice on April 4, 1983 under Sect 25 FFFA of the Act for closing part of the undertaking related to the weaving section. These facts leave no manner of doubt that there was labour unrest coupled with the fear of strike and closure. The settlement itself recites the fact that there were series of bipartite and tripartite meetings between the representatives of the Management and the Unions. In view of the labour unrest and threat of closing down the operation of the weaving department, meetings were also held In the office of the Chief Labour Commissioner with a view to resolve the dispute and a meeting was thereafter held on May 17, 1983 In the office of Shri K. Saran, Joint Chief Labour Commissioner (Central) where the representatives of the Management and the Unions participated along with the officers of the Labour Department which ultimately resulted in a settlement. All these facts establish beyond doubt that there was labour unrest and the Conciliation Officer intervened in the matter and made attempts to bring about a settlement. The submission, therefore, that no conciliation proceeding was in progress when the settlement was arrived at, must be rejected.

22. Learned counsel for the appellant then submitted that the settlement was not arrived at with the assistance and concurrence of the Conciliation Officer. It was submitted, relying upon the decision of this Court in The Bata Shoe Co. (P) Ltd. v. D.N. Ganguly and others, AIR 1961 SC 1158 that a settlement which is

made binding under Section 18(3) of the Act on the ground that it is arrived at in the course of conciliation proceedings is a settlement arrived at with the assistance and concurrence of the Conciliation Officer. Such a settlement brought about while conciliation proceedings are pending, are made binding on all parties under Section 18 of the Act. Reliance was placed on the judgment of this Court in Workmen of M/s. Delhi Cloth and General Mills Ltd. v, The Management of M/s Delhi Cloth and General Mills Ltd. (1969) 3 5CC 302. [AIR 1970 SC 1851].

23. Learned counsel for the respondents did not dispute the legal position as it emerges from these two judgments. It was submitted that the facts of this case clearly establish that the Conciliation Officer intervened when there was considerable labour unrest and brought the parties to the negotiating table. Several meetings were held, some of them in the chambers of higher officials of the Labour Department, and ultimately a settlement was worked out. This is quite apparent from the fact that the terms of settlement has also been signed by the Conciliation Officer, apart from the representatives of the Management and representatives of the two workers Union. We entertain no doubt that the settlement was brought about in the course of conciliation proceedings with the assistance and concurrence of the Conciliation Officer.

24. It was also urged before us by the learned counsel for the appellant that the Tribunal ought to have considered, while passing an Award on June 12, 1987, that the settlement was just and fair and protected the interest of the workmen. The recall of the order was sought on the ground that this aspect of the matter had not been considered when an Award was made in terms of the settlement. This was precisely the ground on which the Tribunal entertained the application for recall and allowed it by order dated February 19, 1990. The Tribunal in our view proceeded on a factually incorrect assumption. The High Court has found that the Tribunal while making an Award in terms of the settlement has in clear terms recorded its satisfaction in paragraph 25 of its order (which we have quoted earlier in the judgment) that the settlement was fair and just. We entirely agree with the High Court.

25. It was lastly submitted that the settlement did not resolve the disputes which were subject matter of reference made to the Tribunal. The submission again proceeds on a misreading of the settlement. It is no doubt true that the dispute referred to the Tribunal mainly arose on account of the Management closing down a large number of looms which necessitated a curtailment of the work force on account of which the Management refused to give work to a large number of workers. We find that Clause 3.2 of the settlement in terms deals with the dispute relating to the weaving department and other allied departments. This submission, therefore has no force.

26. In the result we find no merit in this appeal and the same is accordingly dismissed, but with no order as to costs.

Appeal dismissed.

ANNOTATION

The law laid down by the Supreme Court in this case appears to be that an order of recall passed by tribunal cannot be assailed on the ground that the tribunal have become functus officio is factually incorrect and consequently it had the power to entertain the application in connection with such dispute.

ISRAEL

The National Labour Court
The New Histadrut General Workers' Union v. State of Israel
– Ministry of Transportation, Minister of Transportation, Metrodan Bus Company of Beersheba, Inc.

Right to form a union – right to strike – organizational strike – replacing striking workers - state power as a regulator - proportionality

HEADNOTES

Facts

To what extent can the State, through its regulatory authority to license public transportation, break a strike whose purpose is to organize into a trade union?

This case concerns the privatization of a public bus service in the city of Beersheba. Prior to the privatization, this bus service was operated by a municipal company, which was organized. The bus drivers were protected by a collective agreement. After the privatization, the new private company, called Metrodan, which received a government license to operate municipal bus transportation in Beersheba, refused to recognize, negotiate and sign a collective agreement with the union representing its workers. As a result, the union struck the new bus company and most of the bus lines were not operating. To insure continued public bus transportation in Beersheba, the Transportation Ministry issued a temporary license to another bus company to operate the Beersheba bus routes instead of Metrodan. The union then petitioned the Regional Labour Court (the trial courts of the Labor Courts) to order the State to cancel the license and to not interfere with the workers' right to organize, strike and sign a collective agreement. The National Labour Court accepted the union's petition. The State and Metrodan company filed a petition to the Supreme Court sitting as a High Court of Justice, which issued a temporary order to prevent implementation of the Labour Court judgment. The union then informed the court that the strike had been broken after the Supreme Court order and, therefore,

there was no need to hear the case. The State refused to withdraw its petition and requested the Supreme Court to hand down a judgment and overrule the Labour Court judgment; this request was denied and the Supreme Court cancelled its temporary order and cancelled the State's petition without relating to the merits of the case. Thus, as of now, the National Labour Court judgment is the prevailing case law.

Following are parts of the National Labour Court's judgment.

JUDGMENT

Judge Stephen Adler (President) handed down the opinion:

[1] The issues, which arise in this appeal, are the workers' right to organize and bargain collectively and the extent to which government regulation can limit these rights.

Pertinent Facts Regarding the Regional Court's Actions

[2] Metrodan Beersheba, Inc. (hereafter "Metrodan") was awarded a franchise to provide public transportation service in the city of Beersheba for six years with the option of extending the franchise for an additional four years, beginning January 2003. In order to implement this franchise, Metrodan purchased a fleet of buses and obtained 150 workers, 140 of whom were drivers. The Company operated nineteen bus lines in Beersheba.

Metrodan workers were hired under personal employment contracts; they were not unionized. When hired by Metrodan most of the bus drivers were already members of the New Histadrut General Workers Union (hereafter: "Histadrut" or union). They asked the Histadrut to negotiate a collective agreement with Metrodan.

Elections were conducted and the bus drivers decided to become unionized and elected a works committee. The Histadrut notified Metrodan that it was the certified union and requested to negotiate a collective agreement on behalf of its workers. However, Metrodan management refused to negotiate and the Histadrut found itself facing an intransigent employer.

Metrodan refused to sign a collective bargaining agreement and to become a unionized workplace; it objected to returning to the problematic labour relations which existed at the municipal bus company which it replaced. Metrodan argued in this court that the municipal bus company operated at a loss because it was unionized. In addition, Metrodan claimed that aside from the long established Egged and Dan bus companies, no bus company was unionized and if Metrodan were unionized it would be at a competitive disadvantage. The

Histadrut replied that the real reason for Metrodan's refusal to unionize was that the company wished to pay its drivers a salary below that which it would be required to pay under a collective agreement.

[3] When Metrodan refused to negotiate the Histadrut gave the statutory 15 day strike notice and on 25 November 2004 the strike began and it continues today. When the strike began, the drivers barricaded the buses in the Metrodan parking lot. In response, Metrodan petitioned the Beersheba Regional Labour Court, which enjoined the drivers from interfering with the movement of buses to and from the parking lot. In addition, the Court forbade Metrodan from employing strikebreakers to drive its buses. We note that during the strike Metrodan continued to operate twelve of its nineteen bus lines in the city, which were operated by forty drivers who had decided not to join the strike.

[4] The strike caused great inconvenience to Beersheba residents. To alleviate the transportation situation in the city, the Transportation Ministry issued licenses to taxis to take multiple passengers at a special low charge…However, this arrangement did not significantly alleviate the public's public transportation needs.

[5] The Transportation Minister then issued temporary licenses and permits to a different transportation company to run some of the struck lines. The Minister did this after a limited public tender, to which four companies responded. The tender stated that the license was temporary, so that the company selected "would not operate for less than three days and would not operate for over four weeks." The Minister would decide on a weekly basis if the service would be continued during the following week. The Transportation Ministry retained the option to decide to cancel the license with 48 hours notice. The State Attorney informed the court that the license was meant for the time of the strike.

[6] A condition of Metrodan's franchise was an annual payment of millions of shekels yearly to the State and Local Authorities. In contrast, the company which received the temporary permit paid no license fee and was guaranteed 350,000 shekels income; if the company received a lower income the Government would pay it the difference. The company was also required to honor bus passes that had been sold by Metrodan.

Decision of the Regional Court

[7] The Histadrut filed this case in the Regional Court of Beersheba, petitioning for declaratory relief and permanent injunctions to stop the State from interfering in this dispute and to grant a temporary license to operate public bus transportation during the strike. The Regional Court rejected the petition and only ordered Metrodan to stop selling monthly passes. According to the Regional Court, the strike was an act against the employer, while the Government's

granting of the temporary license was in the public interest and did not reduce the economic damage to Metrodan.

I disagree with the Regional Court's decision, as will be explained below, mainly because it did not give proper importance to the State's [interference] with the Metrodan workers right of labor to organize and bargain collectively.

The Right to Organize and Bargain Collectively

[10] Let us briefly review some basic principles regarding the right to organize and bargain collectively.

Freedom of association in the workplace context includes the right to organize into a trade union, bargain collectively and strike. This case focuses on the right to organize, which has been recognized as a basic freedom in Israeli jurisprudence. The Chief Justice, Aaron Barak, wrote that "The Basic Law: Human Dignity and Liberty, includes workers' right to organize into trade unions. Accordingly, the right to organize is a constitutional right, as this court said [previously] …

[11] The Right to Organize is recognized as a universal right, mentioned in many Conventions that apply to the State of Israel. *The International Convention of [peoples'] Civil and Political Rights 1966,* declares in paragraph 22:

> 1. Every person is entitled to the right of freedom of association with others, including the right to join trade unions which protect his interests …
>
> 2. Nothing in this paragraph permits countries which are a party to the International Labour Convention of 1948, regarding freedom of association and protection of the right to organize, to take constitutional or statuary actions which violate the above mentioned guarantees."

Convention 87 of the International Labour Organization (hereafter "ILO") of 1948, on F*reedom of Association and Protection of the Right to Organize* – which was ratified by the State of Israel – declares that the State is prohibited from taking action which will limit workers' right to organize and it is required to protect these rights. It states:

> Article 2. Workers and employers … shall have the right to establish … and to join organisations of their own choosing …
>
> Article 8(2). The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.
>
> Article 11. Each member … for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

Convention 98 of the ILO of 1949 regarding the Right to Organize and Collective Bargaining, which Israel has ratified, instructs nations to protect the right to organize and bargain collectively.

[12] The purpose of the right to bargain collectively is to encourage the union and employer to sign a collective agreement and to have an organized workplace. This right is embodied in *The Law of Collective Agreements,* 5717-1957. The purpose of this law is that a collective agreement will govern an organized workplace.

> A strike is the main way a union can "convince" an employer to recognize it, negotiate and sign a collective agreement. Limiting the union's ability to strike is, therefore, limiting its' right to organize the workplace.

The State's power to limit workers' right to organize

[13] I will summarize my position by stating that the interference of the Transportation Ministry in Metrodan workers' organization efforts is not proportionate and, therefore, we shall order it to cancel the permits granted, including the subsidies granted to the permit holder. The State's granting of the temporary license to operate bus services limits the workers' freedom to strike and also their ability to organize.

The remainder of this judgment will be organized as follows:

(a) Interference of the Transportation Ministry;
(b) The results of the Transportation Ministry's interference in this labor dispute – not only easing the public's transportation situation, but also limiting Metrodan's workers right to unionize;
(c) Are bus services "essential services", which require State action;
(d) Proportionality of the State action;
(e) The proper remedy;
(f) Labour Court jurisdiction over disputes which concern both the right to organize and the State's power to ensure bus service.

Transportation Ministry interference

[14] Issuance of a license to operate Beersheba bus service and subsidizing that service had the effect of limiting the worker's right to strike. This was also done by recognizing Metrodan's monthly bus tickets, allowing the new bus operator to use Metrodan's garage and parking facilities.

The results of the intervention of the Ministry of Transportation in this disagreement – Damaging the rights of Metrodan's workers to unionize and not only easing the difficulty of the residents of Beersheba

[15] The question of State intervention in a strike to gain recognition has not yet arisen in case law; previous adjudication dealt with organized workplaces. State action in those disputes did not affect workers' right to organize. When the State issued a license to operate Beersheba bus routes it not only limited the right to strike but also the right to organize.

In the last few years union's attempts to organize workplaces has met with several obstacles: insufficient funding of the organizational campaign; discharging of workers seeking to unionize; formation of a "company union"; employer pressure on individual workers; the imbalance of union and employer power; willingness of employers to combat strikes. Such employer action limits workers' right to organize.

It is true that there are certain exceptions to the State's inability to interfere with workers' right to organize. Police, soldiers and jail guards are prohibited by statute from unionizing and this has been upheld by a Supreme Court judgment. Moreover, workers are prohibited by law from acting violently and damaging their employers' property during a labor conflict. These exceptions do not apply to the case before us.

If the Metrodan workers organization efforts fail, their work conditions will continue to be set solely by the employer. Furthermore, considering the current labor market and the unemployment in the south, absence of a union will allow Metrodan to set conditions lower than those of organized workers.

[16] The State's argument was that it acted within its right to provide public transportation to the City of Beersheba. However, we must also consider the resulting limitation of Metrodan workers to organize. In effect we witness cooperation between Metrodan, the State and the licensee. If there was not a labor dispute, Metrodan would sue the State for issuing the license. The State did not use the available sanctions set down in the franchise agreement when Metrodan failed to provide bus service. The State also subsidizes the new licensee. Such State action, in cooperation with Metrodan and the new licensee, has the effect of limiting the workers' right to organize.

The lower court also erred when it said that a strike could only cause damage to the employer and not to the public. In many instances strikes are intended to pressure not only the employer but also the public.

Are municipal bus services an "essential service"?

[17] Another argument made by the State was that issuing the license was meant to reduce pubic hardship and guarantee [people] their right to freely

travel, since for most of them, public transportation is the main, if not only, means of transportation.

The State is required, even during a strike, to ensure that essential public services operate in order to safeguard health and security. However, the right to municipal bus service is not considered by international law as an essential service that justifies limiting the right to unionize or strike. Thus, paragraph 22 of the Convention of Political Rights of the United Nations of 1966 informs us of the cases in which the State is allowed to limit unionization:

> Article 22(2). No restrictions may be placed on the exercise of this right [to form and join trade unions] other than those which are prescribed by the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedom of others.

Clearly, there is nothing in this paragraph that restrains the rights of workers in public transportation service to unionize. In closing, the decision of the competent ILO Committee of 1985 has declared as follows:

> 407. The Committee has considered that transport does not generally fall within the category of essential services.
>
> 408. Workers in metropolitan transport undertakings are not public officials in the sense set forth in the Convention [Convention 87] nor do they perform an essential service in the strict sense of the term.

[18] It is my opinion that municipal bus services do not fall within the category of essential services. Public security is not impaired by a lack of such bus service. The strike was partial. Furthermore, we are no longer discussing a service provided by the public sector. When the State decided to issue a franchise for public transportation services to a private company in Beersheba, the service became private. It is not acceptable that the State should interfere in a labor dispute at a private workplace. The State should honor the autonomy of the parties to a labor dispute and let them resolve their disputes.

Proportionality considerations

[19] The Transportation Minister is required to consider Metrodan's workers' basic right to unionize when deciding whether to prevent the reduction of bus transportation in Beersheba. In our opinion, when balancing the various factors to make such a decision, the Minister did not give the appropriate weight to the workers' rights and gave too much importance to public inconvenience. The Minister did not attach sufficient importance to the fact that during the strike, Metrodan succeeded in operating twelve of its nineteen bus lines with forty non-striking drivers, or to the existence of taxis. Prior to the franchise be-

ing granted, the Beersheba public transportation was operating, although partially. On the other hand, the Minister's action effectively broke the workers' efforts to organize. Thus, the State interference to insure that all Beersheba bus lines operated, violated the principle of proportionality required in such decisions.

[20] We will not conclude this section without emphasizing the importance of bus service to the public and the suffering which the strike causes. It is regrettable that the employer and union are unable to negotiate an agreement. However, the right to unionize and strike is an important element in Israeli democracy and reflects our great respect for peoples' dignity and freedom. The public indeed bears the burden of these democratic institutions. However, this is not the only burden which the public suffers to ensure a democratic state; for example, to protect our right to freedom of speech, the public is exposed to statements and pictures which make many uncomfortable..

In summary, when the State chooses to interfere in a labor dispute it is obligated to carefully evaluate the alternatives and balance the rights involved, without violating the proportionality principle and without preventing union organization of public transportation workers employed by a private company.

The Remedy

[21] In his book, Administrative Power [Hebrew] retired Justice Yitschak Zamir discusses the protection of basic rights from State administrative actions, in the following words:

> When a person is entitled to a human right, which has not been limited by the legislature, . . . a court of law can legitimize the right in the manner in which it legitimizes any other right. According to this, [the court] can demand that the Administrator refrain from all interference in the use of the right.

In my opinion, to prevent denial of the workers' right to organize, it is necessary to prevent the operation of Beersheba bus lines by any other company than Metrodan. The Labour Court should not accept replacing striking employees with strikebreakers.

Conclusion

[23] The appeal is accepted and we declare that the State violated the Metrodan workers' right to organize and bargain collectively and acted in violation of the law and the principle of proportionality when it issued a license for a company other than Metrodan to operate Beersheba bus lines. The State must immediately cancel this license and desist from allowing a company which is not Metrodan to operate Beersheba bus lines.

ANNOTATION

Until the mid-eighties approximately seventy to eighty percent of the Israeli workforce was organized, mainly by the Histadrut General Labour Union. When Israel signed free trade agreements with both the United States and the European Union the economy began to feel the effects of globalization. Pressure on employers to reduce labour costs increased. New industries and companies sprung up, which were not organized, and whose management resisted attempts to organize the workplace. Labour union density was reduced to a third of the workforce. There were fewer collective agreements signed and less union – employer cooperation.

Employers have attempted to eliminate unions at the workplace. In the Delek case (18 ILLR 81), the workforce consisted of both union members and non-union members. When management was required by economic circumstances to reduce the workforce, it dismissed only union members. The National Labour Court issued a judgment preventing this discrimination against union members. In the Horn and Leibowitz case, the management dismissed workers attempting to form a union and the National Labour Court also ordered them to be reinstated. Forming a company union is another anti-union tool that Israeli employers have adopted. In the Haifa Chemicals South case the Histadrut had enough members at the plant to be recognized as the representative union of all the factory workers. This meant that the employer had to bargain collectively with the union. However, the employer refused to do so, dismissed a union activist, formed a company union and used threats to compel union members to resign from the union. The National Labour Court judgment declared this action illegal, enjoined the company from negotiating with the company union and ordered it to negotiate with the Histadrut. However, the company's actions had already caused most workers to renounce their Histadrut membership and refuse to take part in a strike.

The most recent anti-union tool has been State interference to prevent strikes in essential services. The Metrodan case is an example of this phenomenon; with the Transport Ministry issuing a license to operate the Beersheba bus service in order to eliminate the results of the bus drivers strike. The employer, with the State's assistance, acted to replace strikers during an organizational strike. The Court declared the replacement of workers conducting an organizational strike to be unlawful. In this Metrodan case the replacement of striking workers was done in a round about way, by issuing a temporary license to operate bus services; therefore, workers of another company replaced the striking workers. However, the Court declared illegal this indirect way of replacing organizational strikers. The Court also declared that the Beersheba municipal bus

service was not an essential service. This was based on the facts of the case, i.e., some routes were operating, alternative public transportation such as taxis was available and emergency transportation, such as ambulances, was available. The Court did not say that municipal bus service was never an essential service, but that each case had to be decided on its facts.

This case also raises constitutional issues, such as balancing the public's right to transportation against the worker's right to organize into a union.

Finally, the Metrodan case illustrated the crisis in Israeli labour relations. Will Israeli labour relations continue to be based on cooperation of the social partners? Will Israel's economy continue to be a co-operative market economy or become a free market economy? There are conflicting trends in the Israeli labour market and economy, with part of the economy being based on co-operation and part being a competitive economy. Will one of these economic models disappear?

ITALY

Court of Cassation – Labour Division
Decision n. 23552 of 17 December 2004
Ideal Camin v. Cuccureddu

Strike – notion – limits

HEADNOTES

Facts

An employee who, together with a further two of the company's six employees, had left the workplace because they were against the changes in working hours imposed by the employer, was instantly dismissed for insubordination. The employee had contested the lawfulness of the dismissal, since he assumed he had been taking part in a strike which had been called to protest the continual changes in working hours brought about by the employer. Both the tribunal and the Court of Appeal found in favour of the employee.

The employer appealed to the Court of Cassation against the decision of the Court of Appeal in the part in which it had maintained that it was not possible for him to change the working hours at will and that absence without the union's prior approval constituted a lawful exercise of the right to strike, since a notice bearing the union's approval had only been sent to the employer after absence had already begun.

Decision

The Court of Cassation, despite ruling that the first ground is founded, rejects the appeal because it finds the conduct of the employee a lawful exercise of the right to strike.

Law applied

ARTICLE 40 OF THE CONSTITUTION

The right to strike shall be exercised in compliance with the laws that govern it.

JUDGMENT

[…]

At this point it would be useful to reiterate that according to the view of this court (decision no. 4260 of 27 July 1984 …; decision no. 6831 of 8 August 1983 …) endorsed by legal commentators, the right to strike, which article 40 of the Constitution attributes directly to employees, does not encounter – due to the non-implementation of that provision – limits which are different from those of the socio-historical reasoning that justifies it and of the inviolability of other rights or interests which are constitutionally guaranteed. Therefore, from the first point of view, it cannot be considered a strike without absence from work which is decided upon and carried out collectively in order to safeguard collective interests – even if these interests do not regard wages, or are of a general political nature, provided that they impact on employment relationships – and, from the second point of view, all forms of strike action are forbidden if they are carried out in an unlawful manner, in as much as it be detrimental, in particular, to the safety or freedom either of persons, or to the company's rights of ownership or production capacity; by contrast, the objective assessment which might be made regarding the legitimacy, rationality and importance of the ends being pursued, as well as the lack either of formal announcement or notice to the employer, of conciliation attempts, or of union intervention, are of no importance whilst the fact that the strike might do harm to the employer, impeding or reducing the company's production, is an inherent part of the very function of industrial action itself.

The appealed decision refers to such principles, highlighting, implicitly but nevertheless quite clearly, the existence of a collective interest manifested by the presence of three out of the company's six employees and by the circulation of the announcement of the strike by the CGIL [trade union federation] of Savona at 9.45am on the very same day.

In light of what has been said, the appealed decision, as well as proving free of the infringements claimed and to the allegation of defective reasoning, also proves itself to be in compliance, contrary to what is assumed, and conforming to the precise principle of law, with the inherent limits to the lawfulness of strike action as outlined in accordance with the common notion assumed by the constitutional provision (article 40 of the Constitution), and thus with the principle that a strike is lawful if it brings about absence from work which is intended to safeguard a collective professional interest on the part of employees, in accordance with the aforementioned judgment arrived at by the court dealing with the merits of the case and is to be ruled as unobjectionable in this court because it is effectively upheld by correct reasoning, and not, however, directed towards

pursuing spurious ends and the satisfaction of incidental demands of individual employees.

[…]

[Source: Notiziario di Giurisprudenza del Lavoro, 2005, p. 293].

ANNOTATION

In the above decision, the Court of Cassation ruled on whether the employee's absence from work, without notice and without the union's prior approval (the notice bearing the union's approval was sent after the absence had already begun) constitutes a strike.

In the Italian legal order, 'legal monopoly' by the union over the strike does not exist. The right to strike is an individual right which must be exercised collectively. Absence from work on the part of several employees, provided that there is a collective interest behind it, can also constitute a strike.

The calling or the union's approval thereof do not constitute a prerequisite for lawful absence. However, they can constitute appropriate means of proof of the existence of a collective interest behind the industrial action.

In accordance with the traditional view, the above decision, in line with the other decisions of the courts, maintains that what is relevant is the pursuit of collective interests which can also be of a "nature which does not regard salaries and also of a general political nature, provided that they have an impact on employment relationships".

According to the decision of the Constitutional Court, statutory provision "regarding, for instance, the moment in which the strike is declared, and the requirement to notify the employer of the strike" (decision no. 124 of 28 December 1962 of the Constitutional Court) may be introduced. However, in the absence of statutory provisions regulating the right to strike, it cannot be inferred that prior notice constitutes a prerequisite as to the lawfulness of the exercising of the right to strike. Such a conclusion can be inferred *a contrario* from the fact that such an obligation is explicitly provided for by law no. 146/1990 only in the case of a strike in essential public services.

In the absence of statutory provisions regulating the right to strike, its limits were identified by the courts which drew up the theory of the so-called internal and external limits. The internal limits are those which can be inferred from the very notion of strike; the external limits are those deriving from the need to find a balance between the right to strike and other rights which are constitutionally recognised.

Up until 1980, the Court of Cassation had tried to reconstruct an *a priori* definition of strike, from which there resulted a series of internal limits to the exercising of strike. Such a definition, however, did not correspond to the actual experience of industrial relations, and did not comply with article 40 of the Constitution, a provision which confines itself to recognizing the strike as a right and to establishing that the strike be exercised according to the laws that regulate it. With decision no. 711 of 30 January 1980, the Court of Cassation abandoned such an *a priori* notion, ruling that the notion of strike derives from the actual experience of industrial relations and industrial conflict. The term "strike", according to the Court of Cassation, "in our social context… is usually interpreted as meaning nothing more than a collective absence from work, decided upon by a group of employees, in order to reach a common end".

As has been said, the so-called external limits derive from the balance between the interest protected by article 40 of the Constitution and other interests which are constitutionally recognised. Amongst these other interests, we note those of personal safety and the freedom of persons, as well as in particular the freedom of private economic activity protected by article 41 of the Constitution, which also implies the right of the entrepreneur to continue carrying out his economic activities. In accordance with this view, the Court of Cassation, beginning with decision no. 711 of 1980, differentiated between *damage to production*, inherent within the function of industrial action, and *damage to productivity*, able to harm the potential productivity of the enterprise, thereby meaning the employer's ability to continue carrying out his economic activities, from which derives the unlawfulness of the strike.

Consistent with such a view, then, is the statement contained in the above decision that "forms [of strike] are prohibited which […] are damaging to personal safety and the freedom of persons, or to property rights or to the productive capacity of enterprises".

IRELAND

The Supreme Court
Marie Fuller and Others v The Minister for Agriculture and Food
and the Minister for Finance

Limited industrial action – refusal to perform certain duties – whether such persons absent from duty without authority

HEADNOTES

Facts

The applicants were all established civil servants, whose trade union was in dispute with their Department. Limited industrial action took place consisting of the applicants' refusal to perform certain duties. They were removed from the payroll and, in judicial review proceedings, they challenged the lawfulness of the Department's action in so doing.

Decision

A partial withdrawal from work duties does not constitute unauthorised absence from duty. Consequently the applicants' removal from the payroll was unlawful.

Law Applied

CIVIL SERVICE REGULATION ACT 1956, SECTION 16:

"(1) A civil servant shall not be paid remuneration in respect of any period of unauthorised absence from duty.

"(2) If any question arises as to whether a particular period of absence from duty of a civil servant is a period of unauthorised absence from duty the question shall be determined by the appropriate authority."

JUDGMENT

McGuinness J. (Murray C.J. and Hardiman J. concurring) delivered her judgment on 16 March 2005 saying:

This is an appeal by the respondents from the judgment of Carroll J. (8th July 2003) in judicial review proceedings. The learned trial judge held that the respondents had acted *ultra vires* in removing the applicants from the payroll of the Department of Agriculture and Food pursuant to section 16 of the Civil Service Regulation Act 1956. The applicants are civil servants in that Department who were at the time of their purported removal from the payroll engaged in an industrial dispute with the first named respondent.

The background to the dispute and to the applicant's judicial review proceedings is set out in the grounding affidavit of the first named applicant, Marie Fuller. The main facts are not in dispute. All the applicants were at the time established civil servants working in the office of the Department of Agriculture and Food in Clonakilty, Co. Cork. One of the applicants, Carmel Kelleher, held the rank of staff officer; all the remaining applicants were clerical officers. All the applicants were members of the Civil and Public Service Union ("the CPSU"). During the early part of 2003 an industrial dispute arose between the first named Respondent ("the Department") and the CPSU concerning promotional and grading structures in the Department's local offices. The members of the CPSU engaged in what is described as "limited industrial action" in a number of local offices throughout the country. In the Clonakilty office, which is the one relevant to these proceedings, this "limited industrial action" consisted in the staff members concerned attending at their place of work but refusing to deal with telephone and fax queries both in the mornings and in the afternoons and refusing to deal with counter queries in the afternoons. Dealing with these queries was part of the normal duties of the officers concerned. This form of industrial action commenced in the Clonakilty office on the 23rd April 2003, notice of the impending action having been given to the Department by the CPSU by letter dated the 16th April 2003. When the limited industrial action commenced on 23rd April Ms Fuller and the other applicants met with Ms Kathryn Twomey, a higher executive officer, who asked whether they were willing to resume their normal duties. They refused. They were then informed that if they continued to refuse to resume their normal duties they would be served with a written warning followed by a final verbal warning followed by removal from the payroll. On 25th April 2003 Ms Twomey issued a written warning and a final verbal warning to the applicants. Again the applicants were asked if they would resume normal duties. They refused. Later on 25th April each applicant received an e-mail on the following terms:

"Dear Colleague,

I refer to the verbal and written warnings that have issued to you regarding your refusal to perform the core duties of your grade. Despite these warnings you have refused to perform these duties and accordingly arrangements have been made to remove you from the payroll pursuant to section 16 of the Civil Service Regulation Act 1956 with effect from 28th April 2003 until you resume normal duties.

An original letter will issue to each individual by post.

Joe Shorthall, Personnel Division"

From their removal from the payroll the applicants ceased to attend at work and placed a picket on the Clonakilty office. It appears that their removal from the payroll was confirmed by letters addressed to them at the office. On 12th May 2003 the applicants issued their judicial review proceedings. They were granted leave by order of the High Court (Quirke J.) on that date. Leave was granted to apply for the following reliefs:

(a) Certiorari of the decision to remove the applicants from the payroll from the 28th April 2003.
(b) An order of mandamus directing the respondents to restore the applicants to the payroll as and from 28th April 2003.
(c) A declaration that the removal of the applicants from the payroll from 28th April 2003 in purported reliance upon section 16 of the Civil Service Regulation Act 1956 is *ultra vires* section 16 of the 1956 Act null and void and of no force or effect.
(d) A declaration that the removal of the applicants from the payroll from 28th April 2003 in purported reliance upon section 16 of the Civil Service Regulation Act 1956 was carried out in breach of natural justice and fair procedures and is null and void and of no force or effect.

Sixteen grounds for these reliefs were allowed. Grounds 1 to 11 set out the factual background; grounds 12 to 15 are those which are relevant to the present appeal and they were set out as follows:

12. The respondents acted outside the authority conferred on them by section 16 of the 1956 Act in removing the applicants from the payroll in that the applicants were not absent from duty within the meaning of section 16 of the 1956 Act.
13. Further and without prejudice to the foregoing the respondents acted outside the authority conferred on them by section 16 of the 1956 Act in removing the applicants from the payroll in that the said removal

amounted to a suspension from duty without pay. Section 16 does not authorise suspension.

14. Further and without prejudice to the foregoing, in purporting to suspend the applicants without pay under section 16 of the 1956 Act, the respondents deprived the applicants of the rights which they would have enjoyed had they been suspended under section 13 of the 1956 Act and denied their pay under section 14 of the 1956 Act in accordance with the procedures laid down by Circular 1/92.
15. Further and without prejudice to the foregoing, the respondents acted outside the authority conferred upon them by section 16 of the 1956 Act in removing the applicants from the payroll in that the said removal amounted to the imposition of a penalty upon the applicants and the respondents did not have power to impose such a penalty and the respondents did not afford the applicants fair procedures prior to the imposition of that penalty.

The respondents filed a statement of opposition on the 20th May 2003. In their statement the respondents relied on the powers conferred on them by section 16 of the Civil Service Regulation Act 1956 ("the 1956 Act"). At paragraph 2 of the statement it was pleaded that:

> …by refusing to perform their core duties as described in paragraph 10 of the statement grounding the application for judicial review the applicants, while present at their place of work, were absent from duty without authority and accordingly the respondents, their servants or agents acted lawfully in removing the applicants from the payroll.

The other allegations set out by the applicants were denied and the Statement of Opposition concluded:

> 7. It is admitted that the applicants have been and continue to be deprived of their remuneration however it is pleaded that in so depriving the applicants the respondents have acted lawfully and in accordance with the powers conferred upon them by section 16 of the Civil Service Regulation Act 1956.

While it is clear that the core issues before both the High Court and this Court is the interpretation of section 16 of the 1956 Act, reference was made both in the pleadings and in the legal argument to preceding sections of that Act. It is therefore helpful to set out some relevant provisions of section 13, 14 and 15, together with the full text of section 16, of the 1956 Act. Section 13 deals with the suspension of civil servants from duty by a "suspending authority" as defined in section 3 of the Act. It provides:

13. (1) A suspending authority may suspend a civil servant if –

a. it appears to that suspending authority that the civil servant has been guilty of grave misconduct or of grave irregularity warranting disciplinary action, or
b. it appears to that suspending authority that the public interest might be prejudiced by allowing the civil servant to remain on duty, or
c. a charge of grave misconduct or grave irregularity is made against the civil servant and it appears to that suspending authority that the charge warrants investigation.

(2) A suspending authority may terminate the suspension of a civil servant suspended under subsection (1) of this section.

Section 14 makes a number of provisions concerning the remuneration of a civil servant who has been suspended from duty.

14(1) where a suspending authority terminates the suspension of a civil servant by restoring him to duty and the appropriate authority is satisfied that the civil servant has not been guilty of misconduct or irregularity (including misconduct or irregularity charged against him after suspension), the civil servant shall be paid ordinary remuneration in respect of the period of suspension.

(2) Where a suspending authority terminates the suspension of a civil servant by restoring him to duty and subsection (1) of this section does not apply –

a. the appropriate authority, if satisfied that considerations of equity so require, shall direct that ordinary remuneration, whole or part, as the appropriate authority may direct, shall be paid to the civil servant in respect of the period of suspension,
b. before the appropriate authority decides not to give a direction under paragraph (a) of this subsection or decides to give a direction under that paragraph for payment of part only of ordinary remuneration, the civil servant shall be given an opportunity of making to the appropriate authority any representations he may wish to offer.

Subsection (3) deals with the situation which arises when the suspension of a civil servant is terminated by his dismissal from offices and is not relevant to the present case. Section 15 deals with disciplinary measures. Under this section where a civil servant has in relation to his official duties [been guilty] of "misconduct, irregularity, neglect or unsatisfactory behaviour" he may be subjected to disciplinary measures. If his conduct has not resulted in a loss of public monies or public funds the civil servant may be placed on a lower rate of remuneration or may be reduced to a specified lower grade or rank. If on the

other hand his conduct has resulted in a loss of public monies or public funds, the civil servant may be placed on a lower rate of remuneration, reduced to a specified lower grade or rank or both placed on a lower rate of remuneration and reduced in rank. The remainder of the section deals with the detail of the implementation of these disciplinary measures.

The learned trial judge outlined the factual background and referred to the arguments made in the pleadings. She referred to the respondents' assertion that the applicants' actions amounted to a refusal to perform core duties associated with their position as employees. The respondents' view was that it would be inappropriate and fruitless to apply disciplinary procedures as set out in sections 13, 14 and 15 of the 1956 Act. The applicants contended that the phrase "unauthorised absence from duty" was not defined in the Act and ought to be given its literal meaning. The learned judge referred to the definition of absence in *Black's Law Dictionary* which defined absence as "the state of being absent, not present at a particular time; opposite of appearance at a specified time". "Absent" was defined as "being away from; at a distance from; not in company with".

The learned trial judge went on to refer to a number of English decisions which dealt with questions of employees' absence, or unauthorised absence, from their employment. I will refer to some of these decisions later in this judgment. These decisions referred in general to the common law of contract and of employment. Carroll J. emphasised, however, that in their statement of opposition the respondents relied solely on the statutory power contained in section 16 of the 1956 Act. The learned trial judge concluded that in her view section 16(1) envisaged a physical absence from work duties and not, as in this case, a physical presence but only performing part of the duties of the post. She went on to say:

> In the normal way, if there was no union involvement with industrial action and a civil servant decided that he/she would not perform certain duties, it seems to me that this would fall under section 15 as neglect of official duties and could be dealt with accordingly and the civil servant would have the opportunity to make representations under section 15(5), probably on a pragmatic basis because they believe it would escalate the industrial dispute. In doing so they ruled out a remedy otherwise available to them.
>
> In my opinion a partial withdrawal from work duties does not constitute unauthorised absence from duty.

Carroll J. concluded that, since the exercise of the power under section 16 was *ultra vires*, the removal of the applicants from the payroll while they were performing partial duties was therefore null and void. The question of whether the removal was carried out in breach of natural justice and fair procedures did

not arise, and neither did the issue as to whether the applicants were in fact suspended.

The learned trial judge held that the applicants were entitled to an order of certiorari of the decision to remove the applicants from the payroll from 28th April 2003 and a declaration that the removal of the applicants from the payroll from 28th April 2003 in purported reliance upon section 16 of the 1956 Act was *ultra vires* and was null and void and of no force and effect.

[….]

The core issue in this appeal is the interpretation of section 16 of the 1956 Act. This is clear both from the evidential material which is before the Court and from the pleadings. The written warning which was received by the applicants is exhibited in the grounding affidavit of Ms Fuller. It reads as follows:

> You have been requested to deal with phone calls/fax messages/perform counter duties which are part of the core duties of your grade. You have indicated that you are not prepared to do this. You have already been warned orally that refusal may result in your removal from the payroll pursuant to section 16 of the Civil Service Regulation Act 1956. The purpose of this communication is to give you a final warning that continued refusal to deal with phone calls, fax messages/perform counter duties will result in your removal from the payroll.

This was signed by Ms Kathryn Twomey, higher executive officer and dated 25th April 2003. It is clear that both the oral and the written warnings were based on section 16 of the 1956 Act. No other basis for the applicants' removal from the payroll is suggested. The same applies to the email sent to applicants by Mr Joe Shorthall on 25th April, which reads as follows:

> "Dear Colleagues,
>
> I refer to the verbal and written warnings that have issued to you regarding your refusal to perform the core duties of your grade. Despite these warnings you have refused to perform these duties and accordingly arrangements have been made to remove you from the payroll pursuant to section 16 of the Civil Service Regulation Act 1956 with effect from 28th April 2004 until you resume normal duties. An original letter will issue to each individual by post.
>
> Joe Shorthall
>
> Personnel Division
>
> 25th April 2003"

It must be assumed that the hard copy letter which was subsequently sent to the applicants was couched in similar terms. The statement of opposition filed by the respondents relies exclusively on the respondents' powers under section 16. At paragraph 2 it is denied that the respondents acted outside the authority

conferred upon them by section 16(1) of the 1956 Act in removing the applicants from the payroll. At paragraph 5 it is pleaded that if, which is denied, the removal of the applicants from the payroll of the respondents amounts to a penalty then the respondents, their servants or agents imposed the said penalty lawfully and in pursuance of the terms of section 16 of the Act. The respondents deny that section 13 or 14, or Circular 1/1992, have any application to the situation of the applicants. In summary it is asserted that in depriving the applicants of their remuneration the respondents have acted lawfully and "in accordance with the powers conferred upon them by section 16 of the Civil Service Regulation Act 1956".

Neither in the evidence nor in the pleadings is there any mention of common law duties of contract as between the applicants and the respondents. While I would accept the respondents' submission that the reasoning in *Royle v Stafford Borough Council* [1984] IRLR 184 is of no assistance to the applicants, since the ratio of that case turned on the acceptance by the employers of the plaintiff's part performance of his duties, I do not believe that reliance on an implied contractual relationship between the applicants and the respondents is of any real relevance in the present case. The decision of this court in *Carr v Minister for Education and Science and the City of Limerick Vocational Education Committee* [2001] 2 I.L.R.M. 272 is, I believe, of some assistance here. The facts of that case are very complex and there is no need to recite them in full here. Following a long history of negotiations the Minister for Education wrote to the applicant, Ms Carr, saying that he would be forced to suspend her salary as a teacher under the provisions of section 7 of the Vocational Educational (Amendment) Committee Act 1944 if she refused to make herself available for discussions. When the applicant did not reply to this letter the Minister suspended payment of her salary. The applicant was granted an order of certiorari by Morris P. in the High Court quashing the decision purporting to suspend payment of her salary. The High Court also made a declaratory order to this effect and an order that all arrears of salary be paid to the applicant. In this court the respondents appeal was dismissed by a unanimous decision of a five judge court. Judgment was delivered by Geoghegan J. As set out in the head-note the court held that section 7 of the Vocational Education (Amendment) Act 1944 did not give the Minister power to suspend payment of a salary on the grounds of unreasonable behaviour or otherwise. To rely on a statutory power to suspend salary it was necessary to point to a statutory power which expressly permitted it. Furthermore the Minister could not attempt to assert a common law right to suspend the applicant's salary as at all material times he attempted to rely on a statutory power to do so. At page 286 of the report Geoghegan J. stated:

> To rely on a statutory power to suspend salary only it is necessary to point to a statutory provision which expressly permits it. Mr O Reilly did also argue that independently of the Act there might have been a common law right to withhold salary. This argument was more fully developed by Mr Kerr. That argument, however formed the major submission at the hearing of the appeal by Mr Crosbie, counsel for the VEC, and I will consider it in more detail in that context. It would seem quite clear that the Minister cannot possibly for the purposes of this appeal rely on a common law right to suspend salary. At all material times he relied on the statutory power and that continued in the pleadings in the proceedings.

In the present case also the respondents have at all material times relied on the statutory power contained in section 16 of the 1956 Act and, if this appeal is to succeed, the respondents must in my view show that section 16 expressly permits them to remove the applicants from the payroll of the Department in the circumstances described in the evidence which is before the court. Can, therefore, the words of section 16(1) "unauthorised absence from duty" be interpreted, in accordance with the established canons of construction, to mean the refusal of the applicants, despite their physical presence at their place of work, to perform what the respondents describe as their "core duties"? The respondents argue that the learned trial judge's interpretation of section 16 would lead to a conclusion that if the applicants attended at their place of work but did not work at all they would still be entitled to their full pay. This, the respondents say, would be unsuitable. While such a situation could be extremely undesirable it may not, in certain circumstances, be contrary to law. In *Carr v Minister for Education* on two separate occasions this court has held that the plaintiff was entitled to be paid her salary over a period of several years despite the fact that she had not worked in any employment as a teacher during the relevant period.

The applicants in their submission refer to the *dicta* of Blayney J. in *Howard v Commissioners of Public Works* [1994] 1 I.R. 101. […]

The *dicta* of Blayney J. are echoed in the judgment of Denham J. At page 162, under the heading of *"Applying the rules of construction to the Act"* Denham J. stated:

> Statutes should be construed according to the intention expressed in the legislation. The words used in the statutes best declare the intention of the Act. Where the language of the statute is clear we must give effect to it, applying the basic meaning of the words. There is well established case law on this aspect of statutory construction.

At page 163 Denham J. went on to quote from Halsbury: *Halsbury's Laws of England* (4th ed.) (Vol.44) states at paras. 863 and 864 respectively:-

> 'Primary meaning to be followed. If there is nothing to modify, alter or qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning. Speculation as to Parliament's intention is not permissible. If the result of the interpretation of a statute according to its primary meaning is not what the legislature intended, it is for the legislature to amend the statute construed rather than for the courts to attempt the necessary amendment by investing plain language with some other than its natural meaning to produce a result which it is thought the legislature must have intended.
>
> The correct conclusion to be drawn is that the plain language of the Act must not be extended beyond its natural meaning so as to supply omissions or remedy defects. The court should neither misconstrue words so as to amend defects in the legislation nor legislate to fill gaps left by the legislature…."

It is notable that both Blayney J. and Denham J. in *Howard* point out that words used in a statute are to be interpreted in the context in which they occur. It appears to me that this contextual approach is of considerable assistance in the present case. In the earlier part of the 1956 Act there are a series of sections (sections 5 to 12) which deal with the tenure of office of civil servants, their retirement (including, in the original form of the Act, the provision that female civil servants had to retire on marriage) and related provisions. At section 13 the Act turns to a different subject matter. While the 1956 Act is not formally divided into Parts as is the case in many statutes, it is clear that section 13 and 16 stand together in a coherent and interrelated scheme which deals with general discipline in the Civil Service. Section 13 provides for the sanction of suspension where grave misconduct or grave irregularity appears to have occurred, where it seems that the public interest may be prejudiced, or where a charge against a civil servant is being investigated. Section 14 deals in considerable detail with the remuneration of a civil servant who is under suspension. Section 15 goes on to set out, again in detail, the disciplinary measures that can be taken against a civil servant who has been guilty of misconduct, irregularity, neglect or unsatisfactory behaviour in relation to his official duties. Prominent among the graded penalties which may be imposed on the defaulting civil servant is a reduction of the rate of remuneration of the civil servant concerned. These three sections, therefore, deal with the situation where a civil servant is in default of his or her duty. In this statutory context, it seems to me, the legislature goes on to provide for what might be described as the ultimate default – the situation where the civil servant simply fails to come to work at all. In that case the sanction is the ultimate one of complete deprivation of remuneration.

It is the duty of the court to construe section 16 in the light of the plain meaning of the words used and also in the contextual light of the surrounding provisions of the statute. Taking this approach my view is that "absence from

duty" bears the literal meaning, as held by the learned judge, of physical absence from the place of work.

I am fortified in this view by another factor which was put forward by counsel for the applicants. If a partial withdrawal of work duties can constitute "absence from duty", the question must arise as to what degree of withdrawal from duties is required to trigger the mandatory withdrawal of all remuneration. The respondents describe the applicants as having refused to perform "core duties", and no doubt the duties in question were important duties. In future cases, however, the question as to whether particular duties are, or are not, core duties would be bound to arise, giving rise to what Mr Cush SC describes as "grey areas". Section 16 does not permit any partial withdrawal of remuneration. If the respondents' interpretation is correct, partial failure to perform duties where these are held to be (somewhat ill-defined) core duties must always result in entire withdrawal of remuneration. It seems to me unlikely that this can have been the intention of the legislature.

The learned trial judge suggested that where a civil servant decided that he or she would not perform certain duties the respondents' remedy would fall under section 15 as neglect of official duties. Both in this court and in the court below it was submitted by the respondents that both the applicants and their trade union would certainly object to their action being described as grave misconduct or in the other terms used in section 15, and that the use of sections 13 to 15 would be totally inappropriate in the context of an industrial dispute. In this I believe the respondents are perfectly correct. I would suggest, however, that these strictures apply equally to section 16. In my view sections 13 to 16 of the 1956 Act were intended by the Oireachtas to deal with matters of discipline concerning individual civil servants. The Oireachtas has through other legislation provided a framework for the resolution of industrial disputes and has established bodies such as the Labour Relations Commission, the Labour Court and other specialist negotiation and arbitration bodies to this end. These means are available to the applicants and the respondents as a means of resolving their dispute. I am in agreement with the learned trial judge in holding that the partial withdrawal from work duties does not constitute unauthorised absence form duty under section 16. I am also in agreement with her that the question of whether the removal from the payroll was carried out in breach of natural justice and fair procedures does not arise [nor does the] issue as to whether the applicants were in fact suspended.

I will dismiss the appeal and affirm the orders made by the learned trial judge.

[Source: [2005] 1 ILRM 541.]

ANNOTATION

The High Court judgment was reported in Vol.23 ILLR at p. 363 and the annotation thereto (pp 368-369) is referred to and not repeated here. The Supreme Court affirms the High Court's decision and the State's appeal was dismissed. Subsequent to the decision, the opportunity was taken, with the enactment of the Civil Service Regulation (Amendment) Act 2005, to amend section 16 of the Civil Service Regulation Act 1956 by expressly providing that a "period when a civil servant refuses to carry out the duties of his grade shall as respects the civil servant concerned be considered to be a period of unauthorised absence from duty". Whether this will be adequate where a civil servant refuses to carry out certain, but not all the, duties of his or her grade remains to be seen but it should be noted that McGuinness J., delivering the unanimous decision of the Supreme Court, indicated that sections 13 to 16 of the 1956 Act "were intended by the Oireachtas [the Irish Parliament] to deal with matters of discipline concerning individual civil servants". This suggests that the Supreme Court were of the view that their use would be inappropriate in the context of a trade dispute.

FINLAND–UNITED KINGDOM–EUROPEAN UNION

[Editor's note: Although acknowledged that Finnish (and EC) law was applicable, the jurisdiction of the British courts was based on the fact that one of the parties, the International Transport Workers' Federation, is domiciled in the UK]

National Court of Appeal, London (Civil Division)
[2005] EWCA Civ 1299
Viking Line ABP and OU Viking Line Eesti v. (1) The International Transport Workers' Federation and (2) The Finnish Seamen's Union

The right and freedom to undertake industrial action – free movement of services and freedom of establishment (European Union) – interim relief

HEADNOTES

Facts

Viking ABP is a Finnish company and one of the largest passenger ferry operators in the world. It operates seven vessels, including "*Rosella*", which operates under the Finnish flag on the Tallinn-Helsinki route between Estonia and Finland since autumn 2003.

FSU (The Finnish Seamen's Union) is a national union representing seamen. It is based in Helsinki and has about 10,000 members. The crew of "*Rosella*" are members of the FSU. FSU is a Finnish affiliate of the ITF which is a federation of transport workers' unions, with its headquarters in London. There are 600 affiliated unions in 140 countries. One of the principal ITF policies is its "Flag of Convenience" ("FOC") policy now set out in a document entitled "Oslo to Delhi". The "Oslo to Delhi" definition treats the vessel as sailing under a flag of convenience "where the beneficial ownership and control of the vessel is found to lie elsewhere than in the country of the flag" and provides that "Unions in the country of beneficial ownership have the right to conclude agreements covering vessels beneficially owned in their countries." The FOC campaign is enforced by boycotts and other solidarity actions.

So long as "*Rosella*" is under the Finnish flag, Viking is obliged by Finnish law and by the terms of a Collective Bargaining Agreement ("CBA") to pay the crew wages at Finnish levels. Estonian crew wages are lower than Finnish crew wages. "*Rosella*" was becoming loss-making, being in competition with vessels on the same route which paid lower Estonian wages. As an alternative to selling the vessel, Viking sought in October 2003 to reflag it to a different registry, at that stage either Norway or Estonia, with a view to Viking entering into a CBA with an Estonian or Norwegian union and employing either an Estonian crew or a mixed Estonian/Finnish crew.

Viking gave notice of its proposals to the FSU and to the crew in accordance with Finnish law. A number of meetings occurred in the course of which the FSU made clear that it was opposed to the proposal.

On 4 November 2003 FSU sent an email to ITF ("the FSU email") referring to Viking's plan to reflag "*Rosella*" and to reduce "the number of Finnish seafarers on board" stating that "*Rosella*" was "beneficially owned in Finland and effectively controlled by Finnish companies and we therefore have and keep the negotiation rights within FSU". FSU asked ITF to inform all affiliated unions about the matter and to request them not to negotiate with Viking.

On 6 November 2003 ITF did as requested and sent a circular ("the ITF circular") to all affiliates organising seafarers, inspectors and coordinators informing them of the situation in Finland and asking them to refrain from negotiating with Viking: "Please be advised that since the vessels are still beneficially owned in Finland, our Finnish affiliates still retain negotiating rights. Please refrain from entering into negotiations with either company".

FSU approached the ITF because an appeal to other unions from the ITF would have greater value than an appeal from FSU direct. Affiliated unions would be expected to comply because of the principle of solidarity. Failure to comply could lead to sanctions being taken.

FSU claimed a manning agreement for the "*Rosella*", that had been transferred to the Helsinki-Tallinn route. In lack of a valid manning agreement FSU regarded itself being under no obligation of industrial peace under Finnish law, and gave notice for 17 November 2003 of a strike requiring (1) the manning on the "*Rosella*" to be increased by eight and (2) Viking to give up plans to reflag "*Rosella*". Viking conceded the extra eight crew but refused to give up its plans to reflag. Although their manning demands had been met in full, FSU would not agree a renewal of the manning agreement unless Viking also gave up plans to reflag. By letter of 18 November FSU indicated there were two conditions to its agreement to renew the manning agreement:-

a) Viking Line Abp commit themselves to continue to follow Finnish law, [the CBA], the general agreement and the manning agreement…on *MS Rosella*, regardless of a possible change of flag;
b) The possible change of flag of the vessel must not lead to employees, on the vessel or on other Finnish flag vessels belonging to the shipping company, being made redundant or laid off, or changes in the terms and conditions of employment being made without the consent of the employees.

FSU issued press statements which referred to the need to protect Finnish jobs.

Viking started proceedings in the Labour Court on 17 November for a declaration that the earlier manning agreement still remained in force. FSU on the basis of their view that the manning agreement was at an end, gave notice in accordance with the Finnish Act on Mediation in Labour Disputes that it intended to commence industrial action in relation to *Rosella* at 19.00 hours on 2 December 2003. Viking started proceedings in the District Court on 25 November for an injunction to restrain that strike action. However, neither court was able to hear Viking in time; the Labour Court set a preparatory hearing date for 2 December.

Viking was not initially aware of the sending of the ITF circular. On 24 November Viking learnt of its sending. This was important because it effectively precluded any possibility of Viking circumventing FSU and dealing directly with a Norwegian or an Estonian union, because ITF affiliate unions would not go against the ITF circular.

FSU's demands had initially required Viking to give up their reflagging plans. The modification quoted above required that in the event of any reflagging the crew must be employed subsequent to the reflagging under Finnish law and conditions. FSU knew according to Viking that this would render the reflagging pointless because: (1) the whole purpose of the reflagging was to enable Viking to enter into a CBA with a union in Estonia (or another European country) which would enable Viking to pay cheaper crew wages than those Viking were required to pay so long as the vessel was Finnish flagged and in consequence Viking was bound by the Finnish CBA; (2) Viking would in fact be much worse off, because if "*Rosella*" was reflagged to Estonia, Viking would not be able to claim state aid payments which the Finnish government offered to Finnish flag vessels.

Conciliation took place under the auspices of a state-appointed conciliator. Viking undertook that the reflagging would not involve any redundancies. FSU refused to defer the strike. On 2 December Viking settled the dispute because of the threat of strike action. The judge described this settlement as "a total capitulation" by Viking. In addition to agreeing the extra manning, they agreed not to

commence reflagging prior to 28 February 2005, and to discontinue the proceedings in both the Labour Court and the District Court.

On 1 May 2004, Estonia became a member of the EU.

"*Rosella*" continued to make losses, and Viking continued to wish to reflag the vessel to Estonia. The ITF circular remained in force and was never withdrawn by ITF. It followed that the request to affiliated unions from the ITF in relation to "*Rosella*" remained in effect.

Viking anticipated that any warning to the FSU or ITF would precipitate strike action. Viking therefore commenced the action in the Commercial Court in London on 18 August 2004, seeking declaratory and injunctive relief which required withdrawal of the ITF circular and requiring FSU not to interfere with Viking's EC free movement rights in relation to the reflagging of "*Rosella*".

The obligation of industrial peace under Finnish law which derived from the 2 December 2003 agreement ended on 28 February 2005. Viking were concerned, having commenced this action, that unless an order had been made by the court by that date, they would face strike action and a requirement that these proceedings be discontinued as per FSU's terms. They sought expedition of the trial. At a hearing before Langley J on 26 October 2004, FSU and ITF opposed an order for expedition. Langley J nevertheless ordered an expedited trial.

In December 2004, the Åland Shipowners' Association renewed the then current CBA and the "*Rosella*" manning agreement until 2008, so the date of 28 February 2005 ceased to be of critical importance. However, Viking continued to make substantial losses on the "*Rosella*" and it remained important that the position was resolved speedily.

Decision in the Commercial Court

The expedited trial took place in January and February 2005 in the Commercial Court in London; the judge Mrs Justice Gloster gave her judgment on 16 June 2005.

She granted final injunctions on an undertaking being given by Viking not to make any employees redundant as a result of any reflagging in the terms attached hereto.

Gloster J, in reliance on the free movement Articles, particularly Article 43 of the European Treaty granted Viking permanent injunctions restraining the Defendants the Finnish Seamen's Union (the FSU) and the International Transport Workers' Federation (the ITF) from taking industrial action. The injunctions seek (1) to prevent the ITF and the FSU from taking industrial action to deter Viking from reflagging their ferry the *Rosella* from the Finnish flag to the Estonian flag, something they desire to do to take advantage of the cheaper labour

costs of employing a crew from Estonia; and (2) to prevent ITF and the FSU from taking industrial action to persuade Viking that, even if it does reflag, it should continue to pay its crew at Finnish rates negotiated with the FSU. The industrial action and thus its threat would have been lawful under Finnish national law disregarding any impact of the European Treaty. The judge held that the action threatened by the two trade unions imposed restrictions on the freedom of movement of establishment contrary to Article 43, (and indeed the free movement of workers and the free provision of services contrary to Articles 39 and 49), and that it, and thus its threat, would be unlawful. The case accordingly raised important issues relating to the interaction of the key provisions of the Treaty dealing with free movement and the fundamental rights of workers to take industrial action.

It is at first sight surprising that the English Commercial Court should be the forum in which a dispute between a Finnish company and a Finnish Trade Union and an International Trade Union concerned with a ferry running between Finland and Estonia should be litigated. But since the ITF's base is in London, jurisdiction was established pursuant to the Brussels Convention, and Gloster J ruled that comity did not require the English court to stay the proceedings to allow the case to be tried in what might be thought its more natural forum, the Finnish courts.

Gloster J furthermore did not refer the questions of European Law to the European Court. Among her reasons for not so doing were that a reference would involve a considerable delay, and that she was clear about the answers. She accepted Viking's submission that if the industrial action was not prevented the damage to Viking would be so severe that it was important to reach a final conclusion.

The judge gave permission to appeal save in relation to her findings of fact. The appeal was expedited and was heard in the vacation during the first week of September 2005.

Decision in the Court of Appeal

Lord Justice Waller (seconded by Lord Justice Mummery and Lord Justice Tuckey) heard the case during the first week of September 2005. He argued that despite the full and able argument before them, unlike the judge in the first instance Commercial Court, he was not clear as to the answers on the points of European Law. It furthermore seemed to him that the points which arose are of such fundamental importance that a reference is essential sooner rather than later. He added that it also seemed to him that even if comity did not require the court to stay the proceedings in favour of the Finnish courts, where it is being

argued that European Law renders actions unlawful in Finland which would otherwise be lawful by Finnish national law, the court best placed to receive all relevant submissions including those that the Finnish Government might wish to make is the European Court. That there may be a delay as a result of the reference is according to the Judge unfortunate, but he stated that hopefully the European Court will accept that there is urgency in dealing with the questions that arise, the points not only being important in the context of the parties to this case, but in the context of industrial relations generally.

The Judge further reasoned "The above points to the making of the reference without any detailed consideration of the arguments, but, since Viking submit, as they did before Gloster J, that a reference should not be made without interim measures being granted in their favour, some consideration of the merits is necessary. Putting the matter broadly for the moment, they submit that it might take two years for the reference to be heard in the court in Luxembourg, and without interim measures granting injunctions in the form that Gloster J granted them, Viking will suffer irreversible damage – indeed they say that Viking might be forced to sell the *Rosella* and cease trading the ferry between Estonia and Finland, suffering serious losses, irrecoverable (they say) from the trade unions. Equally, of course, the FSU and ITF submit that with interim measures in place in the form that Gloster J made Viking will be able to carry out their intentions to reflag and employ a crew at rates negotiated with the Estonian trade union (the Transport Workers' Trade Unions' Federation), with the result that in two years' time it would be difficult to put the clock back, and in any event damages would never provide an adequate remedy.

Hopefully the two year delay will turn out to be a pessimistic assessment and the European Court will, in the exceptional circumstances of this case, give priority to it, but that there will be some delay cannot be denied."

And the Judge continued: "The answer to the question as to how far this court should go in considering the merits of the case when contemplating whether interim measures should be granted is, as will be clear from the authorities to which I will turn, itself dependent on the answer to certain questions which I can put in this way.

If Viking were granted interim relief but turned out ultimately not to be entitled to it, would damages be an adequate remedy for the trade unions?

If Viking were refused interim relief at this stage and were ultimately held to be entitled to injunctive relief at the trial, would they be adequately compensated in damages by the trade unions?

If Viking were granted interim relief and ultimately held not to have been entitled to it, it seems to me that damages would not provide an adequate remedy. As set out in the Order of Gloster J, Viking have offered an undertaking not

to terminate certain contracts. A similar undertaking has been offered in the form of order put in by Viking before us. But those undertakings do not prevent short-term contracts with employees being brought to an end, nor do they prevent redeployment of employees to other jobs. Furthermore, once the present crew of the *Rosella* were replaced by a low-cost labour crew it would be difficult if not impossible to put the clock back. In any event, compensation to the defendant unions for jobs lost by individuals or for jobs no longer available to individuals would be difficult to calculate if recoverable at all.

If Viking were not granted interim relief and ultimately held to be right in their arguments, it seems to me that the recoupment of any loss in relation to whatever action Viking had taken in the intervening period (i.e. whether it sold the ferry or whether it continued to run it at a loss) has major difficulty. Those representing Viking suggest that there are doubts as to whether such damages would be recoverable in law at all submitting that there is no authority that holds that breaches of Article 43 give rise to a claim for damages." After referring to court practice he stated: "But, even if damages were recoverable in law, proof of damage and the question whether any award could be enforced against either trade union remains in my view highly speculative.

Thus, in my view, this case must be dealt with on the basis that damages will not be an adequate remedy for either party if they succeed at the trial but the decision on interim measures has been against them."

After a detailed discussion about the implications of the ECJ *Factortame* case Justice Waller came to the view that damages are not likely to be an adequate remedy for either party.

Law applied

EC TREATY, ARTICLE 24

JUDGMENT

The Appeal Court came unanimously to the following conclusion:

The Court allowed the appeal and ordered a stay of the action so that a preliminary ruling could be obtained in relation to certain questions from the ECJ. They refused all interim measures in the meanwhile.

The questions which they referred for a preliminary ruling by the ECJ are appended to the judgment. The Court heard the parties on this point and the parties agreed those questions subject to one or two areas of dispute.

The Court held that the case raises questions of some importance. It expressed its hope that the President of the ECJ will feel able, pursuant to Article

55 of the Rules of Procedure of the European Court of Justice, to order that the case be given priority.

The following 10 questions were referred to the European Court of Justice for a preliminary ruling:

"Area of applicability of provisions in respect of free movement

1) If a trade union or an association of trade unions carries out a collective action against a particular enterprise and demands that that enterprise come to a collective employment agreement with a trade union in a particular Member State, thereby making it pointless for the company to operate a vessel under the flag of this other Member State, does such action , with reference to EU social policy, including inter alia Chapter XI of the Treaty Establishing the European Community, and in particular to the precedent set in the deliberations of the Court in the Albany matter of 21 September 1999 (C-67/96 ECR. I-5751, points 52-64) – not come under article 43 of the EU Treaty and/or Directive 4055/86?

Horizontal direct effect

2) Do Article 43 of the EC Treaty and/or Directive No. 4055/86 have a direct horizontal effect in the sense that it ascribes rights to a particular enterprise that this can assert against another particular party, and in particular against a trade union or association of trade unions in relation to a collective action by this trade union or association of trade unions?

Restrictions to free movement arising

3) If a trade union or an association of trade unions carries out a collective action against a particular enterprise and demands that that enterprise come to a collective employment agreement with a trade union in a particular Member State, thereby making it pointless for the company to operate a vessel under the flag of this other Member State, is such action then a restriction in the meaning of Article 43 of the EC Treaty and/or Directive No. 4055/86?

4) Is the policy of an association of trade unions aimed at ensuring that vessels are registered and operate under the flag of the country in which the beneficial owner of and the management of the vessel are located, with the result that the trade unions in the country of the beneficial owner of a vessel have the right to make collective agreements in respect of that vessel a directly discriminating, an indirectly discriminating or a non-discriminating restriction in the meaning of Article 43 EU Treaty or Directive 4055/86?

5) In establishing whether a collective action by a trade union or an association of trade unions constitutes a directly discriminating, an indirectly discriminating or non-discriminatory restriction in the meaning of Article 43 EC Treaty

or Directive No. 4055/86, is the subjective purpose of the association carrying out the action relevant, or must the national court establish the outcome only on the basis of the objective consequences of the action?

Domicile / Services

6) If a parent company is domiciled in Member State A, and intends to carry out a domiciling action by bringing a vessel under the flag of Member State B and have it managed by an existing subsidiary which it wholly owns in Member State B, and which is subject to the management and supervision of the parent company:

a) can the threat of collective action, or collective action by a trade union or association of trade unions aimed at rendering pointless the aforementioned action, constitute a restriction on the parent company's right of establishment in the meaning of Article 43 EC Treaty, and
b) is the subsidiary entitled, after the vessel has been re-flagged, to refer to Directive No. 4055/86 in order to operate services from Member State B to Member State A?

Grounds

Direct discrimination

7) If a collective action by a trade union or an association of trade unions is a directly discriminating restriction in the meaning of Article 43 EC Treaty or Directive No. 4055/86, can it in principle be justified on grounds of special treatment of foreign nationals in public policy as defined in Article 46 EC :

a) because in carrying out a collective action (including strike) is a fundamental right protected by community law; and/or
b) on the basis of the protection of employees?

ITF policy: objective justification

8) Does the policy of an association of trade unions aimed at ensuring that vessels are registered and operate under the flag of the country in which the beneficial owner of and the management of the vessel are located, with the result that the trade unions in the country of the beneficial owner of a vessel have the right to make collective agreements in respect of that vessel, provide a fair balance between the fundamental social right to carry out a collective action and the freedom of establishment of an organisation, and is it objectively justified, fitting and in accordance with the principle of proportionality and the principle of mutual recognition?

Actions of the FSU: objective justification

9) If:

– a parent company in Member State A is the owner of a vessel operating under the flag of Member State A in Member State A, and uses that vessel to provide services between Member State A and B;

– the parent company wishes to operate the vessel under the flag of Member State B in order to implement working conditions that are less favourable than in Member State A;

– the parent company in Member State A is the full owner of a subsidiary in Member State B and the subsidiary is subject to the management and supervision of the parent company;

– the aim is that the subsidiary will manage the vessel as soon as it starts to sail under the flag of Member State B, with a crew that has been recruited in Member State B under the conditions negotiated in a collective work agreement by a trade union that is a member of the ITF;

– the parent company will remain the beneficial owner of the vessel and the vessel will only be chartered to the subsidiary;

– the vessel operates daily services between Member State A and Member State B;

– a trade union established in Member State A carries out a collective action demanding that the parent company and/or subsidiary makes a collective work agreement with it on whose the basis the crew works under conditions that the trade union deems acceptable in Member State A even after the vessel starts operating under the other flag, thereby making it pointless for the parent company to operate the vessel under the flag of Member State B,

does this collective action ensure a fair balance between the fundamental social right to collective action and the freedom of establishment and of the provision of services, and is it objectively justified, appropriate to and in accordance with the principle of proportionality and the principle of mutual recognition?

10) Is the answer to question 9 affected if the parent company undertakes before a judge on its own behalf and on behalf of all companies of the same group not to terminate the service of the persons employed by itself on grounds of the re-flagging (this undertaking not being subject to the requirement that short-term periods of employment are extended, and not preventing employees from being re-employed under the same conditions)?

ANNOTATION

1. Contextual background

The Case C-438/05, which is the number of the case referred to above, is at present (spring 2006) pending in the European Court of Justice (ECJ). The ECJ will give a binding preliminary ruling on how to interpret the relevant EU law in the present case. There are no earlier ECJ decisions directly addressing the issue of the freedom or right to industrial action. The case raises several issues of general importance concerning the relationship between EU law, especially its fundamental economic freedoms, on one hand and the freedom and right to undertake industrial action, on the other. The case also contains some specific features related to the maritime sector and its regulation No 4055/86 concerning freedom to provide maritime transport services between Member States and between Members States and third countries. Furthermore the circumstances of the case are in character very hypothetical, no reflagging has taken place, no industrial action has taken place, the legal procedure concerns a presumed action that will take place according to Viking ABP and its statement is based on the experience from some events in 2003.

There is full understanding among all parties that Finnish law is applicable to the case. It is also clear that a court claim raised in advance concerning presumed future industrial action could not be successful in Finland which also the Finnish government states in its submission to the ECJ in the case.

2. EC law and the right or freedom to collective action

The pending case C-438/05 is not the only case in which the ECJ will have to address the relationship between EC law and national regulation on industrial action. The pending Swedish Vaxholm case C-341/05 partly deals with the same problems (see Ahlberg – Bruun – Malmberg, Transfer, Volume 12, 2/2006. pp. 155 – 166).

For these cases it seems to be of some relevance that the EC law clearly recognizes the right to undertake industrial action. This becomes clear from several sources:

1. Article 136 EC: The Community and the Member States respect fundamental social rights

Article 136 of the EC Treaty begins:

> "The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18

October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers...".

Article 13 of the 1989 Community Charter provides:

"The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements".

2. The EU Charter of Fundamental Rights of 2000 recognises the right to take collective action

The EU Charter of Fundamental Rights adopted at Nice on 7 December 2000 was published as a "solemn proclamation" of the European Parliament, the Council of Ministers of the EU Member States and the Commission in the Official Journal of 18 December 2000 OJ C 364/1).

Article 28 of the Charter provides:

Right of collective bargaining and action

"Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action".

3. Constitutions of the Member States protect the right to take collective action

The constitutions of many EU Member States, including Finland, include guarantees of the right of workers and their organisations to take collective action. The EU institutions have been careful to ensure that Community law does not impinge on these fundamental constitutional rights.

Thus, collective action, including strikes, by trade unions or workers obstructing the free movement of goods destined for intra-Community trade might be alleged to violate EU law. A proposal for a Regulation on the functioning of the internal market in relation to the free movement of goods among the Member States appeared to envisage an obligation on Member States to take all necessary and appropriate measures to prevent such obstacles to the free movement of goods. However, as eventually enacted, Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States (OJ L337/8 of 12.12.98; Article 2) included the following provision:

"This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States".

4. General principles of EC law include protection for fundamental rights

Fundamental rights in the EU legal order have been developed by the ECJ as a result of the sensitivity of national constitutional courts to respect fundamental rights protected by national legal orders. Furthermore all European Union Member States have ratified the ILO Conventions 87 and 98 regulating the principles of freedom of association including – in accordance with consistent ILO practice – the right or freedom to undertake industrial action.

3. Different options for the ECJ

It is not for the author of this presentation to predict the outcome of the case in the ECJ. From the opinions of the parties and those submissions by the EU Member States that have been generally available one can clearly point at three different patterns of argumentation that can be relevant when deciding the case.

First, the ECJ may use the Albany-formula (case C-67/96, see *Bruun – Hellsten* (eds.) Collective Agreement and Competition Law in the EU. The Report of the Colcom Project. Copenhagen 2001 pp. 33-64) and argue that industrial action that, by virtue of its nature and purpose, promotes the objectives of the Community's social policy falls outside the scope of Articles 43 and 49 EC (and Regulation 4055/86). Such reasoning creates a certain immunity for such industrial action from the intervention by EC fundamental economic freedoms.

A second option is to enter into a discussion concerning the possible horizontal direct effect of Articles 43 and 49 EC. A prevailing position in the submissions by the Member States seems to be that these articles and Regulation 4055/86 do not have horizontal direct effect so as to confer on a private undertaking rights which may be relied upon against another private party such as a trade union or asssociation of trade unions in respect of collective action.

A third option for a pattern of argumentation for the ECJ might be offered by the Schmidberger Case C-112/00. That indicates some kind of proportionality assessment where the collective action that Viking seeks to prevent must be objectively justified as a proportionate to the legitimate aim of protecting workers.

We can expect a cautious and well balanced decision – showing respect also for the different industrial relation traditions in the Member States and their national margin of discretion – not earlier than in 2008.

HUNGARY

Supreme Court Civil Council Labour Branch
No. I. 10.441/2004.

Termination of employment of trade union official or member of workers' council - consent by union or council

HEADNOTES

Facts

The employer (plaintiff) terminated the jobs of M. K and A. K. in the department of quality assurance as of June 1, 2001 for reasons of decrease in the scope of tasks belonging to their job and offered the job of analyst for the persons mentioned, which was accepted by M. K. but refused by A. K with reference to reasons of subsistence and to other reasons.

In the course of the negotiations held by the parties, on June 5, 2001 A. K. requested the calculation of his entire working time to the account of the worktime allowance arising from membership in the trade union and workers' council on the basis of the statement made by the trade union and workers' council, while maintaining his labour contract. Instead of this, on June 14, 2001 the plaintiff showed willingness, provided that the defendant trade union and workers' council agreed to the termination of A. K.'s employment relationship by ordinary dismissal, to redeem the entire worktime allowance due to trade union representatives, so A. K. could continue his work as an official in an employment relationship with the trade union. The negotiations for reconcilement were unsuccessful, so the parties considered them as closed on June 20, 2001.

On August 21, 2001 the plaintiff (employer) requested the defendants' consent to the termination of A. K.'s employment relationship by ordinary dismissal. The consent was refused by the defendants (trade union and workers'council) on August 23, 2001. The reasons for the refusal included, among others, the following:

– the analyst's job to be carried out in three shifts in a continuous work order is unfavourable with respect to trade union activity,

- A. K., the most active member of the workers' council, is indispensable during the workers' council elections to be held in November, 2001,
- A. K.'s entire worktime should be redeemed with worktime allowance as a compromise,
- after reorganization, it is questionable whether one person can perform 3 jobs adequately.

On June 24, 2002 the plaintiff filed suit against the defendants and requested the court to pass judgement to substitute the defendants' consent to the termination of the employment relationship of A. K. trade union secretary and workers' council member by ordinary dismissal. The plaintiff expounded the view that the defendant trade union had several members in its governing board, therefore it could not be claimed that they were unable to perform one member's duties either allocated among themselves or in some other way. He reasoned that currently A. K. had no job at the plaintiff thus the consent could not be refused for reasons of management.

Decision

The employer (plaintiff) terminated the job of M. K and A. K. in the department of quality assurance for reasons of decrease in the scope of tasks belonging to their job and offered the job of analyst for the persons mentioned, which was accepted by M. K. but refused by A. K with reference to reasons of subsistence and to other reasons. Refusal of consent was lawful.

Law applied

LABOUR CODE SECTION 28

(1) The prior consent of the higher ranking trade union body is required for the temporary reassignment of an employee who is an elected trade union official, for posting him on an assignment for more than fifteen working days, for transferring him to another employer on the basis of Subsection (1) of Section 150, for the employee's reassignment to another job if it involves transferring him to another workplace, and also for terminating the employee's employment by ordinary dismissal. The opinion of the relevant trade union body shall be requested prior to terminating the employment relation of such an official by extraordinary dismissal, and the relevant trade union body shall be notified in advance regarding the application of the legal consequences set forth in Section 109 and regarding the transfer of an employed official to another workplace.

(2) The trade union shall communicate its position in writing with respect to the employer's proposed action referred to in Subsection (1) above within eight working days of receipt of notification by the employer. If the trade union does

not agree with the proposed action, the statement shall include the reasons therefor. The objection shall be deemed justified if the proposed action is likely

a) to burden the operation of the trade union body in which the employee holds an office as an elected official, unless forfeiting the action constitutes unreasonable or substantial detriment to the employer, or
b) to result in negative discrimination on account of participation in the trade union's interest representation activities.

Failure by the trade union to communicate its opinion to the employer within the above specified time limit shall be construed as agreement with the proposed action.

(3) In the event that an official's employment relationship is terminated by extraordinary dismissal, the provisions of Subsection (2) shall be applied, with the exception that the trade union shall submit its opinion concerning the proposed action within three working days following receipt of notification by the employer.

(4) Officials shall be entitled to the protection afforded under Subsection (1) above for the duration of their term in office and for a period of one year following expiration of such term, provided that the official held the office for at least six months.

(5) If it is not possible to determine which trade union body is competent to proceed in the case of an elected official, the entitlement set forth in Subsection (1) shall be exercised by the trade union body in which the official is a member.

(6) Officials shall be entitled to the protection afforded under Subsection (1) for the duration and under the conditions set forth in Subsection (4) in the case of succession of the employer as well.

LABOUR CODE SECTION 62

(1) Employers shall ensure the opportunity for the workers' councils to publish the information, announcements, as well as data related to their activities, in the manner customary at the employer or any other way deemed appropriate.

(2) Members of the workers' councils shall be entitled to worktime allowance of ten per cent of their monthly working time, while the chairman of the workers' council shall be entitled to fifteen per cent. The appropriation of the total worktime allowance for workers' council members and the chairman may be established in the operative agreement in derogation from the provisions of this Act; nevertheless, the time allowance granted may not exceed half of the members' or chairman's entire working time. Absentee pay shall be paid for the duration of the worktime allowance.

(3) The provisions pertaining to elected trade union officials shall be duly applied for the protection of workers' council members under the labour law,

with the exception that the entitlement of the trade union body set forth in Section 28 shall be exercised by the workers' council.

JUDGMENT

[… [T]he labour court drew the conclusion that the action planned was not in connection with the official's interest representation activity, which was also proved by the plaintiff's proposals made in search of possible solutions. Although the leader's person has or may have a decisive role in the functioning of a body, the change in the leader's person does not render the body unfunctioning. Therefore the labour court substituted the refused consent. The decision of the labour court – on the basis of its reasons deemed valid – was affirmed by the judgement of the county court.]

The appeal for review is grounded. The Supreme Court ruled that the labour court had considered all the relevant data and evidence in its decision. These had to be evaluated by applying Section 28 of the Labour Code and its principles established in the practice of administering justice.

According to these, the consent can be refused only if it is in accord with the social purpose of law, that is refusal is grounded by the trade union activity or some other, similar activity of interest representation becoming hindered. …On the other hand, it may be justified to substitute the consent if the refusal had no substantial grounds, if the action planned by the employer did not affect the refuser's legitimate interests considerably, or if the refusal would involve serious disadvantages for the employer – out of proportion to the consequence for the trade union arising from consent … In the latter case both the advantages and disadvantages have to be considered, with the established social value judgment and practice also taken into account.

In view of this the plaintiff – in the absence of a special reason – could not ignore the observance of the general social practice according to which the trade union official working at the employer is usually in an employment relationship with the employer. Therefore the plaintiff could initiate the change of this situation only for a particularly substantiated reason. The plaintiff's own behaviour – whereby A.K. was not included among the persons filling the remaining quality assurance positions and that employment in the trade union was requested – could not qualify as such. The circumstance that a person not in employment relationship with the employer can also hold the office cannot be interpreted in relation with the proper practice of the right of consent. The plaintiff's statement that the official's job had ceased was not valid, as from the aspect of law the job under labour contract existed and could not be vacated.

The fact that trade union and interest representation activities were hindered was grounded by the circumstance established in the lawsuit, namely that A.K. was one of the most active members of the defendant's organizations whose work under undisturbed circumstances before the workers' council elections was insisted on by the organizations justifiably. A similar circumstance from the viewpoint of performing an official's work is that the offered position was to be taken in a continuous work order in three shifts. The conclusion reached in the labour court's decision, saying that the position offered could not be examined from the aspect given, was not valid.

In the plaintiff's point of view, in judging the lawfulness of refusing the consent requested it is important whether the termination of the official's employment relationship presents a general (objective) hindrance to the interest representation activity, irrespective of the given situation. In connection with this, reference was made to the fact that the defendant trade union had several members in its governing board; therefore it could not be claimed that they were unable to perform one member's duties either allocated among themselves or in some other way. This reasoning is erroneous, in accordance with the established practice of administering justice the number of persons in the trade union or in any other governing board is of no significance in itself with respect to the lawfulness of refusal … Similarly, reference to the fact that the termination of the employment relationship for reasons of economic management (lawful reorganization) excludes the lawfulness of refusing consent is not substantiated.

In consideration of all these, on the basis of the facts established, it had to be accepted as valid that the plaintiff's action involved the hindrance of the defendants' activities, therefore the refusal of the consent was lawful.

ANNOTATION

Rules pertaining to the labour law protection of trade union officials aim to ensure that the official shall not suffer any disadvantages on account of his or her trade union activity, and if so, he or she can have legal protection in court. At the same time the protection due to officials is meant to serve trade union activity as it tries to prevent the officials' removal by prescribing that the employer, before taking employer's actions affecting the official, shall ask for the prior consent and opinion of the superior trade union and shall notify it of the proposed action.

Accordingly, the employer can terminate the employment relationship of an elected trade union official by ordinary dismissal only with the prior written consent of the directly superior trade union body. The same consent is also re-

quired for appointing the official to another position, for his or her assignment or hiring-out to another employer or for his or her posting for more than 15 working days. The superior trade union body – or in the absence thereof the organizational unit of the trade union operating at the workplace in which the official conducts his or her activity – shall communicate its position in writing within eight days of receipt of notification by the employer, including the reasons therefor. If the superior trade union does not agree with the proposed action, the reasons for disagreement shall also be disclosed (the reasons are deemed substantiated if the taking of the planned action would have a result specified in the Labour Code). Failure by the trade union to communicate its opinion to the employer within the above specified deadline shall be construed as agreement with the proposed action.

In the event that an official's employment relationship is terminated by extraordinary dismissal, the employer shall consult only the superior trade union body, which shall submit its opinion concerning the proposed action within a period of three days following receipt of notification by the employer. Officials shall be entitled to protection for the duration of their term and for a period of one year following the expiration of such term, provided that the official held the office for at least six months. It is important to remember that in practice the refusal of consent by the superior trade union body has to be in connection with the hindered or impossible operation of the trade union as a result of the loss of the official concerned. The above protection is also due to the chairman and to the members of the workers' council and similarly to the labour safety representatives.

If it is not possible to determine which trade union body is competent to proceed in the case of an elected official, the right of prior consent to ordinary dismissal by the employer shall be exercised by the trade union body in which the official conducts his or her activities.

Elected trade union officials shall be entitled to the protection – for the duration and under the conditions set forth in Subsection (4) of Section (28) of the Labour Code – in the case of succession of the employer as well.

In accordance with judicial practice, the subsequent substitution of the trade union's legal statement with the court's decision does not render ordinary dismissal lawful for the reason that in the event of the termination of an elected trade union official's employment relationship by ordinary dismissal the prior consent given by the directly superior body is required [Labour Code Subsection (1) of Section 28]. Labour Law Case No. 2001. 459.

Pursuant to the effective Hungarian Labour Code the employee may be simultaneously an elected official in the trade union and in the workers' council. If the employee is the elected official of both the trade union and the workers'

council, the consent of these bodies given according to the rule of law – in addition to the substantial reason and to the conditions prescribed in other rules of law possibly to be applied to the case of dismissal – is required for the termination of his or her employment relationship by ordinary dismissal [Subsection (1) of Section 28 of Act XXII of 1992, Constitutional Court Resolution No. 24/1990, Subsections (1) and (3) of Section 23 of Act IV of 1991].

HUNGARY

Supreme Court Civil Council Labour Branch
No. II. 10.292/2004

Workers' councils right of codetermination with regard to the utilization of institutions and real property designated or actually used for welfare purposes

HEADNOTES

Facts

Workers' hostels – among others – were included as institutions of a welfare nature in the collective bargaining agreement of the defendant, effective as of July 1, 1994. Hotel P. was operated partly as a workers' hostel (140 beds) and partly as a commercial accommodation – run by the limited liability company in contractual relationship with the defendant. A working committee was set up by the parties in order to work out proposals for the utilization of Hotel P., in which the plaintiff's point of view was that the welfare nature of the real property should be strengthened, the number of employees accommodated in the workers' hostel should be increased by the defendant; moreover, it should be used for alleviating the housing problems of newly wed couples. No agreement was reached by the parties in this matter. Afterwards, no further proposals for the utilization of Hotel P. were made to the plaintiff. The collective bargaining agreement was terminated by the defendant on February 17, 2003, and subsequently he verbally informed the plaintiff of his intention of selling Hotel P. The plaintiff announced that he intended to exercise his right of codetermination with regard to the utilization of institutions of welfare nature, and unilateral sale was a violation of law. The defendant did not acknowledge plaintiff's right of codetermination after the collective bargaining agreement had ceased to have effect, and he sold Hotel P. on August 27, 2003.

Decision

The Plaintiff had the right of codetermination in this case regardless of the fact that the collective agreement was terminated.

Law applied

LABOUR CODE

Section 30

Collective agreements may govern:

a) rights and obligations originating from employment relationships, the method of exercising and fulfilling and the procedural order of such relationships;

b) the relations between the parties to the collective agreement.

Section 65

(1) Workers' councils shall have the right of codetermination with regard to the appropriation of welfare funds specified in the collective agreement and with regard to the utilization of institutions and real property of such nature.

…

(3) Employers shall consult the workers' council prior to adopting a decision in connection with

a) plans for actions affecting a large group of employees, in particular those related to proposals for the employer's reorganization, transformation, the conversion, privatization and modernization of a strategic business unit into an independent organization;

…

c) plans connected with employee training, proposals for the appropriation of job assistance subsidies for the betterment of employment conditions, and drafts of plans for early retirement;

…

g) plans for internal regulations affecting the employees' substantive interests;

Section 67

Any action taken by an employer in violation of the provisions set forth in Subsections (1)-(3) of Section 65 shall be construed invalid. The workers' council may file a court action for the establishment of such invalidity.

Section 165

(1) Employers may support the fulfillment of the employees' cultural, welfare and health care needs, and the improvement of their living standards. The

fringe benefits provided therefor shall be set forth in the collective agreement, however employers may also provide additional support to employees.

JUDGMENT

[The labour court (court of first instance) concluded from the action taken immediately after the termination of the collective bargaining agreement for the purpose of selling the welfare institution that the defendant did not exercise his right of termination properly because it was aimed at hindering the exercise of the workers' council right of codetermination. The county court (court of second instance) changed the rulings of the court of first instance and the request was dismissed.

In the point of view of the court of second instance, the workers' council had the right of codetermination exclusively with regard to the sale of institutions and real properties of welfare nature specified in the collective bargaining agreement. With respect to the collective bargaining agreement, the defendant exercised his statutory right of termination, which could not be construed as improper exercise of rights. Thus the request was dismissed by the court of second instance for the reason that the plaintiff wanted to exercise a right to which he did not have entitlement in the absence of a collective bargaining agreement.]

Supreme Court

The plaintiff submitted an appeal for review. Erroneous interpretation of the rule of law was referred to because according to his point of view the right of codetermination with respect to the sale of institutions and real properties of welfare nature was provided for by law irrespective of the collective bargaining agreement. He found it injurious that the violation of Subsection (1) of Section 4 of the Labour Code had not been stated. In his counterclaim, the defendant requested that the final decision be maintained in force.

According to the Supreme Court decision the appeal for review is grounded. Pursuant to Subsection (1) of Section 165 of the Labour Code the employer may provide welfare benefits as social support. Such supports are voluntary but may be set forth in the collective bargaining agreement as mandatory. Rights and obligations originating from employment relationship, the manner of the exercise and fulfilment thereof and the procedural order related to them may be governed by the collective bargaining agreement (Item a) of Section 30 of the Labour Code). Consequently, the collective bargaining agreement may govern

the types, the legal title, the framework and the main rules of welfare benefits without vacating the workers' council's right of codetermination.

Pursuant to Subsection (1) of Section 65 of the Labour Code, workers' councils shall have the right of codetermination with regard to the appropriation of welfare funds specified in the collective bargaining agreement and with regard to the utilization of institutions and real property of such nature.

The scope of the right of codetermination is not specified in the same manner with respect to funds on the one hand and institutions and real property on the other.

The scope of employer's funds is very wide. This is why the right of codetermination mandatory for the employer is made unequivocal by law with regard to funds specified as welfare funds in the collecting bargaining agreement.

However, the welfare nature of institutions and real property may be obvious without such specification in the collective bargaining agreement (children's institution, cultural institution etc.). Therefore – although institutions and real property may also be specified for welfare purposes in the collective bargaining agreement – the welfare nature of institutions and real property permanently intended and used for such purposes can be established without specification in the collective bargaining agreement, too, in which case the workers' council has the statutory right of codetermination with regard to their utilization. The interpretation of legal rules by the preceding courts contrary to this is erroneous.

In the given case the defendant employer did not dispute the utilization of the real property in question partly as a workers' hostel, in his counterclaim reference was made only to the number of employees accommodated. Thus the plaintiff workers' council right of codetermination with regard to the utilization of the real property of welfare nature existed even in the absence of a specification in the collective bargaining agreement.

In consideration of the above, the Supreme Court annulled the final decision, which violated Subsection (1) of Section 65 of the Labour Code.

ANNOTATION

The right of codetermination is the strongest right of workers' councils, which means that the employer and the workers' council shall make decisions jointly in matters belonging to this right. In accordance with Subsection (1) of Section 65 of the Labour Code, the appropriation of welfare funds and the utilization of institutions and real property of a welfare nature belong to the right of codetermination. The utilization of institutions and real property of a welfare nature comprises their sale, renting, leasing, utilization for other purposes or

mortgaging, and in these cases codetermination is necessary. If codetermination becomes impossible because of the parties' disagreement, an arbitrator must be employed pursuant to Section 197 of the Labour Code.

With respect to exercising the right of codetermination, the most severe disputes arose concerning the utilization of institutions and real property of a welfare nature. Several cases are known in which the decisive action taken by the workers' council prevented the sale of welfare institutions, with special respect to the sale of holiday homes. The employer and the workers' council frequently compromised by agreeing that the council would consent to the sale of the institution on condition that all or part of the sum received should be appropriated for social purposes. In a relatively low number of cases the dispute was settled with arbitration. During the past years cases related to the exercising of this right were settled by labour courts the most frequently. The subject of the dispute typically was what qualifies as an institution of welfare nature.

As far as the right of codetermination is concerned the statutory regulations have not changed, but an extremely important new interpretation has been made with respect to the extent of the right. Ever since the establishment of workers' councils one of the most frequent disagreements about interpretation has been how to interpret Subsection (1) of Section 65, namely "Workers' councils shall have the right of codetermination with regard to the appropriation of welfare funds specified in the collective bargaining agreement and with regard to the utilization of institutions and real property of such nature". The subject of the dispute has been whether this right covers only institutions and real property specified in the collective bargaining agreement or every institution and real property of a welfare nature. Labour courts often made different decisions in these disputes. In 2004 the Supreme Court stated that the definition of the right of codetermination was not the same with regard to welfare funds on the one hand and institutions and real property on the other. In the case of welfare funds it covers only welfare funds specified in the collective bargaining agreement. However, concerning institutions and real property, the specification for welfare purposes is decisive irrespective of the collective bargaining agreement.

This decision is important for the reason that some of the employers denied the right of codetermination arguing that the given institution was not specified in the collective bargaining agreement, or no collective bargaining agreement was concluded at the employer at all. In some cases it also happened that the employer terminated the collective bargaining agreement specifying the institution to be sold with the obvious intention of excluding the workers' council from exercising the right of codetermination.

PART SIX

ADMINISTRATION: JUDICIAL AND GENERAL

UNITED STATES OF AMERICA

Court of Appeals for the Sixth Circuit
Walker v. Ryan's Family Steak Houses, Inc.

Arbitration of statutory minimum and overtime wages claims– fairness of arbitration provision imposed as a condition of employment

HEADNOTES

Facts

In addition to other papers job applicants were required to fill out and read, workers applying for low wage restaurant jobs were given a five page single spaced agreement with a company, other than the potential employer, that administers employment arbitration proceedings. Also, as a part of the hiring process, applicants were directed to sign the arbitration agreement. That agreement included a statement that the employee would "arbitrate and resolve any and all employment-related disputes" with the employer. It contained no similar obligation for the employer to arbitrate any employment related claims it might have against the employee. The restaurant was the largest customer of the arbitration administrator and the latter had the responsibility to compile the pool of names from which an arbitrator would have to be selected. Further, the procedure set forth in the arbitration agreement could be terminated by the restaurant with ten days written notice but no similar option was available to employees. In addition, the agreement allowed the arbitration administrator to unilaterally modify the procedural rules and apply the modification to the signer. Under the procedures set forth in the agreement, the parties were entitled to take a single pre-hearing deposition although an arbitrator could allow, but was expressly discouraged from allowing, additional depositions. Finally, although an earlier version of the arbitration services agreement allowed consolidation of claims, the most recent version did not.

The issue in this case was whether an arbitration provision agreed to in obtaining low wage employment bar an employee from suing for statutory minimum and overtime wage claims if only the employee is bound by the agreement, available arbitrators can be selected in a biased manner, claimants will have less

opportunity to discover evidence than they would in preparation for a judicial trial, and the claims of a class of similarly situated employees could not be heard in the same proceeding.

Decision

The trial court properly rejected the arbitration agreement as a bar to bringing statutory wage claims because the employer did not give legal consideration in exchange for the obligations of the employees, it had no concrete obligations under the agreement, and it was a waiver of substantial legal rights unilaterally and unfairly imposed on persons with no real bargaining power. In addition, the arbitration agreement was unenforceable because the means for selecting an arbitrator does not ensure that the decision-maker will be unbiased and independent and the procedure does not ensure a fair and adequate opportunity to prepare for the hearing.

Law Applied

9 U.S. CODE § 2

"A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

JUDGMENT

Before: COLE and CLAY, Circuit Judges; HOOD, District Judge. CLAY, Circuit Judge.

Defendant Ryan's Family Steak Houses, Inc. appeals the October 2, 2003 order of the district court, denying its motion to dismiss and petition to compel arbitration, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 3 and 4, of … claims for violations of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201-219. For the reasons that follow, we AFFIRM.

I.

A. PROCEDURAL HISTORY

On November 12, 2002, Plaintiffs Eric Walker, Steve Ricketts, and Vickie Atchley filed a self-styled "collective action" complaint for violations of the FLSA against Defendant Ryan's Family Steak Houses, Inc. ("Ryan's") in the United States District Court for the Middle District of Tennessee. Ryan's is a Delaware corporation, with its principal place of business in South Carolina, and owns and operates a chain of over 300 restaurants in 22 states. Plaintiffs, former employees at various Ryan's locations in Tennessee, allege that Ryan's failed to pay them the minimum wage and/or one-and-one-half their regular rate of pay for all hours worked in excess of each 40 hour work week, in violation of the FLSA. After Plaintiffs filed suit, 18 additional unnamed plaintiffs filed their consent to become party plaintiffs in the lawsuit. Ryan's moved to dismiss Plaintiffs' complaint and petitioned for an order compelling Plaintiffs to arbitrate their claims pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 3 and 4. Ryan's argued that Plaintiffs federal court claims were foreclosed by the arbitration agreements that each had executed at the outset of their employment.

On October 2, 2003, the district court denied Ryan's motion, holding that there was inadequate consideration for the arbitration agreements, the agreements had the hallmarks of unconscionable adhesion contracts, the agreements were not founded upon mutual assent, and Plaintiffs did not knowingly and voluntarily waive their constitutional right to a jury trial. The court also held that the arbitration forum provided for in the agreements is not able to provide for effective vindication of statutory claims and is an inappropriate substitute for the judicial forum. The court observed that the pool of arbitrators would be constituted in a biased manner and that the limited discovery available in the forum suggested structural bias in favor of the employer. The court further determined that the arbitration agreements appear to prohibit arbitration of class-based claims, which provides a powerful disincentive for employees to pursue individual claims of relatively low monetary value. Ryan's timely appealed.

B. SUBSTANTIVE FACTS

Since 1996 or 1997, any individual who applies for employment with Ryan's has been presented with a 12-page application packet. The second page of the packet notifies the applicant that he or she is required to complete and sign the "Job Application Agreement to Arbitration of Employment-Related Disputes"

(hereafter "Arbitration Agreement") in order to be considered for a position. Failure to sign and accept the Arbitration Agreement and its related rules and procedures purportedly terminates the job application process. After the one-page notice come five pages of single-spaced rules and procedures governing the arbitration procedure. Only after wading through the rules does the applicant get to the one-page job application for the positions of server, salad bar, dishwasher, frontline, hostess, meatcutter, cook, breadroom, or cashier. The two-page Arbitration Agreement, which the applicant must sign, then follows the application.

Plaintiffs cite several examples of applicants who were hired on the spot after a 15 to 20 minute interview, during which the hiring manager hurriedly presented them with various documents that they were instructed to sign in order to be considered for a job. The manager rarely explained the nature of the Arbitration Agreement to the applicants, nor were the applicants given the opportunity to take home and review any of the forms before signing or provided with copies of the executed Arbitration Agreement or rules. Consequently, many of the applicants do not even recall executing the agreements.

One Ryan's employee, Nanella Dukes, was hired on the spot, without filling out any paperwork. Only after working for four or five days was Dukes handed the application packet and told to sign the documents, with her manager explaining that the agreement meant that if Dukes "ever had any problems with Ryan's or Ryan's management, [she] had to 'go through Ryan's arbitration.' " Plaintiffs Julie Oaks and Steven Ricketts also were hired on the spot without first completing the Arbitration Agreement. Oaks's manager explained that the arbitration agreement meant that if Oaks ever had any problems with Ryan's, she "had to 'go through Ryan's ' before [she] could go to an attorney."

According to Dukes, based on her experience conducting new employee orientations, Ryan's managers would place an "x" in every spot an applicant was required to sign, and applicants would be instructed to sign every "x" without any explanation. Dukes's explanation of the application process is consistent with that of Paul Heuther, who worked as a manager at various Ryan's restaurants over a ten-year period. Heuther states that the application process typically would last no longer than 20 minutes, applicants often would be hired on the day that they applied when managers presented the application packet, they would simply tell the applicants that if they wanted a job, "sign these documents here." Heuther further explains, "Our supervisors at Ryan's told us during manager meetings with them, that if it came up to tell any job applicant that the arbitration agreement meant that problems would be handled 'up the chain of command,' and that we would handle problems in house' first, and if the prob-

lem could not be resolved there, then it would be taken to the supervisor to resolve."

Plaintiffs complain that the time-limited context in which they were presented with the Arbitration Agreement, combined with the managers' provision of misleading information about the agreement, is particularly problematic because many of the plaintiffs have not completed high school and/or were in dire financial circumstances at the time of application and therefore were desperate for the low-wage jobs Ryan's offers. Plaintiffs point out that the average annual salary for a top-paid Ryan's restaurant worker is approximately $ 16,000, while minimum wage employees make approximately $ 11,000 annually. Accordingly, Plaintiffs suggest that they had neither the ability nor the incentive to comprehend the significance of executing the Arbitration Agreement.

Unlike the typical pre-employment arbitration agreement which involves a contract between the applicant and his or her potential employer, Ryan's Arbitration Agreement is not between the applicant and Ryan's. Rather, it is between the applicant and Employment Dispute Services, Inc. ("EDSI"). EDSI is a South Carolina corporation whose sole business is the marketing and administration of the Employment Dispute Resolution Program. The program is a third-party arbitration system which was established in 1992 to provide employers and employees outside of the securities industry with a purportedly fair and expeditious means of resolving employment-related disputes. EDSI has contracts with a total of seven companies, including Ryan's.

The Arbitration Agreement that Plaintiffs executed explains that Ryan's (referred to therein as the "Company") had entered into a separate agreement with EDSI "to arbitrate and resolve any and all employment-related disputes between the Company's employees (and job applicants) and the Company." Although Plaintiffs were not provided with a copy of Ryan's separate agreement with EDSI, that agreement obligates EDSI to, *inter alia*, "administer and provide access to the EDSI alternative dispute resolution procedures and forum for all Company job applicants, employees, and the Company itself, as provided in the EDSI Rules and Procedures"; train managers and supervisors about the alternative dispute resolution program; and train managers and employees selected to serve as potential "adjudicators" in the program. Also, for an additional fee, EDSI will conduct "an employee relations audit (personnel polices and procedures, handbooks and other personnel forms), management training, and employee attitude surveys with recommended management responses." Ryan's agreement with EDSI is renewable from year to year, but Ryan's may cancel the contract with ten days' written notice.

By executing the Arbitration Agreement with EDSI, Plaintiffs agreed to (a) bring any employment disputes that he or she may have against Ryan's and that

would otherwise be decided in a state or federal court only in EDSI's arbitral forum and (b) be bound by a final decision of the EDSI arbitration panel. The purported consideration for Plaintiffs' promise to arbitrate is EDSI's agreement "to provide an arbitration forum, Rules and Procedures, and a hearing and decision based on any claim or dispute [that the applicant] may file or defend[.]" According to the agreement, Ryan's is a third party beneficiary of the agreement between Plaintiffs and EDSI, and Plaintiffs are third party beneficiaries of Ryan's agreement with EDSI. The agreement continues for the period of Plaintiffs' employment with Ryan's, unless mutually terminated in writing by Plaintiffs and EDSI.

The 2000 version of EDSI's Employment Dispute Resolution Rules and Procedures – the most recent version of the rules – provides that the substantive rights and remedies in EDSI's arbitration forum are the same as are available in a federal or state court. The rules govern all legal disputes, claims, or causes of action that arise out of the employment or possible employment of all parties signatory to an employment dispute resolution agreement with EDSI. The rules govern both the claims of a "claimant" (i.e., an applicant or employee) and any claims that a signatory defendant might bring against a claimant who has signed the Arbitration Agreement.

The rules further provide that a panel of three "adjudicators" resolves arbitration claims and are chosen from three separate selection pools: (1) supervisors or managers of an employer signatory to an agreement with EDSI; (2) employees who are non-exempt from the wage and hour protections of the Fair Labor Standards Act; and (3) attorneys, retired judges, or other competent legal professional persons not associated with either party. No individual who has been employed by an employer involved in the dispute can serve as an adjudicator.

EDSI provides the parties with a list of three potential adjudicators in each of the three selection pools. The parties have access to a schedule of the adjudicators' fees and their employment history for at least the previous five years, along with related biographical information. Potential adjudicators also are required to disclose any information which may preclude them from making an objective and impartial decision.

Once EDSI selects the pools of potential adjudicators, the claimant and the defendant alternately strike names from each of the three selection pools until one name from each pool remains. Any potential adjudicator may be struck for cause. As a matter of EDSI practice, if an adjudicator is removed from the pool for cause, EDSI provides another potential adjudicator.

Once arbitration proceedings commence, any party may serve a request for production of documents, and counsel for the parties have subpoena power. The

rules also permit each party to schedule a deposition of one individual. A party may file a request for additional depositions, "but such requests are not encouraged and shall be granted in extraordinary fact situations and for good cause shown."

Under the 2000 version of the rules, EDSI reserves the right to modify or amend the Rules after the date the claimant signs the Arbitration Agreement. The claimant, however, has the right to have his or her dispute resolved pursuant to the rules that were in effect at the time the agreement was signed, unless he or she prefers the modified rules.

II.

Plaintiffs filed a self-styled class action under the FLSA, seeking unpaid wages and related penalties against Ryan's. Ryan's argues that Plaintiffs' action should not be in federal court at all and, pursuant to the FAA, moved to enforce the pre-employment arbitration agreements that Plaintiffs executed. For the reasons that follow, we hold that the district correctly refused to enforce Plaintiffs' arbitration agreements as unenforceable under Tennessee law.

…

B. Analysis

1. The FAA and State Law

"The FAA provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, [9 U.S.C.] § 3, and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, [*id.*] § 4." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). "The FAA expresses a strong public policy favoring arbitration of a wide class of disputes." *Cooper v. MRM Investment Co.*, 367 F.3d 493, 498 (6th Cir. 2004). The Sixth Circuit has repeatedly applied the FAA to arbitration agreements formed in the employment setting. *E.g.*, *Cooper*, *supra*; *McMullen v. Meijer, Inc.*, 355 F.3d 485 (6th Cir. 2004) (*per curiam*); … . In particular, statutory claims may be the subject of an arbitration agreement, including employment discrimination claims and claims under the FLSA. *Gilmer*, 500 U.S. at 26-35 (holding that there had been no showing that Congress intended to preclude the arbitration of claims under the Age Discrimination in Employment Act); *Floss*, 211 F.3d at 313 (holding that FLSA claims may be arbitrable).

The FAA provides that "[a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and en-

forceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "Thus, generally applicable state-law contract defenses like fraud, forgery, duress, mistake, lack of consideration or mutual obligation, or unconscionability, may invalidate arbitration agreements." *Cooper*, 367 F.3d at 498 (citations omitted). "The federal policy favoring arbitration, however, is taken into consideration even in applying ordinary state law." *Id.* (internal quotation marks and citations omitted).

2. Choice of Law

Tennessee law applies when analyzing the enforceability of the three named Plaintiffs' Arbitration Agreements because the agreements were executed in Tennessee and substantially performed in that state. *See Cooper*, 367 F.3d at 499 (holding that the district court correctly looked to Tennessee law to determine whether an arbitration agreement was enforceable because the agreement was executed there, the plaintiff's employment and the alleged wrongful conduct occurred there, and neither party expected any other state's law to apply)… . Ryan's argues, however, that the laws of other states apply to the plaintiffs who have opted-in to this litigation and who worked at Ryan's locations outside of Tennessee. Ryan's further argues that the district court violated its due process rights by applying only Tennessee law to address its motion to compel arbitration with respect to these opt-in plaintiffs. We disagree.

[Deleted from the opinion is the court's explanation of why the Constitution permits Tennessee's law to govern this case even though some of the plaintiffs worked in other states. –Ed.]

3. Consideration

In *Floss*, *supra*, this Court addressed the propriety of virtually the identical arbitral scheme at issue in this case and, as in this case, applied Tennessee contract law. At issue was the arbitrability of Plaintiffs Sharon Floss's and Kyle Daniels's FLSA claims in light of the arbitration agreement that they had executed with EDSI as part of their application for employment with Ryan's. As in this case, the plaintiffs argued that the EDSI rules and procedures did not allow them to effectively vindicate their FLSA claims on the grounds that the procedures allow for the appointment of a biased panel of arbitrators and unduly limited their discovery opportunities. *Floss*, 211 F.3d at 313-14.

After voicing its concerns over EDSI's arbitrator selection process, the *Floss* Court held that the plaintiffs were not bound by their arbitration agreements because, as a matter of Tennessee law, EDSI had not provided adequate consideration for the plaintiffs' promise to submit any dispute that they may have with Ryan's to arbitration with EDSI. *Floss*, 211 F.3d at 314-16. According to the

EDSI rules then in effect, EDSI had reserved the right to alter the applicable rules and procedures without any obligation to notify or receive the consent of the plaintiffs. *Id.* at 315-16. The Court held that EDSI's right to choose the nature of its performance rendered its promise "fatally indefinite" and, therefore, lacking in consideration. *Id.* at 316.

In response to the holding in *Floss*, EDSI amended its rules and the Arbitration Agreement in 2000. As under prior versions, the 2000 rules give EDSI the right to modify or amend the rules after the date the claimant signs the Arbitration Agreement. The rules, however, include the following additional language: "In the event these Rules and Procedures are modified after a Claimant has signed an Agreement, the claimant shall have the option to have his or her claim adjudicated under the Rules and Procedures that were in effect on the date the Agreement was signed or the Rules and Procedures that are in effect on the date their claim is filed with EDSI."

EDSI amended the Arbitration Agreement to be consistent with the revised rules… .

Ryan's maintains that these linguistic changes to the rules and the agreement cure the consideration problem that the *Floss* court identified; they argue that EDSI's promise is not illusory because Plaintiffs can insist on the rules in effect at the time they entered into their Arbitration Agreements. Plaintiffs disagree, arguing that EDSI still maintains the right to modify or amend the rules without notice or consent.

We hold that Plaintiffs have the better argument because they signed the identical Arbitration Agreement at issue in *Floss*. Their agreements explicitly reserve EDSI the right to modify or amend the rules from time to time, without providing Plaintiffs the right to insist on the rules in effect at the time that they executed their respective agreements. Although the 2000 version of the rules purport to afford Plaintiffs the right to enforce the rules in effect at the time of execution, Plaintiffs' agreements do not incorporate that right. Each of their agreements states that "My Agreement …contains the entire understanding and agreement of the parties regarding these subjects" and that "My Agreement may not be altered or amended, except in writing signed by the President of EDSI and Me." There is no evidence in the record that any of Plaintiffs agreed in writing with the EDSI's President to adopt the 2000 version of the rules or that Plaintiffs provided any new consideration for EDSI's new promise to disregard (upon Plaintiffs' request) any post-execution amendments to its rules. Accordingly, as far as the named Plaintiffs are concerned, EDSI still retains the unfettered contractual right to alter or amend the rules and procedures, including the right to eliminate the rule added in 2000 that purports to give the claimant the right to enforce the rules and procedures that existed at the time that he or she

executed the agreement. Therefore, Plaintiffs' Arbitration Agreements are no different from the agreements at issue, and held to be unenforceable, in *Floss* due to inadequate consideration from EDSI.

Arguably, the consideration for Plaintiffs' promises to arbitrate derives from a source other than EDSI, such as a promise by Ryan's, which claims to be a third-party beneficiary of the contracts between EDSI and Plaintiffs. *See Restatement (Second) of Contracts § 71(4)* ("The performance or return promise [as consideration for a promise] may be given to the promisor or to some other person. It may be given by the promisee or by some other person."). We hold, however, that Ryan's has not provided adequate consideration.

Adequate consideration cannot take the form of Ryan's promise to submit any claims it may have against Plaintiffs to EDSI's arbitral forum. As explained by one district court:

> EDSI is bound by its promise to Plaintiffs only to the extent that Ryan's is bound to submit to the forum, for without Ryan's consent EDSI can provide no benefit to Plaintiffs. EDSI/Ryan's Contract contains an escape clause whereby Ryan's can cancel its Contract with EDSI on ten days notice. … This provision stands in clear contrast to the mutual termination clause found in the Arbitration Agreement, thus negating any consideration that Plaintiffs might be deemed to receive from EDSI's promise to provide the forum. Similarly, the ten-day escape clause eliminates consideration that might otherwise exist or flow from Plaintiffs' "third-party beneficiary" status, as alluded to in the Arbitration Agreement.

Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985, 1001 (S.D. Ind. 2001). Indeed, we question whether the agreement between EDSI and Ryan's even obligates Ryan's to submit to EDSI's arbitral forum at all. The EDSI/Ryan's agreement merely obligates EDSI (for a fee from Ryan's) to "*administer and provide access to* the EDSI alternative dispute resolution procedures and forum for all Company job applicants, employees, and the Company itself, as provided in the EDSI Rules and Procedures." (J.A. 1758.) (emphasis added). Notably, the agreement does not *require* Ryan's to submit its employment claims to the EDSI forum. Thus, the Arbitration Agreements that Plaintiffs executed misrepresent the meaning of the EDSI/Ryan's agreement by stating that Ryan's "has entered into an agreement with [EDSI] to arbitrate and resolve any and all employment-related disputes between the Company's employees (and job applicants) and the Company." In truth, it is only the Ryan's applicant or employee who has agreed to bring any employment-related dispute exclusively in the EDSI arbitration forum. *See, e.g.*, J.A. 108 (Arbitration Agreement, § B.1) ("Any employment-related dispute ... will be brought ONLY in the EDSI arbitration forum …") (emphasis in original). Although the EDSI/Ryan's contract refers to EDSI's rules, and those rules govern any employment claim Ryan's may have against an

applicant or employee, *see* J.A. 310 (EDSI/Ryan's Contract, Article II, § 1(a), (b)), the rules do not require Ryan's to submit to the EDSI forum to resolve its employment disputes. Even if the rules did so provide, Ryan's promise to submit to that forum would be "fatally indefinite" because (a) Plaintiffs' Arbitration Agreements reserve EDSI's right to modify those rules and (b) Ryan's exerts significant financial control over EDSI and, hence, the rules that supposedly bind Ryan's. *Floss*, 211 F.3d at 316. …

Without any supporting Tennessee authority, Ryan's argues that the fact that it would not consider Plaintiffs' employment applications without their prior agreement to arbitrate constitutes sufficient consideration for Plaintiffs' promises to arbitrate. One district court has rejected this argument under Indiana law, holding that "merely a promise to consider an applicant's application, not employ her, ... standing alone, will not bear the weight required to allow us to construe the Arbitration Agreement as a binding contract." *Geiger*, 134 F. Supp. 2d at 1001-02; *see also Penn v. Ryan's Family Steak Houses, Inc.,* 269 F.3d 753, 760-61(7th Cir. 2001) (holding that there was no consideration for the plaintiff's arbitration agreement with EDSI; noting that "the defendants provide no evidence that any Indiana court has ever held that a mere promise to consider an application for employment would provide consideration for a separate contract").

We similarly conclude that Ryan's has failed to demonstrate that, under Tennessee law, an employer's promise to consider an employment application is adequate consideration for a promise to arbitrate employment disputes that are wholly unrelated to the application or hiring process. Moreover, the record in this case suggests that Ryan's has considered applications and hired applicants without first requiring them to execute an arbitration agreement. Nanella Dukes, Julie Oakes, and Steven Ricketts all were interviewed and hired without first completing their Arbitration Agreements, suggesting that Ryan's promise to consider only applicants who have agreed to arbitrate is illusory, and therefore inadequate, consideration for a promise to arbitrate any kind of employment-related dispute.

4. Knowing and Voluntary Waiver of Right to File Suit in Federal Court

Citing this Court's holding in *KMC Co. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985), the district court held that Plaintiffs could not be compelled to arbitrate their claims because they did not knowingly and voluntarily waive their constitutional right to a jury trial. *See KMC*, 757 F.2d at 755-56 (holding that the parties to a contract may by prior written agreement waive the right to jury trial as long as the waiver is knowing and voluntary). A panel's recent decision in *Cooper* characterized *KMC's* adoption of the knowing and voluntary standard as

dictum, but nevertheless applied the standard. *See Cooper*, 367 F.3d at 507 (holding that "a party who enters an arbitration agreement necessarily consents to the clear and obvious consequence: the surrender of his right to go to trial"). We need not struggle with the question of whether *KMC* is binding precedent on this issue, because the *en banc* Court in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir. 2003) (*en banc*) clearly adopted the knowing and voluntary standard for agreements to arbitrate in lieu of litigation.

According to *Morrison*, to evaluate whether a plaintiff has knowingly and voluntarily waived his or her right to pursue employment claims in federal court, the following factors must be evaluated: (1) plaintiff's experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; as well as (5) the totality of the circumstances. *Id.* (quoting *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995)). The district court correctly held that these factors demonstrate that Plaintiffs did not knowingly and voluntarily consent to arbitration.

First, most of the plaintiff class have not completed high school, and most were in dire financial circumstances at the time of application. The average annual salary for a top-paid Ryan's restaurant worker is approximately $ 16,000, while minimum wage employees make approximately $ 11,000 annually. Accordingly, the district court did not err in concluding that the experience, background, and level of education of the plaintiffs was "low to mid-level."

Second, Plaintiffs typically were hired on the spot after a brief interview, during which the hiring manager hurriedly presented them with various documents that they were instructed to sign in order to be considered for a job. According to one opt-in plaintiff, Ryan's managers would place an "x" in every spot an applicant is required to sign, and applicants would be told to sign every "x" without any explanation. The hiring manager usually would not mention the arbitration agreement, and Plaintiffs had no opportunity to take the Arbitration Agreement home or consult an attorney, even though the agreement purports to afford them that right. Unlike the arbitration agreement found to be knowingly and voluntarily executed in *Morrison* because the plaintiff had three days to withdraw her consent, *Morrison*, 317 F.3d at 668, Plaintiffs were given no option to revoke their consent to the Arbitration Agreement.

Additional evidence suggests that, on those occasions when Ryan's managers would discuss the agreement, they would provide misleading information. Plaintiff Julie Oaks's manager explained that the arbitration agreement meant that if Oaks ever had any problems with Ryan's, she "had to 'go through Ryan's' before [she] could go to an attorney." Paul Heuther, a former manager at vari-

ous Ryan's restaurants, explained that "supervisors at Ryan's told us during manager meetings with them, that if it came up to tell any job applicant that the arbitration agreement meant that problems would be handled 'up the chain of command,' and that we would handle problems 'in house' first, and if the problem could not be resolved there, then it would be taken to the supervisor to resolve." It is no surprise, therefore, that many of the plaintiffs do not even recall executing agreements that preclude them from vindicating their rights in state or federal court.

Third, the Arbitration Agreement's waiver provision states that the claimant agrees that any disputes with Ryan's "which would otherwise be decided in court, shall be resolved only through arbitration in the EDSI forum and *not through litigation in state or federal court*." (J.A. 303)(emphasis in original). The district court found that the waiver provision is explicit, but not clear because it does not use more commonly understood waiver language about forgoing the right to have claims heard at "trial" or by a "jury." …

Fourth, for the reasons discussed above, the court correctly held that the agreements lacked consideration.

Like the district court, we hold that an analysis of the above-stated factors support the conclusion that Plaintiffs did not knowingly and voluntarily execute their Arbitration Agreements. Accordingly, the district court did not err in refusing to enforce them on this ground.

5. Mutual Assent

The district court found that there was strong evidence that the Arbitration Agreements between Plaintiffs and EDSI did not result from a meeting of the minds in mutual assent. We agree.

It is well-settled under Tennessee law that a contract must result from a meeting of the minds of the parties in mutual assent to the terms. *Higgins v. Oil, Chemical & Atomic Workers Int'l Union, Local # 3-677*, 811 S.W.2d 875, 879 (Tenn. 1991). Although the question of mutual assent involves largely an objective analysis, the parties' intent remains relevant, in particular the circumstances surrounding the formation of the contract. *Id.* at 879. The district court below held that Plaintiffs did not mutually assent with EDSI to the terms of their Arbitration Agreements because there is a question as to whether Plaintiffs were provided with the rules when they signed the contracts, conflicting evidence about whether Plaintiffs knew what they were signing at the time they executed the agreements, and evidence that Ryan's managers provided misleading information about the agreements and the arbitration process prior to execution. The court concluded that these facts overcome the general presumption under Tennessee law that a party is under a duty to learn the contents of a written contract

before signing and, therefore, may not deny that a contract he or she admittedly has signed and that expresses the agreement that he or she made ….

* * *

… [W]e hold that Ryan's failed to meet its burden of showing Plaintiffs and EDSI actually bargained over the Arbitration Agreement or that it was within the reasonable expectation of the ordinary person considering the circumstances… . Plaintiffs were presented with the Arbitration Agreement in a hurried fashion and told to simply sign if they wanted to be considered for employment. The agreements were presented to Plaintiffs on a "take it or leave it" basis, and Plaintiffs had no real bargaining power; they had to sign the agreements if they wanted to be considered for employment. Although the Arbitration Agreements state that Plaintiffs had the right to consult an attorney, in reality, they had no opportunity to exercise that right because they had to sign the agreements on the spot. Plaintiffs educational limitations (many have not completed high school and were seeking jobs that would provide them poverty-level wages) also were obvious. Finally, on those occasions when Ryan's managers took it upon themselves to explain the Arbitration Agreement, they gave inaccurate information about the arbitration process and did not tell them that they were waiving their right to a jury trial. For these reasons, the district court correctly held that Plaintiffs did not mutually assent to arbitrate their employment disputes when they executed their agreements with EDSI.

6. Unconscionable Adhesion Contracts

The district court held that Plaintiffs' Arbitration Agreements were unenforceable adhesion contracts. Under Tennessee law, an adhesion contract is "a standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." *Buraczynski*, 919 S.W.2d at 320 (quoting Black's Law Dictionary 40 (6th ed. 1990)). Here, Ryan's presented Plaintiffs with a standardized Arbitration Agreement at or around the time of applying for employment. Ryan's presented the agreements on a "take it or leave it" basis, because Plaintiffs had no opportunity to bargain over the agreements' terms and ostensibly would not be permitted to apply for employment without first agreeing to arbitrate.

We have some concerns about whether Plaintiffs demonstrated the final element of an adhesion contract: "the absence of a meaningful choice for the party occupying the weaker bargaining position." [citing authority]. To find their Arbitration Agreements adhesive, the district court was required to cite

"evidence that [Plaintiffs] would be unable to find suitable employment if [they] refused to sign [EDSI's] agreement." [citation omitted]. The court cited no such evidence ... (reversing district court's finding that pre-employment arbitration agreement was an adhesion contract under Tennessee law because the record was silent on whether other local employers might have hired the Plaintiff without a similar agreement). Nevertheless, we note that the lack of such evidence may not be relevant to the agreements signed by Plaintiffs like Nanella Dukes, Julie Oakes, and Steven Ricketts, who were interviewed and hired without first executing their Arbitration Agreements. Arguably, because they already had been hired and were working when Ryan's presented them with the agreements, Ryan's may have terminated them had they refused to sign. Ryan's therefore had significantly more bargaining power over these Plaintiff-employees, who, unlike applicants, likely had forgone other employment opportunities and would have been severely disadvantaged by having to inform prospective employers that they were terminated shortly after their hire. In contrast to telling an applicant that he or she needs to sign the agreement or else do not bother applying, the threat of termination from one's current employment would appear to be sufficient in itself to demonstrate "the absence of a meaningful choice for the party occupying the weaker bargaining position." [citation omitted]. We need not remand to the district court to reexamine this issue, however, because the court correctly held that the Arbitration Agreements are unenforceable on other state law grounds. Accordingly, we affirm the court's denial of Ryan's motion to compel arbitration of Plaintiffs' claims.

III.

In addition to refusing to enforce Plaintiffs' arbitration agreements on state law grounds, the district court held that the agreements are unenforceable because they do not allow Plaintiffs to effectively vindicate their rights under the FLSA. We agree for the reasons discussed below.

* * *

B. Analysis

Even if there is no contract-based defense to the enforceability of an arbitration agreement, a court cannot enforce the agreement as to a claim if the specific arbitral forum provided under the agreement does not "allow for the effective vindication of that claim." *Floss*, 211 F.3d at 313. Generally, a party cannot avoid the arbitration process simply by alleging that the arbitration panel will be biased, because the FAA "protects against bias, by providing that courts may overturn arbitration decisions 'where there was evident partiality or corruption in

the arbitrators.'" *Gilmer*, 500 U.S. at 30 (quoting *9 U.S.C. § 10(b)*); *see also id.* (declining "'to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 … (1985)). However, the general rule prohibiting pre-arbitration challenges to an allegedly biased arbitration panel does not extend to an allegation that the arbitrator-selection process itself is fundamentally unfair. *McMullen*, 355 F.3d at 494 n.7. In such a case, "the arbitral forum is not an effective substitute for a judicial forum," and, therefore, the party need not arbitrate first and then allege bias through post-arbitration judicial review. *Id.*

The Arbitration Agreements and related rules and procedures at issue in this case demonstrate that EDSI's arbitral forum is not neutral and, therefore, the agreements are unenforceable. As previously described, under EDSI's rules, three "adjudicators" are selected from three separate selection pools to preside over the arbitration hearing. The first of these pools consists of supervisors and managers from another EDSI signatory company; the second consists of employees from another signatory; and the third contains attorneys, retired judges, and other "competent legal professional persons not associated with either party." Although dictum, language in *Floss* signaled this Court's extreme disapproval of this arbitrator selection mechanism:

> We have serious reservations as to whether the arbitral forum provided under the current version of the EDSI Rules and Procedures is suitable for the resolution of statutory claims. Specifically, the neutrality of the forum is far from clear in light of the uncertain relationship between Ryan's and EDSI. [Plaintiffs] Floss and Daniels suggest that EDSI is biased in favor of Ryan's and other employers because it has a financial interest in maintaining its arbitration service contracts with employers. Though the record does not clearly reflect whether EDSI, in contrast to the American Arbitration Association, operates on a for-profit basis, the potential for bias exists. In light of EDSI's role in determining the pool of potential arbitrators, any such bias would render the arbitral forum fundamentally unfair. *See Cole v. Burns Int'l Security Services*, 323 U.S. App. D.C. 133, 105 F.3d 1465, 1482 (D.C. Cir. 1997) ("At a minimum, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections.").

Id. at 314; *see also McMullen*, *supra*, 355 F.3d at 493-94 (following dictum in *Floss* to strike down arbitration scheme in which employer had exclusive control over selection of arbitrator pool).

The record in this case removes any of the uncertainties surrounding the relationship between Ryan's and EDSI that the Court noted in *Floss*. EDSI is clearly a for-profit business, and Ryan's annual fee accounted for over 42% of

EDSI's gross income in 2002. Given the symbiotic relationship between Ryan's and EDSI, Ryan's effectively determines the three pools of arbitrators, thereby rendering the arbitral forum fundamentally unfair to claimants who are applicants or employees. *See Geiger*, 134 F. Supp. 2d at 995 (holding that there is a strong potential for bias in the selection of the arbitration panel because EDSI receives payment from its agreements with various employers to provide a forum for resolving employment disputes, but no comparable payment is made by or received from an employee for agreeing to submit to the forum; further holding that EDSI's full authority to select both the Rules for arbitration as well as the pools of potential arbitrators, combined with EDSI's potential bias in favor of employers like Ryan's, rendered it "unlikely that applicants/employees will participate in an unbiased forum"); *McMullen*, 355 F.3d at 493-94 (holding that the employer's exclusive control over the pool of potential arbitrators prevented the plaintiff from effectively vindicating her Title VII rights: "The arbitrator-selection procedure used by Meijer allows it to create the type of symbiotic relationship with its arbitrators that we feared would promulgate bias in *Floss*."); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999) (affirming denial of motion to compel because the arbitration rules provided a mechanism for selecting a panel of three arbitrators that was crafted to ensure a biased decisionmaker; the employer created the list of potential arbitrators).

The bias against employees and applicants is significantly enhanced by the lack of any criteria governing employees of signatory companies who are eligible to serve as adjudicators. There are no minimum educational requirements, potential arbitrators do not need to have any relevant experience as an adjudicator, and there is no explicit requirement that they be unbiased. Similarly, the rules do not require that the legal professionals who comprise the third pool possess either substantive or procedural knowledge of dispute resolution or of the employment law issues involved in the arbitration. The names of potential arbitrators for the legal professional pool purportedly are provided to EDSI by an unaffiliated company, Resolute Systems, Inc.; however, there is no information in the record regarding how Resolute Systems selects potential adjudicators for EDSI's program.

The bias is exacerbated by the lack of a protocol governing EDSI's selection of potential adjudicators from the three pools. The individuals in the supervisor and employee pools are neither randomly selected nor chosen by a disinterested person for their skills. Instead, all members of these two pools are chosen by the small number of employers who, like Ryan's, have signed alternative dispute resolution agreements with EDSI: Golden Corral Steak Houses, K&W Cafeterias, Papa John's Pizza, Sticky Fingers Restaurants, The Cliffs at Glass, Inc., and Wieland Investments, Inc. In addition, the rules do not prevent a supervisor of a

signatory company from sitting on an adjudication panel with a non-supervisory employee from the same company, including someone whom the supervisor directly supervises. Further, EDSI has no policy in place that prohibits a signatory company from discussing the arbitration process or specific claims with its employee adjudicators or from attempting to improperly influence its employee adjudicators.

Finally, the limited discovery that the EDSI forum provides could significantly prejudice employees or applicants. The rules allow "just one deposition as of right and additional depositions only at the discretion of the (arguably biased) panel, with the express policy that depositions 'are not encouraged and shall be granted in extraordinary fact situations only for good cause shown.'" *Geiger*, 134 F. Supp. 2d at 996 (quoting EDSI Rules, Art. XII, § 6; reproduced at J.A. 315.). We agree with the district court's conclusion in *Geiger* that "the limited discovery, controlled by a potentially biased arbitration panel, ... creates the unfairness to claimants." *Id.*[8] We acknowledge that the opportunity to undertake extensive discovery is not necessarily appropriate in an arbitral forum, the purpose of which is to reduce the costs of dispute resolution. Indeed, when parties enter arbitration agreements at arms-length they typically should expect that the extent of discovery will be more circumscribed than in a judicial setting. But parties to a valid arbitration agreement also expect that neutral arbitrators will preside over their disputes regarding both the resolution on the merits and the critical steps, including discovery, that precede the arbitration award. A structural bias in the make-up of the arbitration panel, which would stymie a party's attempt to marshal the evidence to prove or defend a claim, can be just as prejudicial as arbitral bias in the final decision on the merits. Such is the case here, providing an additional basis to conclude that EDSI's and Ryan's arbitration scheme does not allow for the effective vindication of Plaintiffs' FLSA claims.

IV.

For all the foregoing reasons, we AFFIRM the district court's holdings that state law contract defenses preclude enforcement of Plaintiffs' arbitration agreements and that Plaintiffs' arbitration agreements are unenforceable under the FAA because they do not allow for effective vindication of their FLSA claims.

[Source: 400 F.3d 370, writ of *certiorari* denied 126 S. Ct. 730 (2005).]

ANNOTATION

The Federal Arbitration Act, at 9 USC § 1, excludes from the Act's provisions, employment contracts "of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Nevertheless, in a closely divided opinion, the United States Supreme Court decided that the federal arbitration statute makes arbitration provisions in employment contracts enforceable as a bar to litigation of a claim except for those contracts that involve "transportation workers." *Circuit City v. Adams*, 532 U.S. 105 (2001). However, under the arbitration act's specific language in section 2, in order to be enforceable, an arbitration agreement must satisfy the ordinary requirements for enforcement of a contract. And, the question of whether those requirements have been met are governed by state law. However, the state law rules by which enforcement is governed must be applicable to all contracts and not be designed solely to regulate enforcement of arbitration agreements. *Perry v. Thomas*, 482 U.S. 483, 492 (1987).

Under American legal doctrines, a contract is not enforceable unless supported by 'consideration'. Consideration is something given or sacrificed in exchange for the promise and can include a promise to do or refrain from doing something. The first portion of the court's discussion reasons that the arbitration administrator cannot enforce the agreement to arbitrate because the administrator gave no consideration for the obligation extracted from the employees. This was because the administrator's ability to unilaterally amend the agreement made its promises to the employees illusory and, therefore, did not constitute legal consideration. The court further explained that Ryan's made no concrete commitment to use the arbitration administrator's services, could unilaterally terminate its agreement with the administrator on short notice, and gave nothing in exchange for the employee's promise to take all employment disputes to arbitration. That is, Ryan's had no real commitment under the arrangement. Therefore, Ryan's had not given consideration to either the employee or the arbitration administrator in exchange for the obligations it had extracted. Accordingly, it could not enforce those obligations.

In the U.S., arbitration is widely accepted as the final and binding method for resolving disputes arising under collectively bargained agreements. The parties to such disputes are the employer and the union representing the interests of the aggrieved employee or employees. In such situations, it is presumed that both sides, directly or through their affiliate organizations or advocates, are very familiar with the available pool of arbitrators. Based on that knowledge, often the parties agree in advance as to who will hear their disputes. Alternatively they request a list of available arbitrators either from a government agency or from

an independent organization that provides this service and related services to numerous employers and unions involved in a broad spectrum of industries. The criteria for being included in the pool of arbitrators used in submitting names to the parties primarily looks to the arbitrator's familiarity with labor-management disputes and her or his general acceptance by the parties as an independent, impartial expert respecting such disputes. The principal tribunal administrators (Federal Mediation and Conciliation Service and the American Arbitration Association) and the professional organization of such arbitrators (National Academy of Arbitrators) have adopted a code of ethics, with enforcement procedures, which participating arbitrators must agree to uphold. In the *Ryan's* decision, the court's rejection of the arbitration agreement appeared to have been influenced by the absence of these characteristics concerning the method for finding and selecting arbitrators.

COUNCIL OF EUROPE

European Court of Human Rights
Siliadin v. France

Article 4 of the European Convention on Human Rights – positive obligations on States to adopt and to ensure the effective implementation of criminal-law provisions making slavery, servitude and forced or compulsory labour punishable offences

HEADNOTES

Facts

The applicant, a Togolese national, was brought to France by a relative of her father before she reached the age of sixteen. As an impecunious illegal immigrant in France, whose passport had been confiscated, she was forced against her will to work as an unpaid servant for Mr. and Mrs. B., doing housework and looking after their young children. She worked from 7 a.m. until 10 p.m. every day and had to share the children's bedroom. The exploitation lasted for several years, during which time Mr. and Mrs. B. led the applicant to believe that her immigration status would soon be regularised. Finally, after being alerted by a neighbour, the Committee against Modern Slavery reported the matter to the prosecuting authorities. Criminal proceedings were brought against the couple, who were acquitted of the criminal charges. Proceedings having been continued in respect of the civil aspect of the case, the couple were ordered to pay compensation for non-pecuniary damage to the applicant for having taken advantage of her vulnerability and dependent situation by making her work without pay.

Decision

The Court ruled that the applicant had been subjected to forced labour and held in servitude contrary to Article 4 of the European Convention on Human Rights. That article imposes positive obligations on States to adopt and effectively implement criminal-law provisions making slavery, servitude and forced or compulsory labour punishable offences.

Law applied

ARTICLE 4 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS.
The text is set out in the judgment.

JUDGMENT

…

ALLEGED VIOLATION OF ARTICLE 4 OF THE CONVENTION

The applicant complained that there had been a violation of Article 4 of the Convention. This provision states:

"1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour."

…

Applicability of Article 4 and the positive obligations

The Court notes that the Government do not dispute that Article 4 is applicable in the instant case.

The applicant considered that the exploitation to which she had been subjected while a minor amounted to a failure by the State to comply with its positive obligation under Articles 1 and 4 of the Convention, taken together, to put in place adequate criminal-law provisions to prevent and effectively punish the perpetrators of those acts.

In the absence of rulings on this matter in respect of Article 4, she referred in detail to the Court's case-law on States' positive obligations with regard to Articles 3 and 8 (see the judgments in: *X and Y v. the Netherlands*, 26 March 1985 …; *A. v. the United Kingdom*, 23 September 1998 …; and *M.C. v. Bulgaria*, … ECHR 2003-XII).

She added that, in the various cases in question, the respondent States had been held to be responsible on account of their failure, in application of Article 1 of the Convention, to set up a system of criminal prosecution and punishment that would ensure tangible and effective protection of the rights guaranteed by Articles 3 and/or 8 against the actions of private individuals.

She emphasised that this obligation covered situations where the state authorities were criticised for not having taken adequate measures to prevent the existence of the impugned situation or to limit its effects. In addition, the scope of the State's positive obligation to protect could vary on account of shortcomings in its legal system, depending on factors such as the aspect of law in

issue, the seriousness of the offence committed by the private individual concerned or particular vulnerability on the part of the victim. This was precisely the subject of her application, in the specific context of protection of a minor's rights under Article 4.

The applicant added that, in the absence of any appropriate criminal-law machinery to prevent and punish the direct perpetrators of alleged ill-treatment, it could not be maintained that civil proceedings to afford reparation of the damage suffered was sufficient to provide her with adequate protection against possible assaults on her integrity.

She considered that the right not to be held in servitude laid down in Article 4 § 1 of the Convention was an absolute right, permitting of no exception in any circumstances. She noted that the practices prohibited under Article 4 of the Convention were also the subject of specific international conventions which applied to both children and adults.

Accordingly, the applicant considered that the States had a positive obligation, inherent in Article 4 of the Convention, to adopt tangible criminal-law provisions that would deter such offences, backed up by law-enforcement machinery for the prevention, detection and punishment of breaches of such provisions.

She further observed that, as the public prosecutor's office had not considered it necessary to appeal on points of law on the grounds of public interest, the acquittal of Mr and Mrs B. of the offences set out in Articles 225-13 and 225-14 of the Criminal Code had become final. Consequently, the court of appeal to which the case had been remitted after the initial judgment was quashed could not return a guilty verdict nor, *a fortiori*, impose a sentence, but could only decide whether to award civil damages. She considered that a mere finding that the constituent elements of the offence set out in Article 225-13 of the Criminal Code had been substantiated and the imposition of a fine and damages could not be regarded as an acknowledgment, whether express or in substance, of a breach of Article 4 of the Convention.

With regard to possible positive obligations, the Government conceded that, if the line taken by the European Commission of Human Rights in the case of *X. and Y. v. the Netherlands* were to be applied to the present case, then it appeared that they did indeed exist. They pointed out, however, that States had a certain margin of appreciation when it came to intervening in the sphere of relations between individuals.

In this respect, they referred to the Court's case-law, and especially the judgments in *Calvelli and Ciglio v. Italy* ([GC] … 17 January 2002), *A v. the United Kingdom*, cited above, and *Z. and Others v. the United Kingdom* ([GC] … 10 May 2001), as well as the decision in the case of *G.G. v. Italy* (… 10 October

2002, unpublished) in which the Court had noted in connection with Article 3 that "criminal proceedings did not represent the only effective remedy in cases of this kind, but civil proceedings, making it possible to obtain redress for the damage suffered must in principle be open to children who have been subjected to ill-treatment."

On that basis, the Government argued that, in the instant case, the proceedings before the criminal courts which led to the payment of damages were sufficient under Article 4 in order to comply with any positive obligation arising from the Convention.

In the alternative, the Government considered that in any event French criminal law fulfilled any positive obligations arising under Article 4. They submitted that the wording of Articles 225-13 and 225-14 of the Criminal Code made it possible to fight against all forms of exploitation through labour for the purposes of Article 4 of the Convention. They stressed that these criminal-law provisions had, at the time of the events complained of by the applicant, already resulted in several criminal-court rulings, thus establishing a case-law, and that, since then, they had given rise to various other decisions to the same effect.

The Court points out that it has already been established that, with regard to certain Convention provisions, the fact that a State refrains from infringing the guaranteed rights does not suffice to conclude that it has complied with its obligations under Article 1 of the Convention.

Thus, with regard to Article 8 of the Convention, it held as long ago as 1979:

> "Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life.
>
> This means, amongst other things, that when the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8, respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 without there being any call to examine it under paragraph 2." (*Marckx v. Belgium*, judgment of 13 June 1979 …).

It subsequently clarified this concept:

> "Positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even in the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 in the sphere of pro-

> tection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection" (*X and Y v. the Netherlands*, judgment of 26 March 1985 …; *August v. the United Kingdom* (dec.), … 21 January 2003; and *M.C. v. Bulgaria*, … ECHR 2003-XII).

As regards Article 3 of the Convention, the Court has found on numerous occasions that:

> "... the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals" (see the following judgments: *A. v. the United Kingdom,* 23 September 1998 … ; *Z and Others v. the United Kingdom* [GC], … ECHR 2001-V; *E. and Others v. the United Kingdom*, … 26 November 2002; and *M.C. v. Bulgaria*, cited above, …).

It has also found that:

> "Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity" (see, *mutatis mutandis*, the judgments in *X and Y v. the Netherlands,* cited above,… ; *Stubbings and Others v. the United Kingdom,* 22 October 1996 … ; and *A. v. the United Kingdom,* cited above, as well as the United Nations Convention on the Rights of the Child, Articles 19 and 37).

The Court considers that, together with Articles 2 and 3, Article 4 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe.

It notes that the Commission had proposed in 1983 that it could be argued that a Government's responsibility was engaged to the extent that it was their duty to ensure that the rules adopted by a private association did not run contrary to the provisions of the Convention, in particular where the domestic courts had jurisdiction to examine their application (*X. v. the Netherlands*, … Commission decision of 3 May 1983 …).

The Court notes that, in referring to the above-mentioned case, the Government accepted at the hearing that positive obligations did appear to exist in respect of Article 4.

In this connection, it notes that the Article 4 of the Forced Labour Convention, adopted by the International Labour Organisation on 28 June 1930 and ratified by France on 24 June 1937, provides:

> "1. The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations."

Furthermore, Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 30 April 1956, which entered into force in respect of France on 26 May 1964, states:

> "Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926: … [d]ebt bondage, … [a]ny institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour."

In addition, with particular regard to children, Article 19 of the International Convention on the Rights of the Child of 20 November 1989, which entered into force in respect of France on 6 September 1990, provides:

> "1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, … maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child;"

Article 32 provides:

> "1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
>
> 2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
>
> (a) Provide for a minimum age or minimum ages for admission to employment;
>
> (b) Provide for appropriate regulation of the hours and conditions of employment;
>
> (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article."

Finally, the Court notes that it appears from the Parliamentary Assembly's findings …that "today's slaves are predominantly female and usually work in private households, starting out as migrant domestic workers..."

In those circumstances, the Court considers that limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. Accordingly, it necessarily follows from this provision that Governments have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice (see *M.C. v. Bulgaria*, cited above …).

Alleged violation of Article 4 of the Convention

With regard to the violation of Article 4 of the Convention, the applicant noted from the outset that the right not to be held in servitude laid down in this provision was an absolute one, in the same way as the right not to be compelled to perform forced or compulsory labour.

She said that, although the Convention did not define the terms servitude or "forced or compulsory labour", reference should be made to the relevant international conventions in this field to determine the meaning of these concepts while importance had to be attached in the instant case to the criteria laid down by both the United Nations and the Council of Europe for identifying modern forms of slavery and servitude, which were closely linked to trafficking in human beings, and to the internationally recognised necessity of affording children special protection on account of their age and vulnerability.

She pointed out that her situation had corresponded to three of the four servile institutions or practices referred to in Article 1 of the Supplementary Geneva Convention of 30 April 1956, namely debt bondage, the delivery of a child or adolescent to a third person, whether for reward or not, with a view to the exploitation of his or her labour, and serfdom. She noted that she had not come to France in order to work as a domestic servant but had been obliged to do so as a result of the trafficking to which she had been subjected by Mrs B., who had obtained her parents' agreement through false promises.

She concluded that such "delivery" of a child by her father, with a view to the exploitation of her labour, was similar to the practice, analogous to slavery, referred to in Article 1 (d) of the United Nations Supplementary Convention of 1956.

The applicant also referred to the documentation published by the Council of Europe on domestic slavery and pointed out that the criteria used included confiscation of the [individual's] passport, the absence of remuneration or re-

muneration that was disproportionate to the services provided, deprivation of liberty or self-imposed imprisonment, and cultural, physical and emotional isolation.

She added that it was clear from the facts that her situation was not temporary or occasional in nature, as was normally the case with "forced or compulsory labour". Her freedom to come and go had been limited, her passport had been taken away from her, her immigration status had been precarious before becoming illegal, and she had also been kept by Mr and Mrs B. in a state of fear that she would be arrested and expelled. She considered that this was equivalent to the concept of self-imposed imprisonment described above.

Referring to her working and living conditions at Mr and Mrs B.'s home, she concluded her exploitation at their hands had compromised her education and social integration, as well as the development and free expression of her personality. Her identity as a whole had been involved, which was a characteristic of servitude but not, in general, of forced or compulsory labour.

She added that in addition to the unremunerated exploitation of another's work, the characteristic feature of modern slavery was a change in the individual's state or condition, on account of the level of constraint or control to which his or her person, life, personal effects, right to come and go at will or to take decisions was subjected.

She explained that, although she had not described her situation as "forced labour" in the proceedings before the Versailles Appeal Court, the civil party had claimed in its submissions that "the exploitation to which Ms Siliadin was subjected ... had, at the very least, the characteristics of 'forced labour' within the meaning of Article 4 § 2 of the Convention ... ; in reality, she was a domestic slave who had been recruited in Africa".

As to the definition of "forced or obligatory labour", the applicant drew attention to the case-law of the Commission and the Court, and emphasised that developments in international law favoured granting special protection to children.

She noted that French criminal law did not contain specific offences of slavery, servitude or forced or compulsory labour, still less a definition of those three concepts that was sufficiently specific and flexible to be adapted to the forms those practices now took. In addition, prior to the enactment of the law of 18 March 2003, there had been no legislation that directly made it an offence to traffick in human beings.

Accordingly, the offences to which she had been subjected fell within the provisions of Articles 225-13 and 225-14 of the Criminal Code as worded at the material time. These were non-specific texts of a more general nature, which both required that the victim be in a state of vulnerability or dependence. Those

concepts were as vague as that of the offender's 'taking advantage', which was also part of the definition of the two offences. In this connection, she emphasised that both legal commentators and the National Assembly's taskforce on the various forms of modern slavery had highlighted the lack of legal criteria enabling the courts to determine whether such a situation obtained, which had led in practice to unduly restrictive interpretations.

Thus, Article 225-13 of the Criminal Code made it an offence to obtain another person's labour by taking advantage of him or her. In assessing whether the victim was vulnerable or in a state of dependence, the courts were entitled to take into account, among other circumstances, certain signs of constraint or control of the individual. However, those were relevant only as the prerequisites for a finding of exploitation, not as constituent elements of the particular form of the offence that was modern slavery. In addition, this article made no distinction between employers who took advantage of the illegal position of immigrant workers who were already in France and those who deliberately placed them in such a position by resorting to trafficking in human beings.

She added that, contrary to Article 225-13, Article 225-14 required, and continued to require, an infringement of human dignity for the offence to be substantiated. That was a particularly vague concept, and one subject to random interpretation. It was for this reason that neither her working nor living conditions had been found by the court to be incompatible with human dignity.

The applicant said in conclusion that the criminal-law provisions in force at the material time had not afforded her adequate protection from servitude or from forced or compulsory labour in their contemporary forms, which were contrary to Article 4 of the Convention. As to the fact that the criminal proceedings had resulted in an award of compensation, she considered that this could not suffice to absolve the State of its obligation to establish a criminal-law machinery which penalised effectively those guilty of such conduct and deterred others.

With regard to the alleged violation of Article 4 of the Convention, the Government first observed that the Convention did not define the term "servitude". They submitted that, according to the case-law, "servitude" was close to "slavery", which was at the extreme end of the scale. However, servitude reflected a situation of exploitation which did not require that the victim be objectified to the point of becoming merely another's property.

As to the difference between "servitude" and "forced or compulsory labour", they concluded from the case-law of the Commission and the Court that servitude appeared to characterise situations in which denial of the individual's freedom was not limited to the compulsory provision of labour, but also extended to

his or her living conditions, and that there was no potential for improvement, an element which was absent from the concept of "forced or compulsory labour".

With regard to the difference between "forced labour" and "compulsory labour", the Government noted that, while the case-law's definition of "forced labour" as labour performed under the influence of "physical or psychological force" seemed relatively clear, the situation was less so with regard to "compulsory labour".

The Government did not deny that the applicant's situation fell within Article 4 of the Convention and emphasised that she herself had specifically described her situation as "forced labour" within the meaning of Article 4 of the Convention.

However, they submitted that the domestic judicial authorities had undisputedly remedied the violation of the Convention by ruling that the elements constituting the offence set out in Article 225-13 of the Criminal Code had been substantiated.

Finally, the Government pointed out that the wording of Articles 225-13 and 225-14 of the Criminal Code made it possible to combat all forms of exploitation of an individual through labour falling within Article 4 of the Convention.

The Court notes that the applicant arrived in France from Togo at the age of fifteen years and seven months with a person who had agreed with her father that she would work until her air ticket had been reimbursed, that her immigration status would be regularised and that she would be sent to school.

In reality, the applicant worked for this person for a few months before being "lent" to Mr and Mrs B. It appears from the evidence that she worked in their house without respite for about fifteen hours per day, with no day off, for several years, without ever receiving wages or being sent to school, without identity papers and without her immigration status being regularised. She was accommodated in their home and slept in the children's bedroom.

The Court also notes that, in addition to the Convention, numerous international conventions have as their objective the protection of human beings from slavery, servitude and forced or compulsory labour … As the Parliamentary Assembly of the Council of Europe has pointed out, although slavery was officially abolished more than 150 years ago, "domestic slavery" persists in Europe and concerns thousands of people, the majority of whom are women.

The Court reiterated that Article 4 enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see, with regard to Article 3, the following judgments: *Ireland v. the United Kingdom*, … ; *Soering v. the*

United Kindgom, 7 July 1989 … ; *Chahal v. the United Kingdom*, 15 November 1996 … ; and *Selmouni v. France*, 28 July 1999 …).

In those circumstances, the Court considers that, in accordance with contemporary norms and trends in this field, the member States' positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation (see, *mutatis mutandis, M.C. v. Bulgaria*, cited above …).

Accordingly, the Court must determine whether the applicant's situation falls within Article 4 of the Convention.

It is not disputed that she worked for years for Mr and Mrs B., without respite and against her will.

It has also been established that the applicant has received no remuneration from Mr and Mrs B. for her work.

In interpreting Article 4 of the European Convention, the Court has in a previous case already taken into account the ILO Conventions, which are binding on almost all of the Council of Europe's member States, including France, and especially the 1930 Forced Labour Convention (see *Van der Mussele v. Belgium*, judgment of 23 November 1983 …).

It considers that there is in fact a striking similarity, which is not accidental, between paragraph 3 of Article 4 of the European Convention and paragraph 2 of Article 2 of Convention No. 29. Paragraph 1 of the last-mentioned Article provides that "for the purposes" of the latter Convention, the term "forced or compulsory labour" shall mean "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".

It remains to be ascertained whether there was "forced or compulsory" labour. This brings to mind the idea of physical or mental constraint. What there has to be is work "exacted ... under the menace of any penalty" and also performed against the will of the person concerned, that is work for which he "has not offered himself voluntarily" (see *Van der Mussele v. Belgium,* cited above …).

The Court notes that, in the instant case, although the applicant was not threatened by a "penalty", the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat.

She was an adolescent girl in a foreign land, unlawfully present in French territory and in fear of arrest by the police. Indeed, Mr and Mrs B. nurtured that fear and led her to believe that her status would be regularised … .

Accordingly, the Court considers that the first criterion was met, especially since the applicant was a minor at the relevant time, a point which the Court emphasises.

As to whether she performed this work of her own free will, it is clear from the facts of the case that it cannot seriously be maintained that she did. On the contrary, it is evident that she was not given any choice.

In these circumstances, the Court considers that the applicant was, at the least, subjected to forced labour within the meaning of Article 4 of the Convention at a time when she was a minor.

It remains for the Court to determine whether the applicant was also held in servitude or slavery.

Sight should not be lost of the Convention's special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions, and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (see, among many other authorities, *Selmouni v. France*, cited above …).

The Court notes at the outset that, according to the 1927 Slavery Convention, "slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".

It notes that this definition corresponds to the "classic" meaning of slavery as it was practiced for centuries. Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an "object".

With regard to the concept of "servitude", it "prohibits a particularly serious form of denial of freedom" (see the Commission's report in the case of *Van Droogenbroeck v. Belgium,* 9 July 1980 …). It includes, "in addition to the obligation to provide certain services to another... the obligation on the "serf" to live on the other's property and the impossibility of changing his status". In this connection, in examining a complaint under this paragraph of Article 4, the Commission paid particular attention to the Convention on the Abolition of Slavery (see also the decision in case no. 7906/77 …).

It follows in the light of the case-law on this issue that for Convention purposes "servitude" means an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of "slavery" described above (see *Seguin v. France* (dec.), … 7 March 2000).

Furthermore, under the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, each of the States Parties to the Convention must take all practicable and necessary

legislative and other measures to bring about the complete abolition or abandonment of the following institutions and practices:

> "(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour."

In addition to the fact that the applicant was required to perform forced labour, the Court notes that that this labour lasted almost fifteen hours a day, seven days per week.

Brought to France by a relative of her father's, she had not chosen to work for Mr and Mrs B.

As a minor, she had no resources and was vulnerable and isolated, and had no means of subsistence other than in the home of Mr and Mrs B., where she shared the children's bedroom as no other accommodation had been provided. She was entirely at Mr and Mrs B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred.

In addition, the applicant, who was afraid of being arrested by the police, was not in any event permitted to leave the house, except to take the children to their classes and various activities. Thus, she had no freedom of movement and no free time.

As she had not been sent to school, despite the promises made to her father, the applicant could not hope that her situation would improve and was completely dependent on Mr and Mrs B.

In those circumstances, the Court concludes that the applicant, a minor at the relevant time, was held in servitude within the meaning of Article 4 of the Convention.

Having regard to its conclusions with regard to the positive obligations under Article 4, it now falls to the Court to examine whether the impugned legislation and its application in the case in hand had such significant flaws as to amount to a breach of Article 4 by the respondent State.

According to the applicant, the provisions of French criminal law had not afforded her sufficient protection against the situation and had not made it possible for the culprits to be punished.

The Government, for their part, submitted that Articles 225-13 and 225-14 of the Criminal Code made it possible to combat the exploitation through labour of an individual for the purposes of Article 4 of the Convention.

The Court notes that the Parliamentary Assembly of the Council of Europe, in its Recommendation 1523(2001), "[regretted] that none of the Council of

Europe member states expressly [made] domestic slavery an offence in their criminal codes".

It notes with interest the conclusions reached by the French National Assembly's joint taskforce on the various forms of modern slavery … .

More specifically, with regard to Articles 225-13 and 225-14 as worded at the material time, the taskforce found, in particular:

"We have available a not inconsiderable arsenal of punitive measures. However, these are not always used in full and are proving an insufficient deterrent when put to the test.

…

The concept, found in both Articles 225-13 and 225-14 of the Criminal Code, of the abuse of an individual's vulnerability or state of dependence contains ambiguities that could be prejudicial to their application.

…

That said, and since the law is silent, it is up to the court to determine where the scope of those provisions ends. In this connection, analysis of the case-law reveals differences in evaluation that impede the uniform application of the law throughout France …

…

Whether with regard to actual or potential sentences, the shortcomings of the provisions are clearly visible, in view of the seriousness of the factual elements characteristic of modern slavery.

…

Bearing in mind, on the one hand, the constitutional status of the values protected by Articles 225-13 and 225-14 of the Criminal Code and, on the other, the seriousness of the offences in such cases, the inconsequential nature of the penalties faced by those guilty of them is surprising, and raises questions about the priorities of the French criminal-justice system.

The Court notes that, in the present case, the applicant's "employers" were prosecuted under Articles 225-13 and 225-14 of the Criminal Code, which make it an offence, respectively, to exploit an individual's labour and to submit him or her to working or living conditions that are incompatible with human dignity.

In the judgment delivered on 10 June 1999, the Paris *tribunal de grande instance* found Mr and Mrs B. guilty of the offence defined in Article 225-13 of the Criminal Code. Conversely, it found that the offence set out in Article 225-14 had not been substantiated.

The defendants were sentenced to twelve months' imprisonment, seven of which were suspended, and ordered to pay a fine of FRF 100,000 each and to pay, jointly and severally, FRF 100,000 to the applicant in damages.

On an appeal by Mr and Mrs B., the Paris Court of Appeal delivered a judgment on 19 October 2000 in which it quashed the judgment at first instance and acquitted the defendants.

On an appeal on points of law by the applicant alone, the Court of Cassation overturned the Court of Appeal's judgment, but only in respect of its civil aspects, and the case was remitted to another court of appeal.

On 15 May 2003 that court gave a judgment upholding the findings of the *tribunal de première instance* and awarded the applicant damages.

The Court notes that slavery and servitude are not as such classified as offences under French criminal law.

The Government referred to Articles 225-13 and 225-14 of the Criminal Code.

The Court notes, however, that those provisions do not deal specifically with the rights guaranteed under Article 4 of the Convention, but concern, in a much more restrictive way, exploitation through labour and subjection to working and living conditions that are incompatible with human dignity.

It therefore needs to be determined whether, in the instant case, those articles provided effective penalties for the conduct to which the applicant had been subjected.

The Court has previously stated that children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity (see, *mutatis mutandis*, the judgments in *X and Y v. the Netherlands,* 26 March 1985 … ; *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996 … ; and *A. v. the United Kingdom*, cited above … and also the United Nations Convention on the Rights of the Child, Articles 19 and 37).

Further, the Court has held in a case concerning rape that "the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated" (see *X and Y v. the Netherlands*, cited above …).

The Court observes that, in the instant case, the applicant, who was subjected to treatment contrary to Article 4 and held in servitude, was not able to see those responsible for the wrongdoing convicted under the criminal law.

In this connection, it notes that, as the Principal Public Prosecutor did not appeal on points of law against the Court of Appeal's judgment of 19 October 2000, the appeal to the Court of Cassation concerned only the civil aspect of the case and Mr and Mrs B.'s acquittal thus became final.

In addition, according to the report of 12 December 2001 by the French National Assembly's joint taskforce on the various forms of modern slavery, Articles 225-13 and 225-14 of the Criminal Code, as worded at the material time, were open to very differing interpretations from one court to the next, as demonstrated by this case, which, indeed, was referred to by the taskforce as an example of a case in which a court of appeal had unexpectedly declined to apply Articles 225-13 and 225-14.

In those circumstances, the Court considers that the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim.

It notes that the legislation has been changed but the amendments, which were made subsequently, were not applicable to the applicant's situation.

It emphasises that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies… .

The Court thus finds that in the present case there has been a violation of the respondent State's positive obligations under Article 4 of the Convention.

[The Court noted that that applicant had not made any claim in respect of damages. It made an award in respect of costs and expenses.]

[Source: Judgment of 26 July 2005 (Application No. 73316/01)]

ANNOTATION

1. Article 1 of the European Convention on Human Rights requires States Parties to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. That obligation obviously requires the State itself to refrain from any infringement of the rights in question. The Court has held, with regard to certain rights guaranteed by Convention, that States also have a positive obligation to prevent infringements by non-State actors. It has recognized the existence of such an extended obligation, for example, with respect to the right to life, guaranteed by Article 2 of the Convention, the prohibition of torture laid down in Article 3, and the right to respect for family life stated in Article 8. In the present judgment, the Court recognized that such a positive obligation of protection against infringements by private persons also existed in respect of the prohibition of slavery, servitude and forced or compulsory labour laid down in Article 4 of the Convention. It observed that Article 4 enshrined one of the fundamental values of democratic societies, that it made no provision

for exceptions, and that no derogation from it was permissible under Article 15, para. 2, of the Convention even in the event of a public emergency threatening the life of the nation. Accordingly, Article 4 of the Convention required the penalisation and effective prosecution of any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour.

2. The case related to grave exploitation over a prolonged period of a minor, an immigrant in an illegal situation, who had been required to do domestic work for long hours without pay, and with confiscation of her passport. Proceedings in domestic courts had led to acquittal of the employers on charges under two sections of the Criminal Code. Those sections dealt with the offences of obtaining from an individual the performance of services without payment or in exchange for payment that was manifestly disproportionate to the amount of work carried out, by taking advantage of that person's vulnerability or state of dependence, and to subjecting an individual to working or living conditions incompatible with human dignity by taking advantage of that individual's vulnerability or state of dependence. The courts had. however, awarded monetary compensation to the victim. The European Court of Human Rights held that the circumstances constituted servitude and forced labour, and that the award of monetary compensation was not an adequate measure to ensure observance of Article 4 of the Convention. It considered that the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim. There had therefore been a violation of the respondent State's positive obligations under Article 4 of the Convention.

3. In accordance with the Court's established practice, it took into consideration related international instruments, including the ILO Forced Labour Convention, 1930 (No. 29), the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, and the International Convention on the Rights of the Child, 1989 (all of which have been ratified by France). Rather surprisingly, the Court did not cite Article 25 of the Forced Labour Convention, which lays down requirements corresponding to those defined in its judgment. That article reads

"The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced."