EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES

Colin Sara - Secretary General
Regional Office of the Employment Tribunals
Crescent Centre, Temple Back
Bristol BS1 6 EZ
United Kingdom

Telephone - 44-117 9298261
Fax - 44-117 9253452
e-mail – CSARA@ets.gsi.gov.uk

Termination of Employment at the Initiative of the Employer: the Challenge for Corporate Social Responsibility

Supported by Funding from the European Commission
Agreement No. VS/2003/0554

FINAL REPORT

1. Introduction

1.1 Purpose of Project

This Project was the subject of a Grant Agreement with the European Commission entered into on 12th December 2003, varied by an Addendum of July 2004. The Justification for the Project was set out in the Description of Project annexed to that Agreement -

- Employment protection requires a balance between the social benefits of security of employment and the economic need for flexibility. All countries in the European Union provide protection against unjustified dismissal balanced against a range of situations where dismissal is justified. The accession countries will soon be joining the Union and it is important to see to what

extent their national laws provide similar protection

- Courts throughout the EU and in the accession countries have to apply national laws which seek to maintain this balance, but they do so without reference to any pan-European norms.
- The object of the Colloquium is to allow national judges from European Union and accession countries to exchange those experiences in an informal setting and to seek to reach a synthesis of the respective practices, to agree common practices and to identify differences. In particular the Colloquium will look at the effectiveness of the remedies available in the event of unjustified dismissal
- The Colloquium will also examine those areas where European Law does exist, and consider whether there is a place for more specific EC legislation.

The Description of Project and the Description of Content of Project are annexed to this Report in Appendix I.

1.2 Implementation of Project

The methodology of the project was to ask the Judges from each Member State, including the new entrants, to respond to a Questionnaire. The form of the Questionnaire is annexed to this Report in Appendix I. Based on this Questionnaire, each Member State then prepared a National Report. The National Reports are annexed to this Report as Appendix II. From these Reports the Secretariat then prepared a Synthesis. The final form of this Synthesis is annexed to this Report as Appendix III.

The issues raised by the Questionnaire and the National Reports were then discussed by delegates at two international Congresses. The first took place at the British Embassy, Paris between the 27th and 28th November 2003. The Programme for this Congress is annexed to this report in Appendix IV. Because of problems with some countries attending this Congress a further Congress was held at the Hungarian Supreme Court and the Labour Court in Budapest on 10th and 11th September 2004. The Programme for this Congress is also annexed to this report in Appendix IV.

This Report is prepared from the National Reports, the Secretariat's synthesis and the Notes of the two Congresses.

2. Background and Objectives

Article 30 of the Charter of Fundamental Rights of the Union (now contained in Title IV at Part II of the draft European Treaty) provides:-

> **"Protection in the event of unjustified dismissal**
>
> Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices".

There is no mention of such a right in any previous European Treaty, though the Social Charter of 1992 (Article 2.3) provides for the European Commission to take action in the areas of "protection of workers where their employment contract is terminated" and the right is contained in the ILO Convention no, 158.

This provision in the Social Charter led to the Report completed in April 1997 "Termination of employment relationships – Legal situation in the Member States of the European Union". However, no action has been taken by the European Commission on this Report and the purpose of our Report is to analyse the extent to which the Fundamental Right referred to in the Charter is protected in the various Member States and whether there is a need for Community Action to implement this aspect of the Social Charter and to protect this Fundamental Right.

Since the 1992 Report there have been numerous developments in the approach taken by the Commission to the development of European Law. In particular the draft European Treaty at Article III-104 will give specific power to the Commission to intervene in respect of protection from unjustified dismissal. This Article provides:-

> "2. To this end:
>
> …
> (b) in the fields referred to in paragraph 1(a) to (i), European framework laws may establish minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. …"

The context in which action based on this power may be taken is considered in the Address given by Prof Alan Neal to the EALCJ Congress in Budapest. The Powerpoint Presentation is annexed to this Report as Appendix V. As this history is known to the Commission and is clearly explained in the Appendix, we will not repeat it here.

3. Sources of National Law

Historically, the relationship of master and servant and now of employer and employee has been based on mutual consent. The right of an employee to leave his employment at will is part of the fundamental freedom from slavery incorporated into the Charter of Fundamental Rights[1]. The corresponding right of the employer to terminate the relationship has historically been seen as the other side of the same coin.

[1] Also Article 4 of the Universal Declaration of Human Rights

Accordingly the relationship has always been seen both in Civil Law and in the Common Law as a contractual relationship. It is, however, a continuing contractual relationship, with mutual obligations which continue until the employment is terminated and, socially, can be seen also as a personal relationship which transcends its purely contractual nature.

The protection which this contract gives to the employee is that the employer owes obligations to him during the course of the contract and, more importantly in the present context, is obliged to give reasonable notice before terminating the relationship. The length of this notice for established employees has been treated, even in the absence of statutory protection, as running to several months. Where the employer breaches this obligation and seeks to terminate the employment without notice the employee will have a remedy before the civil courts for breach of contract.

This, however, provides incomplete protection of the employee in that it only provides a right to return to work, or to be compensated for the employer's unwillingness to allow a return to work, for a limited period. There were also situations where the imbalance between the negotiating power of the employer and the employee resulted in very short periods of contractual notice, in some cases limited to a matter of hours.

The Questionnaire did not enquire as to the history of employment protection. However, it seems apparent (with the possible exception of France and the Conseil de Prud'hommes) that a general protection against unjustified dismissal is a "fundamental right" which was only recognised in the 20th Century.

This explains why, with one exception, the right not to be dismissed without lawful reasons is not incorporated into the national constitutions. For example, Ireland has a right to pursue your occupation, Italy sets out the principles of labour legislation, but only Finland, whose Constitution dates from 1999, specifically incorporates the right not to be dismissed without lawful reason.

This lack of constitutional protection, however, is largely rectified by specific legislation, which is unrelated to specific European norms. All of the respondents to the questionnaire (except Iceland which is an EEA country) stated that their country has legislation to protect employees from unjustified dismissal. Some of this is quite recent or recently modified though it often develops existing legislation. The right created by this national legislation is a general right, which is not restricted to employees who have the benefit of collective agreements. We did not, however, receive a Report from Denmark and it is our belief, perhaps surprisingly in view of that country's reputation for providing good protection for employees, that they have no such general right. The rationale, presumably, is the large proportion of Danish employees (about 80%) who have the benefit of a collective agreement, but this does not resolve the position of the remaining 20%. Because of the absence of a Danish Report, this possible breach of the Charter is not considered in detail in the Report.

This Report will seek to deal in some detail with the extent to which the different countries provide comprehensive protection, but it is perhaps worth pointing out in this introduction that three countries, Germany, Austria and Slovenia, provide protection only to employees of larger enterprises (in Germany and Slovenia, those employing 10 or more employees, 5 in Austria). Some countries also restrict protection to employees with a certain length of employment, the longest being one year in the UK and in Ireland, with 6 months in Germany.

Naturally, in all cases the protection is enhanced or interpreted by judge-made law. It may be that the absence of any EU laws on the subject, and therefore the absence of any Acquis Européenne, has resulted in a divergence of judicial interpretation, but our discussions did not indicate that this was the case. Our impression was that divergences in practice and interpretation were no greater than in those cases (e.g. transfer of undertakings) where European legislation exists.

4. Termination of the employment relationship

4.1 Is the termination an act of the parties or a verdict of the court?

At both Congresses there was considerable debate about the extent to which the employment relationship could be terminated at will be either party. The principle of *ad nutum* means that the contract of employment can be terminated by either party, even if this is done in breach of contract and in breach of the statutory right protecting from unjustified dismissal.

This is separate from the remedy of reinstatement, which can be seen either as a nullification of the dismissal or a revival of the employment following an effective dismissal.

In relation to the effectiveness of a dismissal, even where it is later found to be unjustified, there was a divergence of opinion as to whether the employment relationship continued during the period between the contested act of dismissal and the date when the court pronounced its sentence, either accepting the employer's justification or finding the employee unjustifiably dismissed.

The strongest assertion came from the Netherlands, who asserted that the validity of the dismissal does not depend on what the employer does, but on the law. The Netherlands have a unique system, set up in 1945, whereby the employer is not free to dismiss his employee. The employer has the choice of going to the Employment Service in advance of the dismissal and obtaining permission to dismiss or of going to the court for judicial dissolution. If there is no prior consent from the public authority, a purported dismissal is invalid and the employment continues to exist until the Court orders a judicial dissolution.

This can also be done at the instigation of the employee. This concept of prior consent from a public authority is, we believe, unique to the Netherlands as a universal right. This still happens in 50% of cases, providing the employer with advance protection from a claim of unjustified dismissal. Although this system is unique, there are other countries where civil servants or other groups of employees cannot be dismissed without permission of the appropriate body and other areas where prior consultation is mandatory.

The concept of continuation or revival of the contract of employment as soon as the employee contests it is, however, more common. In Sweden and Norway (but not Finland) if the employee contests the dismissal he can continue to work and receive pay until the court decides on the validity of the dismissal. Such rights, however, have to be asserted promptly by the employee, usually within 2 to 4 weeks. This led Sweden to assert that the employment did come to an end by act of the employer, even though it could be revived by an order of reinstatement, whether permanent or only pending the outcome of the case. In Ireland it is possible for the Court to grant an injunction requiring the employer to allow the employee back. This, however, is not the norm. In the majority of states, it is accepted that a unilateral act of termination by either the employer or the employee destroys the relationship and that, at least in the interim between dismissal and the court's verdict, the employment should be treated as being at an end. If there is a subsequent order for reinstatement, which is put into effect, then the employment relationship is revived and treated as having been continuous, but if the dismissal is held to be justified then the employment is not revived and is treated as having ended on the date of the employer's act of dismissal. However, France takes a more subtle position. In certain circumstances the dismissal is treated as null and void and, therefore, as if it never happened. In other cases it is treated as being for insufficient cause, but still effective. In that case the appropriate remedy is compensation.

4.2 Dismissal without notice

Although normally a contract of employment can only be ended by notice, every country accepts that in appropriate circumstances a contract of employment can be validly terminated without notice. In Hungary this is helpfully defined as an "extraordinary dismissal". It is also, in some countries, described as summary dismissal

There are a number of different descriptions of the kind of act of the employee which would justify dismissal without notice. It is perhaps best summarised as "grave fault" by the employee. This will usually mean deliberate conduct, but it can include an act or omission with serious consequences, even though it is not deliberate. In both Paris and Budapest, in order to try to establish the parameters of such "fault", we debated specific examples.

One real life example was petty theft of a care worker eating food worth 5 euros from a patient's food tray another was theft of a pair of shoelaces. In Germany there had been inconsistencies between different courts in similar

cases. In France, the Supreme Court had held that petty theft which did not challenge the position of the employee within the company did not amount to gross misconduct. In Netherlands, the emphasis is on proportionality of the punishment to the crime. However, in Finland and UK the Courts take a strict view of dishonesty and would regard any dishonesty as justifying summary dismissal.

In Budapest we predicated three cases - of being found much later to have lied on the CV, of downloading information from the internet and of smoking in a "no smoking" area. With some dissension from the United Kingdom, it was felt that, unless there were aggravating circumstances, none of these would amount to conduct which would justify summary dismissal.

The other factor which emerged was that in most countries, summary dismissal requires immediate action. The gap between the employer finding out about the conduct and the dismissal must be limited to a period of two weeks to a month. This contrasts with the UK practice of long investigations, with the employee on suspension, resulting in dismissal without notice. It was acknowledged by the Finnish delegate that the requirement of instant response can cause problems, if the employer is forced to act in haste and finds later that he has insufficient grounds.

4.3 Dismissal with notice

The central unifying factor for all the countries which attended the Congresses or provided Reports, was that employees are protected by law from unjustified dismissal at the end of the notice period. This is the central change of attitude which has occurred in all EU countries over the past fifty years or so. Freedom of contract no longer extends to dismissing employees without good reason.

The limitations to this are as follows:-

- Denmark and Iceland, where we believe this protection is not available to employees who do not have the benefit of a collective agreement (either by direct agreement or under the *erga omnes* principle).
- Germany, Austria and Slovenia where this protection is not available to employees of small employers
- United Kingdom, Germany, Austria and, perhaps, other countries where there is a qualification period.
- Certain categories of employees, such as domestic servants, family workers, homeworkers and agricultural workers, who have limited or no protection in some countries. This is an important abrogation of the Charter right which deserves further analysis
- Some atypical workers

The reasons which are accepted as justifying such dismissals and the procedures for delivering protection are considered later.

4.4 Deemed dismissals

In Hungary these are called “Extraordinary dismissals by the employee” and in the United Kingdom “constructive dismissals”, in France “une rupture imputable à l’employeur”. They are defined as dismissals where the conduct of the employer justifies the employee in leaving the employment and claiming unjustified dismissal.

It is our analysis that all EU countries have protection in this area. However, the juridical analysis tends to differ, for example in Austria “the premature resignation by the employee with good cause” is treated like a “termination by the employer without good cause” or unjustified dismissal by the employer, whereas Slovenia has the same concept as Hungary of “extraordinary dismissal by the employee”. In all cases except Iceland (an EEA member) such conduct which destroys the relationship of trust and confidence between the employer and the employee) gives rise to a general right of compensation. In Iceland this right is limited to the notice period.

4.5 Procedure for dismissal

It is generally accepted that a dismissal will only be justified if the employer has gone through the necessary formalities.

4.5.1 Internal procedures

Most countries require some kind of hearing before the decision to dismiss is made (though sometimes summary dismissals are treated as an exception). Thus in France there must be a discussion before the dismissal with the employee and his union representative. In Finland also the employee has a right to be heard and in the UK there is a Code of Practice requiring all employers to set out a Disciplinary Procedure in the Contract of Employment. It is not clear to what extent other countries require similar pre-dismissal procedures.

These internal procedures will also include attempts to find alternatives to dismissal which may involve warnings as to future conduct or performance, training and attempting to find alternative more suitable employment.

4.5.2 Prior permission or notification

As stated below, the Netherlands has a unique system whereby permission to dismiss is obtained in advance from the Employment Service. Austria has a system whereby the Works Council has to be informed. If the Works Council consents this substantially reduces the employee’s prospects of succeeding in court. In Poland and Slovenia there is a similar rule of prior consultation and permission from the trade union.

4.5.3 Notice

The next stage is the giving of notice. Most countries do not require any formalities, but in Italy, Germany, Iceland and Slovenia the notice must be in

writing and in Austria there are strict requirements about identifying the date of termination. The notice period initially is defined by the terms of the contract, but minimum periods of notice, often governed by length of service, are defined by legislation in most countries and collective agreements may often increase these periods for those people covered by the agreement.

4.6 Other methods of termination

There are, of course, many other ways in which a contract of employment can come to an end.

- Death of the employee
- Consensual termination
- Expiry of a fixed term contract. Many countries have limitations on the validity of fixed term contracts e.g. in Germany they are normally for not more than two years. The United Kingdom treats expiry of a fixed term as a dismissal, requiring an admissible reason for dismissal, but we believe that this is not the norm. The Fixed Term Employment Directive is designed to prevent discrimination against fixed term employees, but this does not necessary protect them from termination of their employment at the end of the fixed term.
- Reaching retirement age. This is an accepted method of termination of contract in Germany and probably in most countries. In the UK the approach is different, simply excluding employees who have reached contractual or statutory retirement ages from bringing proceedings. The Age Discrimination Directive allows a national derogation for the continuation of statutory retirement ages, but it is uncertain how it will be implemented in the different countries. There is also a question mark over employees who have been retained after the contractual or statutory retirement ages. Do they lose their protection?
- Breach of a legal requirement or other supervening event. Generally, this is likely to come under the category of a justification of dismissal rather than automatic termination.

We do not regard these as controversial matters, though there may be some disparity in the way they are treated in the different countries.

5. Reasons for dismissal

It is usual to divide the admissible reasons for dismissal into two categories – reasons based on the individual, such as conduct, performance and ill-health and dismissals for economic reasons, such as redundancy, re-organisation etc. This is an important distinction, since in the case of dismissals for economic reasons there is no element of blame or even personal responsibility in relation to the individual dismissed and, as a result there should usually be some compensation in the form of severance payments.

However, in fact, we have analysed the justification for dismissal without emphasis on this division between the two categories.

There are also a number of automatically unfair reasons for dismissal. This categorisation may mean (a) that a dismissal which would otherwise be on admissible grounds is rendered unfair by the presence of an inadmissible factor, or (b) that a person who is otherwise unprotected, either because he is excluded by short service, being over retirement age, or working in an unprotected sector, obtains protection or (c) that a person dismissed for this reason obtains some additional protection, eg additional compensation or interim relief.

5.1 Admissible Reasons

5.1.1 Misconduct

All jurisdictions recognise misconduct as a justifiable reason for dismissal. There is discussion above about the circumstances in which there may be a justified dismissal without notice. It seems clear that the evidence required to justify a dismissal with notice are less than for immediate dismissal, but the exact level of the requirement is hard to define.

France sets out three categories of misconduct, with different effects. *Faute lourde* which must be deliberate and aimed at the employer and disentitles the employee to all indemnity, including pay, from the date of the act of misconduct, f*aute grave* which need not be intentional, but renders it impossible to retain the employee in the enterprise and results in immediate dismissal at the end of the disciplinary procedure and *faute simple* which is serious misconduct, but not so serious that he cannot work out his notice.

Prior warning as to the employee's conduct is an important element in justification. In Germany it is essential that the employee should have been given at least one previous warning, except in the case of very serious misconduct. In other countries the requirements are less formalised. However, the following principles are generally accepted

- Dismissal without notice is treated separately. Not only must the misconduct be grave, but also the dismissal must be done promptly.
- Warnings are a very significant factor. Misconduct which would not justify dismissal without a prior warning, may justify dismissal if the employee has done something similar before and been warned as to his future conduct.
- The essential criterion is that the conduct taken as a whole, must be so serious that the employer cannot be expected to retain the employee in the organisation.

A distinction which emerged during the Congress was the degree of proof required. In most countries the misconduct must be objectively justified. This means showing that the employee had committed the misconduct and not just that the employer reasonably believed that he had done so. This is not the

situation in the UK where the emphasis is on the investigations and the hearings which the employer has carried out. Once that is shown, the court has to consider only whether the employer "believed on reasonable grounds" that the employee had carried out the conduct alleged.

In all other countries, it appears that there is far less emphasis on the procedures. If it is shown that the employee is guilty of the conduct alleged and that the conduct, in all the circumstances, justified dismissal, most countries are not so concerned about whether the employer carried out a detailed investigation and whether the employee was given a fair hearing as to whether he committed the act or not.

5.1.2 Poor performance

Most countries regard poor performance as being akin to misconduct. It is rare for poor performance to be sufficiently grave and immediate to justify dismissal without notice. However, different jurisdictions place greater or lesser emphasis on prior warning. In France the emphasis in respect of poor performance is the need for objective proof, for example by failure to meet targets. In the UK the emphasis on "reasonable belief" makes it much easier for an employer to rely on a perception of poor performance which may not be capable of objective proof but there is a requirement that he should have been given an opportunity to improve his performance before the decision is taken to dismiss. In Norway there is reluctance to accept dismissal for poor performance once the employee has passed the trial period.

5.1.3 Ill-Health

The idea of dismissing an employee because of his ill-health gave rise to a substantial divergence between the Member States, which might merit further study.

One set of countries[2] forbids ill-health dismissal during a fixed period of absence (eg two years), but then allows it freely at the end of that period. Others accept, albeit with varying degrees of reluctance, that there can be dismissal for reasons of ill-health. There was some debate about what happens if an employee returns to work just before the end on the 12 month period and then goes sick again. Most judges felt that they would take a pragmatic approach. The German Report makes the point that ill-health dismissal may be justified "where the continued payment of wages has reached such a level that makes it unacceptable for the employer to operate any longer without replacing the person who is permanently ill".

In all jurisdictions, there is a relationship between the period of paid sick leave, the appropriate date of dismissal and the point at which ill-health retirement is appropriate. If an employee is dismissed and thereby loses either contractual sick pay or a permanent ill-health pension, then such employee may well feel justifiably aggrieved. These discussions do, however,

[2] Italy ,Malta, Luxembourg, Netherlands, Norway,

seem to centre on large organisations with good sickness benefits and pension schemes and with a sufficiently large workforce to be able to replace an employee temporarily and then reintroduce him into the work-force. A more generous view might be taken of a small employer who loses a key employee for a significant period due to ill-health.

As there is no imminent European legislation on disability discrimination the Congress did not debate the relationship (which is proving important in the UK where such legislation does exist) between ill-health dismissals and dismissal because of the employee's disability.

5.1.4 Redundancy

All EU countries recognise redundancy as an admissible ground for dismissal. We did not discuss redundancy at either of the Congresses and we consider that this would be a valuable area for future discussion in the context of dismissal on economic grounds.

Unlike the general issue of unjustified dismissal, collective redundancies are the subject of European Directives. Accordingly there is, or should be, a large area of convergence between the EU countries on this issue. In respect of individual redundancies or redundancies involving a small number of employees there are a number of issues which require consideration -

- The need for warning and consultation before the decision is made to declare a redundancy situation.
- The requirement for the employer to prove that there is a genuine need for redundancies.
- The need for objective criteria for selection.
- The need to seek alternative employment for employees selected for redundancy.
- The provision of appropriate redundancy payments.

Some of these issues are touched on in the national reports. In Finland the employer must show "proper and weighty reasons". In Malta the criteria are "first in, last out" and re-employment if the post becomes available within on year after the end of the notice period. However, the Questionnaire made only brief reference to this issue and, accordingly, the National Reports do not deal with it in detail.

Collective redundancies are the subject of EU Directives and, unsurprisingly, all reporting Member States have legislation in place which is intended to comply with these Directives.

5.1.5 Re-organisation

The distinction between redundancy and re-organisation has been the subject of substantial case law in France and UK and possibly other countries. In both France and UK the substantive law relates to redundancy, but there are often occasions when a company is thriving and is taking on additional employees, but the skills of some existing employees are such that they do not fit into the

re-structured organisation. In France this has resulted in the juridical development of the concept of re-organisation. In the UK it has been dealt with partly by an extended definition of redundancy, developed by case law, to cover a situation where there is no reduction either in the work or the number of employees, but the requirement for employees to do work of a particular kind has diminished or is expected to diminish and also the use of a "catch all" category of "some other substantial reason of a kind which would justify dismissal". Norway also recognises re-organisation as a separate category and, like other countries, requires objective grounds for dismissal.

It seems likely that similar problems have been addressed in a similar way in other countries. For example the Irish report states that re-organisation "would be governed by the word 'redundancy'". The significance of the distinction is that most countries have a provision for redundancy payments even where the dismissal is justified. Logically these should be extended to all dismissals for economic reasons, but this is not necessarily the case.

5.2 Inadmissible Reasons

The Framework Directive gives a number of categories of discrimination which are forbidden. Dismissal for any of these reasons is normally automatically unjustified. These categories have not all been incorporated into national laws and in some cases, as explained below, a dismissal for a discriminatory reason may still be justified. The EALCJ considered the whole issue of discrimination, in particular in relation to Racial Discrimination at our Congress in Dublin in 2000. Accordingly this did not form an essential part of our deliberations in Paris or Budapest.

The National Reports dealt with this issue with varying degrees of precision. In so far as areas of discrimination were not covered, this may be merely an oversight.

- It is our belief that sex discrimination is forbidden in all EU countries both by national and EU law. This includes discrimination on the grounds of pregnancy and maternity.
- Dismissal on racial grounds and discrimination on grounds of religion are causes for concern. The problems are highlighted in our report from Dublin. We were reminded that the Race Discrimination Directive has still not been implemented in several countries, including Germany and there are other countries which do not have specific legislation (relying instead on their Constitution to provide protection), or where the legislation has not resulted in much litigation, for example Sweden. Bans on religious discrimination are certainly in place in France, Finland and Ireland and have just been implemented in UK, but it is not clear the extent to which asserted prohibitions in others countries are being effectively enforced. These are matters of concern, but were not highlighted at our two Congresses.
- Disability. Most countries do not have modern legislation covering disabled people. Often the protection is seen in terms of social security

rather than opening up employment opportunities to disabled people and protecting them from dismissal. The European concept of "reasonable accommodation", applied in terms of European Law to pregnancy and maternity, is particularly important in respect of disability. It is not enough to ensure that disabled people are treated the same as others; it is necessary that reasonable accommodations or adjustments should be made to protect them, not only in providing special aids, such as ramps, Braille readers, ergonometric chairs etc., but also in making allowances for time off, part-time working etc. To our knowledge only the UK has specific legislation in this area, though dismissal for reasons of disability is a specifically inadmissible reason for dismissal in Finland and the Netherlands. Meanwhile in Norway there is general duty to adapt the work where the employee's long term health has been affected by illness. It is possible, therefore, that our general assumption about protection of disabled people may be a misconception. It is pointed out in the Swedish Report that dismissal for a reason which relates to disability may still be justified in the particular circumstances of the case e.g. where, even after reasonable adjustments, the disabled person cannot perform the job for which he was employed.

- Age. Ireland has implemented the Framework Agreement on age discrimination. Their experience has been very interesting, throwing up many problems which will be encountered by other countries when their laws come into effect. The Finnish Report makes clear that age is a forbidden ground of discrimination under their Employment Contracts Act. The Netherlands has a comprehensive General Act on Equal treatment, which includes age discrimination. Other countries, such as Slovenia and Iceland state that age discrimination is forbidden, but, apart from Ireland, we are not aware of any specific current legislation about this complex area. Again, the question may arise whether, in appropriate circumstances, discrimination on the grounds of age may be justified.
- Sexual orientation. The Questionnaire failed to deal specifically with this category and as a result not all countries dealt with this question. For example the apparently comprehensive lists of prohibited discrimination in the French and Italian Reports did not include sexual orientation, but it is included in the Netherlands list. Norway makes it clear that sexual orientation will not be an objectively justified reason for dismissal, but does not include it in the list of automatically unfair dismissals. The ban on such discrimination has recently been implemented in the UK.
- Trade union membership or activities. A ban on discrimination on these grounds pre-dates the other discrimination provisions and appears to be universal. In most cases it is incorporated in the Labour Code.
- Transfer of undertaking. As this is forbidden by the Acquired Rights Directive it should be incorporated in all national laws. We believe that this is the case and that the European norm is generally applied
- "Whistleblowing". It is our belief that only UK, Netherlands and Malta have specific protection for employees who disclose internal matters in

the public interest. It is possible, however, that such problems are the subject of case-law elsewhere.

- Victimisation & Harassment. France has specific protection for dismissal based on *harcèlement.* UK and Germany give special protection to people who are victimised for asserting their legal rights. There is no clear indication in the Reports that other countries have similar provisions, but it may be that this is dealt with by case law.

6. Special Categories of workers

One of the factors which emerged very clearly in the Reports and discussions is the extent to which certain categories of workers are treated differently. Some receive special protection; others are partially or completely excluded from protection; in other cases there are different courts which deal with different categories.

6.1 Civil servants.

The rationale for the different treatment of civil servants (which might appear self-serving) is the need for a degree of independence from their political masters. Indeed the protection of senior civil servants from dismissal is enshrined in the Constitution of Norway. This is also particularly emphasised in the French system where civil and public servants are subject to an entirely different Code and are dealt with under Administrative Law.

It emerged that the range of workers treated as civil servants is under challenge, especially as out-sourcing and privatisation results in a number of public functions being carried out by the private sector and, therefore, a number of public servants moving to the private sector under TUPE. The rationale for treating civil and public servants differently applies to people in positions of authority, but there is no reason why, for example, a hospital porter should be treated differently in a state hospital from a private hospital. In particular, in Italy there was a considerable change in status in the 1990's. However, in Germany the range of employees receiving special treatment is particularly wide, with teachers being treated as public servants and therefore dealt with under the administrative and not the labour code. The special protection of teachers in Norway has recently been removed by legislation.

Separate legislation for civil servants applies in all countries except the UK where only a limited number of office-holders, such as judges, are excluded. The admissible reasons for dismissal set out above are, therefore, applicable only to private employees. Civil servants can still be dismissed for disciplinary reasons, but there is far less flexibility in terms of redundancy. We did not discuss in detail other areas such as poor performance and ill-health. The use of administrative law means that there is a greater emphasis on process. In terms of the central issue of this Report which relates to Article 30, this is not a cause for concern, since it seemed to be universally accepted that civil and public servants have greater protection than private employees. It is, however,

a potential cause of conflict where national governments seek to impose new conditions and sanctions on public servants and where public servants are transferred to the private sector on out-sourcing and privatisation.

6.2 "White collar" and "blue collar" workers.

The difference between white collar and blue collar workers is now largely historical, but the distinction still survives in several Labour Codes, such as Austria. Thus in Hungary executive employees have special protection. In Iceland there is a "Labourer's Act".

6.3 Agricultural workers, family workers and home workers

These categories are a cause for greater concern. In Germany and Ireland family workers working in a household or farm are treated separately. In Italy and Malta domestic servants can be freely dismissed. In Poland farm labourers are not protected. It is not clear whether similar restrictions apply in other countries.

6.4 Probationary periods.

Although most countries do not have qualification periods preventing employees from bringing claims unless they have a certain period of employment, a similar effect is reached by probationary periods and training contracts prior to permanent employment. On discussion it was generally accepted that it is appropriate for employees to be engaged on probation so that their full rights do not apply until the probationary period has been satisfactorily completed. For example Austria has specific provision for probationary periods of up to a month and Finland has a similar statutory provision while in Luxembourg the maximum probationary period is six months, but it was our impression that other countries deal with probationary periods by judge-made law by requiring lesser standards of proof of misconduct or poor performance.

6.5 Atypical workers.

The Commission is aware of the EU-wide move towards engaging workers who do not become full employees of the enterprise. These may be fixed term employees, part-time workers, home workers, agency workers, employees of subsidiary businesses to which the work has been outsourced or independent contractors, either supplying their labour or truly running their own businesses. This was not a substantial aspect of our Congresses, having been considered at our previous Congress in Tenerife.

6.5.1 Fixed Term Workers and Part Time Workers

These workers are already protected by EU Directives and these were reflected in the National Reports. However, discussions in Paris centred on the problems created where fixed term contracts are used as a method of preventing employees from obtaining security of employment. The Directive

does not deal with this, because an employee obtains no protection when the fixed term contract expires. This has resulted in national laws which require the employer to show that the fixed term itself is justified (e.g. France). There are also problems with a chain of fixed term contracts. UK forbids this. In Italy judges refuse to accept that a chain of fixed term contracts differs from an indeterminate contract. However, not all countries have developed such a robust interpretation of fixed term contracts and there are countries where this is seen as a way of avoiding normal employment responsibilities.

6.5.2 Agency workers

These are the subject of a draft Directive and were not dealt with in detail in the Reports. However, it emerged from the discussions in Paris that the Netherlands, Ireland and Germany have recent specific legislation protecting agency workers and placing obligations towards them both on the agency and the enterprise where they work. Ireland goes further and makes it clear that where a worker is engaged by the Agency to work for the user company the employment relationship is with the user company and not the agency. In UK the concept of an implied contract between the worker and the user company has been developed by the courts. It is apparent, therefore, that several countries are moving towards protection of agency workers even in the absence of an EU Directive.

6.5.3 Economically dependent workers

The other categories of economically dependent workers were not discussed except for a passing reference to the plight of home-workers and the position of tele-workers.

6.5.4 Special categories

There are some other special categories within the private sector, such as seamen, apprentices, the military and clergymen. Most countries have special laws relating to these categories.

7. Procedures and Remedies – formal and informal

Rights are of no use unless they are effective. There is an increasing realisation that principles such as protection from unjustified dismissal require effective remedies which may not be solely through judicial process. We therefore discussed in some detail the formal legal procedures available as well as the alternatives to legal process and the nature of the remedies available in the courts.

7.1 Alternatives to legal proceedings

This was the subject of a specific technical session.

7.1.1 Collective agreements.

The Scandinavian model is to separate employees who have the benefit of collective agreements from those who do not. Thus in Finland an individual employee cannot go to the Labour Court unless he has the benefit of a collective agreement. If he does not, he has to go to the civil court to enforce his rights. In most countries the collective agreement sets out specific procedures involving the union in the process of dismissal. Thus in Poland, every employer must inform the trade union of the allegations. The trade union then has 5 days to make representations. If the employer does not do this, and dismisses, the dismissal will be treated as unjustified. In the UK, even where there is no collective agreement, an employer is required to go through a fair procedure and the employee is entitled to be represented by the union at those proceedings. This means that, where there is a collective agreement, the matter has already been considered by an internal panel before the dismissal takes place. On the other hand, it has the disadvantage that if an employee does not have the support of the union (possibly for some unrelated reason which may even include discrimination) that employee is put at a disadvantage.

7.1.2 Conciliation.

This is the process whereby after dismissal, but before judicial hearing, an attempt is made to reach an agreement, with or without the help of an outside body.

The process whereby parties reach agreements to avoid the risks and expense involved in obtaining a judicial verdict on their case is as old as litigation itself. In most countries a substantial percentage of cases are resolved in this way, either before or after proceedings are commenced. However, the aspects which we discussed in Paris and Budapest were the extent to which countries provide a formal framework for such activity.

It seems that the UK's Advisory Conciliation and Arbitration Service ("ACAS") is unique in the EU. This government-funded service provides conciliation services outside the courts system and is generally considered a success. The process, however, is voluntary. Either party can choose not to participate.

It emerged that Italy had attempted an unsuccessful experiment in compulsory conciliation, which had been abandoned after two years. Undeterred UK has just embarked on a similar system whereby judicial procedures are delayed for a fixed period of 13 weeks to enable ACAS to seek to conciliate. At the end of the 13 weeks the role of ACAS comes to an end. This system has been widely criticised and the initial impression is that it provides no advantages over a voluntary scheme and serves to delay what has been perceived as an expeditious system of resolving dispute.

In Germany, there is an important role for the staff committees. This is closely related to the role of the unions in other countries, but in Germany it is of

wider application since all medium to large companies have staff committees. They have an important role in resolving cases before they go to court. Their role is essential in view of the very large case load in Germany.

Although conciliation is desirable there is one qualification. Employer and employee are not in an equal bargaining position. The employee may be short of money and may be without legal advice. Countries such as Italy and UK protect employees in such situations by providing that such agreements are not binding unless they have been achieved through a conciliation body or following professional advice.

7.1.3 Mediation

Currently the movement is towards mediation. Several countries such as Hungary and Luxembourg have recently introduced a formal mediation system; many others have conducted experiments with greater or lesser success. There is an overlap between conciliation and mediation, but the essential difference is between facilitating discussions and leading the discussions. Mediation involves a strong and qualified person acting in an interventionist manner to seek to effect agreement between the parties. The mediator has to be a person with knowledge of the law and the authority to persuade parties, possibly against their inclinations, of the weaknesses of particular parts of their case and therefore the advantages of reaching agreement.

We had a substantive debate about the importance of such mediation and the role of the judiciary. This disclosed an experiment in Germany with judges acting as mediators. The problem was a shortage of judges and the scheme has come to an end, but it has left judges with helpful experience which they use for informal mediation during the course of the case. A different experiment in the Netherlands has had mixed success. The judge instigates and oversees the mediation process, but the mediator is not a judge, but a person who has received mediation training. The involvement of the judges has been beneficial. It makes the judges look at cases differently – more in terms of outcome than legal principles. In Ireland the “Rights Commissioner” has been set up to try to resolve cases by mediation. These experiments show that the judiciary is changing in its approach to cases. The problem is that, while mediation may reduce the number of cases coming to court, it is itself expensive and has to justify itself in terms of outcomes.

Most judges took the view that they had a role in facilitating agreements. This might be at the preliminary stage, when they are discussing the procedures etc., or during the trial itself, when the strengths and weaknesses of the respective cases become clear. There was also discussion about the extent to which the judge who carries out the mediation could also hear the case. In the Netherlands, judges are happy to be active at a preliminary stage, but if they do so they will hand the final verdict over to another judge. In Italy, there is considerable resistance to any such involvement of the judge. The role of the judge, in their view, is solely to decide the issues placed before him. Conciliation and mediation is a matter for the parties and for any outside

arbitrator they choose. In Germany, however, the Judges are happy to be involved in mediation at any stage and would not normally disqualify themselves from further involvement in the case. It emerged that in Hungary a new mediation system was in place, but it seemed to be little used as yet.

The conclusion appears to be that conciliation and mediation are important and growing aspects of resolving employment disputes (of which dismissal disputes form the largest number of cases). However, the effectiveness of formal procedures has yet to be fully tested. In particular, it was felt that mediation, with highly qualified people seeking to resolve significant disputes, has considerable prospects.

7.2 Court process

Claims of unjustified dismissal form the main subject of the cases before the Labour Courts of the EU. Our statistics indicate that between ½ million and 1 million EU citizens bring claims of unjustified dismissal each year. There is, however, a wide variation. Our statistics are not verified and some relate to the overall case load of the Labour Court. However, what we have suggests as follows. The highest number is Germany with 327,957 in 2003, followed by France with 175,257 cases in the Conseils de Prud'hommes of which "a high proportion" concern unjustified dismissal. The next is about 50,000 cases of judicial dissolution per year in the Netherlands followed by 45,000 in Poland and UK with over 40,000. The lowest for which we have figures is Sweden with only 180 cases a year. However, this is only Labour Court cases. Non-union cases go to the civil court. Reports from the New Entrants indicate over 1000 unjustified dismissal claims each year.

High numbers can be treated as an indication of a successful system or an indication of failure. We suggest that it is really an indication of the position at the "coal face" where individual employees face the reality of balancing economic flexibility with corporate responsibility. It is inevitable that employers and employees should take a different view of that balance. What the large volume of cases shows is that the citizens of the EU use the Labour Courts to resolve these conflicts, thereby relieving a mutual sense of injustice which would otherwise arise. It also indicates that the systems in place allow satisfactory access to the courts.

Generally speaking proceedings have to be initiated promptly by the claimant. For example, in Hungary the period is 30 days, in UK three months.

In the majority of countries free legal aid is available. Other countries, such as Finland, UK, Ireland and Slovenia, rely on the unions to provide support or voluntary bodies in those cases where the employee is not a union member. In Poland the unions have been prepared to represent employees who are not union members. The collectivist approach of Nordic countries is demonstrated by the fact that in the Finnish Labour Court it is the union, and not the individual employee, which is the claimant. Therefore legal aid is not required. Sometimes, as in Norway, the employee is required to make a

contribution. Perhaps it is not surprising that, as members of the judiciary, we feel that we are able to do justice between the parties even where the employee is explaining his case himself without legal support.

The structure of the Labour Courts in the different EU countries would involve a complex analysis which is not the subject of this report. In France, Spain and Germany and many other countries, the resolution of labour issues is within the main courts system, but is resolved by a separate section or Chamber of the courts. In France such disputes start with the Conseil de Prud'hommes, but a high percentage (59%) go on appeal to the Social Chamber of the Cour d'Appel. In Italy the issues are resolved by *Pretori* or magistrates who are within the main court system, but who specialise in employment law. In Germany, Spain, Portugal, Austria, Hungary and Slovenia, the Labour Court is a separate Court within the structure of the courts system. By contrast in the Scandinavian countries, the Labour Court is an entirely separate body from the civil courts, designed to resolve labour disputes involving trade unions. Accordingly disputes about dismissals may pass to the Labour Court if there is a collective agreement, but to the ordinary civil courts in other cases. In the common law countries, UK, Ireland and Malta, there are separate tribunals set up to deal principally with individual labour disputes, leaving disputes about collective agreements to the civil courts. In Ireland there is both an employment appeals tribunal, which deals with individual disputes, and a labour court which deals with collective disputes. There is also a separate body dealing with discrimination. In the Netherlands labour disputes are dealt with within the normal court system, but are heard by specialist judges.

During the course of the EALCJ's existence we have had substantial contact with all of the long-standing Member States except Greece. We have also established contact with 5 of the new Entrants, of whom 4 attended the Congress in Budapest. Delegates from two EEA countries have also attended. From this contact we have established evidence which indicates that all EU and EEA countries have arrangements to deal with protection from unjustified dismissal, either through specialists within the courts system or specialist tribunals.

7.3 Remedies – Reinstatement

We spent a significant amount of time discussing the question of reinstatement. We have dealt above with the situation pending the judicial verdict. This section deals with what happens when the verdict is issued.

All countries, except Finland[3], have provision for reinstatement. In Italy they have the logical provision that reinstatement is only available for larger companies.[4]

[3] Finland has recently (in 2001) abandoned this remedy except for public servants.
[4] more than 15 employees at the establishment or more than 60 overall

There are different juridical analyses of what happens when an order for reinstatement is made. In Norway, for example, the effect of a judicial verdict that the dismissal is unjustified is that the dismissal is void and has no effect. It follows that the employee can return to work. In Austria equally the analysis is that the notice is ineffective. The analysis in France (with limited exceptions) and UK, however, is that the dismissal remains effective, but reinstatement is ordered as a judicial remedy. It is, therefore, not automatic, but is dependent on the Court deciding that it is the appropriate remedy.

These two analyses may seem totally different, but detailed discussions made it clear that the effect is not necessarily different. Nearly all countries have a system of reinstatement. On the other hand, none will enforce reinstatement against the will of the employee and few will enforce it against the will of the employer. Instead there will be an award of enhanced compensation. The principal exception appears to be the Netherlands, where orders for reinstatement are routinely made and enforced, but Finland has recently (in 2001) abandoned all provisions for reinstatement as a judicial remedy available in the Labour Court[5], because, in practice, the Courts were not making any such orders.

In other countries, the situation is usually that the employee is entitled to be paid his salary until the question of remedy is resolved. This is because judges accept that it is difficult for an employment relationship to continue in the long term unless there is agreement between the parties.

In this regard we were informed of interesting research from Hamburg, Germany. Under the German system the employer has the right to argue against reinstatement. This indicates that 10% of cases went to court, with only 1.8% reinstated. Even where there is reinstatement, in 90% of cases the employee has ceased to be employed within 6 months. The UK experience is similar.

The difficulty in discovering how far apart the two approaches are is that a formal order for reinstatement is often used as a method of agreeing compensation. If the employer does not want the employee back, he will agree to pay to be rid of him. There is, however, clearly a difference between different countries in the extent to which reinstatement actually occurs.

The overall view of the two Congresses was that, while reinstatement may be the theoretical remedy, in practice most cases where the employee is successful are resolved by a severance payment, whether agreed or decided by the court.

7.4 Remedies – Compensation

The other principal remedy is compensation. There was a clear consensus that compensation should not be unlimited, though in several countries,

[5] The Administrative Courts still order reinstatement in respect of civil and public servants.

including France, there is no formal limit on the amount of compensation. The Netherlands Report indicates that "The compensation is not meant to be a full compensation for all financial and emotional loss being suffered".

There are different ways of calculating compensation. Some have a limit of *x* years' pay; others have a formula based on years' service, others have an overall limit. However, it was agreed overall that the maximum compensation was usually in the region of two years' pay.

This acceptance of some kind of maximum is important. An employee who is unjustifiably dismissed can suffer very substantial financial loss. For example a man in his 50's who is a long-established employee of an old industry may find that he will never work at the same level again. Such an employee will also suffer very considerable mental anguish and loss of self-esteem. However, for him to be fully compensated would put a considerable burden on the employer and might affect his competitiveness and, as a result, other employees would suffer. Accordingly there was wide agreement that some kind of ceiling on compensation was appropriate.

There were also divergences as to whether the compensation was purely financial, or whether it also included general damages for the upset or even psychological damage resulting from the dismissal. In most countries the compensation is for financial loss. In those countries, such as Norway, where compensation is assessed on a general basis, the Court tends to decide on a figure which seems fair and does not explain in detail how this has been calculated. In Luxembourg "moral damages" are limited to €1,000.

There was some evidence of a minimum level of compensation even where there is no reinstatement and no financial loss. In Italy this is five months' pay (a substantial amount). In UK it is one week for each year of service, but with a cap of about 300 euros per week. It is not clear whether other countries have a similar minimum amount of compensation.

8. Conclusion

- It seems clear that unjustified dismissal is the principal area where an employer's assertion of freedom of contract clashes with the employee's right to security of employment. The frequency of such disputes might be seen as an indication that the relationship of employer and employee is under stress. However, we are inclined to take the view that these disputes are simply a manifestation of an inevitable tension between flexibility and protection and that the availability of adequate remedies for unjustified dismissal provide a valuable safety valve.
- There is near unanimity among EU and EEA countries as to the principles set out in Article 30 of the Charter of Fundamental Rights
- Each country has a body of law protecting employees from unjustified dismissal even where proper notice is given (Denmark and Iceland being the only exceptions). There are no large barriers preventing employees

from enforcing those rights, which is demonstrated by the large number of cases where such rights are asserted. The remedies are not unlimited, but in all countries, are proportionate.

- The view of most participants was that action of the nature contemplated by Article III-104 of the European treaty is not necessary. Some arguments, however, were put forward for action.
    - In a highly competitive market-place, countries might be tempted to relax this protection in order to be more attractive to international employers. A formal right, which could be referred to the European Court of Justice would prevent such a development
    - It is desirable to have a minimum standard of basic rights. This could be contained in a Framework Agreement which allowed Member States to continue with their existing practices.
- There are four potential areas where it could be alleged that countries are not conforming with Article 30
    - Exemptions for small businesses
    - Qualification periods
    - Exemptions for certain categories of workers, such as domestic workers, farm workers, family workers and home-workers
    - Where there is a collective agreement, in some countries a claim can only be brought with the support of the union.

  The principal issue is whether these are serious shortcomings, which require EU action or whether they are comparatively minor issues and can be left to national legislatures to deal with.
- As to the above concerns.
    - The absence of a universal right in Denmark and Sweden is of less importance because of the high level of union membership
    - There is some logic in the various restrictions in different countries. Recent employment, employment in small businesses and employment where there is a particular personal relationship with the employers, are all areas where it could be argued that it is right that the employment should end where the relationship has broken down
    - There seems to be little concern in practice about situations where the employee feels aggrieved but the union supports the management and refuses to back the employee.
- The concern of most delegates was that an attempt to formalise basic rights could cause unforeseen problems of definition and lead to unnecessary litigation. Furthermore there is always a danger that countries with rights more favourable to the workers might be tempted to abandon these in favour of more basic rights.

3rd March 2005
Bristol

Colin Sara
Secretary-General