EALCJ

The European Association of Labour Court Judges

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Seville Seminar on the Fundamental Rights of Workers

The highly successful seminar to discuss issues touching upon "fundamental rights of workers" took place in Seville between 14th and 16th May 1997, with the generous assistance of our Spanish colleagues, led by Alfonso Martinez Escribano.

This meeting, which attracted over fifty technical delegates, was honoured by the presence of leading members of the Spanish judiciary, as well as the head of DG/V/A of the European Commission, and a member of the influential *Comité des Sages* which had taken up this issue in its recent report.

The Association is extremely grateful to our Spanish hosts and to the Secretariat and organising team - notably, Ms. Mandy Archer - for all of their efforts in bringing this major undertaking to a successful conclusion.

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Edited by Alan C. Neal

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This Newsletter is primarily dedicated to reporting the proceedings of the Seville meeting. It sets out the principal issues addressed during the seminar, and indicates, in the form of an Executive Report prepared by the Secretary-General for the European Commission, the main conclusions reached during the working sessions.

Work is now proceeding on editing and complementing the material produced in Seville, in order to enable the complete project to be presented in published book form through the firm of Dartmouth Publishers. This task is currently under the direction of the Convenor, Professor Neal.

Future Activities of the EALCJ

In accordance with decisions reached by the Executive Committee of the Association at a meeting in Seville on 13th May 1997, the Secretariat has held a series of meetings with representatives of the European Commission to explore the possibility of future continued collaboration between the EALCJ and DG/V of the Commission. The final outcome of these meetings will be reported in the next issue of the Newsletter.

Seminar on the Fundamental Rights of Workers

Executive Report

Introduction

This is a Summary of the Report of a Seminar of the European Association of Labour Court Judges held on 14 - 16 May 1997 in Seville and attended by Labour Court Judges from the countries of the European Union and the EEA.

Part 1: Social Rights Recognised in International Law, in National Constitutions, and in Community Law

1. *International Law*

The principal international documents are the United Nations Declaration of Human Rights, the New York Agreements, the International Convention on Economic, Social and Cultural Rights, the International Convention on the Elimination of all Forms of Racial Discrimination and the International Convention on the Elimination of Discrimination against Women.

The principal European documents are the European Convention on Human Rights and the European Social Charter.

Of these, only the European Convention on Human Rights has any enforcement provisions - through the European Court of Human Rights, which itself has no direct powers.

The European Social Charter, together with its Additional Protocol, contains 23 Social Rights, of which seven are stated to be minimum, out of which at least five must be recognised by a signatory state.

2. *National Laws*

The courts of the various states have different interpretations of the way in which international rights are incorporated into national law. There is, therefore, no uniform system of recognition.

In the national systems the following groups may be classified:

1. ***Generally agreed rights***

(a) Equality, non-discrimination, and, in particular, rights relating to equality between the sexes
(b) Freedom of trade union association
(c) The right to work
(d) The right to protection of health, social security, and social assistance.

2. ***High level of General Agreement on Rights***

(a) Right to join a union
(b) Right to collective bargaining
(c) Freedom of choice of profession
(d) Full employment
(e) Right to strike
(f) Right to a minimum subsistence income
(g) Right to participation

3. ***Low level of Agreement***

(a) Right to professional training
(b) Right to employee protection
(c) Provision of a Worker's Statute
(d) Right to equitable working conditions
(f) Right to equal pay for equal work
(g) Rights in respect of length of working day, breaks, and holidays
(h) Prohibition of dismissal without legal cause
(i) Maternity protection

3. *Procedure for Protection*

The rights set out above are those which are enshrined in national constitutions. Their nature and enforceability, however, varies widely. Most of the Member States have constitutional courts. The extent to which these Courts are available for direct action by individuals, as opposed to the verification of national laws to ensure they accord with the constitution, is limited. Even in countries where

direct access to the constitutional court is available where no appropriate remedy exists before the normal courts, this course is a last resort.

The problem is compounded by the different natures of the rights set out above. The classic fundamental rights, such as the right to freedom of thought, the inviolability of the home, and the right to communicate are not intended to be rights enforceable between citizens, but are rights which the state is expected to guarantee. In some cases, the constitutional provision can only be described as "programmatic", such that it is not possible to guarantee delivery of the right in real social and economic terms.

The rights which are intended to be enforced by workers against their employers are not, for the most part, those contained in constitutional and international texts, but are those set out in national laws and regulations. These are the rights which ordinary people require to protect them from the day to day problems of employment.

It is in the nature of things that there will always be fundamental rights whose effectiveness depends upon the economic possibilities and political criteria of the relevant public authorities. It follows that a mere proclamation of social rights in Community regulations cannot be sufficient to enable such social rights to be effective.

Part 2: Security of Employment and Freedom to Dismiss

1. *Concept of Dismissal*

Dismissal is the unilateral decision of the employer which discharges *per se* the contractual relationship. However, it also includes the presumption of discharge at the initiative or under the responsibility of the employer. This is sometimes described as "constructive" or "indirect" dismissal, or as discharge under the responsibility of the employer.

2. *Stability in Employment*

There is no fixed right to permanent stability in employment. However, there is universal agreement on the banning of arbitrary dismissals that are manifestly unreasonable, illicit, or without just cause.

3. *Notice of Dismissal*

The right to notice of dismissal provides partial protection from the traditional *ad nutum* nature of employment. Countries vary widely as to what period of notice is required or, indeed, whether there is a general prohibition of dismissal without just cause (with or without notice).

Most legal systems accept that notice can be dispensed with where dismissal is due to causes attributable to the worker's deliberate conduct or culpability. The most widespread rule is that failure to give notice gives a right to receive the legal remuneration which would have been received during the notice period.

4. *Justification for Dismissal*

Because of the perceived contractual weakness of the worker, and the corresponding responsibility of the employer for guaranteeing stability in employment, dismissal is only permitted where it is justified. Justified dismissal can be divided into three categories:

(1) Dismissal due to culpability of the worker, such as unpunctuality, absence from work, negligence at work, disclosing commercial secrets, causing offence to the employer or to other employees, and general misconduct.

(2) Dismissal for reasons relating to the person of the worker, such as professional ineptitude, long-term or persistent illness, or, in some cases, low productivity.

(3) Dismissal for objective reasons in the interests of the company. These are reasons relating to profitability, or efficiency or other economic, organisational or technical reasons. These reasons involve balancing the interest of the worker in preserving his job with the interest of the employer in achieving management objectives.

5. *Form of Dismissal*

All systems require written notification of dismissal, usually accompanied by formal reasons. Rights of consultation and participation by workers are less widespread. The burden of proof in showing reasons for the dismissal is usually on the employer.

6. *Judicial Control*

In most cases unjustified dismissal gives rise to a right to compensation. Many systems also have provision for reinstatement, but in practice reinstatement is rarely imposed against the wishes of the parties. Where reinstatement is deemed appropriate but is not enforced, it may give rise to additional economic compensation. The control of unjustified dismissal rests with the national courts, although the composition of these judicial bodies is different depending on the traditions of each legal system.

Part 3: Exploitation of Workers

1. *The Right to Health and Safety at Work*

The European Directive (89/391/EEC) of 12 June 1989 sets out minimum provisions for Health and Safety at Work in Member States. It is implemented in many different ways and many countries rely on their pre-existing national systems of protection.

2. *Prevention of Labour Risks and Protection from Accidents at Work and Work Related Illnesses*

Most countries have sets of regulations to safeguard health and safety at work. Many also make provision for Prevention Plans and safety committees and safety representatives. Workers have the right to stop work in cases of imminent danger.

Public bodies have been set up to inspect and enforce statutory obligations, with rights of access and rights to order work to stop.

Workers who suffer damage as a result of breaches of the regulations are entitled to compensation, although the amount of compensation varies from full compensation assessed by the court (including sums for pain and suffering) to compensation based on an addition to the social benefit.

The Social Security systems of the Member States provide for benefits for those injured as a result of accidents at work and their dependants.

3. *The Right to Equitable Working Conditions*

Provisions in national legal systems restrict what can be required of workers by limiting the working day, restricting overtime, and requiring premium payments, prescribing holidays and minimum wages. However, while most Member States provide some such protection, the precise provisions are very disparate.

4. *Judicial Protection*

The redress for breaches of all these provisions is to the courts. In many states this is the Labour Courts, but in other states redress is before the ordinary courts.

Part 4: Discrimination

1. *The Right of Equality*

All Member States accept the principle that all persons are equal before the law. In some cases there is an apparent limitation to citizens or nationals of the country in question, but, in practice, all people of whatever nationality are entitled to equal treatment before the courts of the Member States.

2. *Prohibition of Discrimination*

The legal systems prohibit discrimination in respect of specific social, political or personal factors. Sometimes all inequality of treatment which lacks objective and reasonable justification is banned.

The common factors are banning of discrimination on the grounds of race and sex. Provisions to deal with discrimination on the grounds of religion and political opinion are common, but not universal. Other factors are disability, language, place of birth, personal condition, social condition, age, and sexual orientation. Some jurisdictions have residual clauses such as "any other consideration".

Many systems prohibit victimisation of people who seek to assert their rights.

3. *Equality and non-discrimination in Employment*

The right applies to all facets of the labour relationship, from job advertisement, through working conditions, to dismissal.

All of the systems recognise equality of treatment in employment between men and women, in accordance with the 1976 Equal Treatment Directive. Most also expressly recognise the right of equal pay for work of equal value in accordance with Article 119 of the European Treaty. Some measures exist to promote equality of opportunity for women, though any positive discrimination has to be reconciled with the principle of equality of treatment.

The distinction between "direct" and "indirect" discrimination is generally accepted, although in various terms.

Apart from specific rights forbidding discrimination, many systems contain express social rights providing advantages for "disadvantaged groups" of workers, such as disabled people, people with low incomes, and the unemployed.

Despite these express provisions in the law, many European countries have been slow to recognise the extent of xenophobia in employment selection, conditions, and dismissals. While the right not to be discriminated against applies to all citizens of the European Union, not all jurisdictions extend such rights to all foreigners.

Generally speaking, once inequitable treatment is shown, it is for the employer to show that it is not for discriminatory reasons.

Part 5: Rights of Association and Collective Bargaining

1. *Freedom to Join a Union*

All national systems acknowledge this right. The right of employers to form associations is also generally accepted. There are, however, restrictions in national systems in respect of various categories of workers, such as military and police personnel and, in some cases, public employees.

The right to join a union includes the right to form a union, the right to choose one's union, the right to choose representatives, and the right to take part in the activities of the union.

Collective rights of unions include the right to negotiate collective agreements, the right to strike (though this is always subject to regulation), the right to organise disputes, and the right to propose members to be elected to Works Councils, *etc*.

Closed shops are widely, but not universally, forbidden.

Many systems prohibit discrimination on the grounds of trade union membership or activities.

Recognition of the largest union in the work-force is provided for in many systems, although this causes much controversy, especially from minority unions.

Not all European systems contain rights for workers to elect representatives with rights to consultation within the workplace. Where they do, unions are entitled to take a full part. These rights are obligatory where companies operate in more than one EU country.

2. *Collective Bargaining*

These can be divided into collective agreements within individual companies and agreements with wider scope.

In most countries, collective agreements negotiated by recognised unions apply to all workers and employers within their scope, even if they are not members of the union or the employers' association.

Collective agreements are subsidiary to the

general law, except in so far as they provide additional rights. Thus a collective agreement would be subject to general laws on discrimination and pension rights.

3. *Legal Basis of Strikes*

The right to strike is either accepted as a freedom or as an express constitutional right. Often the effect of a strike is to suspend the employment contract, thereby preventing the worker from treating himself as unemployed for the purposes of benefits and the employer from engaging replacement staff.

Many jurisdictions ban illegal strikes, for example where the rules for arranging strikes have not been complied with, or where there is a collective agreement currently in force which carries with it a "peace obligation", or as regards strikes affecting essential services.

4. *Judicial Protection of these Rights*

In many countries unions can bring legal actions in defence of their members' rights.

Conclusions

Our view is that any list of "fundamental rights" in a future Treaty should start from first principles unencumbered by historic lists of fundamental rights. In carrying out this exercise, it is vital to distinguish between those rights which are directly enforceable against employers and those "rights" which are really aspirations which the State aims to achieve.

On this basis, the following directly enforceable rights were established by our Conference:

(1) Rights in respect of working conditions. This right could be formulated either as a right not to have oppressive working conditions or as a right to equitable working conditions.

(2) The right to protection from arbitrary and unjustified dismissal.

(3) The right to health and safety at work.

(4) The right of association.

(5) The right of collective bargaining.

(6) The right not to be discriminated against on the grounds of sex, race, colour, nationality, politics or religion.

This definition of discrimination is significantly narrower that the definition of discrimination contained in the report of the *Comité des Sages* as being a right already established in international law. However, we believe that the definition set out above is likely to produce a more practical effect.

The *Comité des Sages* definition includes also language, political "or any other opinion", social origin, wealth, birth "or any other situation". We consider that the breadth and vagueness of this statement renders it unenforceable and that it quickly becomes apparent that this is not a true fundamental right but an aspiration. Instead, we have tried to set out a prohibition on discrimination which could be directly enforced by workers against employers.

There are other potential areas of discrimination which could be included - *e.g.* disablement, sexual orientation - but these were not debated in detail at the Conference. Many grounds of discrimination, such as discrimination on the grounds of ability, are entirely acceptable. It is important that the prohibition of discrimination should set out clearly the different types of discrimination which are referred to.

The other "rights" contained in the report of the *Comité des Sages* are really aspirations. In relation to the rights of workers, they are:

(1) The right to work

(2) The right to lifelong education and training

(3) The right to protection of the family.

The most important of these is the "right to work". This is a right which cannot be enforced against the employer.

The right to equality before the law is a general right. It is dealt with in the Report as a matter of discrimination, but it differs from the right not to be discriminated against in that it is not enforceable as such against an employer. It is simply the right of all people to have equal access to the courts. It is, therefore, not an employment right at all, but a general principle of civil liberties.

It is our belief that a Statement of Fundamental Rights of Workers is capable of agreement between all the Member States of the European Union without major changes to any of the laws of those countries. Such a Statement would differ from a "Statement of Fundamental Social Rights" in that it would consist of rights which any worker could enforce against his or her employer.

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