



Newsletter No.5

October 1998

Newsletter No.5 — October 1998

Edited by Alan C. Neal

Contents

Arrangements for Rome Seminar 19981

Co-operation between EALCJ and the Meeting of European Labour Court Judges1

1998 Executive Committee Meeting and Technical Seminar2

Rome Technical Seminar Preparatory Background Questionnaire2

Fundamental Social Rights: Executive Summary from Seville4

Diary of Forthcoming International Events7

Officers of the EALCJ for 1998 - 19998

Arrangements for Rome Seminar 1998

This *Newsletter No. 5* sets out the arrangements for the forthcoming meeting of the Executive Committee of the European Association on 29th - 30th October and 1st November 1998. The meeting, together with its associated technical seminar on procedural issues relating to discrimination claims before European labour courts and tribunals, has been organised by the Italian section of the European Association, under the supervision of Judge Giovanni Mammone and colleagues from the *Consiglio Superiore della Magistratura*.

Co-operation between EALCJ and the Meeting of European Labour Court Judges

In line with agreement reached last year at the Seville meeting of the Executive Committee of the Association, informal discussions have taken place between the Association and the loosely constituted Meeting of European Labour Court Judges (MELCJ). The MELCJ recently held its seventh meeting in Oslo, and agreed at that meeting that more formal discussions should be entered into with the Association over potential areas for co-operation or collaboration.

The MELCJ is made up of a relatively small number of Labour Court Judges, the majority of whom are drawn from senior ranks of the judiciary. That organisation also includes members from States outside the EU/EEA. For a number of years, support, through the auspices of the International Labour Office in Geneva, has been provided to the MELCJ to assist with arranging meetings and to enable reports of proceedings to be published.

With a view to exploring future collaborative activities between the two organisations, a position paper has been drawn up by the President of the Norwegian Labour Court, Professor Stein Evju. It has now been agreed that this paper will be discussed at the forthcoming meeting of the Executive Committee of the EALCJ in Rome.

1998 Executive Committee Meeting and Technical Seminar

The next meeting of the Executive Committee of the Association will take place in Rome on 29th - 30th October and 1st November 1998. This will follow a technical seminar on the subject of "Equal opportunities – Practical enforcement of rights", which has been organised with the support of DG/V of the European Commission.

By way of preparation for the Rome seminar, each delegate will be asked to prepare a national report on the way in which the matters to be discussed operate in his or her Member State. This will be collated by the secretariat. The Animateur of each session will be provided with these national reports and will use them to determine the structure of each session.

In general terms, it is intended that the seminar will consist of three working sessions:

1. Access to justice in cases of discrimination

This will concentrate on the practical availability of justice, the nature of the courts which consider such claims, the degree of expertise of those courts, the cost of bringing proceedings, whether a lawyer is required, and the speed at which proceedings operate.

2. Time limits and remedies

This session will compare the time limits used in the different states, the circumstances in which they can be overridden, particularly where Directives have not been correctly transposed into national regulation, and the extent and effectiveness of the remedies.

3. Procedure and appeals

This section will consider the different procedures, the burden of proof, the scrutiny of evidence, the availability of rights of appeal, and the approach to reference to the European Court of Justice.

It has been decided that, in a one-day seminar, a plenary session with reports from the reporters is not appropriate. Instead, reporters will prepare a report in writing on their respective sections, which will be distributed to the delegates and to the Secretariat. The Secretariat will then prepare a Final Report to be passed to the European Commission and the delegates and, if appropriate, to be published. This will thus facilitate a wider dissemination of the fruits of the seminar at a later date.

European Association of Labour Court Judges – Technical Seminar "Equal opportunities – Practical enforcement of rights" Preparatory Background Questionnaire

A. Access to Justice in Cases of Discrimination

1. Which courts deal with allegations of discrimination? Are such allegations dealt with:

- (a) By the ordinary civil courts
- (b) By the constitutional court
- (c) By the labour court
- (d) By a court specifically created for this jurisdiction

2. Can such claims be commenced and conducted by any aggrieved party in person, or do they have to be brought through an intermediary? If the latter, please explain the system.

3. Does the person making a complaint (i) have to pay a fee (ie. any sum of money payable immediately)

or (ii) have to give any other form of financial undertaking (eg. to pay a financial penalty in the event of losing the claim) in order to enable him or her to bring proceedings?

If so, what is the amount of this, to whom does it have to be paid, and in what circumstances will it be payable?

4. Is "Legal Aid" or any other kind of publicly funded legal assistance available to a person making a complaint?

If so, in what circumstances will this be available? In particular, does its availability (or the extent of the assistance) depend upon the complainant's financial or other means?

5. What is the normal period of time which elapses between the making of the complaint and the making of a final decision by the court of first instance?

6. What kinds of discrimination are justiciable in your national system? (*eg.* sex discrimination, race discrimination, disability discrimination, age discrimination, discrimination on the grounds of religion, discrimination on the grounds of political belief, *etc.*)

7. Do the courts which resolve these issues consist solely of professional judges or are lay people involved?

If so, how are these lay members chosen? Is there any special selection process in order to enable them to sit in discrimination cases?

8. Do the judges who determine these issues have any special expertise or training in discrimination matters?

If so, please indicate briefly the nature of such expertise or training.

(c) *Direct entitlement to promotion or other benefits lost* as a result of discrimination. If so, how is this determined and how is this enforced?

(d) *Compensation*

If the remedy is in the form of (financial) compensation:

(i) Is there an upper limit for the amount of compensation? If so, what is this, how is it established, and is there any mechanism for reviewing or updating the relevant figure?

(ii) Is compensation available for *proven economic (financial) loss* resulting from the discrimination? If so what is the current range of the value of such awards?

(iii) Is compensation available for *injury to health* caused by the discrimination? If so what is the current range of the value of such awards?

(iv) Is compensation available for *injury to feelings* caused by the discrimination? If so, what is the mechanism adopted for calculating the relevant amount, and what is the current range of the value of such awards?

B. Time Limits and Remedies

1. What (if any) is the time limit for bringing proceedings (from the date of the alleged act of discrimination to the commencement of proceedings).

2. Can any time limits be overridden? If so what are the principles for so doing?

3. What is the nature of the remedy available to a complainant where discrimination is proved? In particular, does your national system include the possibility of:

(a) *A declaration of rights*. If so, what form does this take, and what consequences follow from the making of such a declaration?

(b) *Reinstatement or re-engagement*. If so, is this directly enforceable (and how?), or is it only available if the employer is willing to comply?

C. Procedure and Appeal

1. Please summarise the procedure adopted when a person wishes to make a complaint of discrimination?

2. Is there a right of appeal from a decision in relation to a complaint brought on grounds of discrimination? If so, please describe the process and the level (or levels) of appeal available.

3. Is "Legal Aid" or any other kind of publicly funded legal assistance available to a party in the event of an appeal from a decision in relation to a complaint brought on grounds of discrimination?

4. Is it possible for a person to pursue an appeal without being represented by a lawyer? If so, does the person have to have some form of representation, or is that person entitled to appear and to argue the case in person?

Fundamental Social Rights: Executive Summary from Seville

INTRODUCTION

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

PART ONE: 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.

PART TWO: 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 dismissal 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 due to causes attributable to the worker's deliberate conduct or culpability. The most widespread rule is that failure to give notice gives right to receive the legal remuneration which would have been received during the notice period.

PART THREE: EXPLOITATION OF WORKERS

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

The European Directive 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 dependents.

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 FOUR: 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. *Banning of Discrimination*

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

The common factors are banning of discrimination on the grounds of race and sex. Discrimination on the grounds of religion and political opinion is 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 ban 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 the systems recognise equality of treatment in employment between men and women, in accordance with the Equal Treatment Directive. Most also 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, though 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 FIVE: RIGHTS OF ASSOCIATION AND COLLECTIVE BARGAINING

1. *Freedom to Join a Union*

All national systems acknowledge this right. The right of employers to form association is also generally accepted. There are however, restrictions in national systems in respect of different 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 your 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 of the grounds of trade union membership of activities.

Recognition of the largest union in the workforce is provided for in many systems, though 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 work-place. 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 or 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 than the definition of discrimination contained in the *Comité des Sages* Report as being a right already established in international law. However, we believe that the definition set out above is likely to be 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 ban on discrimination which could be directly enforced by workers against employers.

There are other potential areas of discrimination which could be included *eg.* disablement, sexual orientation, but these were not debated in detail at the Conference. Many grounds of discrimination *eg.* 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 *Comité des Sages* report 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 Member States. 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.

Diary of Forthcoming International Events

International Society for Labour Law and Social Security 6th European Congress Warsaw, Poland, September 13 – 17, 1999

Subjects: (1) Social Dialogue – Economic Interdependence and Labour Law
(2) Wage Employment and Self-Employment
(3) Reforms of the Social Security Systems in Europe

Further information: Congress Office Director, 6th European Congress for Labour Law and Social Security,
ul. Górskiego 9 pok. 404, 00-033 Warszawa, Poland
Tel: (+48) – 22 – 827-05-44 Fax: (+48) – 22 – 827-32-91

International Industrial Relations Association 12th World Congress Tokyo, Japan, May 29 – June 2, 2000

Subjects: (1) Exploring Trends in Employment Relations and New Approaches to Work in the 21st Century
(2) The Impact of Globalization on National and Regional Systems of Industrial Relations and Employment Relations
(3) Changing Patterns of Employee and Union Participation: Toward New Systems of Industrial Relations?
(4) Search for Flexibility, Fairness and Prosperity: Alternative Employment Policies in the 21st Century
(5) Asia in the 21st Century: Challenges and Opportunities in Work and Labor

Further information: IIRA 12th World Congress Secretariat, c/o The Japan Institute of Labour, 8-23,
Kamishakujii 4-chome, Nerima-ku Tokyo 177-8502, Japan
Tel: (+81) – 3 – 5991-5195 Fax: (+81) – 3 – 3594-1115 E-mail: iira12th@jil.go.jp

**International Society for Labour Law and Social Security
XVIth World Congress
Jerusalem, Israel, September 3 – 7, 2000**

Subjects: (1) Industrial relations, including collective disputes, in the public sector
(2) Similarities and differences between labour contracts and civil and commercial contracts
(3) Retirement pension (social security): National schemes, social insurance and private funds

Further information: Congress Secretariat, XVI World Congress of Labour Law and Social Security,
P.O. Box 50006, Tel Aviv 61500, Israel
Tel: (+972) 3-514-0000 *Fax:* (+972) 3-514-0077 *E-mail:* labourlaw@kenes.com

Officers of the EALCJ for 1998 – 1999

President: Judge Alfonso Escribano (Spain)
Past-President: Mr. Christopher Tickle (United Kingdom)

Secretary-General: Mr. Colin Sara
Convenor: Professor Alan Neal
Treasurer: Mr. Douglas Crump

The EALCJ *Newsletter* is the official organ of the European Association of Labour Court Judges, which is a Company limited by guarantee in the United Kingdom. The *Newsletter* aims to provide current news and information about the activities of the Association and its members. Contributors to the *Newsletter* express their personal views, and should not be taken necessarily to represent the official positions adopted by the Courts or Tribunals in which they sit, or the views held or expressed by the governments or any government agency of the Member States or legal systems in which they act.

Newsletter Editor: Professor Alan C. Neal
Editorial Address: High Trees House, Hallaton, LE16 8UH, United Kingdom
FAX: (+44) - 1858 - 55.53.97
eMail: acn6@le.ac.uk